Business and Human Rights

Business and Human Rights

Edited by
Wesley Cragg
Schulich School of Business, York University, Toronto, Canada

Edward Elgar
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2012941547

ISBN 978 1 78100 576 7

Typeset by Servis Filmsetting Ltd, Stockport, Cheshire
Printed and bound by MPG Books Group, UK

Contents

List of contributors vii
Preface viii

PART I TOWARD A THEORY OF THE HUMAN RIGHTS RESPONSIBILITIES OF CORPORATIONS

1. Business and human rights: a principle and value-based analysis 3
   Wesley Cragg
2. Corporate social responsibility: beyond the business case to human rights 47
   Tom Campbell
3. The limits of corporate human rights obligations and the rights of for-profit corporations 74
   John Douglas Bishop
4. Silence as complicity: elements of a corporate duty to speak out against the violation of human rights 105
   Florian Wettstein
5. The case for leverage-based corporate human rights responsibility 135
   Stepan Wood

PART II BUSINESS, HUMAN RIGHTS AND INTERNATIONAL TRADE

6. Human rights and international trade: normative underpinnings 179
   Alistair M. Macleod
7. Coordinating corporate governance and corporate social responsibility 198
   Pitman B. Potter

8. Challenges to secure human rights through voluntary standards in the textile and clothing industry 220
Brigitte Hamm

9. Mining, human rights and the socially responsible investment industry: considering community opposition to shareholder resolutions and implications of collaboration 243
Catherine Coumans

10. To ban or not to ban: direct-to-consumer advertising and human rights analysis 276
Alex Wellington

PART III POSTSCRIPT

11. Business and human rights: reflections and observations 315
Charles Sampford

Index 333

Contributors

John Douglas Bishop, Business Administration Program, Trent University, Peterborough, Ontario, Canada

Tom Campbell, Centre for Applied Philosophy and Public Ethics, Charles Sturt University, Canberra, Australia

Catherine Coumans, MiningWatch Canada, Ottawa, Canada

Wesley Cragg, Professor and Director of the Canadian Business Ethics Research Network, Schulich School of Business, York University, Toronto, Canada

Brigitte Hamm, Institute for Development and Peace, University of Duisburg/Essen, Duisburg, Germany

Alistair M. Macleod, Department of Philosophy, Queen's University, Kingston, Canada

Pitman B. Potter, Professor of Law and HSBC Chair in Asian Research, University of British Columbia, Vancouver, Canada

Charles Sampford, Director, Institute for Ethics, Governance and Law (a joint initiative of the United Nations University, Griffith, QUT, ANU, Center for Asian Integrity in Manila and OP Jindal Global University, Delhi) Brisbane, Australia

Alex Wellington, Department of Philosophy, Ryerson University, Toronto, Canada

Florian Wettstein, Director, Institute for Business Ethics, University of St Gallen, St Gallen, Switzerland

Stepan Wood, Osgoode Hall Law School, York University, Toronto, Canada

Preface

The chapters in this volume with two exceptions originated from a workshop organized by the Canadian Business Ethics Research Network (CBERN) held in April 2010. CBERN was formally launched in 2006 following receipt of a seven-year $2.1 million grant from the Canadian Social Science and Humanities Research Council. The network's mission is to support, facilitate, encourage and profile Canadian research in business ethics nationally and internationally.

The idea for a workshop on business and human rights gained enthusiastic support for many reasons. The subject is one of emerging interest and concern among scholars. It has also emerged as a pressing issue on the part of non-governmental organizations (NGOs) like Amnesty International, Global Witness and human rights organizations generally. It has become of equal interest for business leaders and leading business and professional firms in the private sector and of increasing interest for governments. One feature of this interest is that, unlike many other topics in the field of business ethics – corporate social responsibility, for example – the focus on the human rights responsibilities of business is a recent phenomenon. Interest was spurred in the first instance by NGOs in the early 1990s as increasing evidence of human rights abuses on the part of business firms operating particularly in developing countries began to surface. Accompanying this evidence was the reluctance of many governments to move to curb those abuses and the relative insensitivity of the corporate world and corporate leaders to their significance. As a result of NGO advocacy, the responsibility of business for human rights gradually moved onto public agendas, eventually winning the attention of the United Nations (UN) Commission on Human Rights in the closing years of the 1990s. It is only in the early years of the twenty-first century that the topic has moved onto the business ethics agenda in a significant way.[1]

For a variety of reasons, the topic of business and human rights is of particular relevance for Canada. It has become increasingly clear, as research has assembled evidence about the nature and scope of human rights abuses perpetrated by business firms, particularly multinational corporations, that a significant proportion of those abuses have occurred in the resource extraction sector, especially oil and mining. This should

not come as a great surprise. Much of the world's oil deposits are in developing countries like Nigeria, for example, that have weak systems of government and serious problems with corruption, and as a result limited success in imposing and enforcing respect for human rights. The same is true for mining. Mining requires a very substantial investment upfront but also long-term investment in infrastructure. Further, like the extraction of oil, mining can have very significant environmental, social and economic, national and local impacts, including the creation or exacerbation of corruption and civil and military conflict. It follows that in many parts of the world where resource extraction is taking place, human rights are likely to play a central role in how people are treated only if the companies engaged in extractive activities decide that they have a responsibility to promote human rights and ensure that they are respected in their own operations and to the extent possible in their sphere of influence. However, until recently, becoming actively involved in the promotion and protection of human rights has not been thought to be a business responsibility where not required by law and where human rights standards are not enforced by governments.

What is significant about this feature of resource extraction is that in oil, but also and particularly in mining, Canada and Canadian companies are world leaders. In both sectors, Canadian companies are active worldwide. This is especially true in the field of mining. It is not surprising, therefore, to discover that Canadian companies have on the whole a less than stellar human rights record. It is also not surprising that Canadian NGOs and Canadian business leaders have been active in bringing human rights concerns to light and seeking to better understand the human rights responsibilities of Canadian corporations working internationally in oil and mining.

With this background in mind, an invitation was circulated broadly and a workshop organized to examine business and human rights from an explicitly ethical perspective.

Identifying clearly the human rights responsibilities of corporations is important, as already suggested. It is also very contentious. Perhaps the most graphic evidence of this fact is the highly critical response that greeted the report of a working group to explore this topic that was created by the UN Human Rights Sub-Commission on the Promotion and Protection of Human Rights. The results of their work, entitled *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, were tabled at the 55th Session of the Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights (United Nations, 2003). Central to the findings of the working group was the recommendation that corporations

and other business entities should be understood to have human rights responsibilities similar in scope and character to those of the nation state. Further, those responsibilities should be understood to be legal obligations under international law.[2] While the report was greeted enthusiastically by NGOs and by many in the legal community, it was harshly criticized by large segments of the business community and by most of the governments of the industrialized North.

Not only is the topic in practical terms highly contentious, it is also complex and intellectually challenging. This is true for legal scholars in part because until recently, it has been assumed that the responsibility for protecting human rights was a state responsibility. It is particularly true for scholars in the field of business ethics both because analysis and commentary have been dominated by legal scholarship but also because the topic of human rights is philosophically complex and contested.

Given this background, the papers that the workshop invitation solicited were organized around a number of questions. Did corporations, or more particularly multinational corporations, have human rights responsibilities beyond those set out by the laws of the countries in which they operated? Should national governments with strong human rights laws extend the reach of those laws to cover the operations of companies over which they have national jurisdiction when operating abroad? If corporations did have human rights responsibilities that extended beyond what the law required of them, what were the nature and the scope of those responsibilities? Were voluntary codes of ethics a useful vehicle for raising corporate human rights standards in their international operations? In all 20 papers were presented and discussed at length over two and a half days. Most of the presenters left committed to further study and research based on insights and observations gained though presentation and discussion and with a view to resubmitting their contributions for possible inclusion in a special issue of *Business Ethics Quarterly* and also a book comprising papers first presented at the workshop.

A special issue of *Business Ethics Quarterly* (January 2012, **22**(1)) has now appeared. The editor and publisher of *Business Ethics Quarterly* have kindly agreed to having three of the papers of that special issue republished in this volume. The chapters in this volume include but also go well beyond the scope of the *Business Ethics Quarterly* papers. They are organized around three themes and a postscript: theoretical discussions focused on determining whether corporations have ethically grounded human rights responsibilities and, if so, the nature and scope of those responsibilities; the implications of the assumption that business firms and other business entities have human rights responsibilities that go beyond those imposed by law for the regulation of international trade; three case

studies looking at the human rights responsibilities of corporations in three different economic sectors, clothing, mining and pharmaceuticals; and finally, a reconceptualization of human rights and the implications of that reconceptualization for business.

All the chapters with three exceptions (Chapters 1, 6 and 11) are extensively developed and rewritten versions of papers first presented at the CBERN workshop held at York University. Chapter 1 by Wesley Cragg was published originally in the Oxford University Press *Handbook of Business Ethics* and benefitted a great deal in its development from the advice and critical commentary of George Brenkert, one of the two editors of that volume. It is being republished here in a modestly revised form. Chapter 6 is the result of the ongoing interest of Alistair Macleod in the integration of human rights principles into the regulatory structures that have been developed to govern international trade. The final chapter is a developed version of a key note address delivered by Charles Sampford to the third Annual Conference of the CBERN in Montreal in May 2010. Chapter 7 by Pitman Potter was first presented at the CBERN (April 2010) workshop and subsequently published in a law journal. It has been revised for publication in this volume. Chapter 10 by Alex Wellington was presented at the CBERN workshop and subsequently published in an Australian medical journal.

Much of the discussion at the CBERN human rights workshop focused on the work of the Special Representative of the Secretary General of the UN, John Ruggie. Elements of that discussion are captured in the first part of this book, 'Toward a Theory of the Human Rights Responsibilities of Corporations'. However, the main contours of that discussion are captured in the workshop papers that were subsequently accepted for publication in the special January 2012 issue *of Business Ethics Quarterly*.

I would like to thank the participants in the CBERN workshop and the authors of the chapters in this volume for stimulating debate and discussion and for their dedication to submitting to a rigorous process of editorial critique and review over the intervening period.

NOTES

1. For a more extended discussion of this history, see Cragg et al. (2012).
2. For a more detailed account of the report and its recommendations, see the section on corporations and human rights in Chapter 1.

REFERENCES

Cragg, W, D.G. Arnold and P. Muchlinski (2012). 'The guest editors' introduction: human rights and business', *Business Ethics Quarterly*, Special Issue on Human Rights and Business, **22**(1), 1–7.

United Nations (2003). Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights 55th Session, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E/CN.4/Sub.2/2003/12/Rev.2.

PART I

Toward a theory of the human rights responsibilities of corporations

1. Business and human rights: a principle and value-based analysis*

Wesley Cragg

INTRODUCTION

The thesis that business firms have human rights responsibilities is one of the least and, at the same time, one of the most contested theses in the field of business ethics. Explaining why this is the case and how it has come to be the case is the central task of this chapter.

Until very recently, for reasons explored in Section 1.1, the protection and promotion of human rights has been thought to rest more or less exclusively with the state. As a result, it has been taken for granted that the human rights obligations of corporations were indirect and legal in nature. That is to say, it has been widely assumed that the human rights obligations of corporations were those assigned to them by the laws of the countries in which they had operations. Since virtually all countries do assign human rights obligations to corporations, and virtually all corporations accept that they have a moral obligation to obey the law, it follows uncontroversially that corporations have human rights obligations. It is in this sense that the proposition that business firms have human rights obligations is uncontested.

Under conditions of globalization, however, assumptions about the nature of the human rights obligations of business firms, but more particularly multinational corporations, are undergoing significant re-evaluation. This re-evaluation of the relation between business and human rights in the global economy is being fostered by the importance of the modern shareholder owned multi- or transnational corporation in shaping economic development worldwide, allegations of human rights abuses on the part of multinational corporations and limitations in the capacity of nation states to control the international operations of corporations.

Evidence of these shifts can be seen in the emergence of voluntary codes of corporate conduct. Some of these codes are articulated by corporations themselves; some are set out by international government institutions like the United Nations (UN) Global Compact, for example; some are

formulated by international non-governmental organizations (NGOs) like Amnesty International; and yet others are developed by international private sector organizations and associations like the International Council for Mining and Metals (ICMM).[1]

The report entitled *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, tabled at the 55th Session of the Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, is another dramatic example of the re-evaluation that is currently underway (United Nations, 2003). The *Draft Norms* document has caused wide debate and controversy. If adopted, its effect would be to create an international legal framework allocating direct legal human rights obligations to multinational corporations in their international operations.[2]

The idea that corporations have direct human rights duties or obligations is changing what Peter Muchlinski argues is 'the very foundation of human rights thinking' (Muchlinski, 2001, p. 32). It is this extension of direct human rights obligations to corporations that has made and is making the topic of business and human rights one of the most contested areas of business ethics.

The purpose of this chapter is to track and evaluate evolving views about the human rights obligations of corporations.[3] Specifically, my goal in what follows is to determine whether corporations have direct, morally grounded human rights obligations. Further, if they do, what is the character and scope of those obligations?

My analysis has three sections. Section 1.1 addresses two questions: (1) what are human rights? and (2) why historically has the responsibility for protecting and promoting human rights been thought to rest more or less exclusively with the state?

Section 1.2 looks at three models that dominate contemporary debates regarding our understanding of the human rights obligations of corporations. The first model, the one most deeply entrenched in current management and legal thinking, takes the position that corporations have no human rights obligations beyond those legal obligations imposed by nation states through legislation. Evaluating this model will lead us to explore why, given the historically grounded view that human rights protection and promotion are a state responsibility, corporations are now caught up in human rights debates. The second model is a voluntary self-regulation model. This model accepts the idea that corporations have direct human rights obligations. It assumes, however, that determining what those obligations are should be undertaken voluntarily by corporations themselves. The third model takes the view that corporations have direct human rights obligations similar in nature to those of nation states.

It proposes that corporations should be held directly responsible for protecting and promoting human rights by national and international courts and legal tribunals.

Each of these models will be shown to be seriously flawed. As a consequence, in Section 1.3, we evaluate and endorse a fourth 'hybrid' model that argues that corporations have human rights obligations and that the scope and character of those obligations are a function of two things: (1) the social, cultural, political, legal, environmental and economic settings in which a given corporation is active and (2) the nature and scope of the actual or potential human rights impacts of a given corporation in the settings in which it is doing – or is proposing to do – business.

1.1 HUMAN RIGHTS AS A PHILOSOPHICAL CONCEPT AND A HISTORICAL PHENOMENON

1.1.1 What Human Rights Are

Human rights are typically encountered today as principles or standards that find expression in laws or statutes enacted by legislative authorities, in the constitutions of national states, for example, the Canadian Charter of Rights and Freedoms, or in proclamations by international political bodies or institutions like the UN. The UN Universal Declaration of Human Rights, passed by the General Assembly of the UN in 1948, is a paradigmatic example. This Declaration consists of a preamble and 30 articles that set out the human rights and fundamental freedoms to which all men and women are equally entitled, regardless of differentiating characteristics like the colour of their skin, their religious beliefs, their nationality or ethnic origin. As I explain in more detail below, human rights articulate standards of behaviour that human beings have a right to expect of each other, standards that constitute obligations that human beings share as human beings.

1.1.2 The Moral Foundations of Human Rights

The idea that human beings have rights by virtue of their status as human beings emerges clearly for the first time in the twelfth and thirteenth centuries. Seen from a historical perspective, human rights are grounded on the view that the defining characteristic of human beings is their status as moral agents. In this respect, they are born both free and equal. Moral agency requires both the capacity and the freedom to make choices based on moral considerations and to act on them. Human beings are equal

because, as moral agents, they share equally the capacity and the freedom that capacity confers to make moral choices.

As James Griffin points out, early justifications of human freedom and equality derived from the view that:

> we are all made in God's image, that we are free to act for reasons, especially for reasons of good and evil. We are rational agents; we are more particularly moral agents. (2004, p. 32)

The concepts of human freedom and equality are historically tied closely to the idea of human dignity, which was also theologically grounded in its earliest expression by early Renaissance philosophers like Pico della Mirandola, an early Renaissance philosopher, who argued that:

> God fixed the nature of all other things but left man alone to determine his own nature. It is given to man 'to have that which he chooses and be that which he wills'. This freedom constitutes . . . 'the dignity of man'. (Griffin, 2004, p. 32)

The idea that human freedom itself confers dignity is subsequently taken up by both Rousseau and Kant. Emerging from their philosophical accounts is the realization that if it is a moral agent's capacity to make moral judgements that constitutes human freedom, and if it is human freedom that confers dignity, it then follows that theological supports for the idea are no longer necessary (Griffin, 2004, p. 32).

Human rights enter the picture as principles or standards designed to protect and enhance the capacity of human beings to make and to act on choices guided by moral considerations. That is to say, human rights give expression to human freedom, human equality and human dignity as core moral values. They define what counts as being treated with dignity and respect.

The role of human rights, then, is to ensure that every human being has the freedom needed as a moral agent to pursue goals and objectives of his or her own choosing. Their justification is grounded on the need to ensure what all human beings share, namely, the freedom required to make the choices that the exercise of moral agency and moral autonomy requires.

The existence and importance given to human rights today reflects the perceived need to create rules, principles and laws that, if respected, will ensure that everyone has the freedom required to exercise their moral autonomy. To provide people with the freedom required for the exercise of moral autonomy is to treat them with dignity and respect. To provide or allow that freedom for some but not others is to engage in discrimination.

It follows, as Alan Gewirth points out, that the need that all human

beings share equally for the moral space or freedom required for the exercise of moral autonomy generates a common interest in ensuring that the freedom to exercise moral autonomy is acknowledged and respected. Human rights serve to protect this interest that all human beings share with each other as human beings. There can be no justification, therefore, for restricting the freedom of some, but not others, to make and to act on choices guided by moral reflection. If some human beings are human rights bearers, all human beings are rights bearers. If human dignity requires respect for human rights, human rights ought to be respected by all human beings since all human beings are worthy of being treated with dignity (Gewirth, 1978, 1996, p. 16).

Where and when they are respected, human rights have both intrinsic and instrumental value. They are intrinsically valuable because they affirm that the bearers of human rights are human beings equal in moral status to all other human beings and worthy, therefore, of equality of treatment on all matters impacting their capacity as moral agents to lead lives of their own choosing. They are also of significant instrumental value inasmuch as their respect ensures that the bearers of human rights will not be prevented by arbitrary barriers from living self-directed lives. Consequently, all human beings have an equal interest in ensuring that their human rights are protected and promoted.

This account of human rights is important for present purposes for several reasons. It explains why human rights are properly regarded as fundamental moral principles or values to the extent that they map the conditions for the respect of human beings as persons, that is to say, as moral agents. It grounds human rights in the concepts of freedom, dignity and equality and gives those values foundational moral significance. It provides a basis for understanding the historical emergence of human rights as significant practical, moral and legal tools for protecting human dignity and advancing the principles of human freedom and human equality. It offers a framework for understanding the nature and character of the obligations and duties that the acknowledgement of the existence of human rights generates. And it links respect for human rights directly to human well-being.

1.1.3 Human Rights and their Characteristics

Human rights as just described have a number of distinctive, interrelated characteristics.

1. They are intrinsically moral in nature. Human rights, that is to say, are moral rights. They set the fundamental conditions for the moral

treatment of human beings as human beings, because they connect directly to human well-being.[4]

2. They are universal. All human beings are the bearers of human rights by virtue of their common status as human beings (Gewirth, 1996, p. 9). This means, as Campbell points out, that 'they apply to everyone, whatever the existing societal and legal rights may be within particular states'. They are 'those rights that ought to be respected globally' (2006, p. 103).
3. They generate parallel, correlative moral obligations or duties quite independently of the actions, decisions, status or role of those for whom they generate moral obligations. From a moral point of view, this characteristic sets the obligations generated by human rights apart from other kinds of moral obligations. There are many reasons for this.

   Typically, moral duties and obligations are triggered by a specific act or by decisions taken by those having the obligation. Further, normally, an obligation is to someone specific. Moral obligations when triggered are typically specific and direct. For example, the obligation to keep one's promises might well be described as universal in its application. Anyone making a promise, that is to say, has a (prima facie) obligation to keep that promise. The obligation to keep a promise, however, can only be triggered by making a promise.

   Obligations also flow from roles. Parents have obligations as parents. Professionals have obligations as professionals. Members of legislatures have obligations as elected legislators. However, only those assuming those roles have those specific obligations. The obligations that come with the assumption of a specific role are specific to the people assuming the role: one's own children, clients or patients, members of one's constituency and so on.

   In contrast, the obligations generated by human rights are quite different in character. Like human rights themselves, the obligations they impose are universal. They are not triggered by specific actions, decisions or roles on the part of those bearing the obligations. Rather, they attach to anyone and everyone in a position to impact a rights bearer's capacity to exercise his or her rights.[5]

   Two very important conclusions follow from the fact that the obligations imposed by human rights are universal obligations. First, if I have a right to be treated with respect by virtue of my status as a human being, then everyone I encounter has an obligation to treat me with respect regardless of personal characteristics or roles or any act or decision they may have performed or undertaken (Gewirth, 1996, p. 9). This means that just as all human beings are the bearers

of human rights, equally all human beings are the bearers of human rights obligations. Second and equally important, while the human rights of human beings are uniform and universal, the obligations generated by those rights while universal are not identical. They vary with the situations in which people find themselves. Understanding the conditions under which it is morally appropriate to assign human rights obligations (to governments, corporations or individuals) is therefore fundamental to understanding what human rights are.[6]

4. Human rights are important because they are so closely linked to human autonomy and well-being. Respect for human rights creates conditions which allow human beings to exercise their uniquely human capabilities and as human beings to live, and assist others to live, in ways of their own choosing.
5. Human rights are overriding. That is to say, they trump or take precedence over all other moral and non-moral values and principles and the obligations these other values and principles generate. They are overriding because of their importance. That is to say, the function of rights is to ensure that rights bearers are not arbitrarily prevented by other individuals, groups or their society from realizing their potential as human beings, as they understand it, and in so far as they so choose (Campbell, 2006, p. 34; Griffin, 2004, p. 33). When embedded in legal systems, this feature of human rights is most graphically illustrated by the power of judges to strike down or nullify laws that clash with the exercise of human rights as laid down in constitutions in the form of charters or bills of rights.[7]

   Human rights are overriding, also, because they are of fundamental moral importance for building societies where exercising the full range of human capacities is a genuine possibility and available to everyone.[8]
6. Human rights must be institutionalizable.[9] Tom Campbell describes this as a 'practicality requirement', which he interprets to mean 'that it is possible or practicable to embody the right in actual societal or legal rules that promote the interests to which the right in question is directed' (Campbell, 2006, p. 35; Griffin, 2004, p. 33).

   This feature of human rights is crucially important for our discussion. It follows from the Kantian principle that 'ought implies can'. Rights generate obligations. It cannot be the case that someone has a right where an obligation generated by the right cannot be carried out. Neither can it be the case that someone has a right where the obligations implied by what is claimed to be a right are so abstract or vague that it is unclear what obligations are entailed.

   Most particularly, it cannot be the case that someone has a human

> right that is universally worthy of respect unless that right is capable in principle and practice of being embodied in a matrix of rules capable of guiding human behaviour.[10] For this to be the case, the rules, principles or practices that generate human rights obligations must be capable in principle and practice of being monitored and enforced.[11]

Three important conclusions emerge from this discussion. First, the function of human rights is to instantiate conditions in which human dignity, freedom and equality are respected. The obligations flowing from the existence of human rights, therefore, cannot be understood to be voluntary or matters of choice. To the contrary, respect for human rights must be societal or society-wide in nature. Second, human rights must be capable in principle and in practice of being institutionalized or embedded within a system of universal, binding and overriding rules or principles capable in principle and practice of guiding behaviour. Further, the implementation of those rules and principles must be capable in principle and practice of being monitored and enforced.

Third, to say that someone or some organization, institution or state has human rights responsibilities is to say one of two things. It is to say that that there are rules or practices in place that the obligation bearer has an obligation to respect and observe. Alternatively, it is to say that the obligation bearer has a moral obligation to institutionalize rules designed to ensure that the human rights of individuals are protected and respected.

As we shall see, until very recently, responsibility for institutionalizing rules designed to protect and ensure respect for human rights has been assumed to be the exclusive prerogative of the nation state. It is this assumption that the claim that corporations have human rights obligations is challenging.

Human rights and the law

In today's world, responsibility for embodying human rights in an actual, functioning social system is virtually universally accepted to be a responsibility of the state using its power to create and enforce law. It does not follow from the practicality requirement, however, that the institutionalization of human rights must take place exclusively within legal systems in the form of constitutional provisions or laws. This may be a requirement for a society like our own. However, it would certainly seem an open possibility, and perhaps historically a reality, that a society could exist in which the freedom, dignity and equality of human beings were generally respected though not embedded in the form of human rights laws subject to legal enforcement.[12]

From their first appearance in modern Western societies, however,

protecting and promoting human rights have been seen as more or less the exclusive responsibility of the state. This does not alter the fact that human rights are essentially moral constructs grounded on moral principles and moral conceptions of what it is to be a person or a human being. Neither does it suggest that in the absence of legal enforcement, people cannot be said to have human rights. What it does mean, however, is that the moral obligation for ensuring respect for human rights has been thought, until very recently, to fall on the shoulders of governments responsible for directing the affairs of state. This history helps to explain why it is the legal status of human rights that has come to dominate human rights discourse today, both nationally and internationally.

This fact about the allocation of human rights obligations in modern societies raises two significant questions:

1. Why, historically, has responsibility for ensuring respect for human rights fallen so exclusively to governments?
2. What rules and principles are thought today to embody respect of human rights?

1.1.4 Human Rights as Legal Constructs

Assigning responsibility to the state for ensuring that human rights are respected has obvious merits for two reasons in particular. First, the state, by virtue of its legislative, adjudicative and enforcement powers, has a unique capacity to institutionalize rules required to promote and protect the interests to which human rights are directed. Second, historically, the abuse of the power of the state by governments has been the most obvious and significant obstacle to securing respect for human dignity, freedom and equality of treatment.

It is not surprising, therefore, that both abstract philosophical examination of natural rights and human rights and the practical assignment of the responsibility for ensuring their respect have focused historically on discerning the limits to the morally acceptable uses of state power. Neither is it surprising that it is the abuse of state power that has provided the occasion and the motivation for addressing human rights issues.

Philosophical debates occasioned by the abuse of government power have focused on grounding discussions of human dignity, liberty and equality on secure moral foundations. Political debates have focused on the more practical challenge of translating these fundamental moral values into laws and legal systems capable of constraining government exercise of political, police and military power.

Accordingly, the significant advances in the institutionalization of

human rights rules have come in response to the abuse of government power. The *Magna Carta* has often been cited as one of the earliest practical human rights victories because it stands as a landmark example of the institutionalization of rules constraining the exercise of the power of the British Crown. The American Declaration of Independence is a second frequently cited example with its proclamation:

> We hold these truths to be self-evident, that all men are created equal and that they are endowed by their creator with certain unalienable Rights . . . .

The French Declaration of the Rights of Man and Citizen, with its proclamation that 'men are born and remain free and equal in rights', echoes the American Declaration of Independence in affirming the values thought to be essential to the recognition of the inherent dignity of all human beings.

It is no coincidence that these historically significant attempts to embed moral conceptions of rights in legal frameworks, as well as the philosophical debates on which they were based, were made in revolutionary environments generated by the arbitrary and discriminatory exercise of state power. Hence they illustrate the reality that defining human rights has typically occurred in environments where the capacity of people individually or collectively to pursue goals and objectives seen as morally legitimate and/or morally required was arbitrarily constrained by the exercise of state power.[13]

Neither is it a coincidence that the remedies for these abuses have historically taken the form of laws embedded as bills of rights in national constitutions and national statutes. States and their governments have a unique legal capacity to create rules that apply uniformly to all their citizens, thus giving human rights society-wide application. There are no other societal institutions that have had until very recently that power and reach. The only drawback from a human rights perspective is that the reach of state law historically is territorial in nature and therefore geographically restricted. Human rights, by contrast, are universal rights that create obligations for all human beings. The fact that the protection and promotion of human rights has come to be seen as primarily a responsibility of nation states has, therefore, a somewhat paradoxical character which has led some to question whether the concept of human rights is in fact a meaningful one (Stoilov, 2001).

It was abuses perpetrated by fascist governments on the countries, people and peoples over which they gained control before and during the Second World War that refocused world attention on the central importance and the universal character of human rights. Those abuses included genocide, arbitrary police search and seizure, imprisonment, torture,

execution without public trial, slavery, as well as economic exploitation and impoverishment.

The explicit response was the drafting of the UN Universal Declaration of Human Rights and its subsequent endorsement by the General Assembly of the UN.[14] In adopting the Universal Declaration, the General Assembly set the Declaration as 'a common standard of achievement for all peoples and all nations . . .'. The response was, therefore, a global response and the responsibility for protecting and advancing protection of human rights identified as a global responsibility.

The Universal Declaration of Human Rights holds the key, therefore, to answering our second question, namely: what rules and principles are thought today to embody respect of human rights?

1.1.5 The Internationalization of Human Rights

The UN Universal Declaration of Human Rights and the two covenants,[15] endorsed by the members of the UN a decade or so later, are today a widely endorsed international human rights benchmark. The UN Declaration sets out the moral principles on which human rights rest. It then sets out the specific rights whose respect, the Declaration's authors concluded, were essential to the realization of the moral values on which the Declaration grounded human rights.

Both in the preamble and the body of the document, the values of freedom (liberty), dignity and equality are identified as the three moral values or principles on which human rights are grounded. Thus, the preamble identifies the 'inherent dignity and the equal and inalienable rights of all members of the human family' as the 'foundation of freedom, justice and peace in the world' and goes on to assign to member states responsibility for the promotion of human rights and fundamental freedoms.[16]

The Universal Declaration of Human Rights then sets out the full range of rules and principles its drafters and signatories concluded required protection and promotion if the three fundamental values of freedom, equality and dignity were to be respected. Thus, Article 3 sets out a basic cornerstone right, namely, the right to life, liberty and security of person, a right essential to the enjoyment of all other rights. Articles 4 to 21 elaborate on the political and civil rights[17] that drafters and signatories understood to be essential for securing the freedom required if human beings were to be able to exercise their uniquely human faculties and abilities.

Article 22 asserts the universal 'right to social security' and the economic, social and cultural rights indispensable for human dignity and 'the free development of the human personality'.

Articles 23 to 27 detail the specific rights entailed by the right to social

security and related economic, social and cultural rights perceived as essential for the achievement of social equality.[18]

Articles 28 and 29 point in the direction of solidarity rights that entitle the individual 'to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized', while assigning moral duties to the community 'in which alone the free and full development of (one's) personality is possible'.[19]

The preamble of the UN Declaration calls on every individual and every organ of society to keep this Declaration constantly in mind and to promote by teaching and education 'respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance'. The obligation for ensuring respect for human rights, however, is clearly and unambiguously assigned to states who are instructed to ensure that all human rights are 'protected by the rule of law'.[20]

John Ruggie, in his report to the Human Rights Council of the UN (2007), entitled *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, emphasizes the significance of the way in which human rights responsibilities are assigned in the UN Declaration. He points out that the obligation to protect and ensure the enjoyment of human rights as set out in all modern treaties, declarations and covenants rests exclusively with governments with an emphasis on legislated protections and judicial remedies (Ruggie, 2007, p. 5 #12). He points out further that:

> The traditional view of international human rights instruments is that they impose only 'indirect' responsibilities on corporations – responsibilities provided under domestic law in accordance with states' international obligations. (Ruggie, 2007, p. 11 #35)

Finally, he points out that where the Universal Declaration provisions have entered 'customary international law', 'it is generally agreed that they currently apply only to states (and sometimes individuals)' (Ruggie, 2007, p. 12 #38).

Thus, the prevailing conventional and therefore standard view of human rights is the view that the moral responsibility for ensuring respect for and the enjoyment of human rights lies with states or governments. Further, the normal and most efficacious way for states to effect their responsibilities is through legislation, the use of state enforcement powers and effective and independent judicial institutions. It is to this view I now turn.

1.2 CORPORATIONS AND HUMAN RIGHTS

1.2.1 Model One: The Legal Model

The standard view assigns exclusive responsibility for the protection and promotion of human rights to the state. It does not follow that corporations have no human rights obligations. Rather, the standard interpretation holds that all human rights obligations of corporations are indirect. That is to say, they flow through the law.

On this model, the human rights obligations of a corporation are assumed to be limited to respecting the human rights laws and regulations set out by the states in whose jurisdictions it is active. That is to say, the moral obligation to respect and promote human rights is indirect and circumscribed by a corporation's legal and moral obligation to obey the law. It is therefore to the state that rights holders must turn for support and for remedies where their rights are not respected.

This historically grounded account of the human rights obligations of corporations has clear strengths. It is supported by both the conventional legal view of human rights, as we have seen, and what remains to a large extent the dominant conventional management view and theory that the primary moral and legal obligation of private sector managers is to maximize profits for shareholders, a view captured most graphically by Milton Friedman who argues in various fora (see, for example, Friedman, 1962) that the sole responsibility of managers is 'to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom' (Friedman, 1970). It is a view that, like its legal counterpart, is deeply embedded in corporate law, contemporary institutional investment practices and management practice particularly in North America. It is a view, furthermore, that is supported by a number of influential theories of the firm.[21]

Rejection of the thesis that corporations have direct, morally grounded human rights responsibilities rests on two kinds of considerations. The first consists of four distinct but related considerations.

1. Corporations do not have the requisite powers required to institutionalize human rights standards. They are not capable of ensuring that human rights are universally or even widely respected in the countries in which they are active.
2. To assign to corporations the obligation to ensure respect for human rights is inconsistent with a commitment to democratic principles which requires that the responsibility for serving public interests should be carried out by publicly elected officials. Corporate boards

and their managers do not have democratically determined mandates. They are accountable in a formal sense only to their shareholders and not to the general public. The interests they serve are private, not public interests.

3. Managers do not have human rights training or competence. Managers of corporations are trained to make intelligent decisions as agents of their stockholders in market environments in anticipation of and in response to market demands. They are not competent to set human rights standards (the role of legislators), to determine the proper application of those standards (the role of civil servants) or to respond to breaches of those standards (the role of the police and the courts). There are no grounds for confidence, therefore, that they are likely to exercise human rights responsibilities well. Milton Friedman puts the point bluntly when he says of business people:

   > They are capable of being extremely far-sighted and clear-headed in matters that are internal to their business. They are incredibly short-sighted and muddle-headed in matters that are outside their business . . . . (Friedman, 1970, p. 123)

   On this view, it is important that business leaders and the corporations they lead stick to their business or commercial role and leave human rights standard setting and enforcement to those who have the mandate and the competence, namely, governments and public servants.[22]
4. A final and perhaps the most fundamental objection to the view that corporations have and should exercise human rights responsibilities is that human rights values and principles and market economy values and principles are fundamentally incompatible. On this view, to impose direct (and in the view of some even indirect) human rights obligations on corporations is to undermine the functioning of competitive markets.[23]

In contrast to these weaknesses, a second set of considerations point to significant virtues associated with this first model.

5. The Legal Model is clear that responsibility for ensuring respect for human rights does and should fall squarely and unequivocally on the state. Further, it respects the principles that the state's responsibilities cannot legitimately be delegated or shared.
6. It locates the moral responsibility for the enforcement of human rights with an authority that has the range of powers required to institutionalize their protection.

7. From a business perspective, it creates a level playing field for corporations and provides the kind of certainty about 'the rules of the game' that allows business to focus on economic objectives.
8. It makes lines of accountability clear. Corporations are accountable to the state for obeying the law. The state is accountable to its citizens and the international community for ensuring that its laws provide adequate protection for human rights.
9. Finally, for all these reasons, allocating the moral obligation to ensure respect for human rights to the state is efficient from the point of view of government, business, society and people generally by making the responsibilities of each clear. Government is morally responsible for protecting human rights. Business is morally responsible for obeying the law. Society and people generally are morally responsible for ensuring that governments live up to their moral responsibilities.[24]

In spite of these clear strengths, however, the Legal Model has come under sustained critical scrutiny. The fact that it is commonplace for corporations to acknowledge a direct moral responsibility for human rights observance in their corporate codes of ethics is one indication that the model is deficient in significant ways. The gradual extension of national (domestic) law to encompass corporate liability for international crimes, and the gradual extension of responsibility for international crimes to corporations under international law are yet more harbingers of evolving understandings of the moral responsibilities of corporations with respect to human rights.[25]

What would appear to underlie these changes is globalization. Understanding the impact of globalization on shifting conceptions of the human rights obligations of corporations is therefore our next task.

1.2.2 Globalization and the Shifting Responsibilities of Business and Government

Three significant changes integral to globalization are central to understanding the growing dissatisfaction with the traditional allocation of direct human rights responsibilities exclusively to governments. First, under conditions of globalization, corporations have acquired what would appear to be government-like powers. Second, globalization has been accompanied by both a diminished capacity and a diminished will on the part of governments to meet their human rights obligations. Third, the shifting powers of governments and corporations under conditions of globalization have opened the door to significant and very harmful human rights abuses on the part of corporations.

Each of these factors has been set out and analysed at length elsewhere (Addo, 1999; Campbell, 2004; Cragg, 2005a; De Feyter, 2005; Ruggie, 2006; Sullivan, 2003). It is possible here to point simply to some of the key factors undermining what constitutes the dominant conventional legal and economic understanding of the human rights responsibilities of corporations.

(1) Under conditions of globalization, the private sector, dominated by the growth of large multinational corporations, has come to play an increasingly significant role in the economies of developed, developing and under-developed countries worldwide. Throughout the world, the investment decisions of corporations have displaced governments as the key determinants of economic development. The implications of decisions taken by transnational corporations for the welfare both of the people and communities of the countries in which they do business are, therefore, on these grounds alone, substantial.

The access of large multinational corporations to huge pools of capital allows them to generate the technology required to put 'nature altering science to work'.[26] As a result, corporations have acquired the power to change in very significant ways, natural, social and economic environments not only locally but also globally. New technologies, products and systems are now global in their reach and impact. Applications of nuclear technology have global implications as Chernobyl and the more recent Fukushima Daiichi nuclear disaster have demonstrated. The use of fossil fuels in North America, Asia and Western Europe is impacting the global climate as evidenced by global warming. Hedge funds can destabilize national and international financial institutions (Lowenstein, 2002). In short, science and technology under conditions of globalization are putting in the hands of the modern multinational corporation a kind of power that was the subject of science fiction just a few short decades ago.

The increasing power of corporations to impact the lives of those affected by their decisions and activities is not restricted simply to the supply of goods and services. Corporations have also acquired the capacity to shape in significant ways the legal environments in which they operate. Thus, under conditions of globalization, corporations have become a great deal freer to choose where the goods and services they provide will be produced and, by implication, the legal and regulatory standards that will govern their production. The products that appear on the retail shelves of a department store, the produce in the local grocery store or the voice from a call centre may originate anywhere in the world. This factor has greatly expanded the power of

corporations to determine the regulatory environments in which they do business.

The power to choose the regulatory environments in which corporations operate has also increased their power to shape the regulatory environments in which they operate through bargaining, negotiation and lobbying. Governments under conditions of globalization must compete with each other for private sector investment. Reducing regulatory constraints is one way of winning the competition. The resulting impact on health, safety, wages and the natural environment, to take just a few examples, has inevitable implications for the protection and the promotion of human rights.

The powers and opportunities resulting from globalization have also resulted in an enhanced capacity on the part of corporations to become directly involved in setting standards of operation in the various countries in which they operate. There are three dimensions to this power. First, as John Ruggie (2006, p. 5) points out, 'what once was external trade between national economies increasingly has become *internalized* within firms as global supply chain management which functions in real time and directly shapes the daily lives of people around the world' (emphasis in original).[27] This gives corporations extensive and direct power to set standards under which goods and services are produced by suppliers in their supply chain.[28]

Corporations have played and continue to play an influential role in shaping trade agreements, for example, bilateral investment treaties, which grant them significant legal rights. In some economic sectors, as Ruggie points out, corporations have acquired the right to participate directly in setting the standards governing their own operations. Further, a significant range and number of disputes related to foreign investments 'are now settled by private arbitration and not by national courts. Accordingly, corporate law firms and accounting firms add yet additional (corporately controlled) layers to routine transnational rule-setting' (Ruggie, 2006, p. 5).

Finally, corporations are active participants in international standard-setting organizations like the International Labour Organization (ILO), the World Health Organization (WHO) and various other UN bodies. The result is that multinational corporations are playing a direct role in setting international standards governing their own operations. This involvement in the regulatory activities of international institutions, traditionally the preserve of state governments, is a relatively recent phenomenon that illustrates the growing power of corporations internationally.[29]

(2) By contrast, globalization has diminished the power of national

governments to set regulatory standards in important ways. The doors to globalization and the creation of international markets have been opened by international regulatory systems whose function is to regulate the operations of national governments themselves. The World Trade Organization (WTO) and regional free trade agreements like the North American Free Trade Agreement (NAFTA) have significantly constrained the freedom of national governments to regulate their own economies. Thus, to take just one example, national governments that are members of the WTO are significantly restricted in the ways in which they can regulate the conditions under which goods and services are produced. For example, a member government of the WTO cannot prevent the import of clothing because it is produced under sweatshop conditions.[30]

In many developing countries, multinational corporations are essentially unregulated, except in so far as they impose environmental, social and economic standards of performance on themselves. Individuals, communities and indeed entire countries may thus become subject to the ethical standards that these corporations implicitly or explicitly espouse.

The capacity of even the most sophisticated governments to evaluate the risks posed by new technologies and the products they generate is limited. Access to the financial resources that will allow governments to compete for the intellectual expertise required to evaluate new products and economic development initiatives has been limited often in response to corporate pressure to reduce taxes. New technologies are spawning new products, chemicals, for example, so quickly that government regulation has difficulty keeping up. Governments increasingly rely on the companies producing new products to self-evaluate the risks they may pose to users and the public more generally. As a result, serious questions about both the capacity and willingness of governments to set appropriate social, economic and environmental parameters for economic activity in global and local markets have emerged.

(3) Finally, globalization has opened the door to significant potential and actual abuses of human rights on the part of multinational corporations in the pursuit of profits. Abuses range across virtually every section of the International Bill of Rights, the international human rights benchmark against which corporate conduct is commonly evaluated. Abuses have occurred with regard to: the use of public and private security forces by mining companies and governments; land tenure, water and labour violations on the part of food, beverage, apparel and footwear industries; and privacy and freedom

of expression infringements on the part of corporations in communications and information technology (Ruggie, 2006; Scott, 2001).

The widespread use of bribery as a corporate strategy for accomplishing strategic objectives is another door leading to human rights abuses that globalization has opened.[31] Corruption, as Transparency International has pointed out, is occurring in near pandemic proportions in many parts of the world. Bribery by itself is an important moral issue. It always involves an abuse of a position of responsibility by an individual. Its ethical, or more accurately, its unethical character, attaches directly to that abuse of authority. Where public officials are involved, it is easy to think of the problem as one simply of unjust enrichment related to the winning or retaining of contracts. In fact, however, bribery typically impacts law enforcement. Its point is to relieve those paying the bribe of the need to meet legal and regulatory standards. The result is often human rights abuses. As notable human rights expert Mary Robinson has observed, when laws and regulations governing drinking water, safe working conditions, building codes, abduction, the protection of property, the administration of justice and the management of prisons are subverted through bribery, human rights inevitably suffer (Transparency International, 2004, p. 7).

Cataloguing the abuses of the modern corporation, particularly the modern transnational corporation, has become a major preoccupation of a cadre of critics and NGOs over the past two decades. The revolution in communications technology that has provided the essential framework for globalization has also opened the door to the global sharing of information about the impact of corporate business activities in every part of the world. Analytical and scholarly critiques have typically focused on the phenomenon of globalization and its implications for the capacity of governments to fulfil their responsibilities and maintain or build democratic institutions and practices (Broad, 2002; Hertz, 2001; Klein, 2000, 2007; Korten, 1995).

To summarize, globalization has opened the door to significant and harmful human rights abuses by multinational corporations, abuses of a kind that have led in the past to the assignment of the obligation to both respect and ensure respect for human rights to the state by their citizens and more recently by the UN. Globalization has also conferred on corporations government-like powers to control the conditions under which the goods and services they provide are produced and distributed. Further, while the power of corporations has been enhanced by globalization, the

power of governments to set and monitor human rights standards has been diminished, leaving a human rights vacuum. It follows, therefore, that having acquired government-like powers, corporations must assume at least some of the moral burden for protecting and promoting respect for human rights.

This argument is powerful. It seriously undermines the Legal Model. Finally, it has led many to conclude that, like governments, corporations have an obligation to respect but also ensure respect for human rights.

The argument, however, leaves three questions of fundamental importance unanswered.

1. If we accept that corporations have direct, morally grounded human rights obligations, as this argument suggests, what are those obligations?
2. Is the proposal that corporations have human rights obligations compatible with the requirement that human rights obligations must be institutionalizable?
3. Is the assignment of government-like human rights obligations to corporations compatible with the effective and efficient operation of a market economy?

Two models have emerged in response to these questions. Evaluating those models is the task for what follows.

1.2.3 Model Two: A Self-regulatory Model

The Self-regulatory Model is a response to the deficiencies of the Legal Model and is built largely around voluntary codes of ethics. The codes on which the model is built may be created by, for example: individual corporations; industry-wide associations like the International Council on Mining and Metals (ICMM) and the International Chamber of Commerce (ICC); intergovernmental institutions like the Organization for Economic Cooperation and Development (OECD); and international governmental institutions like the World Bank and the International Financial Organization (IFO).[32]

The strengths of this model are twofold. First, it endorses the view that corporations have direct human rights obligations. As such, it captures the perceived need to articulate the human rights responsibilities of corporations more specifically with a view to strengthening corporate awareness of their human rights obligations locally and internationally.

A second clear strength is that virtually all voluntary codes acknowledge the universal character of human rights by acknowledging the global

application of the human rights identified in their codes. This constitutes a kind of universalization of human rights that national legal systems cannot provide.

Like the first model, however, this model is severely flawed.[33] First, and most significantly, it understands human rights obligations to be voluntary and self-assigned. This feature of the model collides with the concept of human rights in two ways. To begin with, it carries with it the implication that the assumption of human rights responsibilities is a voluntary corporate act. However, if corporations have human rights obligations, they are not voluntary. They are entailed by the human rights that generate them.

In addition, voluntary codes both in theory and in practice imply that determining the nature and scope of a corporation's human rights obligations is a matter of self-formulation. The practical implications of this implied view are best reflected in the wide variation in the human rights contents of voluntary corporate codes of ethics. Some are quite general, for example, the OECD Guidelines; others are more detailed, for example, the UN Global Compact; and some are quite detailed, for example, the Apparel Industry Partnership Workplace Code.[34] This feature of voluntary codes conflicts with the fact that human rights by their nature entail that the bearers of human rights obligations, in this case corporations, are not free to pick and choose among the human rights they are prepared to acknowledge and respect, as the earlier discussion indicates.

Second, and equally significant, most voluntary codes and the corporations that endorse them are silent on issues of accountability. Consequently, they are largely silent on questions of verification and enforcement. Further, where codes and the corporations endorsing them do set out concrete provisions for verification and enforcement, they imply in so doing that any assumption of responsibility in these regards is again voluntarily assumed.

In summary, the weakness of the Self-regulatory Model is the fact that voluntary codes are voluntary. The model implies that corporations have a right to pick and choose the standards that apply to their own conduct. Further, it assumes that how voluntary codes are applied and interpreted is a matter, when all is said and done, of corporate discretion.[35] As we have seen in Section 1.1, this approach is incompatible with fundamental features of human rights.

1.2.4 Model Three: The Draft Norms Model

The third model is a response to the weaknesses of both the Legal and the Self-regulatory Models. Although it is in many respects the mirror

opposite of the first, nonetheless an essential feature of this third model is that it shares with the first the view that laws are the only effective tool for institutionalizing the human rights responsibilities of corporations and ensuring that those responsibilities are carried out.

The Legal Model proposes that corporations have no morally grounded human rights responsibilities beyond those set out by law. The Draft Norms Model takes the opposite position. It proposes that the acquisition of government-like powers entails the assumption of human rights obligations wholly similar to those of governments. The proposed (but never adopted[36]) UN *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* was the product of more than five years of deliberation and negotiation on the part of a working committee established by the UN Commission on Human Rights Sub-Commission on the Promotions and Protection of Human Rights. Clause one of the UN *Draft Norms* asserts that corporations have a (moral) obligation to 'promote, secure the fulfillment of, respect, ensure respect of and protect human rights', an assignment of obligations that is identical in wording to what in the preamble, paragraph three, the authors of the *Draft Norms* understand to be the obligations of states. The obligations assigned to corporations by the *Draft Norms* incorporate the entire panoply of treaties and international instruments to which states are subject and include: the right to equal opportunity and non-discriminatory treatment; personal security rights; the rights of workers; respect for national sovereignty and human rights; obligations with respect to consumer protection; and obligations with respect to environmental protection (United Nations, 2003, Section E, #12). Finally, as is the case for states, the rights in question, and by implication the obligations they generate, are described in the preamble, paragraph 13, as universal, indivisible, interdependent and interrelated.

The very comprehensive character of the *Draft Norms* is perhaps reflected most dramatically in clause 12, which says:

> Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.

What is distinctive about this model, then, is that the scope and nature of the human rights obligations assigned to corporations is understood to parallel the scope and nature of the human rights obligations of states.

To ensure that the moral obligations of corporations are respected, the *Draft Norms* propose that corporations be formally monitored and that the human rights obligations of corporations be embedded in international law and national legal systems. Clause 18 asserts that:

> Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through *inter alia* reparations, restitution, compensation and rehabilitation for any damages done or property taken.

The same clause assigns responsibility 'for determining damages, in regard to criminal sanctions, and in all other respects' to 'national courts and/or international tribunals pursuant to national and international law'.

In summary, the Draft Norms Model proposes to move from a system of institutionalization in which the human rights obligations of corporations are indirect, to a system in which corporations are directly responsible to right bearers for protecting and promoting the full range of human rights 'recognized in international and national law' previously understood to be the sole responsibility of governments.

Strengths and weaknesses of Model Three

This third model has clear strengths.

1. By assigning broad human rights responsibilities to corporations, it gives human rights a global character and reach that locating human rights obligations exclusively with the nation state cannot achieve.
2. It connects the human rights obligations of corporations to widely endorsed international standards.
3. It calls for both monitoring and enforcement.
4. It proposes to embed the human rights obligations of corporations within current national and international legal structures.

It is not surprising, therefore, that the model attracted the wide support of lawyers and international NGOs when it was first presented.

Despite its initial appeal to many human rights advocates, however, the model is seriously flawed. What the model fails to take into account is the different roles of governments and private sector corporations in the pursuit of public and private interests. Equally, the model fails to take into account the role of human rights in protecting the right of individuals to pursue private interests.

The central obligation of governments is to serve the public interest, or the public or common good.[37] In modern societies protecting and

promoting human rights is essential to the achievement of that goal. By protecting and promoting human rights, a government commits itself to ensuring equality of access to the benefits that human rights extend to rights bearers. By protecting and promoting human rights, governments commit to removing arbitrary barriers to the access of individuals to the resources and opportunities needed to pursue their individual and therefore private and public interests.

Human rights are core moral values, as we have seen, because their respect is a necessary condition for the exercise of human autonomy or freedom. Further, inasmuch as human rights are universal and overriding, they are public or common goods.[38] Protecting or generating public goods is perfectly consistent with the exercise of power by governments because protecting and promoting the public good is their explicit obligation. These two characteristics combined generate an obvious tension, however, when they intersect with values fundamental to commercial activities in market environments. Markets are environments in which individuals and groups pursue private interests. One of the fundamental interests of individuals is the right to social, economic and cultural environments in which they are free to pursue their private interests. Absent this right, the capacity to make autonomous moral decisions disappears.

Corporations are the contemporary tool of choice in market economies for the pursuit of private economic interests. To impose on corporations an overriding obligation to protect and promote human rights, and thereby to ensure the protection and promotion of the full range of interests that human rights are designed to protect, is, in effect, to remove from corporations the right to serve private interests as their primary obligation.

For example, clause 12 of the *Draft Norms* requires transnational corporations and other business enterprises to respect political and civil but also social, economic and cultural rights. Among other things, the *Draft Norms* would require them to contribute to the realization of the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education and so on. If these rights are taken as overriding, a fundamental characteristic of human rights, the capacity of individuals or corporations to choose the purposes for which to enter into contractual relationships, is either removed or very seriously attenuated.

This conflict between commercial values and human rights becomes inescapable if the principle that human rights obligations are overriding obligations is combined with the indivisibility principle,[39] a principle that proposes that human rights obligations are all of one piece and must all be accepted as an integral package.[40] That is to say, the conflict is inescapable if the indivisibility principle is understood to mean that human rights

obligations, by their nature, come in a comprehensive bundle imposing obligations uniformly and universally across the whole range of human rights on corporate obligation bearers. It is inescapable because it entails that corporations must give overriding priority to the full range of human rights in all aspects of their operations.

The effect of the model, therefore, is to collapse the distinction between private and public interests, and require that corporations and business enterprises assume a role similar to that of governments by giving priority to the public interest in all aspects of their operations. To put the matter concretely, a corporation wishing to contract with a supplier in a developing country like Bangladesh would have to decide first whether this was the appropriate place to invest given a global or universal 'right to development'. Having resolved that issue, it would then have to give overriding priority among other things to the right to economic development, healthcare and education in that country.

Once the implications of this model for the prioritization of public versus private goods and interests are clear, the exposure of this model to a Legal Model-type critique of the assignment of human rights obligations to corporations also becomes clear. Managers are not equipped to determine what the public interest requires with respect to the economic development of a country, or the provision of education or healthcare. They do not have a public mandate to undertake these tasks. Prioritizing these kinds of objectives is not consistent with their fiduciary obligations to their shareholders. Finally, undertaking public responsibilities required by this understanding of their human rights responsibilities would eliminate the use of corporations for the pursuit of private goals and objectives.

It is not surprising, therefore, that while the Draft Norms Model won the approval of the international NGO community, it was for the most part opposed by corporations and governments. Indeed, it would appear that the Draft Norms Model has resurrected fundamental issues and disagreements about the social responsibilities of corporations that Model Two-type voluntary commitments by corporations and other bodies had given the appearance of resolving. Not surprisingly, in rejecting the Draft Norms Model, the business community has, among other things, appealed to the dangers of collapsing the role of private sector actors, whose principal focus is the private interests of shareholders and other stakeholders, for example, employees, customers, clients and suppliers, into the role of governments, whose principal focus is the public interest.[41]

1.2.5 Summary

Let me summarize the conclusions to be drawn from our discussion of the three models of the human rights obligations of corporations.

First, I have rejected the view that corporations have no direct morally grounded human rights obligations beyond those imposed by law. With the power of corporations to impact the enjoyment of human rights on the part of those affected by their operations comes the responsibility to protect and respect human rights in the exercise of that power.

Second, voluntary self-regulation and the voluntary assumption or determination of human rights obligations by corporations is not a valid foundation on which to build an understanding of the human rights obligations of corporations. Human rights obligations are not voluntary. They are obligatory, universal and overriding.

Third, the assumption that the human rights obligations of corporations are similar in nature or parallel to those of the state is mistaken. The human rights obligations of corporations are those obligations which flow from the role and powers of corporations, particularly corporations in international markets. The primary role of corporations is to serve private not public interests. Furthermore, though the powers of corporations are substantial, they are nonetheless different in significant ways from those of governments.

Finally, it follows from these conclusions taken together that it cannot be the case that the indivisibility principle endorsed by the UN and built into the *Draft Norms* holds true of corporations however valid its application might be to the state. The effect of the indivisibility principle applied to the human rights obligations of corporations is to convert private sector entities into public sector organizations whose primary purpose is the advancement of public not private interests.

1.3 IDENTIFYING THE HUMAN RIGHTS OBLIGATIONS OF CORPORATIONS

1.3.1 The Nature and Scope of Corporate Human Rights Obligations

What our discussion shows is that corporations have human rights responsibilities. What we have been unable to determine thus far is the specific nature of those responsibilities. As we shall see, however, discussion in Sections 1.1 and 1.2 has provided us with the building blocks required to find what will turn out to be rather surprising answers to the three questions at the centre of this inquiry.

What then are the specific human rights responsibilities of corporations? We know from previous discussion that they do not cover the full spectrum of human rights as set out, for example, in such instruments as the International Bill of Rights. We know also from previous discussion that, in spite of the fact that they are not as comprehensive as those of states, they are not voluntary. That is to say, corporations are not free to pick and choose what their human rights obligations are. What our findings also imply, though only obliquely, is that the human rights obligations of corporations are difficult to specify in concrete terms because they are in fact variable. That is to say, if the human rights obligations are limited but not voluntarily assumed, then, as we shall see, they may well vary with the settings in which corporations operate.

What is it then about human rights that suggest that the human rights obligations of corporations are variable? First is the fact that a corporation, operating in a country in which human rights are embedded in a functioning legal system, does not, for the most part, have to address questions about its human rights obligations simply because they are more or less comprehensively set out in law. In that kind of setting, a corporation's human rights obligations will be met simply by obeying the letter and the spirit of the law. In contrast, the human rights obligations of a company operating in a country where respect for human rights is not embedded in the law, or if embedded not enforced, will differ from those of a corporation operating in a legal environment in which human rights are fully embedded. Similarly, a company operating in a country whose government and people simply do not have the economic or social capacity to defend human rights in the face of their abuse by powerful economic actors will face different human rights obligations.

In a country like Canada with its universal healthcare system, a corporation can leave any basic human rights related responsibilities for assuring adequate medical treatment for its employees to the state. In a country like the United States, what a company's healthcare obligations are becomes a matter to be determined through deliberation and negotiation. This is true across the full range of possible corporate social responsibilities. Where environmental protection regulation is robust, the primary obligation of a corporation will be to live up to its legal and regulatory responsibilities. If a corporation does not do so, there is a robust enforcement system in place to require compliance. Where environment protection on the part of the state is weak or absent, a corporation is faced with the need to define its environmental responsibilities for itself (Matten and Moon, 2008, p. 406).

Where human rights are concerned, where the law establishes adequate minimum wages, provides adequately for the formation of and participation in a union, ensures reasonable protection against arbitrary arrest or

confiscation of property and so on across the full range of human rights, a corporation will not need to address the human rights issues and standards involved beyond understanding its obligations as set out by law. In so far as human rights issues arise, any obligations will most likely involve participating in public policy dialogue around those issues openly and in good faith.[42]

A second reason for variability flows from the first. The role of human rights is to create an environment where the dignity, equality and freedom of people are respected. The morally mandated task of a corporation seeking to understand its human rights obligations, where they are not defined adequately by the legal and regulatory system in place, is to mitigate the negative human rights impacts of its activities and enhance positive impacts. Inevitably, these impacts will vary from company to company and from setting to setting.

A commitment on the part of a corporation to respect the human rights of those whose human rights are impacted by its actions or activities will require that the corporation in question determine how those affected view those impacts on their freedom, equality and dignity and what for them would constitute the mitigation of negative and the enhancement of positive impacts. This is true in part because those impacted are likely to be the best judges of the implication of those impacts for their own lives. It is also true because a failure to take into account the interpretations and conclusions of those affected is to ignore their interest in participating in the creation of a social, cultural, political, natural and economic environment in which freedom, equality and dignity are protected and promoted, since it is these interests that human rights are put in place to protect.

Corporations faced with the need to determine their human rights obligations where they are not adequately defined by law can therefore meet their moral obligations only by engaging in a process of dialogue or moral deliberation. For reasons just set out, this process of moral deliberation must include 'the free and informed and equal participation of all those who are affected by a particular decision' (Campbell, 2001, p. 181).

The virtue of this process, as Tom Campbell points out, is that:

> It captures a social situation which pressures participants to take an impartial and inclusive view. It encourages the provision of all available evidence or information which is relevant to the matter in hand. It is tolerant with respect to the criteria of relevance that are involved. It holds the promise of limiting the extent of any coercion that might result from the decision in question. (Campbell, 2001, p. 181)

Even more important, however, is the fact that if human rights are at stake, fundamental interests of those rights bearers likely to be impacted

are also at stake. Any decisions in which the interests of rights bearers are not directly represented or engaged will be a breach of their human rights. It is exactly the capacity to engage issues of this nature that human rights are put in place to protect.[43]

An example will illustrate these conclusions. One of the obligations of corporations in global markets around which there is wide consensus is the obligation not to be complicit in the abuse of human rights on the part of the state.[44] The challenge in carrying out this obligation on the part of a corporation is to determine what counts as complicity. Given that human rights are those rights required for the protection and enhancement of human freedom, dignity and equality, complicity will involve any action or activity that endorses, encourages or supports explicitly or implicitly behaviour on the part of a state that undermines the freedom, equality or the dignity of those impacted.

Determining complicity thus requires the assessment of the impact a corporate action or activity is having or is likely to have on the lives of those impacted.[45] Equally, respect for the human rights of those impacted requires that those impacted or likely to be impacted participate in the assessment of those impacts. What, for example, would a corporation have to do to avoid complicity in human rights abuse in a country like Myanmar (Burma)? For some, the answer is clear: avoid doing business in Myanmar. But is this obvious? Could a sound decision be arrived at without significant consideration of the impacts of not investing or divesting if already invested? And could the impact of not investing or of divesting be reliably determined without input on the part of those impacted as to the nature of the impacts that divestment, for example, would have? Clearly, the use of forced labour would count as morally unacceptable complicity because of its obvious negative implications for the autonomy of those forced to work against their will. But what would the prohibition against complicity imply for a corporation that is able to resist the use of forced labour and willing to pay a living wage? Equally, what would the prohibition against complicity require of a corporation with regard to the payment of royalties to an oppressive state such as Burma or Sudan?[46]

Similar examples abound. What is to count as complicity in a country like South Africa under conditions of apartheid, or the employment of women in a Muslim country like Saudi Arabia, or freedom of expression or association in a country like China or the Middle East?[47]

What is at stake here is not simply a matter of interpreting what respect for freedom of association or expression means in a country like China under the political conditions that exist there at a specific point in time. Rather, it is a matter of determining which human rights should take priority in these various circumstances and why. Accordingly, the problem is

to determine not simply the proper implementation of a specific right like freedom of association, but rather the specific human rights obligations of a corporation in the specific social, cultural, legal, environmental and economic circumstances in which it finds itself. It is the variability of the circumstances and the options available given the capacity of a company to respond that blocks the determination of a general, overarching set of concrete corporate human rights obligations.[48]

Three things follow from this discussion. First, the direct human rights obligations of corporations will vary with the environment in which they are active or thinking of becoming active. Second, determining those human rights obligations requires human rights impact assessments. This being the case, one of the central human rights obligations of corporations as well as other organizations and institutions with human rights responsibilities and interests is to develop effective and authoritative human rights impact assessment tools and methodologies (Ruggie, 2006, p. 21 #77).[49]

Third, protecting the interests of those whose human rights are impacted or are likely to be impacted will require the involvement of those whose human rights interests are at stake in determining what would count as protection and what would count as enhancement of their rights.

It does not follow from the fact that the human rights obligations of corporations are context relative that they are also culturally relative. Human rights are universal. However, the obligations they entail will vary with obligation bearers and the settings in which obligation bearers find themselves. This is true not just of human rights. It follows from the nature of moral obligations. Parents, teachers, doctors, engineers all have obligations by virtue of their roles that others do not have. People who can swim have obligations to save someone who is drowning that those without those skills do not have. And so it is with human rights.

Neither is it the case that because the obligations of corporations vary that the obligations they do have are voluntarily assumed. Though the human rights obligations of corporations are a function of the social, political, cultural, environmental and economic setting in which they are active, they are not discretionary.

1.3.2 Corporations and the Institutionalization of Human Rights

As noted earlier, one of the requirements for the existence of a human right is that its protection should be institutionalized or capable of being institutionalized. Does the account just offered of the human rights obligations of corporations meet that requirement?

To institutionalize human rights is to embed them in 'stable, valued and recurring patterns of behaviour' (Huntington, 1969, p. 12) that are rule

governed, and to 'define actions in terms of relations between roles and situations' (March and Olsen, 1989, p. 160). Institutionalization enables 'predictable and patterned interactions which are stable, constrain individual behaviour and are associated with shared values and meaning' (Matten and Moon, 2008, p. 406).

Institutionalization of corporate human rights obligations thus requires several things. It must be possible in theory and practice to embed action guiding rules, in this case rules designed to protect and promote human rights, in the management systems of those corporations to which they apply. It must be possible to monitor the implementation of the rules to determine compliance and to communicate findings in publicly available reports. The reports must be subject to verification. Unless these conditions are satisfied, it will not be possible to determine whether respect for the rights in question has been institutionalized and whether a corporation's human rights obligations are being met.

As it turns out, these conditions are all realizable. Management systems are being developed and refined that allow training, monitoring, reporting and auditing. These systems and training programmes are designed to ensure that the ethical values and principles to which a corporation commits itself are effectively institutionalized. These systems are now commonplace. The Global Reporting Initiative has taken great strides in developing transparent monitoring and reporting systems. AccountAbility, Social Accountability International, the CAUX Roundtable, Transparency International and a variety of other public, private and voluntary sector organizations are engaged in developing sophisticated management systems for embedding ethical standards in organizations, and monitoring, reporting and auditing the effective implementation of those standards throughout an organization's operations.[50]

The institutionalization of rule systems designed to guide corporate protection and promotion of human rights requires two additional elements. The human rights standards to be institutionalized must be credible. To be credible, they must emerge from public dialogue that incorporates the perspectives of those whose interests the standards are put in place to secure. Second, organizations engaged in supporting, facilitating and promoting international trade must recognize that they too have a key role in ensuring that corporations they are engaged with live up to their human rights obligations. Such organizations include: financial institutions like banks and export development agencies; international financial institutions like the World Bank, the IFO and regional banks like the Asian Development Bank; industry associations like the ICMM; NGOs setting reporting and auditing standards like the Global Reporting Initiative and AccountAbility and so on. It requires that all these organizations engage

in open and transparent discussion of the standards they endorse. And it requires that the process of public discussion and negotiation includes a significant role for those whose freedom, equality and dignity the standards being negotiated and implemented are meant to protect and enhance.

Further, the institutionalization of human rights requires that organizations and agencies playing a supporting, facilitating or promotional role also require that the corporations whose activities they support embed their responsibilities in their management systems throughout their operations. Financial institutions, for example, banks and export development agencies, can require human rights impact assessments and set relevant, setting-specific requirements for loans and other forms of financial support.[51] This would mean that a corporation could not get a loan unless it could persuade the financial agency to which it was turning for assistance that it had taken the steps necessary to identify its human rights obligations and ensure that it had the management systems in place to ensure that its human rights obligations were met. Industry organizations can set standards for membership, for example, impact assessment, reporting and auditing requirements. International financial institutions can create transparent procedures for setting and enforcing their human rights standards as a condition of financial support.

1.3.3 Model Four: The Hybrid Model and Issues of Practicality and Effectiveness

As our discussion shows, the assertion that human beings are rights bearers is of little practical value or ethical import unless the assertion finds concrete expression in rules and practices that protect and promote human equality, freedom and dignity. Are there practical examples of specific rule systems that are and have been effective?

A detailed answer to this question is not possible here. However, a brief summary account points persuasively in a positive direction. There is, to begin with, little evidence that general and sweeping endorsements of human rights by corporations, or international institutions, or governments, or non-governmental organizations, taken by themselves, are of much practical import. By way of contrast, there are examples of codes that are setting-specific, that, arguably, have made a difference. The Sullivan Principles for South Africa are perhaps the best example. Other examples would include the McBride Principles for Northern Ireland and the Miller Principles for China.[52]

Three examples illustrate the more recent emergence of industry-specific codes of ethics whose goal is the institutionalization by corporations of rule systems that impose specific corporate human rights obligations. The

Voluntary Principles on Security and Human Rights are a first example. These principles promote human rights risk assessments and the provision of security provider training in the resource extraction sector. The Kimberly Process Certification Scheme is focused specifically on blocking the sale of blood or conflict diamonds. The Extractive Industries Transparency Initiative is a third example of an industry-specific initiative that is designed for country-specific application, in this case with a view to inhibiting public sector bribery and corruption in resource rich countries in the developing world.

Each of these examples illustrates rule systems designed to protect the human rights interests of people impacted by corporate activity. Each incorporates a setting-specific rule system. Each has emerged from broadly inclusive and transparent stakeholder dialogues. Two of the three would appear to be having significant, positive practical impacts on those whose interests they are designed to protect.[53]

Equally significant, these and similar initiatives are intersecting with rule systems whose contents corporations do not control. Increasingly, these other rule systems are forming an interconnected 'web of rules' that are mutually reinforcing. Although corporations can ignore these interlocking sets of rules in principle, in practice, this freedom is increasingly truncated. Obtaining loans for international projects is an example. Without access to loans, many projects are out of reach. Increasingly, national and international financial institutions, for example, the World Bank, the IFO, the international regional banks, national export development and credit agencies and private sector banks, are setting performance standards for loan applicants. The Equator Principles are an example. These standards are in a sense voluntary. It is also true that these rule systems set uneven standards and do not always emerge from transparent and inclusive, consensus-oriented dialogue as the history of the development of the Equator Principles shows.[54] However, individually and collectively they have impacts that are increasingly difficult for multinational corporations to avoid.

In summary, multinational corporations as well as public, private and NGO institutions, organizations and agencies are increasingly involved in the creation and administration of practical, setting-specific rule systems that have significant human rights content and are based on processes of collective moral deliberation that aspire to transparency and inclusiveness.

1.3.4 Final Questions

One of the important elements of the Legal Model is that model's implicit critique of the alternatives:

1. Corporations do not have the requisite capacity and power required to institutionalize human rights standards.
2. Corporate attempts to acquire or exercise human rights responsibilities are clearly inconsistent with a commitment to democratic principles.
3. Managers do not have human rights training or competence.
4. Human rights and market economy values are fundamentally incompatible.

Is the Hybrid Model vulnerable to these objections?

The first three objections can now be countered relatively easily. First, as we have seen, corporations do have the requisite capacity and power to institutionalize and integrate human rights rules and standards into their day to day operations. Institutionalizing basic rules designed to guide day to day operations is one of the fundamental responsibilities of management.

Second, identifying and exercising corporate human rights responsibilities are clearly not inconsistent with democratic principles. In taking up their human rights responsibilities, corporations are not usurping or diminishing in any way the responsibilities of governments or the state. Their specific human rights obligations in concrete and specific settings are neither identical with nor broadly similar to those of the state. Their power to impact and protect the enjoyment of human rights, while similar in some respects, nonetheless differs in significant ways from that of the state. Their human rights obligations are both limited in nature and vary with the social, political, cultural, legal, environmental and economic settings in which they are active, neither of which is true of the state. Further, the requirement that corporations actively seek to identify their human rights responsibilities in the setting in which they are active or are potentially active is not an invitation to unilaterally define what their human rights responsibilities are. The very nature of their human rights responsibilities requires that the identification of human rights responsibilities in specific settings be a collaborative, multi-stakeholder process. The human rights obligations of corporations can only be determined on the Hybrid Model through transparent and inclusive dialogue, debate and negotiation. Further, once identified, the obligations involved are not voluntary or discretionary. The execution of human rights obligations will be undemocratic only if it involves the exercise of corporate power to exclude stakeholders with a legitimate interest in the outcome from participation, or, alternatively, if it involves the use of corporate power to dictate the outcome.

Third, corporations have the management tools and capacity to think

through their human rights responsibilities and determine how most effectively to fulfil them just as they have the capacity to marshal the resources to determine their legal and other management responsibilities. Where they do not in specific settings have the required skills and resources, they have the resources and capacity to determine what resources are required to meet their responsibilities and acquire those resources. If their capacity to marshal the required resources is restricted, then, as in other aspects of their operations, they have an obligation to limit their investments and activities in the setting in which their activities have the potential to generate human rights risks that they do not have the resources to determine or mitigate. But this requirement is not unique to human rights risks. It is true of all risks that a prudent management has the responsibility to identify and mitigate, environmental or political risks, for example. Thus, meeting corporate human rights responsibilities will require that management undertake credible human rights impact assessments, something that managers clearly have the competence to undertake. It also requires participation in a process of moral deliberation that is transparent and inclusive. Finally, it requires credible monitoring, reporting and verification of corporate success in meeting its obligations. All of these are skills and competencies that managers require in other areas of their work.

The fourth objection is in many respects the most fundamental. It is also the most ideological. It is certainly true that respect for human rights constrains what corporations can and cannot do in the pursuit of their commercial interests. However, the Legal Model, which assigns responsibility for setting and enforcing human rights standards more or less exclusively to the state, does not leave corporations free to ignore human rights in their market activities. It simply relieves them of the need to determine for themselves what those standards should be. Thus, with respect to this fourth objection, there is no relevant difference between the Legal and the Hybrid Models. Both models accept that corporations have human rights obligations. Both models require that corporations respect rules not of their own making. The only real difference between the two models is how the rules are determined, implemented and enforced and by whom.

It follows that if there is a fundamental conflict, tension or incompatibility between human rights and free market values or principles, then that tension or incompatibility holds equally for both the Legal and the Hybrid Models.[55] This wider and ideologically oriented issue, then, takes as its focus the values that should frame market economies and the role of the state in regulating market economies. While this is without question a significant problem, addressing it is beyond the scope of this discussion.[56]

1.4 CONCLUSIONS: A SUMMARY AND OVERVIEW OF FINDINGS AND CONCLUDING OBSERVATIONS

Understanding the role of human rights in the management of the contemporary private sector corporation is one of the most challenging tasks of business ethics. There are several reasons for this. Human rights have a character that sets them apart from other moral values that frame human behaviour. They are universal and thus not as such variable across social, cultural, political, environmental or economic settings in which human activity takes place. However, the moral obligations they generate are variable, unlike the rights that trigger those obligations.[57] For the state, they come in a package, a state of affairs frequently captured by the suggestion that human rights are interrelated and indivisible. For corporations, on the other hand, as we have shown, human rights while interrelated are not indivisible. For corporations, they do not come in the same kind of package.

For many, the suggestion that the human rights obligations of corporations vary with the social, cultural, political, environmental and economic settings in which they are or might become active implies what might be described as human rights relativism. This conclusion, however, is unwarranted. The fundamental moral importance of human freedom, equality and dignity is not variable or relative. Neither do the rights themselves, whose protection and respect are required if human freedom, equality and dignity are to be realized, vary from setting to setting. What does vary from setting to setting are first, the human rights impacts corporate activities are likely to have and second, the means available to corporations to mitigate negative and promote positive impacts. In countries with well-developed human rights laws and democratic political structures (each probably a necessary condition of the other) the obligations of corporations will be defined by those laws. Where there are deficiencies and ambiguities with regard to the human rights practices of a corporation, correcting those deficiencies or resolving the ambiguities will require a process of dialogue and negotiation in which those impacted or their surrogates are active participants.

In countries lacking fully developed human rights laws and democratic governments, the obligations of corporations will be quite different. They will also be variable from company to company and from industry to industry. Assessing the human rights obligations of corporations in this kind of setting will require moral deliberation that must be transparent and inclusive if the values of freedom, equality and dignity, on which human rights rules are grounded, are to be respected. If those founda-

tional values do not guide the deliberative process leading to a determination of a corporation's human rights obligations, then the outcome of the deliberative process will be morally flawed.[58]

What will not vary from company to company is the obligation to put in place management systems that ensure that a company-wide commitment and the capacity to fulfill that commitment are embedded in the company's management systems. This will include an obligation to monitor, report and verify success in meeting those commitments. These obligations also extend to public and private sector organizations and agencies engaged in supporting, facilitating or promoting corporate activity in environments in which human rights standards are not adequately defined, monitored and enforced by the state.[59]

Because human rights obligations, understood as variable, are capable of being institutionalized and are in fact (even if inadequately) being institutionalized, this approach to understanding the human rights responsibilities of corporations meets the test of practicality to which human right attributions are subject.

The human rights obligations of corporations are therefore context dependent but not morally relative. The obligations of corporations will vary with the nature of the human rights impacts of their activities as well as their capacity to anticipate and mitigate where negative and, where positive, enhance those impacts in morally appropriate ways. On the other hand, corporations that are alike in the human rights impacts that are likely to result from their activities and alike also in their ability to mitigate negative impacts and promote positive ones will have the same human rights obligations. It does not follow that companies lacking the capacity to mitigate negative impacts or promote positive ones will have less onerous obligations. It follows only that they will be different. Thus, for example, a company unable to avoid the use of forced labour in a country like Burma will have moral obligations that differ in this respect from a company that is able to carry out its economic activities without the use of forced labour. Accordingly, this approach or model meets the basic moral requirement that like cases be treated alike and different cases treated differently.

In short, globalization has undermined the Legal Model in which the moral responsibility for preventing human rights abuses and promoting respect for human rights rests largely or exclusively with the state. Globalization has resulted in significant shifts in the power of the state to prevent human rights abuses and enforce and promote respect for human rights laws. Equally, globalization has resulted in shifts in the capacity of corporations, particularly multinational corporations, to avoid the human rights constraints that have traditionally been the obligation of the state to

impose on their activities. Corporations today have powers that they did not previously have. With their shifting power comes shifting moral obligations. The task in this chapter has been to understand the implications of these changes for the human rights obligations of corporations.

NOTES

* Reprinted by permission of Oxford University Press, Inc, *The Oxford Handbook of Business Ethics* (Oxford Handbooks in Philosophy) by George G. Brenkert and Tom L. Beauchamp (2009), Chapter 9 'Business and human rights: a principle and value-based analysis'.

1. For a comprehensive collection of international codes, see *Voluntary Codes: Principles, Standards and Resources* at http://www.CBERN.ca/capacity/tools/index.html or http://www.yorku.ca/csr.
2. For a more detailed outline of this process of evaluation, see Cragg et al. (2012).
3. Note that because corporations are dominant expressions of private sector economic activity in contemporary economies, the focus throughout this chapter will be privately and publicly held private sector corporations.
4. They contribute to human well-being both because their respect enhances human freedom, dignity and equality and because of their instrumental value. Tom Campbell (2006, p. 34) explores these ideas.
5. This observation is crucial to the discussion to follow. The central question for this chapter is determining the human rights obligations of corporations. The answer I give to this question is that the human rights obligations of corporations are a function of their human rights impacts. (See the chapter's Conclusions for a summary.) Corporations, I argue, have an obligation to mitigate negative human rights impacts and enhance potentially positive impacts. It follows, I argue, that while the human rights obligations of governments are uniform across countries and societies, the human rights obligations of corporations vary with the social, cultural, legal, environmental and economic contexts in which they operate.
6. This is a crucially important point. It provides the foundation for the argument in Section 1.3 of this chapter.
7. If, when embedded in legal systems, 'human rights' did not have this overriding character, they would not be human rights.
8. Human rights are typically described in Western societies as individual rights, which of course they are. Western societies have as a consequence focused heavily on civil and political rights, or what are sometimes referred to as first generation human rights. However, from the first formulations of the human rights declarations following the Second World War, the role of human rights in building social conditions in which human beings can flourish has been emphasized. The preamble to the UN Universal Declaration provides a good example of this vision. The insistence that economic, social and cultural rights be given the same moral status as civil and political rights illustrates the perceived importance of human rights for the creation of societies in which human beings can flourish. More recently, attention has shifted to the role of human rights in fostering conditions favourable to economic developments. Amartya Sen (1999) illustrates this shift in focus. It is this shift that has motivated much of the emphasis on the human rights obligations of corporations, since in today's world, it is widely agreed that corporate investment is the key to economic development, as I discuss at more length in Section 1.2 of this chapter.
9. I return to a discussion of what counts as the institutionalization of human rights in Section 1.3 below.
10. The claim that a human right did not exist in a particular society would not by itself

nullify the claim that people in that society had that right unless the claim was true. What this does mean, however, is that it could not be the case that a child in a particular country had a right to education if it was the case that fulfilling that right was beyond the capability of that society or its government. It might of course be the case that all children the world over should have the right to an education. Creating the conditions in which such a right could be said to exist in particular cases might then be said to be a moral obligation, though for whom it was an obligation would have to be then argued and determined.

11. It is this feature of human rights that leads some to (the mistaken) view that human rights must find expression as laws or as integral elements of legal systems to be said to exist.
12. It is worth pointing out that if rights can be either or both societal and legal in nature, as Campbell (2006, p. 35) argues, then it would seem to follow relatively uncontroversially that they need not be formalized into law to be respected.
13. For a more detailed account of the emergence of rights discourse, see Campbell (2006, chapter 1).
14. Clause two of the preamble is explicit on this point. It begins: 'Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind . . .'.
15. When the General Assembly of the UN adopted the Universal Declaration, they requested the drafting of a covenant on human rights to include measures of implementation. It was explicitly decided in 1950 that this covenant should include economic, social and cultural rights as well as civil and political rights. After debate, however, it was decided to draft two covenants, one to set out civil and political rights and the other to focus on economic, social and cultural rights. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were adopted by the General Assembly in 1966.
16. See also Article 1 that states: 'All human beings are born free and equal in dignity and rights' and Article 3 that states: 'Everyone has the right to life liberty and security of person.'
17. These rights are sometimes referred to as first generation rights. They derive primarily from the seventeenth and eighteenth centuries. They played a particularly formative role in the writing of the American Declaration of Independence and the French Declaration of the Rights of Man and Citizen.
18. These rights are sometimes referred to as second generation rights.
19. These solidarity rights are sometimes referred to as third generation rights.
20. See the third clause of the preamble, for example.
21. The view of the firm on which these theories are grounded is based in the first instance on the work of a number of influential economists which include Friedman and Hayek. More recent defences have been mounted by business ethicists. One such defence is argued by Goodpaster (1991). A second detailed analysis and defence is offered by John Boatright (1999). An exhaustive critical analysis of shareholder theory by business ethicists can be found in Clarkson (1998).
22. It is important to note here that the critique just outlined is normally directed against the thesis that corporations have social responsibilities beyond meeting their obligations to shareholders. They are equally germane to the thesis that corporations have human rights responsibilities inasmuch as human rights are an example of the kinds of social responsibilities that are the focus of this debate.
23. This is the basic objection of prominent critics of the view, for example, Friedman and Hayek, that corporations have social responsibilities (and by implication human rights responsibilities) beyond simply serving the interests of their shareholders. For a more recent, systematic defence of this view, see Gregg (2007).
24. It is perhaps worth noting here how effectively this assignment of responsibilities dovetails with the preamble to the UN Declaration of Human Rights.
25. For an authoritative account of these developments, see Ruggie (2006).

26. This point is developed at greater length in chapter 1 of Cragg (2005a). See also Hannah Arendt's (2000) description of the significance of the power that science has generated to 'act into nature' and the significance of that power for our relation as human beings to nature and our capacity to impact and alter nature and the natural environment.
27. Ruggie (2006, p. 20) notes that intra-firm trade amounts to some 40 per cent of United States total trade, and that that percentage does not fully reflect the related party transactions of branded marketers or retailers who do not actually manufacture anything themselves.
28. Brigitte Hamm's chapter in this volume provides a concrete description and illustration of this recently acquired corporate power and its human rights implications (see Chapter 8).
29. For a more detailed discussion of this development, see Muchlinski (2001, pp. 31–47).
30. For a detailed defence of this point, see Arthurs (2005b).
31. Bribery is not a phenomenon that globalization has introduced. As a way of influencing the behaviour of public officials it is probably as old as government itself. What globalization has done is to open the door to the use of bribery as a tool for accomplishing corporate objectives on the part of wealthy and powerful corporations. It is the willingness of multinational corporations to use bribery to accomplish their objectives in international markets that has resulted in its exponential growth particularly in developing and under-developed countries. For an in-depth analysis of this phenomenon, see Cragg (2005b).
32. For a comprehensive compendium of international codes, see note 1 above.
33. What follows is a summary critique. For a detailed analysis and critique, see Arthurs (2005a).
34. For a comprehensive collection of codes, see note 1 above. See also Ruggie (2006, p. 9 #39).
35. For a detailed analysis of the shortcomings associated with this second model, see Addo (2005, pp. 667–89). See also Ruggie (2006, p. 20) and Arthurs (2005a}.
36. Stepan Wood points out in his contribution to this volume that '[t]he UN Human Rights Commission gave the *Draft Norms* a chilly reception in 2004, noting that it had not requested them and that they had no legal standing. It nevertheless asked the Office of the High Commissioner to prepare a report on existing standards related to business and human rights that would identify outstanding issues and make recommendations for strengthening such standards and their implementation' (see Chapter 5). One outcome was the appointment of John Ruggie as Special Representative of the UN Secretary General with a mandate for studying and recommending a framework that would effectively identify the human rights responsibilities of business entities.
37. The distinction between public and private interests, goals and responsibilities, or private and common goods or interests is a common feature of the position of Legal Model supporters like Friedman and Hayek. The importance of the distinction is analysed by Goodpaster (1991). For an extended discussion of the concept of a common or public good, see Finnis (1980).
38. Raz (1986, p. 198) provides the following definition of a public good: 'A good is a public good in a certain society if and only if the distribution of the good is not subject to voluntary control by anyone other than each potential beneficiary controlling his share of the benefit.' Human rights properly enforced have this characteristic and are therefore properly described as public goods.
39. The resolution of the General Assembly setting out what has come to be called the indivisibility principle reads: 'the enjoyment of civic and political freedoms and or economic, social and cultural rights are interconnected and interdependent' (Resolution 421 (V), Sect. E).
40. It would seem that this resolution was designed to emphasize that it would be contrary to endorsement of the UN Declaration of Human Rights to endorse one of the two covenants and not the other. For a more comprehensive description of the origins of

the principle and its evolution and application to international human rights discourse, see Novak (2005, p. 178).

41. This particular issue is a central concern of business ethics. For a discussion of the dangers attending the elision of public and private sector roles, see Goodpaster (1991).
42. The obligation to participate openly and transparently in developing and coming to conclusions about human rights obligations is discussed in more detail below.
43. Catherine Coumans's case study in Chapter 9 of this volume takes up this point.
44. This obligation is examined at length in this volume by Florian Wettstein in Chapter 4 and Stepan Wood in Chapter 5.
45. A useful example of a human rights impact assessment involving those impacted is the Harker Report undertaken at the request of the Canadian government regarding the Canadian mission in Sudan. See Canada (2000).
46. The case of Burma (Myanmar) is interesting for this discussion for two reasons. First, Burma is an example of a country with a very oppressive government and a long history of human rights abuses. Second, Burma has occasioned wide debate and analysis on the part of scholars specifically concerned to understand the moral responsibilities of firms active or contemplating investing in that country. See, for example, Holliday (2005), Louwagie et al. (2005), Schermerhom (1999) and White (2004).
47. As indicated in note 44 above, these issues are addressed at length by Florian Wettstein and Stepan Wood in their contribution to the volume.
48. For an interesting discussion of human rights impact assessment methodology, see Canada (2000).
49. What this suggests is that John Ruggie is correct in his view that the way forward to a more effective understanding of the human rights obligations of corporations must include human rights impact assessment.
50. AccountAbility is an international organization engaged in setting and evaluating CSR methods by sustainability standards (http://www.accountability.org, accessed 24 July 2012). Social Accountability International, whose focus is more specifically labour standards, is also involved in developing assurance standards and methodologies. Its governing body draws its membership from business, academic and voluntary sector organizations. The CAUX Roundtable is an international business-oriented organization with connections to a variety of faith traditions.
51. For a discussion of the role of export credit agencies, see Halifax Initiative (2002).
52. For these documents, see note 1 above.
53. John Ruggie comments at some length on these and related initiatives in section IV of his 2007 report to the UN Secretary General. See Ruggie (2006). The Kimberley Process Certification Scheme was developed to eliminate what have come to be called blood diamonds from international trade. Unfortunately, international reluctance on the part of participating national governments to address problems with the certification process in countries like Zimbabwe have badly undermined the credibility of the process and the commitment of its member governments to enforce its rules. For a discussion of current problems with the process, see the Global Witness website, available at http://www.globalwitness.org/campaigns/conflict/conflict-diamonds/kimberley-process (accessed 2 January 2012) and the Partnership Africa Canada website, available at http://www.pacweb.org/pubs-diamond-nr-e.php (accessed 24 July 2012).
54. For an outline of the history of the Equator Principles, see http://www.equator-principles.com/index.php/history (accessed 24 July 2012).
55. Gregg (2007) proposes that any imposition of corporate social responsibility type values on the operation of the free market by governments or other organizations, will inevitably undermine the values on which free markets are grounded. If this argument is sound, it will apply with equal force to any model of a system that assigns human rights obligations to corporations. That being the case, it is not grounds for rejecting the Hybrid Model as a way of determining the ethical responsibilities of corporations in a global economy in favour of the standard model.
56. What I do not explore in this chapter is the extent to which assigning direct, morally

grounded, human rights obligations to corporations might require according them rights needed to fulfil their human rights obligations that are inconsistent with public interest values associated with the structure and operations of democratic institutions. For a discussion of this issue, see John Bishop's contribution to this volume (Chapter 3).

57. This distinction between the universality of human rights and the variability of human rights obligations is a fundamental feature of human rights as I point out in Subsection 1.1.3 'Human rights and their Characteristics'. The human rights obligations of states are uniform because the powers of the state to protect and promote human rights inherent in its status as a state are uniform. This is not true of individuals or corporations. It is for this reason that the obligations for corporations and individuals are variable.
58. The contributions to this volume of Brigitte Hamm in Chapter 8 and Catherine Coumans in Chapter 9 illustrate the importance of this point.
59. See Catherine Coumans's contribution to this volume for an application of this conclusion to the specific example of ethical investment.

REFERENCES

Addo, M.K. (1999). 'Human rights and transnational corporations', in M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, The Hague, London and Boston, MA: Kluwer Law International, pp. 3–37.

Addo, M. (2005). 'Human rights perspectives of corporate groups', *Connecticut Law Review*, **37**(3), 667–89.

Arendt, H. (2000). 'The concept of history, ancient and modern', in P. Baehr (ed.), *The Portable Hannah Arendt*, New York: Penguin Group, pp. 278–310.

Arthurs, H. (2005a). 'Corporate codes of conduct: profit, power and law in the global economy', in W. Cragg (ed.), *Ethics Codes, Corporations and the Challenge of Globalization*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing, pp. 51–75.

Arthurs, H. (2005b). 'Private ordering and workers' rights in the global economy: corporate codes of conduct as a regime of labour market regulation', in W. Cragg (ed.), *Ethics Codes, Corporations and the Challenge of Globalization*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing, pp. 194–212.

Boatright, J. (1999). *Ethics in Finance*, Oxford: Blackwell.

Broad, R. (2002). *Global Backlash: Citizen Initiatives for a Just World Economy*, Lanham ,MD: Rowman & Littlefield Publishers.

Campbell, T. (2001). 'Democratising human rights', in T.D. Campbell and B.M. Leiser (eds), *Human Rights in Philosophy and Practice*, Surrey, UK: Ashgate.

Campbell, T. (2004). 'Moral dimensions of human rights', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations*, Dordrecht, Boston, MA and London: Kluwer, pp. 11–31.

Campbell, T. (2006). *Rights: A Critical Introduction*, London and New York: Routledge.

Canada (2000). *Human Security in the Sudan: The Report of a Canadian Assessment Mission*, Ottawa: Minister of Foreign Affairs.

Clarkson, M. (1998). *The Corporation and its Stakeholders: Classic and Contemporary Readings*, Toronto: University of Toronto Press.

Cragg, W. (2005a). 'Ethics, globalization and the phenomenon of self-regulation', in W. Cragg (ed.), *Ethics Codes, Corporations and the Challenge of Globalization*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing, pp. 1–23.

Cragg, W. (2005b). 'The US Foreign Corrupt Practices Act: the role of ethics, law and self-regulation in global markets', in W. Cragg (ed.), *Ethics Codes, Corporations and the Challenge of Globalization*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing, pp. 112–54.

Cragg, W, D.G. Arnold and P. Muchlinski (2012). 'The guest editors' introduction: human rights and business', *Business Ethics Quarterly*, **22**(1), 1–7.

De Feyter, K. (2005). *Human Rights: Social Justice in the Age of the Market*, London and New York: Zed Books.

Finnis, J. (1980). *Natural Law and Natural Rights*, Oxford: Clarendon Press.

Friedman, M. (1962). *Capitalism and Freedom*, Chicago, IL: University of Chicago Press.

Friedman, M. (1970). 'A Friedman doctrine – the social responsibility of business is to increase its profits', *New York Times Magazine*, 13 September.

Gewirth, A. (1978). *Reasons and Morality*, Chicago, IL: University of Chicago Press.

Gewirth, A. (1996). *The Community of Rights*, Chicago, IL: University of Chicago Press.

Goodpaster, K.E. (1991). 'Business ethics and stakeholder analysis', *Business Ethics Quarterly*, **1**(1), 53–73.

Gregg, S. (2007). *The Commercial Society: Foundations and Challenges in a Global Age*, Lanham, MD: Lexington Books.

Griffin, J. (2004). 'Human rights: whose duties', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations*, Dordrecht, Boston, MA and London: Kluwer, pp. 31–43.

Halifax Initiative (2002). The NGO Working Group on the EDC, A Working Group of the Halifax Initiative, 'Linking investment and human rights: the case of export credit agencies', Ottawa, available at http://www.halifaxinitiative.org/updir/LinkingInvestment.pdf (accessed 24 July 2012).

Hertz, N. (2001). *The Silent Takeover: Global Capitalism and the Death Of Democracy*, London: William Heinemann.

Holliday, I. (2005). 'Doing business with rights violating regimes: corporate social responsibility and Myanmar's military junta', *Journal of Business Ethics*, **61**(4), 329–42.

Huntington, S. (1969). *Political Order in Changing Societies*, New Haven, CT: Yale University Press.

Klein, N. (2000). *No Logo*, Toronto: Knopf.

Klein, N. (2007). *The Shock Doctrine: The Rise of Disaster Capitalism*, Toronto: Knopf.

Korten, D. (1995). *When Corporations Rule the World*, West Hartford CT: Kumarian Press.

Louwagie, I., L. Weyn and M. Bienstman (2005). *Where Do You Draw the Line? Research into the Financial Links Between Five Bank Groups and Companies that Abuse Human Rights*, Brussels: Netwerk Vlaanderen vzw.

Lowenstein, R. (2002). *When Genius Failed: The Rise and Fall of Long-term Capital Management*, London: Fourth Estate.

March, J.G. and J.P. Olsen (1989). *Rediscovering Institutions: The Organizational Basis of Politics*, New York, Free Press.
Matten, D. and J. Moon (2008). '"Implicit" and "explicit" CSR: a conceptual framework for a comparative understanding of corporate social responsibility', *Academy of Management Review*, **33**(2), 404–24.
Muchlinski, P. (2001). 'Human rights and multinationals: is there a problem?', *International* Affairs, **77**(1), 31–47.
Novak, M. (2005). 'Indivisibility of human rights', in R. Smith and C. van den Anker (eds), *Human Rights*, London: Hodder Headline Group, pp. 178–80.
Raz, J. (1986). *The Morality of Freedom*, Oxford: Oxford University Press.
Ruggie, J. (2006). *Promotion and Protection of Human* Rights, Report to the United Nations Commission on Human Rights, E/CN.4/2006/97, 22 February.
Ruggie, J. (2007). *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/035, 9 February.
Schermerhom, J.R. Jr (1999). 'Terms of global business engagement in ethically challenging environments: applications to Burma', *Business Ethics Quarterly*, **9**(3), 485–505.
Scott, C. (2001). 'Multinational enterprises and emergent jurisprudence on violations of economic, social and cultural rights', in A. Eide et al. (eds), *Economic, Social and Cultural Rights*, 2nd edn, Dordrecht and Boston, MA: M. Nijhoff Publishers, pp. 563–95.
Sen, A. (1999). *Development as Freedom*, New York: Anchor Books.
Stoilov, Y. (2001). 'Are human rights universal?', in T.D. Campbell and B.M. Leiser (eds), *Human Rights in Philosophy and Practice*, Surrey, UK: Ashgate, pp. 87–105.
Sullivan, R. (ed.) (2003). *Business and Human Rights*, Sheffield, UK: Greenleaf Publishing. Transparency International (2004). 'Corruption and human rights', *Global Corruption Report*, Berlin, available at http://www.transparency.org/publications/gcr/gcr_2004 (accessed 24 July 2012).
United Nations (2003). Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, 55th Session, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E/CN.4/Sub.2/2003/12/Rev.2.
White, J. (2004). 'Globalization, divestment and human rights in Burma', *Journal of Corporate Citizenship*, **14**, 47–65.

2. Corporate social responsibility: beyond the business case to human rights

Tom Campbell*

Much of the debate about corporate social responsibility (CSR) focuses on the 'business case', according to which CSR is morally permissible, or required, if and only if, and only to the extent that, it benefits the corporation in question (Cragg, 2004, pp. 123–6). The business case stimulates extensive research on the empirical question as to what extent and in what circumstances meeting CSR expectations does in fact promote or protect the interests of a corporation (Orlitsky, 2003; Schreck, 2009; Vogel, 2005). In contrast, this chapter addresses the normative question as to whether and when the responsibilities of corporations ought to go beyond the business case and, if so, how the boundaries of such 'altruistic' responsibilities could be drawn in a morally acceptable and economically prudent manner. It is argued that the CSR (as defined in this chapter) that goes beyond the business case is best approached in terms of human rights justifications. The suggestion is that requiring CSR beyond the business case is morally justified and a candidate for legal enforcement only if, and only to the extent that, it is for the protection or furtherance of the human rights of those affected. This is explored primarily in relation to those specific human rights violations by corporations that arise in the course of their business activities, but also applies both to corporate complicity with the human rights violations of states and to corporate responsibilities to assist or undertake state responsibilities with respect to protecting human rights violations by third parties.

After distinguishing within corporate responsibility (CR) generally – between corporate business responsibility (CBR), corporate philanthropy (CP) and CSR – Section 2.1 analyses the CSR that goes beyond the business case. This is called 'intrinsic CSR'. The distinctive feature of intrinsic CSR is that its moral salience does not depend on any strategic or instrumental economic value it may have for the corporation involved. 'Instrumental' CSR, on the other hand, is CSR that is justified through the

benefits that derive to the corporation in question, through such consequences as enhanced customer reputation and shareholder approval. This raises the question of how moral questions about the nature and extent of intrinsic CSR are best conceptualized. The aim is to arrive at a conceptual framework that draws attention to the crucial moral issues at stake in the realm of corporate regulation generally, and particularly with respect to justifying the CSR that goes beyond the business case.

Section 2.2 explores the moral justification of intrinsic CSR. The prime moral issues at stake here are whether there ought to be any intrinsic CSR at all, either permitted or required in morality, and, if so, whether this CSR ought also to be permitted or required in law. It is suggested that these moral questions are best framed by distinguishing between 'corporate human rights responsibilities' (CHRR), which relate primarily and directly to the economic functions of corporations, on the one hand, and 'state human rights responsibilities' (SHRR), which relate primarily and directly to the political functions of states in liberal society and involve corporations only when they are implicated in the activities of states when violating state-oriented human rights or failing to protect human rights against the predations of third parties, including corporations. CHRR are identified independently of the indirect responsibilities of corporations to resist or support states in connection with their failures and successes pertaining to SHRR. The distinction between CHRR and SHRR relates not only to differences in the content of the respective obligations of corporations and states deriving from a common set of human rights. It also applies to differences in the specific content and relative importance of the human rights involved, hence the need to distinguish not just between CHRR and SHRR but also between corporate-oriented human rights and state-oriented human rights.

Section 2.3 considers some of the advantages to be derived from adopting this conceptual framework for the analysis and promotion of those human rights that ought to feature in determining the moral and legal responsibilities of corporations. These advantages include facilitating the identification of the very different moral grounds for promoting different elements of corporate responsibility, and explicitly connecting CSR to moral theories of human rights, and establishing a basis for rendering corporate human rights and their correlative responsibilities sufficiently specific to work satisfactorily as bases for legal liability. These advantages are illustrated in relation to three recent initiatives relating to the interface of corporations and human rights.

2.1 CORPORATE RESPONSIBILITY

No acceptable theory of CSR – normative or otherwise – can avoid the preparatory task of making clear how 'corporate social responsibility' and its related terminology are being used within the theory (Matten and Moon, 2004; van Marrewijk, 2003, p. 96). The scheme adopted here distinguishes three ingredients within overall 'corporate responsibility' (CR), the generic term used here for all socially or legally required corporate conduct. CR divides into: (1) CBR, (2) CP and (3) CSR. Cutting across these divisions, I also distinguish between 'instrumental' and 'intrinsic' CR, the former being responsibilities for which the rationale is promoting the business interests of the corporation in question, thus satisfying the business case, while the latter has a moral justification relating either to its intrinsic or moral value beyond the business case. The purpose of these categorizations is to bring to the fore crucially distinct grounds for the justification of different types of CR.

CBR, as defined in this chapter, concerns a corporation's responsibilities to its stockholders in the context of the norms that govern competitive market relationships, viewed either ideally in terms of what these norms ought to be or de facto in terms of existing laws and social expectations. Within CBR, stockholder interests, whether short or long term, are paramount, but only within the ambit of rules that govern business conduct with respect to such matters as corruption, dishonesty, bad faith and anti-competitive conduct. This goes beyond the more limited conception of CBR as dealing solely with the moral (and normally legal) obligations of corporations to their stockholders. However, as discussed below, while such obligations have the significant moral weight that derives from the moral agency of the shareholders, those moral reasons for favouring shareholder interests that derive from the general welfare require that shareholder interest is considered in, and limited by, the moral priority of the context of the competitive market arrangements that make for general economic prosperity.

CP is the use of corporate resources to protect and promote the well-being of persons with whom the corporation has no direct business or economic relationships other than being the donors and recipients of philanthropic assistance.

Then, in the core sense of a term that is sometimes confused with overall CR, there is CSR itself, which, broadly conceived, concerns (a) those duties that relate to preventing the actual and potential harmful social consequences of mainstream business activities, duties that go beyond those of CBR and take in all the adverse social impact of business operations and its economic activities on human wellbeing beyond its

stockholders, and also (b) such positive duties as there may be to promote social benefits through mainstream business activities. CP arises in connection with the possible uses of corporate resources for benefits beyond those owed to stockholders and those affected by a corporation's operations, whereas CSR arises within the domain of the actual impact of a corporation's economic activities.

Within CSR, so defined, we can then distinguish, in terms of justifying rationales, between a purely instrumental form of CSR, in which the social consequences in question are valued for strategic business reasons alone, and an intrinsic form of CSR, in which the social consequences involved are valued for their own sakes, in that they are deemed to be morally important objectives or ends in themselves rather than, for instance, a means of enhancing the corporation's reputation, thereby increasing its profitability. The same distinction can be applied within CBR and CP, to the extent that adherence to CBR and CP can also be justified in terms either of promoting corporate interest or in terms of wider and more evidently moral considerations, such as general economic prosperity and the benefits bestowed on the recipients of philanthropy.

These distinctions enable us to single out a range of different moral dimensions in CR. Thus, focusing on CBR brings out the general moral case for the market-oriented economic role of corporations in a commercial society. CBR may be justified both in terms of the prior rights of individuals, including the right (perhaps the human right) to join together in economically productive activities, and/or consequentially, that is, in terms of the economic benefits and hence the wellbeing that flow from having relatively autonomous corporations competing in relatively open markets. These moral reasons for enabling corporations to exist and flourish are necessary background factors that underpin the business case for CSR generally. Indeed, the business case has little or no moral force in the absence of an underlying justification for such corporate rights and duties. CBR presupposes a positive moral evaluation of liberal economic systems that both licence and limit corporate pursuit of corporate interests (Cragg, 2004). This evaluation is based on the general material benefits derived from the pursuit of profit with free market economies. Awareness of this moral foundation of CBR helps us to avoid the false antithesis between business and morality that skews so many of the debates on business ethics, as if economic systems do not make a morally significant contribution to general welfare (Rice, 2002). An all-things-considered moral appraisal of CR requires that proper account be taken of the nature and weight of the moral case for having corporations at all, together with the corporate rights that are justified by that moral case, such as limited liability and shareholder prioritization.

In contrast, the moral value of CP can be dissociated from the economic role of corporations and assessed almost entirely in relation to the outcomes of CP for its immediate beneficiaries together with the general moral duty of all persons and organizations to promote good outcomes. If we adopt a principle of humanity, according to which everyone ought to contribute to the relief of suffering in some measure, then CP responsibilities are not purely supererogatory. In the economic sphere, these morally valued benefits may be counterbalanced by negative economic consequences arising from the departures from pure CBR that it involves. On the other hand, they may also have instrumental benefits for corporations through social goodwill. However, overall, even utilizing the managerial skills and other human resources as well as corporate wealth to provide services for deserving causes, this is unlikely to reach such proportions as to impact on the business goals of a corporation and hence enter into substantial conflict with its CBR.

Difficult questions do arise if it becomes clear that CP is impacting negatively on the interests of stockholders, or other 'internal' stakeholders, such as employees. In these circumstances a strong business case can be mounted against that part of CP that does not generate enough customer approval and reputational advantage to generate sufficient corporate financial benefit to cover the costs of the philanthropy in question. One solution to such conflicts is to require transparency in relation to CP, including information as to its alleged profitability, so that investors can endorse or reject the CP in question either by retaining or disposing of their shares in that corporation or through some other forms of shareholder control over CP.

Quite different issues emerge in relation to CSR, defined as responsibilities relating to the social impact of corporate business operations. What we are dealing with here is the evaluation of the consequences of activities that are legitimate in terms of CBR, and impact on those who are directly affected by corporate actions or omissions. Stakeholder theory attempts to categorize such persons by reference to the different ways in which corporate actions affect them. Indeed, in historical terms CSR may be seen as the extension of the range of corporate activities beyond the stockholders to other groups or 'stakeholders', such as employees, suppliers, creditors, consumers and even non-governmental organizations (NGOs) (Broadhurst, 2000; Freeman, 1984). It therefore makes sense to confine 'CSR' to these extended activities that go beyond the immediate economic goals that are taken to constitute the very idea of a business corporation (Carroll, 1979).

This analysis of CSR is seriously incomplete from the point of view of those who consider that a defining characteristic of CSR is that it is an

entirely voluntary matter, perhaps on a par with CP in this respect. For them, CSR, by definition, goes beyond the legal obligations that a corporation may have, so that there can be no such thing as legally enforced CSR (European Commission, 2001). Such voluntarist definitions of CSR are frequently adopted in business circles, so much so that it has become a term associated with those who seek to head off state regulation. Thus, Standards Australia defines CSR as 'A mechanism for entities to voluntarily integrate social and environmental concerns into the mainstream of corporate management business activities' (Standards Australia, 2003, 1.4.1), while the European Commission defines CSR as 'a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment' (European Commission, 2001). However, such definitions of CSR beg the question as to what sort of enforcing mechanisms are appropriate for ensuring that corporations have a regard for the interests of non-stockholders who are affected by, or contribute to, their operations (Wettstein, 2009). No definition of CSR should render it conceptually impossible for CSR to be other than voluntary. Moral discussion of CSR should not be inhibited and distorted by placing a conceptual veto on legally enforcing CSR.

Indeed, addressing the specific issues raised in this chapter require conceptions of all types of CSR that do not exclude the use of any of the available modes of implementation. This can be done by identifying the defining objectives of CSR as relating to those socially or legally required activities that concern the actual and possible social impact of the economic activities of the corporation in question, whether or not these activities are intended or do in fact promote the profitability of the particular corporation. CP can then be distinguished from CSR by its extraneous connection with mainstream corporate management (Tracey et al., 2005, p. 328).

Building on this analysis of CSR in general, we can distinguish 'instrumental CSR', which is justified by its role in promoting the profitability of the organization in question, from 'intrinsic CSR', which is justified insofar as it achieves certain social benefits for their own sake, independently of their impact on profitability. Both are, or can be, morally justified, but in different ways. In the normative debate there is no problem in justifying instrumental CSR in terms of its economic benefits, provided they do not conflict with CBR. The prime challenge is to provide a justification for intrinsic CSR, and doing so in a way that is not incompatible with the underlying moral rationale for having corporations or for the ways in which corporations are expected to operate within a market economy. Justifying intrinsic CSR is therefore the key normative challenge and the main topic of this chapter.

2.2 JUSTIFYING INTRINSIC CSR

The business case for CSR has two significant attractions. First, it provides a strong pragmatic basis for motivating conformity to CSR. Second, it enables us to avoid confronting the more difficult task of justifying intrinsic CSR. There are, however, countervailing disadvantages that arise from depending solely on the business case. In the first place, the empirical evidence for the profitability of conformity to CSR is patchy, inconclusive (Campbell and Vick, 2007; Schiller and Roner, 2006) and always open to challenge. In the second place, the business case is vulnerable to the contention that social pressure from customers, which is the main explanation for the fact that CSR, at least sometimes, ultimately benefits corporations, is not itself morally justified. For instance, the customer and public opinions that play the decisive role in the instrumentality of CSR may not adequately take into account the economically beneficial role of profit-driven corporations in competitive markets. On the other hand, if these customer pressures are morally justified in pressuring corporations to undertake socially beneficial activities that are not otherwise beneficial to the business organization, then it follows that corporations are indeed morally bound to go beyond the business case and practise intrinsic CSR.

Either way, it is when the contingent positive correlation of corporate self-interest and public wellbeing does not hold that a normative theory of CSR is put to the decisive test. The crucially controversial normative issue regarding CSR is whether intrinsic CSR, that is, CSR for its own sake, should be morally affirmed, and, if so, legally permitted and/or legally required. It is therefore unwise and unsatisfactory to avoid directly addressing the normative bases of intrinsic CSR while relying on the alleged business advantages to be gained by paying heed to the CSR expectations of consumers, investors, voters and employees.

Is there, then, a moral case for intrinsic CSR? This question is part of the more general matter of the justifications available for the existence and rights of corporations generally. One type of justification relates to presupposed rights of individuals to associate in the pursuit of their individual aims, economic or otherwise. Just as CP may or may not be justified on the basis of the pre-existing autonomy rights of individual shareholders who may or may not approve of their investments being used to generate funds for philanthropic purposes, so, it may be argued, intrinsic CSR is morally acceptable if it has the explicit or implied support of shareholders. The assumption here is that corporations are agents of their members (Schleifer and Vishny, 1997). If so, it follows that corporations may, with the tacit or explicit consent of their members, do whatever these members are entitled to do individually. Freedom of individual choice, which is

an ingredient in the justification of economic associations, may also be used to justify CP and intrinsic CSR. Collective shareholder sovereignty would appear sufficient to legitimate intrinsic CSR that is approved by shareholders.

This only takes us as far as the moral permissibility of intrinsic CSR, dependent on the agreement of shareholders, and does not justify requiring or enforcing it. Indeed, it may not even justify CSR, for there may be other moral considerations that override this rationale for the permissibility of stakeholder approved CSR. A case can be made, for instance, that corporations are business entities and therefore, by definition, must be confined to undertaking business activities (Sternberg, 2000, pp. 30–2). These activities cannot include intrinsic CSR that has, also by definition, no business objectives. However, such a priori categorization carries little moral weight. We can readily conceive either of more open-ended definitions of 'business', which include, for instance, not-for-profit concerns, or allow for the existence of hybrid organizations that have a variety of constitutive purposes. In fact, the current liberal concept of business is flexible enough to take in associations that are mainly but not exclusively profit-oriented. There is therefore no conceptual block to incorporating at least a degree of intrinsic CSR into the idea of what corporations are, or ought to be, for.

The definitional argument can, nevertheless, be turned into a substantive one by asserting that intrinsic CSR conflicts with the function of business in a liberal capitalist economy, which requires, in terms of CBR, that corporations should act in a self-interested manner to the detriment of their competitors. Perhaps, therefore, corporations have a moral responsibility to confine themselves to increasing shareholder profits because this is maximally efficient in terms of economic productivity generally, leaving it to other types of organization to deal with non-productivity concerns, such as the redistribution of wealth, according to the 'social contract' of the time (Cragg, 2000). This institutional division of labour may be commended on grounds of both efficiency and governance, with management featuring in the business realm and democratically guided administration in the social sphere. Such a contention has been, and to some extent still is, the legal status quo in many western jurisdictions (UK Companies Act, 2006, Sect. 46). If an organization is to be treated as a participant in a free market system then it must play by the rules of that system if doing otherwise would undermine the effective functioning of the system as a whole. 'Rogue' businesses that put other things before their profitability may be considered to be free-riders in a system that maximizes output by operating on competitive profitability.

This argument is supported by the wider rationale that, as we have seen

in our consideration of CBR, is a necessary prerequisite of the legitimation of free market competition, namely, that the market maximizes wealth and hence advances major aspects of human wellbeing (Cragg, 2004, pp. 118–21). This approach carries considerable weight in a capitalist or mixed system of production, so that there is always a powerful prima facie argument for confining the responsibility of corporations to maximizing their profits within the confines of CBR. Nevertheless, such considerations are not in themselves decisive since there are other values that compete with maximizing economic productivity, including more egalitarian distribution of the produce and services, having regard to differential deserts, taking into account environmental outcomes and providing tolerable conditions of employment. There may be a case for leaving the implementation of such values to states and other organizations because of the market distortions that arise from widespread non-economic behaviour on the part of business organizations, but it cannot be ruled out that a degree of market non-conformity may be acceptable or required if it furthers these other morally approved objectives. It may be, for instance, that the non-economic values identified are most readily attainable through regulation of business and are thought to be more morally compelling than the reduction of economic benefits entailed by the regulation in question. Thus, increased security of employment may be valued more highly than the marginal reduction of the profitability and general market efficiency that securing this objective involves.

In short, the justificatory task, within liberal capitalism, is to identify moral rationales that are strong enough to outweigh profit-based criteria but not so wide in scope that they introduce widespread distortions into a beneficial system that thrives on open and honest competitiveness, with its associate endorsement of such self-interested market exchanges as promoting the common good. For this reason, we need strong, but circumscribed, moral grounds for justifying and at the same time limiting intrinsic CSR. In this case, corporations ought, normally, to be permitted, and even required, to pursue the goal of maximal sustainable profitability, within the confines of CBR. The task is then to formulate principles that enable us to mark the borders of the morally acceptable exceptions in terms of overriding moral considerations that trump the normal assumption of sustainable corporate self-interest.

The thought is that the normative role of limiting otherwise legitimate activities fits neatly into substantial aspects of the discourse of rights, particularly when these are conceived of as side constraints that mark the boundaries of normal self-interested conduct (Dworkin, 1978; Nozick, 1974). Such a normative function is a characteristic (but not exclusive) domain of rights discourse. The prime institutional exemplification of this

function is to be found in so-called 'constitutional democracy' in which constitutional rights are taken to place limitations, or impose further requirements, on what may be – in itself – not only legitimate but morally required conduct of states. There the standard approach is that normally majoritarian decision-making is decisive and ought to be the preferred political process, but this is subject to overriding requirements that enter the picture when the majoritarian decisions that are made conflict with human rights. The parallel situation within the CR arena would be that corporate decision-making ought normally to serve the business interests of the corporation, but only to the point where this conflicts with its human rights responsibilities. On this analysis CHRR circumscribes what are otherwise morally legitimate or indeed desirable activities, but does not do so in an open-ended way.

Such parallels between corporations and states are, of course, far from providing a complete picture of the similarities and differences between states and corporations, and rights have in practice many other institutional roles. States are faced with intractable problems as to how such human rights can be protected and promoted without infringing fundamental democratic rights. There are no institutional arrangements that can be relied upon to come up with an objective and correct judgement as to what does and what does not infringe human rights. Whatever human rights safeguards are desirable, in politics we are always up against the problem of who, if anyone, can be trusted to exercise a rights-based veto on democratic decision-making. This is also a problem for democratic decision-making as to what is to be legally required in the way of CHRR. However, the similarity of corporations and states as powerful agencies capable of producing both considerable good and considerable harm gives much plausibility to the thesis that intrinsic CSR has a justifiable role in overriding otherwise licensed or required corporate self-interest within the bounds of CBR, if this is necessary to secure the protection or furtherance of one or more human rights.

This human rights approach to intrinsic CSR justification has the advantage of providing the sort of powerful moral grounding that can readily be accepted as trumping otherwise convincing arguments for sticking with the business case and therefore rejecting intrinsic CSR. Human rights responsibilities, if properly articulated, express very fundamental moral imperatives relating to the ways we ought to treat other human beings and are, therefore, a very effective basis for the articulation of the morally acceptable boundaries for the imposition of intrinsic CSR. This allows that corporations may continue with standard business activities, subject to market norms, as long as they do not violate a definitive set of corporate human rights responsibilities or become complicit in viola-

tions or failures of state-oriented human rights. Further, this framework fits the assumption that, although most human rights responsibilities fall primarily on governments, especially those relating to the protection of human rights against the abuses inflicted by organizations within their jurisdiction, at some level everyone and every organization has overriding obligations to promote or respect human rights, although within existing international human rights law, corporations do not have international legal obligations (McCorquodale and La Forgia, 2001).

2.3 HUMAN RIGHTS AND CSR: A FRAMEWORK

The analysis and justifications of CSR outlined above (a Framework) is designed to aid decision-making about the social and legal enforcement of CSR and at the same time clarify the different ways in which corporations ought to respect and promote human rights of one sort or another. More specifically, it frames the basis on which intrinsic CSR may be rightly required of corporations. For this purpose, the suggested Framework emphasizes the need to develop a corporate-related conception of human rights that helps in the identification of the direct corporate human rights responsibilities concerning the social impact of their economic activities. This is in addition to more state-related human rights conceptions concerning corporate complicity with state abuses and corporate assistance to states in fulfilling their responsibilities with respect to protecting human rights against the abuses of non-state organizations, including corporations themselves.

The core argument in favour of the proposed Framework is that it enables us to distinguish clearly between the morally different considerations that are routinely lumped together under broad and ill-defined conceptions of CSR that often take in almost the whole range of corporate responsibilities. This applies particularly to the distinction between CBR and CSR. First, the prime underlying moral basis of CBR is the efficiency of open markets with respect to the promotion of general economic prosperity.[1] Given the social and economic importance of general conformity to these 'rules of the game' there is a clear case for legal articulation and enforcement of CBR independently of human rights considerations, in order to prevent free-riding and other types of unfairness.

Second, CP, in contrast to CBR, has its moral basis firmly in the promotion of deserving and needy causes for their own sake, rather than playing a systemically beneficial part within a productive economic system. Such activities are clearly admirable in themselves and appropriate for all those persons and organizations that are able to help, provided this has the

support of those whose sources are being redistributed. Also, according to the business case, CP may be justified on instrumental grounds to the extent that it furthers the business interests of the corporation and possibly even when this is not the case, provided that the internal stakeholders do not object. In the case of the relief of suffering and other important priority social benefits, the principles of humanity and justice may legitimate collective redistributive arrangements generally. As possessors of wealth, resources and skills, corporations, like all other organizations and individuals may be called upon to contribute to such morally desirable goals but these obligations are distinct from their obligations qua corporations.

Third, CSR, in contrast to CP, concerns the ways in which a corporation takes account of social considerations as it pursues its economic goals. Insofar as CSR has a moral basis beyond the corporate benefits of instrumental CSR, this relates to the promotion of benefits, or prevention or reduction of the harms, caused by corporations, either indirectly through complicity with state-perpetrated harms or more directly through their standard corporate operations. The primary claim to be assessed here is that we require for the moral justification of intrinsic CSR the sort of priority considerations that are commonly expressed in terms of fundamental human rights with the role of acting as compelling limitations placed on otherwise morally acceptable activities. Hence, the suggested link between intrinsic CSR and human rights. Further it is suggested that the difficult excise of articulating the detailed content of such rights is best served by distinguishing between those human rights that are established principally to control the conduct of states and those that are oriented to the control and direction of economic organizations, such as the modern corporation.

The principal utility of the Framework in clarifying the distinctive moral groundings of different modes of CR and identifies the nature of the answer that should be given to the key questions of whether, and to what extent, corporations may be rightfully permitted or required to act for reasons other than promoting their own interests. This section explores three aspects of this claim: (1) the utility of the distinctions between CBR and CSR and between instrumental and intrinsic CSR; (2) the relevance of the moral bases of human rights; and (3) the need to specify corporate-oriented as distinct from state-oriented human rights.

2.3.1 Distinguishing CBR from Instrumental and Intrinsic CSR

Ways in which distinguishing CBR, CP and CSR, and focusing on the nature and scope of intrinsic CSR, serves to clarify the moral issues that are at stake within the domain of CR, can be illustrated by reference to three

recent developments initiated by the United Nations (UN) with respect to corporations and human rights. First in time is the UN Global Compact (GC) in 2000, which calls for voluntary commitments to ten principles of conduct and values.[2] Second in time are the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (*Norms*) presented by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003. Third in time are the reports of the UN Special Representative on Business and Human Rights, John Ruggie, who was also a key figure in the development of the GC.[3]

An initial and important point concerning these three human rights initiatives is the misleading extension of the concept of human rights to cover different ethical imperatives with very distinct foundations. Here I note that there is a tendency to incorporate CBR within the scope of human rights responsibilities. Thus, in the GC, the last of the ten principles, which was added in 2004, states that 'Businesses should work against corruption in all its forms, including extortion and bribery', and goes on to link this to 'free and fair competition' (http://www.unglobalcompact.org/aboutthegc/thetenprinciples). According to the Framework suggested here, this should be classified as a matter of CBR, which, for the reasons given above, justifies the imposition of legal constraints and may also generate purely moral obligations when legal constraints are inoperative or ineffective. The principal grounds for such norms are the benefits that flow from an open and competitive economic system. This is a very different moral basis from those underlying the nine other principles, two of which make general reference to what are in effect state-oriented human rights, and four principles that are uncontroversially instances of intrinsic CSR, dealing with freedom of association, forced and compulsory labour, child labour and discrimination in employment and occupation, all of which are strong candidates for inclusion in CHRR because they identify fundamental human interests that are important in themselves and at risk within economic or business relationships.

The same clarificatory analysis can be applied to the *Norms* that, despite their focus on the responsibilities that ought to be legally enforced, include a wide range of the ethical and soft legal responsibilities to be found within existing international agreements and codes of corporate conduct, sources that are excessively wide in scope and imprecise in content.[4] In the case of the *Norms*, as candidates for the legal enforcement of CSR, evaluation is assisted by disentangling the elements of CBR, such as anti-corruption, intellectual property and the rule of law in relation to business transactions, from the elements, such as personal security, equality of opportunity, consumer protection and labour rights, which are prime candidates for inclusion in intrinsic CSR, with personal security fitting best into the

SHRR basket and versions of the others, such as child labour, more within CHRR.

The Ruggie reports are less prone to the conflation of CBR and CSR. Ruggie concentrates on promoting the economic efficiency of the rules that regulate markets, while adding that such rules contribute indirectly to the realization of human rights in terms of encouraging the rule of law in general and generating wealth that assists with the eradication of poverty (Ruggie, 2008, p. 2).

With respect to the distinction between instrumental and intrinsic CSR, it is noteworthy that the recurring theme of the UN Global Compact Office in the commentaries given on the ten principles is the strategic advantages to be derived from protecting corporate reputation through respecting the principles, to the relative exclusion of anything resembling an affirmation of the moral value of intrinsic CSR. This is also very evident in the Special Representative's analysis, which draws extensively on the business case through 'social expectations' and 'prudential risk management'. This indicates that the GC, the *Norms* and the Ruggie reports are not being presented in terms of the actual moral basis of CSR. Emphasizing instrumentality of much CSR may be practically persuasive in encouraging corporations to sign onto the GC and support the *Norms*, but obscures the important relevance of the moral foundation of CSR beyond the business case. This may be put down to the strategy of the UN in soliciting corporate support for the GC, but it obscures the more direct and more compelling moral justifications for the initiative. This takes us to the second of the suggested advantages of the Framework.

2.3.2 Directing Attention to the Moral Bases of Human Rights

The second reason for adopting the proposed Framework is that it, in focusing on the question of justifying intrinsic CSR, which is fundamental to legitimating the imposition of legal restrictions on what would otherwise be normal business practice, brings in the deep moral foundations of human rights discourse. This is not something that is attempted in the three UN initiatives I am using to illustrate the relative merits of the Framework, perhaps for the pragmatic reasons that attempted moral justifications of human rights raise underlying disagreements in and between members of the UN.

However, it is the moral salience of human rights that make it the best discourse we have for identifying the vulnerable and fundamental human interests whose protection ought to be prioritized in any social, political or economic system, particularly with respect to the control of concentrations of economic and political power. Human rights have the moral force

to justify restricting otherwise beneficial corporate conduct. They are also sufficiently special to serve the important purpose of limiting the scope of the CSR obligations that ought to be legally enforced, thus giving explicit recognition to the moral basis on which the business case rests, namely, the general economic benefits of free markets within the confines of CBR.

The advantage of this Framework in this respect is not so much that human rights provide easy answers as to the proper limits of legally required or politically coerced CSR, as if we could simply read off the content of legitimate CHRR from an agreed set of human rights. Rather, this Framework invites us to think through the very difficult issues involved by identifying those fundamental human interests that are threatened by unrestricted corporate conduct. This, then, puts us in a better position to decide what corporate-related human rights ought to be at the same time as specifying what CHRR ought to be. Far from simply deducing CHRR from a pre-existing set of human rights, raising the question of legitimate CSR requires us to formulate just what the content of those human rights ought to be and why this is the case. What the Framework provides is to make clearer the questions that ought to be asked and to suggest the parameters of acceptable answers to these questions.

In the complexity of dealing with these normative issues on the basis of first principles plus detailed knowledge of the business scenario, it is tempting to approach the content of corporate-oriented human rights from a legal angle and rely on human rights law, domestic and international, to provide the sources of CHRR (Muchlinksi, 2007, p. 436). This is essentially how the *Norms* were devised.

However, although there is much to be learned from international treaties and domestic legislation and in relevant case law regarding the possible moral justifications for human rights, the crucial normative questions logically relate to the question of what laws ought to be in place rather than to the current positive law regimes and trends (Arnold, 2010). From this perspective it is necessary to draw primarily on the developing moral and political discourse of human rights and human rights values, in conjunction with the morally justifiable roles of business entities. This major task, which can only be touched on here, requires us to identify the morally basic human interests that are threatened by or dependent on corporate activities and how these interests may be protected and furthered by institutional arrangements that can provide some sort of guaranteed counterbalance to the serious harms perpetrated by the acts and omissions of corporations.

So, human rights in this context are not to be identified with current international human rights law, if only because it is largely state-oriented. Rather, they are those basic human interests that ought to be singled out

for guarantee by the social, economic and political arrangements operative in all human societies. This requires us to assess the nature and significance of those fundamental interests that are at risk in specific types of society and relate them to social and legal mechanisms for their protection and furtherance against the standing threats and promises of powerful agents. This is important, not only because it relates to attributing responsibility for protecting or furthering these interests, but also because it is misleading to say that there are, or ought to be, rights to protect or promote these interests just because these interests are important for those whose interests they are. The ascription of a right requires not only the identification of a valuable human interest but a moral judgement that some other party ought to have a recognized obligation to protect and or further that interest (Campbell, 2006b; Ivison, 2008).

Standing back from existing human rights law and corporate codes of conduct, and emphasizing the essentially moral nature of the exercise of deciding what legally required CSR obligations there ought to be, takes us to contentious issues within the philosophy of human rights, which are largely missing from the debate arising from the GC, the *Norms* and the Ruggie reports. Various philosophies of human rights are, however, canvassed in the business ethics literature. Thus, writing before the formulation of the *Norms*, Steven Ratner suggests that we should approach what I call CHRR by identifying the deleterious impact of characteristic corporate conduct, particularly where 'human dignity' is damaged (Ratner, 2001). This directs our attention to the threats that transnational corporations (TNCs) pose to fundamental human interests from what might be seen as a Kantian perspective, according to which the fundamental interests on which rights are or ought to be founded relate to the distinctively human capacity for self-reflective moral agency. However, Ratner assumes that, while states and corporations differ in their human rights responsibilities, the rights in question remain essentially the same in both cases. Rights, he assumes, are the interests that ought to be protected and these can be identified, as Joseph Raz suggests, prior to, and independently of, ascribing any correlative duties (Raz, 1986, p. 171). This precludes adopting the suggestion that identifying the rights that ought to exist involves determining the responsibilities that we should impose within the process of determining what interests ought to be protected. Yet, Ratner does note with concern that enlarging the scope of CHRR may have results that are 'inconsistent with the reality of the corporate enterprise' (Ratner, 2001, p. 518), which points us to a general utility rationale for permitting corporate activity, and suggests that the content of corporate-oriented human rights are to an extent dependent on prior assessments of their corporate responsibilities with respect to fundamental human interests.

Despite its popularity as the fundamental human rights value, the emphasis on dignity comes up against several major problems, including its cultural elasticity, and, on its Kantian analysis, tending to emphasize the centrality of autonomy and self-determination, to the relative neglect of human miseries, particularly the economic miseries, which seems particularly germane to CHRR. This issue is tackled by Denis Arnold (2010), who adds to the thesis that human rights are founded on the fundamental value of human agency or moral autonomy, the distinction drawn by Henry Shue (1996, pp. 18–20), that priority be given to 'basic' human rights, that is, 'those rights necessary for the attainment of other rights and without which it is impossible to lead a decent human life' (Arnold, 2010, p. 386), such as liberty of physical movement, social participation, physical security and the subsistence required for a decent or tolerable life. Arnold concludes that where corporations are in existing social relationships arising out of their economic activities they have 'perfect obligations' with respect to these human rights, thus bringing the relief of suffering firmly into the human rights domain.

Inevitably there are significant points of contention that can be raised about such analyses, some of which relate to the sort of fundamental moral disagreements that contrast the utilitarian consequentialism of Jeremy Bentham with the moral autonomy approach of Immanuel Kant. The absence of the basic rights in question may be thought to have importance in itself, perhaps because of the suffering involved, in addition to their further consequences for the right-holders as moral agents. Other suffering, not so clearly related to human agency, may be seen as equally important. More generally, the fundamental moral importance of a right is not always or solely dependent on the further consequences of its neglect. Thus, the right not to be tortured is based as much on the pain inflicted as on its effects on human dignity or agency. Moreover, concepts such as 'decent' (a rather mild term) and 'dignity' (a somewhat ambivalent term) and 'agency' are alarmingly imprecise, even when used to encapsulate the essentials of more detailed analyses. It is also clear that, particularly in cross-cultural contexts, agreement may be reached on the content of something like 'basic' rights without having a prior agreement as to how these are to be justified (Whelan et al., 2009).

This Framework does not, of course, resolve these deep issues of moral value and universal rights, but it does prompt the necessary move of bringing these issues to the fore when issues of intrinsic CSR are on the table. We have here the basis of the sort of moral debate that could result in a reasonable consensus as to those things that corporations may rightly be compelled to do. In this case the legitimate boundaries of intrinsic CSR

can usefully be articulated in terms of those fundamental human rights that are applicable to corporate activity.

2.3.3 Distinguishing Corporate Human Rights Responsibilities (CHRR)

Permitting the entry of philosophical and principled moral and political debate into the picture may be perceived as taking several steps backward in the attempt to identify specific CHRR, a process which, I have argued, is necessary if we are to make a case for the legal enforcement of CSR. If we cannot rely on domestic and international human rights law as a sufficient guide, and if there is no consensus amongst ethical theorists as to the basic principles underling the moral idea of human rights, and no agreement as to what such principles require at the level of precision needed for identifying enforceable obligations, then perhaps we do not have a useful framework with which to proceed.

However, raising the issue of what should constitute CHRR is essential to the ongoing task of specifying CSR obligations with a precision sufficiently detailed to form the basis of objective, and therefore predictable, legal adjudication and hence efficient and formally fair enforcement. Only by articulating a distinctive set of corporate-oriented human rights can we reasonably hold corporations legally accountable for the grave harms they can and sometimes do inflict, and do so within the bounds of the rule of law. The Framework helps in this regard by pointing the way to a more effective and more acceptable basis for holding corporations to account than the ill-defined CSR norms that are at present on offer.

This is an issue which arises in relation to each of the three initiatives used illustratively in this section. The GC provides only a general statement of human rights values that are easy to adopt on an unaccountable voluntary basis but unsuited to serve as legal obligations. The *Norms*, which were put together by legal experts who envisage the extension of the application of international human rights law from states to corporations, are more specific but unduly wide ranging. However, the human rights identified in the *Norms* are largely a selection from state-oriented human rights, arrived at by leaving out those responsibilities that can only be fulfilled by states, such as granting citizenship. In addition, in the *Norms*, there are general affirmations of civil, political, economic, social and cultural human rights, with little specific focus on what can be expected of corporations. Overall, it is hard to discern, within the *Norms*, a systematic attempt to identify corporate-oriented human rights in a way that assists the project of justifying intrinsic CSR and identifying its parameters in any useful detail. The *Norms* do in places show a difference in emphasis between state-oriented human rights and corporate-oriented human

rights, as is apparent when they focuses on the concerns of the ILO. This does at least hold out the prospect of conceptualizing a set of corporate-oriented human rights norms. On the other hand, the *Norms* include a variety of very general ethical standards, which do not point clearly towards the responsibilities of corporations or have the moral weight of human rights discourse (Kinley et al., 2007). As Peter Muchlinski puts it, 'many of the sources, referred to as contributing to the Draft Norms, constitute more general codes of business ethics, which, by their nature, will deal with social issues not usually described as human rights issues' (Muchlinksi, 2007, p. 446).

Nevertheless, progress towards the goal of a precision in the specification of the content of requirements that renders CSR more fit for law-making is made possible by the human rights focus of the *Norms*, which has the effect of drawing attention to the priority of the prevention of grave harms and injustices, one of the advantages of the Framework suggested here. In practice, however, the *Norms* blur the boundary between the obligations of states and those of corporations (Mayer, 2007) and lay disproportional emphasis on corporate complicity with violations of SHRR. This is understandable since, until recently, it has in general been taken for granted that the human rights under consideration in these debates are those that feature in the documents included in the so-called International Bill of Rights (the Universal Declaration of Human Rights and subsequent conventions and treaties). However, it is now more widely accepted that these sources of human rights were developed principally to affirm and create the responsibilities of states, making states responsible for recognizing and protecting the human rights of it own citizens and enforcing human rights norms in relation to those individuals and organizations within their jurisdiction. Because these state-oriented norms are not routinely enforced by international legal process and are in many respects aspirational in content, considerable latitude is embedded in the formulation and subsequent interpretation of SHRR. In consequence, the UN human rights regime is not so immediately and evidently applicable to corporations that have very different functions and constituencies from those of states and may be made liable to more stringent and direct legal enforcement, both domestically and internationally.

The contention that CHRR should not be articulated primarily in terms of SHRR is based on the insight that it is not just the human rights responsibilities that differ, as between states and corporations, but also the content and even the identity of the specific human rights that correlate with those responsibilities. At the level of practice, the content of human rights is determined by what are taken to be their correlative responsibilities, rather than vice versa. Consequently, we need a

distinctive corporate-oriented conception of human rights that enables us to work towards agreeing on specific CHRR on the basis of the content of corporate-oriented rather than state-oriented human rights. Without calling into question the view that corporations ought not to be complicit in state-oriented human rights violations perpetrated by states (Clapham and Jerbi, 2001; Korbin, 2009; Ratner, 2001), or denying the proposition that corporations may have limited moral duties to promote just institutions in circumstances where states are failing with respect to their human rights responsibilities (Hsieh, 2009), a comprehensive account of CHRR must articulate a distinctive set of corporate-oriented human rights that relate directly to the economic functions and management capacities that constitute the distinguishing characteristics of business organizations.

We have seen that, while they make no attempt to theorize the different moral foundations of CBR, CP and CSR, the *Norms* do include the sorts of consideration that are specifically connected with business operations, and should, according to the Framework proposed, be at the core of CHRR. To some extent this has been taken up by John Ruggie, who was asked by the UN Sub-Commission on the Promotion and Protection of Human Rights to 'identify and clarify the standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights'. The resulting report explicitly addresses the concept of 'corporate-related human rights harm' and the 'differentiated responsibilities' of business organizations and 'the specific responsibilities of companies in relation to all the rights that they may impact' (Ruggie, 2008).

This should bode well for the identification of distinct CHRR. However, in practice, this attempt to identify CHRR in more detail has been undertaken on the basis that all UN endorsed human rights are of equal standing in all spheres of human activity, so that the focus on corporate-related human rights harms is approached on the basis that the activities of corporations are liable to impinge on all human rights norms as they have been developed within the history of the UN. This directs our attention to the human rights provisions directed at the characteristic failures of states and hence on issues connected with corporate complicity with state violations of these rights. This features in the debate concerning corporate 'spheres of influence' in the brief given to John Ruggie as Special Representative, suggesting that TNCs can and should bring effective pressure to bear on states, particularly those host nations whose wealth is often dwarfed by that of the TNCs involved.

The Framework suggested here goes beyond these parameters to a more precise focus on those harms that are the consequence of corporate conduct within its 'sphere of activity' (United Nations, 2003, p. 1), which

commends parameters that limit CHRR to the fairly immediate impact of their business engagement, applying largely where TNCs are engaged in natural resource extraction and manufacturing in developing countries or enter in to business relations with suppliers operating in these places. This leads to an emphasis on such matters as slavery, child labour, destruction of indigenous economies and poor health and safety conditions in developing host countries. Other obvious examples include employee exploitation, including forced labour, and arbitrary harsh disciplinary practices, excessive working hours, insufficient wages to support a tolerable existence, freedom of association, freedom of speech in the workplace, discrimination and serious risks to health and safety.

Nevertheless, when we get down to the details that have to be dealt with when making clear precisely what is to be required of corporations, it remains difficult to discern what their scope and extent is to be. This relates not only to who has the responsibilities but also what those responsibilities are. There are big differences, for instance, between the freedom of speech that states should uphold in the public sphere and nature and extent of the free speech that, on human rights grounds, should be permitted in the workplace. The differences here relate not only to who has the correlative obligation but also the content of the obligation in question and hence the content of the right itself.

As may be expected, moving from the historical development of SHRR to contemporary issues of CHRR works best with respect to negative human rights where the responsibilities require that states and corporations do not harm others in specified ways (Ruggie, 2008). Gross harms perpetrated by corporations include loss of life at work, destruction of the means to subsistence of other human groups and damage to the health of employees, customers and communities affected by industrialized productive processes. These follow similar lines to the human rights harms attributed to states, insofar as the harms in question are similar in nature, but the way they come about and how they might be combated may differ markedly.

It is often argued that only states have positive human rights responsibilities with CHRR being confined to negative responsibilities, such as may be encompassed by the rubric 'Do no harm', endorsed by John Ruggie. Quite apart from the difficulty of drawing a clear boundary between positive and negative rights (Shue, 1980), we cannot assume that corporations should not be ascribed positive CHRR with respect to their distinctive capacities and special skills in promoting and managing economic production. In working out the distinctive CHRR it must be an open question whether some of the business-oriented economic human rights may not go beyond those that correlate with SHRR. The function of states may be

perceived as governmental rather than economic production (Lane, 2004), thus reducing SHRR in the sphere of basic economic interest, opening the possibility that the imperative of actively promoting human rights on the latter sort may be stronger in CHRR than in SHRR, at least with respect to employees. Here, the appropriate sources for CHRR are the objectives set in the long history of the ILO.

A more difficult question is how far harming consumers through the production and marketing of dangerous products or widespread damage caused outside the workforce by industrial accidents and environmental pollution can be regarded as coming under the human rights umbrella. Arguably, corporations should have greater human rights responsibilities than states, both in terms of scope and level of effort, although more limited in their range to those affected by the activities of the corporations in question rather than all persons within the jurisdiction of the state.

A further challenge is how to categorize serious disadvantages that are the foreseeable outcomes of normal and legitimate economic competition and development that nevertheless destroy the livelihood of vulnerable groups. The distinctive issues here are the differential capacity for harm and benefit available to many corporations, which is greater than that available to many states, and also the more general question of whether some of the externalities of some productive processes are so damaging to the perhaps unidentifiable victims as to merit being classified as human rights violations.

The problems in approaching CHRR through critically examining the applicability of SHRR to corporations emerge most keenly when we are dealing with positive human rights responsibilities as part of legitimate intrinsic CSR. Such positive responsibilities involve not just taking measures to protect people against the predations of third parties but also to assist people whose basic interests are at risk, however they have come about. Even with states such positive obligations are routinely viewed as less imperative than negative ones, although the consequences are often indistinguishable, and the remedies are less readily provided for. This is even more the case with corporations, which are not generally viewed as having positive obligations to all persons, either within a particular jurisdiction or territory, even with respect to life and serious ill-health, all of which appear to go far beyond the range of CHRR (Muchlinksi, 2007, p. 434).

These are a few brief illustrations of the sort of issues that arise in approaching CSR through the suggested Framework. Answers cannot be read off from existing human rights definitions and practices but the crucial moral questions can be located within a powerful and flexible discourse that holds out some prospect of reaching a satisfactory outcome,

provided we ask the right questions and frame our answers in the appropriate terms.

2.4 CONCLUSION

The main contention of this chapter is that the discourses of human rights and CSR should be brought into more focused interaction by suggesting that human rights should be seen as the touchstone for determining the proper scope of the enforcement of intrinsic CSR through legal means or coercive political pressures. Within this scheme the emphasis has been on the need to develop a conception of corporate-oriented human rights that are clearly distinguished from the human rights that have been developed in the context of curbing and guiding the conduct of states. This is additional to current preoccupations with identifying corporate complicity with the human rights abuses of states, and the idea that, where states are weak and abuse human rights, corporations should act as surrogate states in protecting people against the human rights abuses of third parties.

Indications have been given that the likely outcome of applying this Framework is the conclusion that intrinsic CSR should consist primarily of negative duties (that is, duties not to violate human rights), and, secondarily, of positive duties (that is, duties to protect and promote human rights). In both cases the human rights concerned are primarily the rights of those affected by the acts or omissions of corporations within their spheres of operation. In the case of negative CHRR, corporations are unconditionally morally responsible for their conduct and may rightly be subject to appropriate legal requirements enforcing their CHRR. In the case of positive human rights responsibilities, possible implications, not explored here, are that their moral justification is, as with CP, conditional on their obtaining the express or tacit permission of shareholders and that the fulfilment of positive CHRR ought not to be required by law. However, it is legitimate for states to require corporations to assist them in the fulfilment of SHRR. Thus, legal requirements to engage in positive human rights actions may be justified indirectly by derivation from SHRR together with the political right of states to require its members, individual and corporate, to assist in the fulfilment of their legitimate roles. This justifies, for instance, states taxing corporations and using the proceeds for the protection and furtherance of the state-oriented human rights of other parties. Further, complicity in the human rights violations of states, the paradigm example of CHRR in contemporary business ethics literature, is accepted as an important and relevant factor. However, the Framework proposed here is organized primarily around the question of the rationale

for articulating a distinct set of human rights that relate to the specific and direct responsibilities of corporations that is with corporate-oriented rather than state-oriented human rights.

The thesis that morally justifying intrinsic CSR is best approached in terms of human rights could have unintended undesirable consequences. Thus, viewing CSR from a human rights perspective may be thought to imply that the preferred process for determining the specific content of corporate-oriented human rights is through the medium of domestic or international human rights courts. One of the reasons for introducing human rights into the CSR debate is, indeed, to gain acceptance for the view that intrinsic CSR ought to be legally enforced where this is the most effective or fair way to proceed. This does not imply, however, that the process of moving from indeterminate goals to concrete requirements of human rights and responsibilities is a matter of legal rather than political bodies.

Such an endeavour, if it is to have sustainable legitimacy, particularly in democratic countries, must be the consequence of political rather than legal decision-making. Advocates of human rights tend to assume not only that human rights are essentially legal phenomena that call for comprehensive legal enforcement, but that this is an area of law in which judicial law-making should dominate. The problem with this approach is not that legal enforcement is undesirable but that judicial law-making lacks competence and legitimacy, where it is not subject to democratic review. This is especially the case when dealing with the complex balances that are involved in determining the permitted extent of the social economic rights that must be central to any corporate-oriented statements of human rights. In this sphere it is important to be clear precisely how the understandably vague and indeterminate considerations identified in such documents as the *Norms* are to be translated into specific legal requirements.

Another possible drawback for a human rights approach to intrinsic CSR is that it may be unduly restrictive as to what is to count as morally legitimate intrinsic CSR. There are many CSR goals that have some moral salience but do not qualify as fundamental human rights. Certainly, we have seen that the *Norms* appear rather too broad in their moral scope. To some extent this problem can be countered by locating some of these concerns within the compass of instrumental CSR, or within CBR and CP. Thus, we have seen that CBR has moral significance, but this is not tied to human rights objectives and is not dependent on human rights justification. Also CP, which goes beyond the claims of human rights, can, however, be included as part of the general requirements of business ethics, provided that these are legitimated by the consent of corporate members. Most importantly for the human rights approach to CSR,

I have argued that that there is a strong case for being restrictive with respect to the scope of intrinsic CSR. This is because business organizations ought not to be diverted from their economic functions except where very significant moral concerns are at issue, especially if legal and social sanctions are involved.

Despite these risks to the political legitimacy and justified scope of adopting a human rights approach to intrinsic CSR, the Framework proposed provides the right sort of parameters within which to develop further the debates around the *Norms* and other proposals for clarifying CHRR in legally appropriate form. A human rights discourse tailored to the context of business provides a Framework that draws on a powerful tradition of social and political thought and experience that is capable of being developed and deployed in the pursuit of agreement on the essentials of intrinsic CSR. This can then be used to legitimate the more forceful pressures on corporations encouraged by NGOs and provides a basis for both voluntary and legally required CHRR that goes beyond the objectives of the business case.

NOTES

* Warm thanks to the participants in the Canadian Business Ethics Research Network (CBERN) Business and Human Rights Symposium, and especially to Wesley Cragg, for their valued comments and personal contributions to this debate.

1. This can, but need not, be refined if we take on board the view that the moral justification of CBR also involves recognition of certain liberty and property rights, which may or may not be themselves morally justified on consequentialist grounds.
2. The GC was initiated by the then UN Secretary General, Kofi Annan, in 2000, as a voluntary scheme for corporate conduct, and is now endorsed by over 5000 corporations around the world.
3. These have all been the subject of much recent critical commentary. I select them because of their evident relevance to the association of CSR and human rights, and in the hope of contributing to the development of Professor Ruggie's project of establishing a 'framework' for classifying corporate human rights responsibilities. See Kinley et al. (2007), Rice (2002) and Seppala (2009).
4. The *Norms*, together with their commentary, deal with such matters as equality of opportunity and treatment, personal security, corruption, conforming to international, national and local laws, collective bargaining, intellectual property, consumer protection and the protection of both the environment and the residents of countries where businesses operate. International standards directed specifically at business entities, such as those promulgated by the International Labour Organization (ILO), and adopted in the GC, are also there. The interests to be protected include the precondition of successful global commerce such as the rule of law and, indeed, the legal norms that conform to the expectations of transnational corporations, at least when operating in developed countries.

REFERENCES

Arnold, D.G. (2010). 'Transnational corporations and the duty to respect basic human rights', *Business Ethics Quarterly*, **20**(3), 371–99.

Broadhurst, A.I. (2000). 'Corporations and the ethics of social responsibility: an emerging regime of expansion and compliance', *Business Ethics: A European Review*, **9**(2), 86–98.

Campbell, K. and D. Vick (2007). 'Disclosure law and the market for corporate social responsibility', in D. McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press, pp. 241–78.

Campbell, T. (2006a). 'A human rights approach to developing voluntary codes of conduct for multinational corporations', *Business Ethics Quarterly*, **16**(2), 255–69.

Campbell, T. (2006b). *Rights: A Critical Introduction*, London: Routledge.

Carroll, A.B. (1979). 'A three-dimensional conceptual model of corporate performance', *Academy of Management Review*, **4**, 497–505.

Clapham, A. and S. Jerbi (2001). 'Categories of corporate complicity in human rights abuses', *Hastings International and Comparative Law Review*, **24**, 339–50.

Cragg, W. (2000). 'Human rights and business ethics: fashioning a new social contract', *Journal of Business Ethics*, **27**, 205–14.

Cragg, W. (2004). 'Human rights, globalisation and the modern shareholder owned corporation', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporations and Public Sector Organisations*, Dordrecht: Kluwer, pp. 105–27.

Dworkin, R. (1978). *Taking Rights Seriously*, London: Duckworth.

European Commission (2001). *Promoting a European Framework for Corporate Social Responsibility*, Luxembourg: Office of the Official Publications of the European Commission.

Freeman, R.E. (1984). *Strategic Management: A Stakeholder Approach*, Boston, MA: Pitman.

Hsieh, N. (2009). 'Does global business have a responsibility to promote just institutions?', *Business Ethics Quarterly*, **19**(2), 251–73.

Ivison, D. (2009). *Rights*, Stocksfield: Acumen.

Kinley, D., J. Nolan and N. Zerial (2007). 'The "Norms are dead! Long live the Norms!" The politics behind the UN Human Rights Norms for corporations', in D. McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press, pp. 459–75.

Korbin, S.J. (2009). 'Private political authority and public responsibility: transnational politics, transnational firms, and human rights', *Business Ethics Quarterly*, **19**(3), 349–74.

Matten, D. and J. Moon (2004). 'Corporate social responsibility in education in Europe', *Journal of Business Ethics*, **45**, 323–37.

McCorquodale, R. (2009). 'Corporate social responsibility and international human rights law', *Journal of Business Ethics*, **87**, 385–400.

McCorquodale, R. and R. La Forgia (2001). 'Taking off the blindfolds: torture by non-state actors', *Human Rights Law Review*, **1**, 189–218.

Muchlinski, P. (2007). 'Human rights and multinational enterprises', in D.

McBarnet, A. Voiculescu and T. Campbell (eds), *New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press, pp. 431–58.
Nozick, R. (1974). *Anarchy, State and Utopia*, Oxford: Blackwell.
Orlitsky, M.F., L. Schmidt and S.L. Rynes (2003). 'Corporate social and financial performance: a meta-analysis', *Organizational Studies*, **24**(3), 103–41.
Ratner, S.R. (2001). 'Corporations and human rights: a theory of legal responsibility', *Yale Law Journal*, **111**, 443–545.
Raz, J. (1986). *The Morality of Freedom*, Oxford: Oxford University Press.
Rice, D. (2002). 'Human rights strategies for corporations', *Business Ethics: A European Review*, **11**(2), 134–6.
Ruggie, J. (2008). *Promotion and Protection of All Human Rights, Civil, Political, Economic and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc. A/HRC/8/5.
Schiller, B. and L. Roner (2006). 'What's the real benefit of ethical practice?', *Ethical Corporation*, September, 35–7.
Schreck, P. (2009). *The Business Case for Corporate Social Responsibility: Understanding and Measuring Economic Impacts of Corporate Social Performance*, Dordrecht: Springer.
Seppala, N. (2009). 'Business and the international human rights regime: a comparison of un initiatives', *Journal of Business Ethics*, **87**, 401–17.
Shue, H. (1980). *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Princeton, NJ: Princeton University Press.
Standards Australia (2003). *Australia Standard: Corporate Social Responsibility*, Sydney: Standards Australia.
Tracey, P., N. Phillips and H. Haugh (2005). 'Beyond philanthropy: a community enterprise as a basis for corporate citizenship', *Journal of Business Ethics*, **58**, 327–44.
United Nations (2003). *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August.
van Marrewijk, M. (2003). 'Concepts and definitions of corporate social responsibility and corporate sustainability: between agency and communion', *Journal of Business Ethics*, **44**, 95–105.
Vogel, D. (2005). *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility*, Washington, DC: The Brookings Institute.
Wettstein, F. (2009). 'Beyond voluntariness, beyond CSR: making a case for human rights and justice', *Business and Society Review*, **114**(1), 125–52.
Whelan, G., J. Moon and M, Orlitzky (2009). 'Human rights, transnational corporations and embedded liberalism: what chance consensus?', *Journal of Business Ethics*, **87**, 367–83.

3. The limits of corporate human rights obligations and the rights of for-profit corporations

John Douglas Bishop

3.1 INTRODUCTION

Many business ethicists and businesspersons agree on the need for corporations to respect human rights. John Ruggie, Special Representative to the Secretary General of the United Nations (UN) on Business and Human Rights, argues that corporations have a 'responsibility to respect' human rights (Ruggie, 2008). There is less agreement, and certainly less clarity, on exactly what corporate respect for human rights involves. Problems arise because of both the nature of rights and the nature of corporations. Human rights codes (the UN Universal Declaration of Human Rights, for example) were designed primarily with states or governments as the rights observers (and especially as the rights ensurers); this makes extension of rights obligations to corporations problematic. For example, a central problem with extending human rights obligations to corporations is whether corporations have duties with respect to all or only some of the rights that governments are enjoined to respect.

Debates over the extension of human rights obligations from governments to corporations centre on several key questions. The most basic question is if and why corporations should have such obligations at all, but even if it is granted that they do, there are further questions: which human rights obligations do corporations have, whose human rights should they consider and are there limits to the corporate resources they should devote to their human rights obligations? The purpose of this chapter is to contribute to this debate by clarifying the nature of corporate human rights obligations, and by arguing that the human rights obligations of corporations should be limited by the limits on the legal rights that should be extended to corporations.

My approach will be to clarify the possible human rights obligations of corporations, and then to ask the question of what rights must be extended

to corporations in order for corporations to fulfil each sort of obligation. If it can be shown that corporations should not have a particular right, it follows that corporations cannot be viewed as having any human rights obligations that require them to have that right. For example, if corporations have an obligation to protect the security rights of their employees, then we must view corporations as having the right to hire armed security personnel insofar as this is necessary to protect employees. If corporations have an obligation to speak out against government violations of human rights, then corporations must have the right to freedom of speech, including freedom of political (not just commercial) speech.

Throughout this chapter, it should be borne in mind that the obligations created by people's human rights may not completely account for all the ethical obligations a corporation has. A corporation may well have ethical obligations based on some other grounds: deontological, utilitarian and so on. Furthermore, corporations may have supererogatory obligations on humanitarian grounds, such as an obligation to philanthropy, which by definition is beyond rights obligations. Also, it needs to be noted that obligations based on human rights may not correspond to legal obligations in any country that does not enshrine and observe relevant human rights in its laws. This includes an unfortunately large number of countries at the moment. Indeed, no country has a perfect human rights record.

The next section of this chapter examines some of the reasons that have been given for thinking that corporations have human rights obligations. Section 3.3 considers and finds inadequate for our purposes several theories on the limits of corporate human rights obligations. Section 3.4 categorizes types of human rights and suggests that subsistence rights and basic rights to freedom, security and non-discrimination are the origins of most corporate human rights obligations. In section 3.5, I propose a principle that limits corporate human rights obligations. The proposal is that we should compare the chances of human rights fulfilment (and violation) that are likely to result from assigning human rights obligations to corporations with the chances of human rights fulfilment (and violation) that are likely to result from giving corporations the rights needed to undertake those human rights obligations. The rest of Section 3.5 aims to clarify this principle by considering corporate obligations: (a) to respect basic human rights; (b) to not be complicit in human rights violations by others; (c) to actively prevent human rights violations by others; (d) to spend corporate resources on human rights fulfilment; and (e) to ensure a society that respects human rights. Section 3.6 steps back from these considerations to look at the status and use of the principle that this chapter proposes. The concluding section gives a quick summary of the main argument of this chapter.

3.2 WHY CORPORATIONS HAVE HUMAN RIGHTS OBLIGATIONS

At the current stage of human economic development, there can be little doubt concerning the need for corporations to show some respect for human rights; the limits on corporate human rights obligations suggested in this chapter are not intended to undermine those corporate obligations that do exist. These obligations are the inevitable consequence of the existence of huge and powerful corporations in the global economy. The size of transnational corporations (TNCs) is stunning. Half or more of the world's largest economies are corporations.[1] The impact of corporations on many people's lives is huge. Many people are corporate employees, either directly or indirectly through contractors and suppliers. And in most developed countries, corporations own and control nearly all the productive resources and the entire population of such countries are customers and neighbours of corporations. As Cragg (2004) has argued, the size and impact of corporations, and their control of production morally requires that society benefit from the existence of corporations, which entails, Cragg argues, that at a minimum corporations respect human rights.

The inquiry into the human rights obligations of corporations is all the more vital because at the current stage of globalization, governments, who are traditionally viewed as the protectors of human rights, are often becoming less likely or able to fulfil this role. There are several reasons for this, some of which directly involve large corporations. The ideology of free markets and deregulation and the competitive pressures of global markets restrict the ability of governments to ensure corporate activities do not harm people's rights. In some of the countries TNCs operate in (and in the case of many natural resource companies, must operate in), corrupt or elitist governments lack the desire to protect people's rights. Corruption and brutal elitism cannot be entirely blamed on corporations – both existed long before corporations, which in their current form are a relatively recent invention – but corporate complicity with unsavoury governments is of ethical concern; even if a corporation is not directly involved in rights violations, many people question the operation of corporations in countries with governments that grossly violate human rights (Wettstein, 2010). There is clearly a need to establish the nature of corporate obligations with respect to human rights, not just in cases in which the corporation is directly involved, but also in cases where corporations operate in societies with significant human rights issues. This, of course, is not intended to pre-judge what corporate obligations are in such cases; I intend here only to emphasize the need to address the questions that arise in extending human rights obligations to corporations.

The theoretical grounds for human rights obligations for corporations are various (Cragg, 2010). The most straightforward approach is deontological; if humans do in fact have human rights, then all agents capable of doing so have obligations to respect those rights (Arnold, 2010). This raises many questions about the extent to which corporations are the relevant sort of moral agent, and it conflicts with the intuition that we may not want corporations to have or exercise agency to the extent necessary for them to fulfil obligations with respect to all human rights for every person. A second approach would be to ground corporate obligations for human rights in utilitarianism; indeed some philosophers have tried to ground all rights on utilitarian arguments (Sumner, 1987).[2] Arguments for corporate human rights obligations based on the size and power of corporations are often utilitarian in nature, but the global economy is far too complex for the predictability utilitarianism requires.[3] A third approach would be to imagine a hypothetical social contract between society and corporations; corporations need the support of society's legal system to exist – shouldn't society demand respect for human rights in return? For reasons that have been outlined by Bishop (2008), this form of the social contract argument cannot be viewed as sufficiently rigorous to specify corporate rights and obligations.

There are two key problems in extending human rights obligations to corporations; the first has to do with the nature of human rights, the second with the nature of corporations.

Human rights were not designed with corporations in mind. Some human rights were designed as aspirational ideals, but most were designed to protect individual people from government actions. Every right, of course, requires a right holder and a right observer, and it is typically governments that are the rights observer for human rights (Campbell, 2004b). Even in the case of those human rights that entail obligations on non-government agents, the government usually has an obligation to ensure the right is observed. For example, the right to life prohibits people from murdering other people every bit as much as it prohibits governments from non-judicial killing, but the prohibition on murder entails an obligation on the government to enhance personal security through creating police forces, courts, prisons and so on (Campbell, 2004a; Griffin, 2004).

That governments are the primary rights observers and ensurers is clear from most of the codes of rights including the French Declaration of the Rights of Man, the American Bill of Rights and the UN Universal Declaration of Human Rights.[4] More specifically to the issue of corporate responsibility, Hillemanns points out that the experts who drew up the 'UN norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' 'stressed that States

possess the principal responsibility to assure the implementation of human rights and that business should not be asked to assume the role of States' (Hillemanns, 2003, p. 1070), but she also says that these norms were still criticized by business representatives and organizations who asserted 'the traditional view in international law that the promotion and protection of human rights is a task and obligation reserved for national governments' (Hillemanns, 2003, p. 1068).

Governments should be committed to ensuring human rights as defined by their own constitutions and by the UN Declaration. If corporations are similarly bound to observe human rights, how are we to interpret their obligations? To continue the example of the right to life, corporations obviously have an obligation not to have people murdered, but it is less clear what obligations they have towards anyone's safety beyond that. The nature of such obligations is also not clear. It would be extremely odd and problematic to suggest corporations should be responsible for police, courts or prisons, and I know of no authors who suggest this. Some approaches to this issue, such as suggesting corporations have only negative duties to refrain from human rights violations, or that their obligations are only side constraints that oblige them to avoid harm, are shown in this chapter to be inadequate. Clarifying the nature of corporate human rights obligations is a prerequisite for discussing their limits; this chapter attempts this in Section 3.4, and concludes that the limits on different sorts of corporate obligations will have to be discussed separately (see Section 3.5).

The second problem with establishing corporate human rights obligations lies in the nature of corporations. Are corporations the sort of entities that can have obligations of the relevant kind? Human rights obligations may appear to be similar to, or a kind of, moral obligation, and it is questionable whether or not corporations are moral agents. Long ago, French (1979) argued that they are, and his view has more recently been supported by others (Arnold, 2006). But many have disputed it. For present purposes we can avoid this debate because there are several ways that the concept of corporations having human rights obligations can be interpreted, some of which avoid attributing moral agency to corporations. Thus, we can say corporations have human rights obligations without committing ourselves to corporate moral agency, though that possibility is not excluded. Consider the following four ways of interpreting the phrase 'corporations have a human rights-based obligation to do action x':

1. A corporation is a moral agent that has a moral obligation to do x because some human (or humans) has a human right that the company do x.

2. Human rights law (national, international or treaty) ought to require the corporation to do x. This puts the actual moral obligation on law-makers and enforcers, but it allows us to continue to use the phrase 'corporations have an obligation to do x' as a shorthand for views about what is or should be contained in human rights declarations and legal codes.
3. Saying corporations have an obligation to do x may mean that people are entitled to, and ought to, react to corporations not doing x as though a human right were violated in an unacceptable fashion. The phrase, in other words, advocates and justifies moral censure, persuasion, outrage and actions (such as boycotts) if corporations do not do x.
4. We could view corporate rights obligations in terms of whether the decision-making structures of a corporation result in policies and actions consistent with human rights. Essentially, this would mean that corporate human rights obligations are characteristics of their decision-making processes.

Thus, whether or not corporations are viewed as moral agents, we can attribute meaning to the claim that corporations have human rights obligations. For this reason, we will not have to examine the limits of corporate human rights obligations in the context of the debate on the moral agency of corporations.

3.3 THE LIMITS OF CORPORATE HUMAN RIGHTS OBLIGATIONS: SEVERAL SUGGESTIONS

If corporations have human rights obligations in some sense, the next step is to determine which human rights create those obligations, and whose human rights corporations ought to consider; these questions I will refer to, respectively, as the extent and scope of corporate human rights obligations. Essentially, we are asking about the limits of corporate human rights obligations for it seems unlikely that corporations have all the rights obligations that governments have, and we will see that some of their obligations do not extend to all people. The need to limit corporate human rights obligations is consistent with the intuition that there are obligations we do not want corporations to have because those obligations would involve corporations in matters they should stay out of (Hsieh, 2009). That intuition needs clarifying and justifying; the primary point of this chapter is to examine the obligations of corporations in light of the rights that corporations have or that they should have. There have

been several other approaches to specifying the limits of corporate human rights obligations; I will briefly outline four of these and explain why they are inadequate.

Respect for human rights is often required by law, and it might be that corporate obligations with respect to human rights can be reduced to an obligation to obey relevant human rights laws; on this view, there would be no obligations beyond the law. Most writers (for example, Cragg, 2004; Lane, 2004) reject this approach, citing reasons such as the need for TNCs to operate in countries with governments and laws that do not or cannot protect human rights (Cragg, 2004); the inability of the law to ever completely protect human rights (Douzinas, 2000; Lane, 2004); and the ability of corporations to manipulate and avoid the law, often with cost savings in doing so (Cragg, 2004). Furthermore, limiting corporate responsibility to staying within the law becomes circular and pointless if we consider how much power corporations have to create the laws that govern themselves (Cragg, 2000). This power is partly the result of the self-regulation movement (which is inconsistent with the only-obligation-is-to-stay-within-the-law approach), but also the ability of corporations to threaten governments with moving elsewhere, the competitive pressures of global markets, the political influence of corporations, the corruption of some governments and ruling elites, and the corporate 'rights' and powers enshrined in economic treaties (such as the North American Free Trade Agreement, NAFTA) that corporations had considerable influence in creating. For these sorts of reasons, we can conclude that the law alone cannot establish the extent and nature of corporate human rights obligations.

One way of extending human rights obligations from states (or governments) to corporations might be to distinguish negative (or liberty) rights from positive (or welfare) rights; governments would be responsible for both kinds of rights, corporations only for respecting negative rights. But this approach has been seen as problematic ever since Shue (1980) criticized the underlying distinctions.[5] Neither the positive/negative distinction, nor the related liberty/welfare distinction can be maintained without many complications, and conflating the two distinctions is simply wrong. All rights imply both negative and positive obligations, and, as Archard (2004) argues at length, many welfare rights are presupposed by liberty rights; he gives the example of the right to freedom of speech presupposing fulfilment of a person's right to a basic education. Archard (2004, p. 57) concludes: 'What has been shown is that there is no simple set of minimal determinate duties that fall upon organizations and that correlate with the "negative" liberty rights.' Lane (2004, fn. 20) says bluntly that the positive/negative distinction is 'crude and misleading'.[6] More recently, Hsieh

(2009) has argued that a 'positive' corporate obligation to be involved in the creation of social and political institutions can be derived from the 'negative' obligation to refrain from doing harm.

Lane (2004) argues at length that the basis of corporate human rights obligations must include a recognition of the human right of autonomy for individuals and communities. She discusses the example of a mining company negotiating with communities and residents living near a large mining project; such 'neighbours' have a right to know how they will be impacted as this is necessary for them in negotiating with the company. However, a principle of respecting autonomy is not by itself a sufficient guide for the extension of human rights obligations from governments to corporations. This is primarily because some rights holders do not have the necessary autonomy for reasons which the company cannot fix or does not have an obligation to fix. If rights-holder autonomy is absent and cannot be attained, this is not an adequate reason for ignoring people's rights – it probably, indeed, makes observing their rights more important. The use of autonomy to guide human rights obligations can also encounter significant administrative problems (not to mention costs); Lane (2004) discusses, for example, the issues of establishing who can represent a community and who are members of a community. Lane's concept of autonomy also suffers from a lack of a clear analysis of what is meant by autonomy, and more particularly, by a discussion of how individual autonomy relates to community autonomy. Respect for autonomy is important, but not sufficient for our purposes. Another suggestion might be to assess corporate rights obligations by trying to balance the public goods of rights recognition with the private (or corporate) costs/benefits of the rights obligations. This would be consistent with Cragg's argument that corporations have human rights obligations because society is entitled to public benefit from creating the legal and other environments necessary for corporations to exist (Cragg, 2004). Although Cragg's argument is correct and his conclusion underlies the problem we are dealing with, balancing public and private costs/benefits cannot be used for establishing what human rights obligations corporations have; the public good can only establish that corporations have obligations, not what those obligations are. There are several reasons for this. Most importantly, rights are not about the greatest good; rights recognize precisely that which cannot (or at least should not) be sacrificed for a greater good. To use Dworkin's (1977) language from *Taking Rights Seriously*, the nature of rights must be established by principle, not by policies, not even policies aimed at obtaining the public good. Furthermore, corporations themselves cannot use such a balancing principle to figure out what their own obligations are because they are not (and probably cannot be) structured to make decisions based

on calculating and balancing public goods and costs. Corporations are private organizations and internalize only private costs and benefits in their decisions, though they can also recognize constraints, such as legal, ethical and we hope human rights constraints. Finally, balancing principles are notoriously difficult to use in decision-making. In fact, as the Arrow Impossibility Theorem shows (Arrow, 1951), and as Bishop (2000) has shown with respect to balancing stakeholder interests, the sort of balancing principles required here resembles social decision principles and so often cannot produce decisions.

From the failure of these four attempts at limiting corporate human rights obligations, we can conclude that the limiting principle proposed in this chapter will have to avoid several problems. It will have to recognize that current law is an inadequate basis for human rights obligations; it will have to rely on a more sophisticated analysis of human rights that is available in the negative (liberty) and positive (welfare) rights distinction; it cannot rely on the autonomy, or even the perspective, of those whose rights are or might be violated; and, finally, it cannot rely on any principle that balances human rights fulfilment (or violations) with a cost/benefit analysis from a corporate perspective.

3.4 THE TYPES AND LIMITS OF CORPORATE HUMAN RIGHTS OBLIGATIONS

Human rights, such as those enshrined in the UN Declaration of Human Rights, place significant obligations on governments. Corporations are different sorts of entities than governments and therefore should not have the same human rights obligations (Arnold, 2010). So which obligations do they have, and which do they not have? In short, what are the limits to corporate human rights obligations?

This question can be broken down into the following questions: (a) which rights create human rights obligations for corporations?; (b) what sorts of obligations do these rights create?; and (c) whose rights create those obligations.

Ruggie's (2008) report distinguishes between government and corporate obligations by saying that governments have a duty to protect human rights, and corporations have a responsibility to respect them. As Arnold (2010) makes clear, this is not an adequate theorizing of the issues; neither the distinction between 'duty' and 'responsibility', nor between 'protect' and 'respect' is clear in this context. Arnold has some interesting comments on duty versus responsibility, and proposes an analysis of rights and rights obligations that goes some way to explain how corporate human

rights obligations differ from government obligation. My intention is to extend and build on Arnold's analysis in an attempt to clarify the limits of corporate responsibility.

Arnold distinguishes between basic and aspirational rights. Basic rights are those rights necessary for the attainment of other rights and without which it is not possible to live a decent human life (Shue, 1980, pp. 18–20). For example, a basic right to subsistence is necessary before one can take advantage of a non-basic right to education. Basic rights may be contrasted with aspirational rights, such as unlimited access to high quality education and healthcare, that may foster a flourishing and fully realized human existence but are difficult, or impossible, to guarantee universally. Henry Shue has famously and persuasively defended three basic rights: (1) liberty of physical movement and social participation (Shue, 1980, pp. 65–88); (2) physical security (p. 20); and (3) subsistence, meaning 'unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, minimal preventive public health care' (p. 23) (Arnold, 2010, p. 386).

Basic rights, according to Arnold, are of two types: first, liberty and security rights, and, second, basic subsistence rights. Liberty and security rights impose on corporations universal obligations to refrain from activities that violate the liberty and security rights of any human being; these obligations can be viewed as 'side-constraints that bound the moral space in which duty bearers may pursue ends without unjustified interference by other agents or institutions' (Arnold, 2010, p. 386). The obligations of basic subsistence rights are not owed to all people, but only 'when certain relationships exist' between the rights holder and the rights observer (Arnold, 2010, p. 386). Arnold applies this to corporations as follows:

> This is a crucial point for the argument of this article, for wherever TNCs do business they are *already* in special relationships with a variety of stakeholders, such as workers, customers, and local communities. In their global operations and in their global supply chains, TNCs have a duty to respect those with whom they have relationships. At a minimum, then, TNCs managers have duties to both ensure that they do not physically harm or illegitimately undermine the liberty of any persons, and the additional obligation to ensure that subsistence rights are met. (Arnold, 2010, p. 387, emphasis in original)

In his analysis, Arnold underemphasizes one of Shue's basic rights, to wit, the right to 'social participation' (Shue, 1980). I bring this up because the corporate obligations that arise from this basic right may go beyond side constraints and it raises questions about whom corporations have obligation-generating special relations with. The right to social participation would include the right of every person not to be excluded from

labour, promotion and business activities because of his or her race, gender, class, religion and so on; this would place a side constraint on corporations that prohibits discrimination against any individual. This would include obligations to both employees and potential employees, and so potential employees must be included in the group with the relevant special relation necessary for human rights obligations. The right to social participation includes not just a right not to be discriminated against, but also the right of everyone to have access to the capabilities necessary to participate in the social-economic system that includes TNCs. Such a right would include basic literacy, for example. What sort of obligation does this impose on corporations? More than a constraint is required to fulfil this obligation, and the obligation must be to more people than those the corporation currently does business with since it must also include potential business relations. The obligation would not just be to employees, but to customers and potential customers, which would seem to include just about everyone.

Although Arnold's purpose was to establish moral grounds for why corporations have human rights obligations, he has also gone some way to clarifying the limits on corporate human rights obligations. Towards answering the question of which rights, he has drawn our attention to the distinction between basic and aspirational rights, and within basic rights, to the distinction between, on the one hand, liberty, security and participation rights, and, on the other, subsistence rights. In considering what sorts of obligations those rights place on corporations, he has in the first place suggested liberty and security rights place 'side constraints' on corporate actions, but that subsistence rights entail obligations to ensure the right. Further, he has suggested that corporations do not have obligations with respect to aspirational rights, only with respect to basic rights. And finally, in answer to the question of whose rights, he suggests corporations have rights obligations only to those with whom they have a 'special relationship'. He has defined this very broadly, and I think with insufficient precision, when he writes: 'wherever TNCs do business they are *already* in special relationships with a variety of stakeholders, such as workers, customers, local communities' (Arnold, 2010, p. 387, emphasis in original).

There are, however, a number of problems that may evade solutions using these concepts. If corporations have obligations not to be complicit in the human rights violations of governments and other entities, then side constraints may not encompass all their obligations even with respect to liberty and security rights. The extent of corporate obligations to ensure subsistence rights and whose subsistence rights they need to consider also need clarification. Finally, we should consider whether aspirational rights entail any sort of obligations on corporations, and whether those obliga-

tions are in the form of imperfect duties. For example, corporations might have obligations to cooperate with government attempts to fulfil such rights, and perhaps further obligations in countries in which the government is lacking in efforts with respect to aspirational rights.

In Section 3.5, I will propose a principle that limits corporate human rights obligations. The proposal is that we should compare the chances of human rights fulfilment (and violation) that are likely to result from assigning human rights obligations to corporations with the chances of human rights fulfilment (and violation) that are likely to result from giving corporations the rights needed to undertake those human rights obligations. The rest of Section 3.5 will clarify this principle by considering corporate obligations: (a) to respect basic human rights; (b) to not be complicit in human rights violations by others; (c) to actively prevent human rights violations by others; (d) to spend corporate resources on human rights fulfilment; and (e) to ensure a society that respects human rights.

3.5 RIGHTS-BASED OBLIGATIONS IMPLY CORPORATE RIGHTS

If a person or any other entity has an obligation to do a particular action, then they must have a right to do that action. This is true both for moral rights and obligations, and for legal rights and obligations. If corporations have human rights-based obligations, they ought to have the rights necessary to fulfil those obligations. The notion of corporations having rights is not strange – at least it is not in legal theory; the essence of corporations is that they are rights-bearing legal entities. A business can exist without incorporation; what incorporation adds to a functioning business are the legal rights that corporations enjoy. The nature of corporations is defined by the rights granted them by law.

It follows from this that corporate human rights obligations are restricted by the rights corporations do and do not have, and the obligations corporations should fulfil are limited by the rights they should have. The question we need to address is: what legal rights should corporations have?

This is a moral question. The rights of corporations are usually legal rights, but what rights they should have is a moral or ethical question, not a legal one. A moral argument that attempts to show what legal rights a corporation should have is vastly different from the moral arguments that show human beings have human rights. Human rights are inherent rights in that a human being has human rights because of the nature of what it is to be human; this is the sort of argument Arnold uses. Corporations do

not have any inherent rights in this sense; all a corporation can have are legal rights, and a corporation's legal rights are only those that the law recognizes. Human rights, in contrast, exist even if not recognized by law; if a human being's human rights are ignored because the law does not recognize them, we say his or her rights are violated. We do not say they do not have that right. It is incorrect to say a corporation's rights are violated if it does not have a legal right in a particular country; a legal right is not violated if it does not exist. Perhaps it would be clearer if we referred to the legal rights of corporations as legal privileges, but I will stick with legal rights as it is more common.[7]

That corporations only have legal rights (and do not have any inherent rights similar to human rights) does not affect the fact that there are numerous moral arguments attempting to justify which legal rights corporations should have. Such arguments are not based on the nature of corporations, but on the nature of people, societies and human rights. There is no agreement on how to answer the question of what legal rights corporations should have; attempts have been based on the transference of people's rights to the corporations they found (Malcolm, 1994), the necessity of the corporate right to the fulfilling of the rights of people (Mayer, 1990), utilitarian arguments (Horwitz, 1977; Perrow, 2002) and social contract arguments (Bishop, 2008).

This chapter will take a different approach because we are not trying to answer the question in general; in this chapter we need only consider what legal rights corporations need to fulfil their human rights obligations. The point to insisting corporations have human rights obligations is to try to minimize the human rights violations that result from corporate activity. There is a long history of corporate human rights violations, some of them very serious: fruit companies in Central America, oil companies in Nigeria, Nestlé in Africa, mining companies everywhere – even allegedly Coca-Cola in various places. The problem is, the more legal rights are extended to corporations so that they can fulfil their human rights obligations and the more powers and privileges corporations have, the higher the risk of ever more serious human rights violations by those corporations. What is needed is some sort of balance; since corporate legal rights need to be restricted to prevent serious human rights violations, corporate human rights obligations need to be limited to those which can be fulfilled given limited legal rights. Like all balancing principles, this principle will not always give precise guidance, but it will help clarify the intuition mentioned earlier that there are powers and privileges that governments have that corporations ought not to have, and that corporate human rights obligations must differ from government human rights obligations accordingly. To sketch a brief example just for clarity, consider the pos-

sibility of a legal right of corporations to hire armed security personnel: on the one hand, corporations may need this right so they can protect their employees' right to security of person when, for example, the employee is moving large sums of cash. Or a corporation running a large chemical or fertilizer factory will need to protect explosive materials so they cannot be used to threaten the security rights of many people. On the other hand, if corporations have a general right to hire armed personnel, some corporations are large enough and rich enough to maintain armies complete with tanks, helicopters, planes and other military equipment. Such armies can pose major threats not only to people's security rights, but to their political rights as well. Consider the corporate uses of armed forces documented by Madelaine Drohan in *Making a Killing* (Drohan, 2003). This problem remains despite the fact that the last company with the legal right to declare war, the East India Company, lost its army and navy in 1874 (Micklethwait and Wooldridge, 2003). In deciding what legal right to hire armed personnel corporations should have, we need to balance corporate human rights obligations with the potential threat to human rights posed by a well-armed corporation.

3.5.1 Basic Rights and Side Constraints

The basic human rights to liberty, security and participation entail corporate obligations that Arnold suggests take the form of side constraints. This raises several questions; first, to whom do corporations owe these sorts of obligations? Second, are there limits on how much corporations should spend on fulfilling these rights? To answer this question, we need to examine what rights corporations need to fulfil these sorts of obligations. Third, are side constraints an adequate description of all the obligations that corporations have with respect to these rights? This question is raised in this section, but more thoroughly discussed in subsequent sections.

Corporations have an obligation to refrain from violating the basic rights of security, freedom and participation for all people that they have a relevant relationship with. However, the question of whether the rights holder has the relevant sort of relationship with any corporation is easily answered because direct violation of a person's human rights is a relationship of the relevant sort. Hence, corporations ought to refrain from directly violating all basic human rights of all people. Indeed, this conclusion may also apply to basic subsistence rights and even aspirational rights; corporations may or may not have obligations to fulfil such rights (this we will discuss below), but if in saying that corporations should respect such rights we are only suggesting that corporations have side-constraint obligations to refrain from interfering with the fulfilling of such rights

by people or governments, and then such obligations will be towards all people. That corporations have side-constraint obligations to respect the human rights of all people seems to follow directly from Cragg's justification of the need of corporations to benefit any society that allows them to exist and function. Cragg says 'that, under conditions of globalisation, respect for and a commitment to advance respect for human rights is both constitutive of the public good to which corporations have an obligation to contribute and empirically necessary if public goods are to result from commercial corporate activity in global markets' (Cragg, 2004, p. 124). If we interpret Cragg's 'respect for and a commitment to advance respect for' to include at a minimum refraining from violations of everyone's basic right to security, freedom and participation, and refraining from interfering with the efforts of other entities (especially governments) to fulfil any human right, then Cragg's argument establishes that corporations have such rights-based obligations.

Side constraints require that corporations refrain from any action that directly harms a human being in a way that violates that person's rights. The emphasis is on refraining from actions; this is sometimes referred to as a negative obligation, but that characterization is problematic. Viewing these obligations as entirely a negative obligation misses many actions that respect for human rights imposes on corporations, as Arnold points out. The problem is that having a side constraint to refrain from an action can cost a corporation a lot of money. This raises issues of how far such obligations extend and whether there are limits to such obligations.

Consider a simple example: if a mining company dumps cyanide or other pollutants in a river (Arnold, 2010), they are violating the basic right to personal security of the people who live downstream. The corporation should refrain from dumping the pollutants; this is an obligation to refrain from an action imposed on the corporation by people's human rights. However, in order to refrain from dumping pollutants, the corporation has to build suitable treatment facilities; this is not simply a negative act of refraining, but a positive activity that could cost the company huge sums of money. So the question of limits arises even with the need to simply refrain from human rights violations. The positive actions imposed by a respect for human rights are all ways of conducting a corporation's business so that harm to people does not result. The legal rights a corporation needs to fulfil this obligation are simply the definitional rights to conduct their business; the obligations merely restrict corporations from some sorts of business actions. However, it needs to be added that the corporation (and its senior managers) need to have the legal right to spend corporate resources on activities that fulfil basic human rights. This needs to be true even if such actions cannot be justified on other grounds such as corporate reputation

or lawsuit avoidance. Since no further rights for corporations are implied by respecting basic human rights, corporations ought to respect all the basic rights of all people. This does not answer the question of how much corporations should spend, unless one takes an absolutist view that they should spend whatever it takes to eliminate all rights violations, even the most trivial. My approach of asking what legal rights corporations need to have to fulfil their human rights obligations does not solve the question of how much corporations should spend; this is true not only for the obligation to respect basic human rights, it is a more serious limit on the approach for other sorts of obligations, as discussed below.

So far in this section, we have been discussing the extent and scope of corporate human rights obligations for basic rights using Arnold's terms of side constraints and the special relationship required to generate human rights obligations. There are some human rights advocates who want to go beyond side constraints even for basic rights, and who suggest that corporations have obligations not just to show restraint in the ways they conduct their business, but also actively engage in areas beyond their normal sphere of business. For example, Hsieh (2009) has argued that respect for the basic human rights such as security involves more than side constraints that require refraining from harm, and more than conducting business in ways that avoid harm; he argues that the human right of security of person imposes on corporations obligations to help build political and social institutions if those institutions are missing in a host country and if they are needed in order to prevent harm from corporate activities. For example, if a host country lacks environmental laws or labour regulations, corporations should not only refrain from exploiting these omissions, they ought to provide assistance to the host country's government to develop suitable regulations. If the country lacks the political infrastructure to create and enforce such regulations, the corporation should presumably be involved in creating these as well. If Hsieh's argument is correct, respect for even basic human rights, such as refraining from causing harm, imposes on corporations more that side constraints; it also creates positive obligations that would entail corporations having rights to become involved in major political and social undertakings. What legal rights corporations would need and whether we would be prepared to extend these rights to corporations is an interesting question. I discuss some of the issues and limits below in Subsections 3.5.2 and 3.5.3.

3.5.2 Obligations of Corporations Not to be Complicit on Human Rights Violations

Accusations of corporate failure in the area of human rights often focus on complicity with violations that are committed by others (Wettstein, 2010). Wettstein classifies complicity into four types: direct, indirect, beneficial and silent. It is the last of these we will discuss here, though it is possible the issues raised may also apply to beneficial complicity. Wettstein defines silent complicity when he notes 'otherwise innocent bystanders may turn into accomplices by not speaking out against the wrongdoings done to human beings; in such cases, their silence is to be interpreted as moral support or encouragement for the perpetrator or at least as a sign of acquiescence' (Wettstein, 2010, pp. 36–7). Accusations of corporate support for silent complicity presuppose that corporations have human rights obligations that extend beyond refraining from certain actions, and thus extend beyond side constraints. They imply that the accuser believes that corporations have obligations to actively discourage or even interfere to prevent human rights violations committed by others. Frequently, the rights violators are governments, and often the rights violated include the basic rights to security, freedom and participation. Complicity can extend beyond government violations of basic rights, but for reasons of length and clarity the present discussion will be confined to such situations. The key aspect of this that needs discussing is the requirement for corporations to try to influence governments; this requires corporations to have political rights. Two aspects of such rights will be discussed separately: the right to take part in public discourse on human rights issues and the right to use their influence privately by lobbying governments discreetly – in other words, in secret.

People are often instinctively opposed to any political rights for corporations. Corporations, after all, have immense amounts of money, power and influence, far more than a private citizen can acquire in a lifetime, and corporations have strictly private purposes, usually the funnelling of as much money as possible to the already rich or prosperous who own the companies. Political rights combined with such wealth and the inability of corporations to identify with the public good pose a threat to the equality aspect of liberal democracy (Copp, 2000), and to the human right to political equality which Shue recognizes as a basic right. Political rights for corporations would violate the equal stakes argument outlined by Copp (2000). On the other hand, anyone who wishes to deny corporations political rights, including the right to political free speech, cannot simultaneously argue that corporations have an obligation to publicly protest and oppose government human rights violations.

Mayer gives a concise list of concerns about how corporations can use (abuse?) a right to freedom of political speech:

> a credible case can be made that corporations, following their primary mandate of maximising shareholder wealth, have not generally advocated for free, untrammeled discourse in order to create a 'robust debate' on public issues in the United States media, in its courts, or in its other public institutions. Rather, a pattern emerges in the corporate use of economic and political power to limit discussion, suppress alternative viewpoints, and skew public policy debates. This pattern is evident in U.S. media consolidation, corporate public relations, corporate lobbying, lawsuits against public participation, advertiser's pressure on media, and widespread practices of hiding (or shredding) information that would be useful to public officials or the public generally. (Mayer, 2007, pp. 77–8)

Mayer's primary concern is with truth and falsehood and the effect of corporate free-speech rights on public discourse, but clearly some of the issues he discusses include threats to human rights. Strategic lawsuits against public participation (SLAPP), for example, 'remind us that some corporations have actively sought to suppress speech' (Mayer, 2007, p. 81), a clear violation of the basic rights of political participation and of an individual's freedom of speech.

The issue at the centre of Mayer's article is the accusation that Nike was claiming and using the right to freedom of political speech in order to hide its (alleged) complicity with human rights violations in the factories of its suppliers. Thus a corporate right to freedom of political speech in this case posed a threat of corporate violation of human rights. Mayer, however, does not consider the other side of this problem, which Wettstein raises; that corporate silence (or the lack of a right to corporate freedom of speech) can entail silent complicity with government human rights violations in countries that host a corporation's factories, and that corporations need the freedom of political speech if they are to speak out against such violations and if we are to claim that corporations have obligations not to be complicit.

As a possible solution to the potential for the misuse of corporate free speech to violate people's rights (and for other reasons such as promoting efficiency and fairness), Mayer looks to the idea of hypernorms (as developed by Donaldson and Dunfee, 1999). This, however, addresses issues in corporate ethical responsibility (and assumes corporations have the right to freedom of speech); it does not answer the question of what rights of corporations should be legally recognized. In the US context, perhaps this latter question is a moot point, for in the USA corporate rights are determined on constitutional grounds, not on considerations of rights violations and rights obligations.

Mayer's appeal to 'substantive hypernorms' resembles a claim that corporations have an ethical responsibility not to violate human rights. Mayer says: 'Some trans-cultural norms may include human rights, such as the right to freedom from torture or the right to subsistence, or the right to minimal education' (Mayer, 2007, p. 84). These seem to be basic rights to security, subsistence and participation. The passage surrounding this quotation implies that the concept of hypernorms is more inclusive that a respect for human rights.

A claim of ethical responsibility for respecting human rights is compatible with corporations having the legal right to freedom of speech (and may even be entailed by that legal right), and hence is compatible with an ethical obligation to avoid silent complicity with the human rights violations of governments. This, however, does not answer the question of whether corporations should have the right to freedom of political speech; to answer that question, we need to estimate the extent to which corporations are likely to violate the sorts of ethical restrictions Mayer says they have.

In discussing the right to corporate involvement in politics we also need to consider lobbying. As Ostas (2007), Mayer (2007) and others show, there are serious problems, including the violation of people's political rights, with allowing such powerful organizations as corporations to use their money and influence in secret lobbying of government officials and members of the government. The private purposes of corporations would inevitably dominate such lobbying, and would pose a threat to political equality and possibly a number of other human rights. Inevitably, money contributions are involved in such lobbying, either as campaign contributions or as bribes, but in either case, corruption is involved and there is a real possibility of corporate capture of the government's policy and regulation processes (Zinnbauer, 2009). This conclusion that corporations ought not to have rights to lobby governments in secret is similar to the position taken by Scherer and Palazzo (2007) using a Habermasian approach to a similar question.

This conclusion may sound fine with respect to corporations in countries with liberal democratic governments, but should corporations not use their influence behind the scenes when human rights are threatened by regimes that are not democratic and/or are already corrupt? Should, for example, Shell Oil have non-publicly used its influence with the Abacha regime when that regime was violating human rights in many areas of Nigeria? Should Shell have tried to save Ken Saro-Wiwa and others from extra-judicial execution? Two points need to be made on this issue; first, it is incumbent on those who want corporations to use their influence behind the scenes to show that this is more effective than public opposition

to human rights violations. Public commitments from corporations are probably more believable since they are publicly exposing their reputations; this is especially true in the long run. Second, corporations cannot be trusted to lobby secretly in support of human rights; there are too many private interests at stake. Nor can they be trusted to lobby secretly only with non-democratic regimes. For a TNC it is the same executives that deal with all sorts of governments, and asking them to use certain techniques only in some countries seems impractical.

In short, corporations should not have the right to lobby governments in secret, and hence they are not obliged to promote human rights by using their private influence or through secret lobbying. On balance, the risk of human rights violations from secret corporate lobbying of governments tends to be greater than the benefit of using the secret influence of corporations in preventing government human rights abuses, especially considering that there is the alternative of public influence.

We have considered the two extremes of completely public political freedom of speech and secret corporate lobbying of government. There is, of course, a vast area of possibilities in between, including, for example, unidentified public discourse (such as Astroturf sites; see Monbiot, 2006) or regulated semi-public lobbying such as in the USA or Canada. It would be impossible to consider all possibilities here, and, furthermore, the balance between the risk of corporate human rights violations and the obligations of corporations to promote government observance of human rights may be considerably different in different countries and cultures, and at different times. This greatly complicates applications of the principle of balancing potential human rights violations with human rights benefits, but it does not invalidate the principle itself. The two extreme cases are illustrative.

However, it is interesting in this context to consider recent discussions of the free speech and lobbying rights of corporations under American law; see, for example, Ostas's (2007) discussion of both the legal and ethical status of such rights. Under US law, courts have decided that corporations have constitutional rights, including rights to free (political) speech (Hess and Dunfee, 2007; Mayer, 2007), and hence to lobbying. Effectively, this is to decide corporate rights on grounds other than the likelihood of corporations using their rights to violate human rights (as this chapter suggests should be one of the key considerations). However, Ostas points out that such constitutional rights can be limited by laws if the government can show that it is 'the "least restrictive means" to achieve a "compelling government interest"' (Ostas, 2007, p. 36). Presumably, given US commitments to human rights in the constitution and international treaties, preventing or minimizing corporate violation of human rights would be

considered a 'compelling government interest', though proving the connection between the right to lobby and human rights violations might be extremely difficult in practice. But Ostas goes on to show that such legal constraints on the constitutional rights of corporations are inadequate. In his discussion of the ethical debate surrounding lobbying, he concludes that there needs to be further limits on corporate pursuit of self-interest thorough lobbying, at least in those cases in which corporations have sole or privileged access to legislators. The consideration proposed in this chapter, that the corporate right to lobby needs to be restricted by considerations of potential corporate violations of human rights, would impact this discussion in two ways: first, it would provide a 'compelling government interest' to support laws restricting lobbying. And second, it provides grounds for an ethical obligation on lobbyists if such laws do not exist.

3.5.3 Corporate Obligations to Actively Prevent Human Rights Abuses by Others

This subsection discusses whether we should view corporations as having an obligation to prevent, or to attempt to prevent, governments, other corporations and people from interfering with a rights-holder's exercise of his or her human rights. Perhaps the most obvious and important human right that needs protecting is the right to security of person. Examples of corporate obligations that derive from people having this right would include obligations to protect executives and employees from safety hazards, and in some instances, to protect them from hostile actions by criminals, insurgents/freedom-fighters or nasty governments. From considerations of length, this subsection will concentrate on corporate obligations that result from the threat of hostile actions. The question that will concern us is whose security rights corporations ought to protect; I will argue that the obligation is restricted to stakeholders in the narrow sense, and only when those stakeholders are being stakeholders.

The corporate right that is implied by security obligations is the right to hire armed security personnel. The mention of a right of corporations to hire armed security personnel generally provokes three intuitive reactions. The first is that corporations should not have any such right; citizens do not have the right to carry arms in most countries, and many philosophers, such as Hobbes, have argued that the right to use force should be reserved to the government (presumably in the form of well-trained and accountable police officers). The second thought from many people is that of course corporations need security guards, and they often need to be armed. Brinks guards carry guns, for example, and if a company is

running a large chemical or fertilizer plant making potential explosives, then of course the security guards should be armed. The third thought is a realization that corporations are wealthy enough to afford full-scale armies – and indeed some corporations have security forces that amount to armies. Blackwater comes to mind, but also more legitimate corporations such as Shell Oil security operations in Nigeria (Drohan, 2003). If corporations have the right to hire armed security personnel, should there be limits to that right?

On the one hand, there is a major threat to human rights if armed corporations are capable of threatening the government or state, or if armed corporations become involved in civil wars, insurgencies or political unrest. If armed security guards threaten ordinary citizens or order them about – citizens are, after all, generally unarmed (except in the USA) – this in itself constitutes a violation of their basic rights to freedom. In short, there are legitimate concerns about the potential for armed corporations to violate human rights. The history of corporations in the eighteenth and nineteenth centuries (Micklethwait and Wooldridge, 2003; Perrow, 2002), and many twentieth-century examples in Central America, Africa and elsewhere give substance to these fears. On the other hand, to prevent other sorts of rights violations corporations need to secure dangerous property such as explosives; corporations need to have adequate security to conduct normal business tasks, such as the banks moving large amounts of cash securely; and corporations need to provide security to corporate employees and other people such as customers and suppliers when on corporate property. Consider, for example, the security we need and expect corporations to provide when we are flying in commercial airplanes.

On balance, I think we can summarize this by saying corporations should use arms only defensively to protect corporate property, and to protect people – but only when those people are being company stakeholders. A requirement to protect people when not stakeholders would involve corporations in political and security matters too extensively, that is, there would be too high a risk of corporate violations of human rights. The implications of this for corporate rights obligations is that corporations have no obligation to protect the security rights of any property but their own (or that which is entrusted to them) or of any people except narrowly defined stakeholders while they are stakeholders.

However, this position may still have problems. First, in some situations, especially in countries where the government is having difficulties keeping civil and political control, it could still authorize corporations to maintain full-scale armies; protecting petroleum pipelines in some parts of the world comes to mind. Second, it could involve corporations in fighting insurgents, or paying ransom to terrorist groups for kidnapped employ-

ees. And finally, it is vague on the question of obligations to stakeholders who are targeted because they are stakeholders but who are not currently being stakeholders, such as employees threatened by insurgents while the employee is not on duty. In short, the suggested limits on corporate obligations for the human right to security are a bit vague in some circumstances, but the circumstances cited as examples, such as kidnapped employees, are extreme ones that would prove very difficult under any approach.

3.5.4 Spending Corporate Resources on Human Rights Fulfilment

In some situations corporations may have obligations to spend money and use corporate resources to help fulfil people's human rights claims. Examples might include obligations to finance schools or hospitals (or pay school fees or health insurance costs) to fulfil people's basic education and healthcare rights.[8] If governments provide adequate education and healthcare, as they do in all developed countries except the USA, a corporation's obligation would be to pay its fair share of taxes to make this provision possible. However, in countries in which basic healthcare and schools are not provided by the state, a corporation would be under an obligation to pay school fees and health insurance. In Arnold's terms, we are here discussing the obligations (if any) of corporations to spend corporate resources on the fulfilment of basic subsistence rights, and possibly on aiding the fulfilment of aspirational rights.

Although he used different language, Milton Friedman's (1970) arguments imply that corporations do not have any obligations to enhance anyone's human rights except where there is direct benefit to the corporation that is equal to or more than equal to the costs incurred. Friedman would not oppose an employee literacy programme, for example, if that programme provides more efficient and cost-effective workers, or an AIDS awareness and treatment program if that programme helps retain a difficult-to-replace workforce. More difficult questions arise when it is suggested corporations should go beyond investing in health and education, and commit resources to enhance people's human rights without expectations of direct benefits to the corporation.

In countries without adequate basic education and healthcare services, people might want corporations to be responsible for these services, especially if corporations are the only organizations with the money, resources and management expertise to provide them. Basic healthcare and education are basic welfare rights, not aspirational rights, so it might be argued that corporations incur obligations to aid their fulfilment when governments cannot or will not supply them.

However, there are also serious concerns about corporations controlling

education and healthcare systems. Corporations have private purposes, and an education system designed merely to enhance those purposes would not ensure the right to an education. Corporate-sponsored doctors, clinics or even hospitals in most cases would not give corporations the opportunity or temptation to violate people's rights, but no affordable healthcare system is possible without considerable effort being put into preventive medicine, and that means public campaigns about lifestyles, including such intimate areas as sex, diet, smoking, alcohol consumption, childbirth and exercise. Allowing corporations the right to run large-scale lifestyle campaigns does give corporations both the opportunity and temptation to violate people's rights. For example, the reluctance of tobacco companies to widely publicize information they have on the harmful effect of cigarette addiction is a violation of people's right to security and healthcare. Experience has shown we cannot trust corporations not to violate such rights. The fact that corporations are private organizations with private purposes suggests that any lifestyle campaign they ran would depart from concerns about people's health and would become tangled up in corporate marketing and advertising campaigns driven by the corporation's private purposes.

On balance, corporations should not have the right to run healthcare and education systems if there is the possibility of well-run government systems. In a country without government systems, people should probably welcome corporate schools and clinics, but extending to corporations the right to run entire healthcare and education systems would be to invite private commercial purposes to control public goods with a serious risk of human rights violations as a result. I conclude that the responsibility of corporations to enhance the fulfilment of basic welfare rights and aspirational human rights is limited to specific projects and does not include any obligation to create or run large social systems. The exact nature of corporate obligations to enhance fulfilment of basic welfare and aspirational rights by funding specific projects is not established by the current argument; it may be supererogatory.

3.5.5 Ensuring Respect for Human Rights

The obligation to create a society in which no one's rights are violated and everyone has sufficient resources to exercise his or her rights is a government responsibility that, I argue in this section, does not extend to corporations. This conclusion is generally accepted in the literature on corporate human rights obligations, and is accepted by the Ruggie (2008) report. This section considers an argument as to why corporations should not be viewed as having this sort of obligation.

Since corporations have private purposes, usually involving maximizing their own or their shareholders' wealth, the law should not extend to corporations the rights necessary to create a specific type of society. We can expect massive violations of human rights – certainly of aspirational rights, but also of basic rights – if corporations pursued their purposes by creating social structures that enhance their own wealth. Only the rich and prosperous who own corporations would benefit. And the benefit to them would be only financial; it is quite possible that the rich and prosperous would suffer in terms of having their human rights threatened. Even rich people are worse off in terms of health, security, life expectancy and several other factors in societies with highly unequal distributions of wealth (Wilkinson and Pickett, 2010). Corporations cannot and should not try to control the overall nature of society. Therefore, human rights failures and violations that result from social structures are not a corporate responsibility.

However, corporations may have an obligation to work with governments, cooperate with them and never sabotage or undermine government programmes designed to ensure human rights; it is beyond the scope of this chapter to show that such an obligation exists, but if it can be established on other grounds, it is not limited or prohibited by the principle discussed here. Such an obligation to work with governments is not just a negative obligation to refrain from interference, but also an obligation to actively cooperate. Corporations, for example, should not avoid taxes that are essential to a nation's education system. In countries where governments have mandated that healthcare or healthcare insurance is the responsibility of employers, corporations should cooperate by paying these costs. The reason this obligation is not beyond the limits of corporate obligations is that the corporate rights necessary for corporations to cooperate with such government programmes do not extend beyond the right of corporations to conduct business within the law. It is the rights necessary for corporations themselves to build a society that ensure everyone's rights that are far too extensive. Corporations would have to become involved in and accountable for police, courts, prison systems, education systems, social welfare and many other aspects of our lives. This they should have no right to do because the private nature of corporate interests causes too high a risk of corporate human rights violations. Ruggie recognizes this limit on corporate human rights obligations when he reserves the 'duty to protect' human rights to governments, and assigns to corporations a 'responsibility to respect'.

3.6 BALANCING CORPORATE HUMAN RIGHTS OBLIGATIONS AND THE RIGHTS OF CORPORATIONS

This chapter has suggested that the human rights obligations of corporations should be limited by limits on the rights of corporations. It is probably uncontentious to claim that if corporations have obligations they ought to have the rights necessary to fulfil those obligations. However, the implications of this for the limits of corporate human rights obligations require further comment.

Earlier, this chapter rejected the idea of assessing corporate rights obligations by trying to balance the public goods of rights recognition with the private (or corporate) costs and benefits of the rights obligations. That balancing principle was rejected on the ground that rights are not about the greatest good, and should not be weighed in the balance with costs and benefits, especially the private costs and benefits of corporations. The balancing principle this chapter advocates is not liable to this criticism because it balances rights with rights. The balancing principle presented here suggests that we balance, on the one hand, the degree of human rights fulfilment and violation that will likely derive from assigning human rights obligations to corporations, with, on the other hand, the degree of human rights fulfilment and violation that will likely derive from assigning to corporations the rights they need to fulfil those obligations. This is to balance rights with rights, not rights with other goods, either public or private.

Any principle that advocates balancing two considerations raises the issue of whether there might be some meta-principle that helps identify the balancing point. In the present case, I think the answer is 'no'. The problem is that the likelihood of rights violations and fulfilment that would result from attributing to corporations either rights or rights obligations has a large empirical content; this is true despite the ever-present concern that for-profit corporations are created to fulfil private interests. To cite an example, the history of tobacco companies in North America is relevant to predicting possible human rights violations as those corporations turn their attention to marketing cigarettes in the third world. Their history and past record on human rights are likewise relevant for estimating the potential for human rights violations of mining, petroleum and other corporations. This empirical content raises the probability that the best balancing point between corporate rights and corporate human rights obligations may be different in different cultures and countries. For example, the human rights benefits and risks of allowing corporations to lobby governments in secret may be very different in stable liberal democracies than in dictatorships, oligarchies or even democracies with

weak governments. This is a major concern for specific applications of the approach used in this chapter because it is often the same TNCs that operate in many different types of societies.

Such operational difficulties raise questions about the balancing principle and who should be influenced by it and for what purpose. Most importantly, ethicists who try to make impartial assessments of corporate human rights obligations should be mindful of the principle; the approach clarifies the intuition that there are significant limits to the human rights obligations that should be assigned to corporations, and that the human rights obligations of corporations are significantly different in extent and kind from those of governments. This helps clarify the philosophical grounds for Ruggie's distinction between the duty of governments to protect human rights and the responsibility of corporations to respect them. It follows from this that the principle should be of interest to such people as TNC executives, trade treaty negotiators and UN agencies as they try to work out the agreements, codes and practices that need to emerge from Ruggie's efforts. In particular, it highlights an issue that should concern legislators, lawyers and judges who define the legal rights of corporations.

3.7 CONCLUSION

The extension of human rights obligations to corporations raises questions about whose rights and which rights corporations are responsible for. This chapter gives a partial answer by asking what legal rights corporations would need to have to fulfil various sorts of human rights obligations. We should compare the chances of human rights fulfilment (and violations) that are likely to result from assigning human rights obligations to corporations with the chances of human rights fulfilment (and violations) that are likely to result from giving corporations the rights needed to undertake those human rights obligations.

The obligation to refrain from violations of the basic rights to security, freedom and participation requires that corporations enjoy only those rights to conduct business as an economic entity.[9] Since extending those rights to corporations is necessary for them to function and do not pose any increased risk of corporate human rights violations, corporations should be viewed as having obligations to respect the basic human rights of all people. These obligations often require expenditure of corporate resources, and should not be viewed as simply side constraints on corporate actions.

The obligation for corporations to avoid complicity in human rights

violations committed by other entities, especially governments, requires corporations to have political rights, including freedom of speech and the right to lobby governments. If such political rights are exercised publicly, the risk of corporate violations of human rights is minimal. If corporations have the right to lobby governments in secret, the risk of corporate human rights violations greatly increases. Corporate rights to actions that fall between complete publicity and complete secrecy would have to be assessed separately in a similar fashion.

If corporations have an obligation to protect people's basic human rights to physical security, corporations need to have the right to hire armed security personnel. However, the wealth of corporations is such that the exercise of this right in some circumstances could involve the creation of private armies. This would create a very high risk of corporations violating human rights in pursuit of their private interests. Therefore, the corporate right to hire armed security personnel should be limited to protecting corporate property and narrowly defined stakeholders while they are stakeholders.[10] Hence, corporate obligations to protect human rights are similarly limited.

An obligation on corporations to fulfil basic and/or aspirational welfare human rights would involve corporations in using corporate resources to create and run healthcare and education systems in countries where the government does not organize such systems. In general, because corporations have entirely private purposes, extending to corporations the right to organize social systems poses a high risk of corporate human rights violations. Without these rights, corporate obligations to enhance welfare rights should be confined to contributing to schools, school fees, hospitals and other specific projects.

Corporations have no obligation to ensure human rights. To have such obligations, corporations would need many rights that ought to be reserved only for governments. In this sense, the principle discussed in this chapter supports Ruggie's distinction between the government duty to protect human rights and the corporate responsibility to respect them. And it supports our intuition that corporations ought to not have the same human rights obligations as governments because that would require corporations to have far too much power.

I conclude, therefore, that corporate human rights obligations are limited by limits on the rights corporations would need to have in order to fulfil the obligation.

NOTES

1. By comparing GDP to total corporate revenue; see KasandraProject (2007).
2. Sumner (1987) thinks rights and rights obligations can be extended to collectives (pp. 209–11), but he does not mention corporations in particular, and it is not obvious how his extension would apply to them.
3. See Donaldson and Dunfee (1994, 1995) on the problem of bounded rationality in business ethics, and Mitchell (2009) on the complexity (in the technical sense) of cost/benefit analysis.
4. In the Preamble, the UN Declaration does assign human rights obligations to 'every individual and every organ of society', but it does not itself specify anywhere how rights obligations apply to 'organs', and organs are not mentioned again in the Declaration.
5. See also Lane (2004).
6. See also Muchlinski (2001).
7. This paragraph ignores the slight complication of the definitional rights of corporations; see Bishop (2008).
8. See Articles 26 and 25 of the UN Universal Declaration of Human Rights.
9. Bishop (2008) refers to these as definitional rights.
10. Compare with Voluntary Principles on Security and Human Rights (2011).

REFERENCES

Archard, D. (2004). 'Welfare rights as human rights', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Dordrecht: Kluwer, pp. 45–62.

Arnold, D.G. (2006). 'Corporate moral agency', *Midwest Studies in Philosophy*, **XXX**, 279–91.

Arnold, D.G. (2010). 'Transnational corporations and the duty to respect basic human rights', *Business Ethics Quarterly*, **20**(3), 371–99.

Arrow, K.J. (1951). *Social Choice and Individual Values*, New York: Wiley & Sons.

Bishop, J.D. (2000). 'A framework for discussing normative theories of business ethics', *Business Ethics Quarterly*, **10**(3), 563–91.

Bishop, J.D. (2008). 'For-profit corporations in a just society: a social contract argument concerning the rights and responsibilities of corporations', *Business Ethics Quarterly*, **18**(1), 191–212.

Campbell, T. (2004a.) 'Introduction', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Dordrecht: Kluwer. pp. 1–8.

Campbell, T. (2004b). 'Moral dimensions of human rights', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Dordrecht: Kluwer, pp. 11–30.

Copp, D. (2000). 'Capitalism versus democracy: the marketing of votes and the marketing of political power', in J.D. Bishop (ed.), *Ethics and Capitalism*, Toronto: University of Toronto Press, pp, 81–101.

Cragg, W. (2000). 'Human rights and business ethics: fashioning a new social contract', *Journal of Business Ethics*, **27**, 205–14.

Cragg, W. (2004). 'Human rights, globalisation and the modern corporation', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Dordrecht: Kluwer, pp. 105–28.

Cragg, W. (2010). 'Ethics, human rights and the modern multnational corporation', Paper presented at the CBERN Business and Human Rights workshop, York University, February.
Donaldson, T. and T.W. Dunfee (1994). 'Toward a unified conception of business ethics: integrative social contracts theory', *Academy of Management Review*, **19**(2), 252–84.
Donaldson, T. and T.W. Dunfee (1995). 'Integrative social contracts theory: a communitarian conception of economic ethics', *Economics and Philosophy*, **11**, 85–112.
Donaldson, T. and T.W. Dunfee (1999). *Ties that Bind: A Social Contracts Approach to Business Ethics*, Boston, MA: Harvard Business School Press.
Douzinas, C. (2000). *The End of Human Rights: Critical Legal Thought at the End of the Century*, Oxford: Hart.
Drohan, M. (2003). *Making a Killing: How and Why Corporations Use Armed Force to do Business*, Toronto: Random House Canada.
Dworkin, R. (1977). *Taking Rights Seriously*, Cambridge, MA: Harvard University Press.
French, P.A. (1979). 'The corporation as a moral person', *American Philosophical Quarterly*, **16**(3), 207–15.
Friedman, M. (1970). 'The social responsibility of business is to increase its profits', *New York Times Magazine,* pp. 32–3, 122, 126.
Griffin, J. (2004). 'Human rights: whose duties?', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Dordrecht: Kluwer, pp. 31–44.
Hess, D. and T.W. Dunfee (2007). 'The Kasky-Nike threat to corporate social responsibility: implementing a standard of optitmal truthful disclosure as a solution', *Business Ethics Quarterly*, **17**(1), 5–32.
Hillemanns, C.F. (2003). 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', *German Law Journal*, **4**(10), 1065–80.
Horwitz, M.J. (1977). *The Transformation of American Law, 1780–1860*, Cambridge, MA: Harvard University Press.
Hsieh, N.-h. (2009). 'Does global business have a responsibility to promote just institutions?', *Business Ethics Quarterly*, **19**(2). 251–74.
KasandraProject (2007). 'Killer corporations: numbers and economy', available at http://kassandraproject.wordpress.com/2007/12/23/killer-corporations-numbers-and-economy/ (accessed 24 July 2008).
Lane, M. (2004). 'Autonomy as a central human right and its implications for the moral responsibilities of corporations', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Dordrecht: Kluwer, pp. 145–63.
Malcolm, J. (1994). 'Do corporations have rights?', Unpublished thesis, Murdoch University.
Mayer, C.J. (1990). 'Personalizing the impersonal: corporations and the Bill of Rights', *Hastings Law Journal*, **41**, 577–667.
Mayer, D. (2007). 'Kasky v. Nike and the quarrelsome question of corporate free speech', *Business Ethics Quarterly*, **17**(1), 65–96.
Micklethwait, J., & Wooldridge, A. 2003. *The company: A short history of a revolutionary idea*. New York: Modern Library.
Mitchell, S. D. 2009. *Unsimple truths: Science, complexity, and policy*. Chicago;

London: The University of Chicago Press Chicago and London.
Monbiot, G. 2006. *Heat: How to stop the planet burning*. London: Allen Lane.
Muchlinski, P. 2001. Human Rights and Multinationals: Is there a Problem? *International Affairs*, 77: 31–47.
Ostas, D. T. 2007. The Law and Ethics of K Street: Lobbying, the First Amendment, and the Duty to Create Just Laws. *Business Ethics Quarterly*, **17**(1): 33–64.
Perrow, C. 2002. *Organizing America: Wealth, power, and the origins of corporate capitalism*. Princeton, NJ: Princeton University Press.
Ruggie, J. (2008). *Protect, Respect and Remedy: A Framework for Business and Human Rights*, United Nations Doc. A/HRC/8/5, 7 April.
Scherer, A.G. and G. Palazzo (2007). 'Toward a political conception of corporate responsibility – business and society seen from a Habermasian perspective', *Academy of Management Review*, **32**, 1096–120.
Shue, H. (1980). *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Princeton, NJ: Princeton University Press.
Sumner, L.W. (1987). *The Moral Foundation of Rights*, Oxford: Clarendon Press.
Voluntary Principles on Security and Human Rights (2011). 'The Voluntary Principles on Security and Human Rights', available at http://www.voluntaryprinciples.org/principles/ (accessed 10 June 2011).
Wettstein, F. (2010). 'The duty to protect: corporate complicity, political responsibility, and human rights advocacy', *Journal of Business Ethics*, **96**(1), 33–47.
Wilkinson, R.G. and K. Pickett (2010). *The Spirit Level: Why Greater Equality Makes Societies Stronger*, New York: Bloomsbury Press.
Zinnbauer, D. (2009). 'Corrupting the rules of the game: from legitimate lobbying to capturing regulation and policies', in Transparency International (ed.), *Global Corruption Report 2009*, Cambridge: Cambridge University Press, pp. 32–9.

4. Silence as complicity: elements of a corporate duty to speak out against the violation of human rights

Florian Wettstein*

4.1 INTRODUCTION

'The vast majority of corporate rights violations,' as Stephen Kobrin (2009, p. 351) observes, 'involve complicity, aiding and abetting violations by another actor, most often the host government.' Kobrin's claim certainly seems plausible. In an increasingly interconnected world our actions affect the lives of others in ever more profound ways. Thus, increasingly we may contribute to harm without being aware of it, or at least without intending to do so. It is in the very nature of complicity that it falls 'outside the paradigm of individual, intentional wrongdoing' (Kutz, 2000, p. 1). The problem deepens if we are not merely looking at the actions of individuals, but at those of organizations that operate globally and on a large scale, such as multinational corporations. Corporations may become complicit in human rights violations although they are not doing anything wrong in a conventional sense or engaging in any unlawful conduct (Brenkert, 2009, p. 459; Ratner, 2001, p. 501); they may simply be going about their business. This contributes to the pervasiveness of corporate complicity and renders it notoriously hard to grasp and, not least, to condemn. The very nature of wrongdoing is changing in the process of today's globalization.[1]

The changing nature of wrongdoing in the global age must be followed by our rethinking of the parameters of moral responsibility. The fact that corporations often contribute to wrongdoings in the course of their 'regular' business conduct rather than by engaging in some specific, overt and deliberate harmful activity, poses new challenges to our moral intuition and our natural sense of justice. This is why cases of corporate complicity are in a sense symptomatic for our time; they require us to rethink some of the certainties of the Westphalian age and to come up with new normative visions and concepts to deal with the new problems with which we are faced in a transnational world.

In this contribution I will show that the application of the concept of silent complicity in particular challenges conventional interpretations of corporate responsibility in profound ways. Silent complicity may appear as the least significant form of complicity simply because it does not involve an active contribution by the corporation to a specific wrongdoing. Perhaps this is why its momentous conceptual and normative implications are readily overlooked. At a closer look, acknowledging a corporation's silence as a form of complicity implies a far-reaching statement about the nature of corporate responsibility in general. This is why silent complicity merits careful study.

Specifically, I will show that silent complicity, as it is commonly defined and referred to in the relevant practical and academic debates, hinges on the existence – and subsequent violation – of positive moral obligations, rather than the merely negative duty to do no harm. More precisely, the obligation to avoid silent complicity requires that corporations which risk to become silently complicit speak out with a view to helping to protect potential or actual victims from human rights abuse. In this respect, silent complicity is distinctly different from all other forms of complicity.

The aim of this chapter is to assess under what conditions it is plausible to speak of corporations as silently complicit in human rights abuses and, thus, under what circumstances such a positive duty to speak out can be assumed. For this purpose, my argument must be based on several presuppositions and, accordingly, advances its claims in hypothetical form. First, my argument hinges on the assumption that, very generally, human rights impose direct moral obligations on corporations. Recent contributions to the debate have shown that such an argument can plausibly be made (see, for example, Arnold, 2010; Campbell, 2006; Cragg, 2010; Wettstein and Waddock, 2005) and I will abstain from repeating it here. Second, if we assume that corporations do have direct human rights obligations, then the obligation not to be complicit in any form of human rights violations must necessarily be included among them. Third, if we hold that silence can, in principle, denote a form of complicity, the obligation not to be complicit in human rights violations logically includes also silent complicity.

If we hold these assumptions to be valid, then the application of the concept of silent complicity to corporations implies, as a matter of consistency, that such corporations have a positive obligation to help protect the victims of human rights violations – often in opposition to and by putting pressure on perpetrating host governments. This arguably is a controversial claim. Not only does it challenge the more common perception that corporate human rights obligations are to be limited to the negative realm, but it also seems that such a corporate duty to help protect[2] human rights

goes against the defining assumptions of the waning Westphalian era: state-centrism, state sovereignty and non-interference.

Therefore, it is the aim and purpose of this contribution to shed more light on the conditions under which a corporation's failure to speak out in the face of human rights abuse can indeed be said to amount to complicity. The literature on corporate complicity in general has grown steadily in the past few years and includes normative (see, for example, Brenkert, 2009; Hoffman and McNulty, 2009; Kline, 2005) and legal (see, for example, Clapham, 2006; Clapham and Jerbi, 2001; Ramasastry, 2002; Ratner, 2001) analyses of the concept, as well as analyses from the standpoint of political science (see, for example, Kobrin, 2009). However, the particularities of silent complicity have hardly been studied and dealt with at all so far. It is true that many major policy papers (see, for example, United Nations, 2008a) and initiatives (for example, United Nations Global Compact), as well as some academic writings on complicity (see, for example, Clapham and Jerbi, 2001; Kline, 2005; Ramasastry, 2002; Tripathi, 2005) have referred to or made use of the concept of silent complicity. However, none has analysed systematically and in sufficient detail the conditions under which agents can indeed be said to be guilty of it. While at least some have tied silent complicity to certain requirements such as presence, authority and/or status (Clapham and Jerbi, 2001, p. 344; United Nations, 2008a, p. 12), none has embedded them in a holistic theory or even sufficiently (or at all) clarified why and how such requirements ought to be seen as relevant for establishing silent complicity. Given the profound normative implications of silent complicity and its increasing practical relevance in a rapidly globalizing world, the lack of attention it has received in academic literature is striking.

In what follows, I argue that for a corporation to become silently complicit four conditions must be fulfilled: voluntariness, connection to the human rights violation, power to significantly influence the perpetrator and a certain social or political status. These four conditions derive from two constitutive requirements underlying the concept of silent complicity, which I will call the 'omission requirement' and the 'legitimization requirement,' respectively. All four conditions need to be met for silent complicity to occur.

In the first step of my argument, I will deal with some definitional aspects and outline the two constitutive requirements mentioned above. In the second step, I will derive the four conditions from the two constitutive requirements and reflect on them in the corporate context. In the third step, I will illustrate my argument with the practical example of Shell's role in Nigeria during the 1990s. I then respond to the claim that speaking out against human rights abuses would constitute illegitimate interference

with a host country's sovereignty. I conclude the chapter with some brief reflections on legitimate corporate human rights advocacy; specifically, I will outline four safeguards to protect the public interest when corporations engage in such overtly political activity.

4.2 SILENT COMPLICITY AND THE MORAL DUTY TO HELP PROTECT

Corporate complicity is commonly defined as 'aiding and abetting' in the violation of human rights committed by a third party (see, for example, Clapham and Jerbi, 2001, p. 340; Kobrin, 2009, p. 351; Ramasastry, 2002, p. 95). Aiding and abetting is to be interpreted broadly; it includes not merely direct involvement of corporations, but also various forms of indirect facilitation.

Thus, corporate complicity can be categorized by the nature of its contribution to the wrongdoing in play. The literature on the topic commonly refers to four different forms of complicity: direct complicity, indirect complicity, beneficial complicity and silent complicity (see, for example, Clapham, 2006, pp. 220–5; Clapham and Jerbi, 2001; Ramasastry, 2002).[3] While direct complicity implies direct involvement of the corporation in a human rights abuse, indirect complicity involves mere facilitation, that is, an indirect contribution to the general ability of a perpetrator to commit human rights violations. There is increasing agreement that the scope of complicity may extend beyond active assistance given to a primary perpetrator. Cases of beneficial complicity, for example, do not require an active contribution by the corporation, but merely that the corporation directly or indirectly benefits from the violation of human rights. In the case of silent complicity, even 'merely' standing by while human rights are violated is increasingly perceived as a form of complicity.

In contrast to other, more 'conventional' forms of complicity, silent and in most cases also beneficial complicity are not established by a corporation's active contribution, but by its passive stance toward the violation of human rights. Knowingly looking the other way while the most basic rights of human beings are trampled underfoot by a host government can constitute not merely indifference, but actual support. In such cases, silence can have a potentially legitimizing or encouraging effect on a perpetrator, which in turn grounds the accusation of silent complicity (see, for example, United Nations, 2008a, p. 12).[4] For John M. Kline (2005, p. 79), silent complicity 'suggests that a non-participant is aware of abusive action and, although possessing some degree of ability to act, chooses neither to help protect nor to assist victims of the abuse, remaining content

to meet the minimal ethical requirement to do no (direct) harm.' Hence, moral blame in cases of silent complicity is not attached to certain harmful actions conducted by the corporation, but to its failure to give assistance to those in need when it is in a position to do so. In short, the main difference between silent complicity and most other forms of complicity[5] is that its moral basis is not commission, but omission.

The normative implications of this insight are far-reaching. Omission denotes a failure to act in response to wrongdoing. Thus, rather than to merely passively refrain from specific harmful actions, the agent in danger of becoming silently complicit is under a moral obligation to confront and possibly counteract the wrongdoing. If silence renders companies complicit, speaking out to help protect the victims is what is required to diffuse such allegations. The claim that a corporation is silently complicit in human rights violations, as Wiggen and Bomann-Larsen (2004, p. 11) conclude, implies that it is guilty of omitting to fulfill an actual positive duty.

A positive duty goes beyond the mere avoidance of doing harm to others; it includes an obligation to come to the victims' help or assistance. Thus, the obligation to avoid silent complicity, as pointed out in Kline's definition quoted above, implies a duty to 'help protect' or to 'assist victims of the abuse' (Kline, 2005, p. 79). Specifically, as Andrew Clapham and Scott Jerbi (2001, pp. 347–48) point out, silent complicity 'reflects the expectation on companies that they raise systematic or continuous human rights abuses with the appropriate authorities.' This is by any means a far-reaching claim. It challenges the common assumption that the moral obligations of corporations ought to be limited to the negative realm of doing no harm and, in a sense, associates them with actions and responsibilities that we normally hold to be the exclusive domain of governments. It is thus not surprising that silent complicity is noted as the 'most controversial type of complicity' by the UN Global Compact.[6]

In sum, there are two constitutive requirements that need to be fulfilled in order for an agent to be guilty of silent complicity: first, the agent must have failed to speak out and help protect the victims. I will call this the 'omission requirement.' Second, the omission of this positive duty must have a legitimizing or encouraging effect on the human rights violation and the perpetrator who is committing it. I will call this the 'legitimization requirement.' This, in turn, raises the question: under what conditions can corporations indeed be said to be silently complicit in a host government's human rights abuse? That is, under what circumstances or conditions can these two requirements plausibly be said to be fulfilled? In what follows I will assess both requirements separately. The 'omission requirement' I will argue, hinges on one general and two qualified conditions, while the 'legitimization requirement' depends on a fourth condition.

4.3 ASSESSING THE 'OMISSION REQUIREMENT': ELEMENTS OF A POSITIVE DUTY TO SPEAK OUT AGAINST THE VIOLATION OF HUMAN RIGHTS

A first important distinction that needs to be drawn in order to assess the 'omission requirement' is the one between negative and positive duties. A negative duty is a duty to do no harm while a positive duty is a duty to assist or 'help persons in [acute] distress' (Pogge, 2002, p. 197). Thus, a negative duty is a duty not to make a situation worse while a positive duty is a duty to improve a given state of affairs. Negative duties are commonly seen as stricter than positive ones (Scheffler, 2001, p. 37; see also Rawls, 1971, p. 98), which is at the root of the controversy surrounding any argument that assigns positive duties to corporations.[7]

The distinction between negative and positive duties is not to be confused with the one between passive and active duties. Passive duties command us to merely abstain from certain (harmful) activities while active duties require us to actively perform specific actions. Negative duties can be active or passive. Doing no harm may be as simple as abstaining from actively hurting someone (passive), but, depending on the situation, it may also require actively eliminating risks or dangers to others, such as cutting the tree in one's yard that threatens to fall onto the sidewalk. Passive duties are always negative, since passively abstaining from specific actions is obligatory only if those actions are harmful to others (or, in some cases, to oneself). As a consequence, positive duties are always active.[8]

In his seminal work *Basic Rights* (1996), Henry Shue further specified those different duties for the specific context of human rights. He divided human rights obligations into duties to respect, duties to protect and duties to realize human rights.[9] Duties to respect human rights are negative duties; they command us not to directly or indirectly violate human rights. Accordingly, they can be either active or passive. A passive duty to respect demands that we abstain from actions in violation of human rights; an active duty to respect requires us to seek to eliminate or reduce dangers and threats within our sphere of influence or responsibility. Positive duties, then, include duties to protect and duties to realize human rights. Both of them demand that duty-bearers take active measures to come to the victims' assistance.

The duty to speak out against human rights violations is a positive duty. That is to say, it is a duty to speak out to help protect the victims. Thus, implicitly, as Kline's definition above makes clear, the duty to speak out is based on the expectation that doing so might potentially influence the perpetrator's actions. It is from this perspective that commonly the duty

to speak out is not perceived merely as a duty to make a statement, but as a broader duty to address the issue with the appropriate authorities. For Tom Campbell (2006, p. 258), for example, 'it must be part of the obligations of MNCs to do what they can to place pressure on abusive governments.'[10] In other words, an agent in danger of becoming silently complicit is not asked necessarily to withdraw from the respective country, nor to merely issue a public condemnation,[11] but to use its influence to attempt to alter the actions or policies of a perpetrator or a potential perpetrator. For former UN High Commissioner for Human Rights, Mary Robinson, the increasing use of the notion of silent complicity 'reflects the growing acceptance . . . that there is something culpable about failing to *exercise influence*' in circumstances of 'systematic or continuous human rights abuses' (quoted in Clapham, 2006, p. 221, emphasis added). Similarly, for the International Council on Human Rights Policy (2002, p. 133, emphasis added) silent complicity implies that 'A company is aware that human rights violations are occurring, but does not intervene with the authorities to *try and prevent or stop the violations*.'

Thus, silent complicity presupposes corporate human rights obligations that reach beyond the realm of doing no harm. This conflicts with the limited view on corporate human rights obligations that has dominated the current debate on business and human rights (see, for example, Arnold, 2010; Hsieh, 2009), a view that has been confirmed and reasserted by the UN Secretary-General's Special Representative on Business and Human Rights (SRSG), John Ruggie. The result is that his proposed UN Framework locates corporate human rights obligations exclusively in the category of negative duties to respect.[12] Duties to protect and to realize human rights, as a consequence, are presented as the exclusive domain of governments (see United Nations, 2008b, p. 4).

Ruggie's main report questions the case for legal liability for silent complicity (United Nations, 2008b, p. 21). Peculiarly, however, it seems not to rule out the application of the concept of silent complicity to corporations from a moral point of view, despite the limited view on corporate human rights obligations. Rather, referring to the UN Global Compact, the so-called companion report lists silent complicity among those forms of aiding and abetting in which corporations ought to avoid being implicated (see United Nations, 2008a, p. 17). Ruggie does indicate that the companion report merely aims at clarifying how complicity relates to and fits into the merely negative corporate responsibility to respect human rights (United Nations, 2008a, p. 1). However, it seems that if we limit corporate obligations to the negative realm of respecting human rights, then we eliminate the possibility of silent complicity as described above. On the other hand, if we hold that silent complicity is a real possibility for

companies, we must expand our view on corporate obligation beyond the negative realm and at least contemplate corporate obligations also in the category of the duty to protect.

In order to determine under what circumstances corporations are indeed violating a positive duty to help protect (that is, meet the first constitutive requirement for silent complicity), we must know something about the conditions and criteria that underlie moral duties in general. Such conditions generally get more extensive when moving from passive to active duties and from negative to positive ones.

Generally, for there to be a passive negative duty to do no harm, only one condition needs to be fulfilled, which is that an agent has some level of autonomy to act. It is against this background that the passive negative duty to do no harm is of a general nature and of universal reach; it applies to everyone at the same time and to the same extent. I will refer to this as the criterion of voluntariness. Second, for a negative duty to become active there must be a morally significant connection between the respective agent and the human rights violation. In contrast to passive duties, active duties (negative or positive) are specific and dependent on the context and situation; they apply to particular agents to varying degrees and extent. However, for active duties to apply to some agents but not to others, there must be something that specifically links those agents to the human rights violations at stake. I will call this the connection criterion. For there to be a positive duty to help protect, these two conditions must be complemented with a third one; a positive duty to improve a given state of affairs presupposes that a duty-bearer has the power to exert influence on the situation in a positive way. Thus, I will refer to this as the criterion of influence/power. The first two conditions aim at the non-violation of human rights, which means that they can be justified on a deontological basis. The third condition, however, aims at the improvement of a given situation. Thus, its justification or plausibility requires at least some sensitivity to consequences (not, however, consequentialism). Let us analyse all three conditions in more detail.

4.3.1 Voluntariness

Passive negative duties apply to all responsible individuals at all times and to the same extent; we all have the same duty to abstain from harming others. For any rational, adult human being this responsibility can only be mitigated or eliminated if the action causing harm is not freely chosen or if the harmful consequences are not foreseeable. Thus, moral responsibility, as opposed to mere causal responsibility, depends on autonomous and thus voluntary or intentional action. We can only be held morally

responsible for actions we freely and willingly choose, but not for those over which we have no control or which we are forced to commit. As Iris Marion Young argued correctly:

> If candidates for responsibility can demonstrate that their causal relation to the harm was not voluntary, that they were coerced or that they were in some other way not free, then their responsibility is usually mitigated if not dissolved. When the agents are causally and freely responsible, however, it is appropriate to blame them for the harmful circumstances. (Young, 2003, p. 40)

We generally distinguish between two kinds of unfreedom, which tend to mitigate or resolve moral responsibility. First, our autonomy can be impaired internally due to mental or psychological conditions. In such cases, we may not be fully in control of our own actions. Second, there can be external restrictions for autonomous action. Such external restrictions may come in the form of coercion, that is, by the use of force or credible threats, on the one hand, or as a lack of alternatives, on the other. With regard to the latter case, whether or not we are able to act freely is frequently seen as a matter of having viable alternatives from which to choose (Gosepath, 2004, pp. 54–5). This condition is also known as the 'principle of alternate possibilities.'[13] The viability of alternatives and thus the question whether or not action can be considered truly free also depend on the normative burden or, in Kant's (1996, pp. 19ff.) words, 'obstacles,' which they present to us:

> Subjectively, the degree to which an action can be imputed (imputabilitas) has to be assessed by the magnitude of the obstacles that had to be overcome. – The greater the natural obstacles (of sensibility) and the less the moral obstacle (of duty), so much the more merit is to be accounted for a good deed, as when, for example, at considerable self-sacrifice I rescue a complete stranger from great distress. (Kant, 1996, p. 19)

Thus, for a course of action to be considered a viable option or alternative, the obstacles which it presents to the agent must not be unreasonably high in relation to the fundamentality of the moral obligation at stake. The more fundamental the obligation we are looking at, the less weight the argument of normative cost connected to fulfilling it will carry. Thus, in order to nullify moral responsibility for a harmful action in the category of passive negative duties, one would have to show that the normative cost of abstaining from that action greatly outweighed the negative obligation to do no harm. Considering the primacy of the do no harm principle, such attempts succeed only very rarely. Or, formulated differently, our obligation not to harm others holds even at considerable cost to ourselves.

This is the case particularly where obligations as fundamental as the ones deriving from human rights are weighted against mere utilitarian considerations. This is not to say that there are no thinkable cases in which the normative burden of avoiding to do harm may be too high for a specific agent. Perhaps the most evident and intuitive example is that of harm committed in self-defense, that is, cases in which one's own life may be severely threatened. However, generally, normative burden considerations become more relevant and important when dealing with positive, rather than negative duties.

4.3.2 Connection

For there to be an active negative duty, voluntariness must be combined with connection. As pointed out earlier, silence turns into complicity only if, based on the perception of implicit endorsement or approval, it has a legitimizing or encouraging effect on the wrongdoing. This, it seems, presupposes a significant connection between the agent and the human rights violation. After all, the very claim that agents have an active duty to disassociate themselves from a particular human rights violation or its perpetrator already implies that there is an actual connection that links them to the violation in a morally relevant way. The crucial question is what qualifies connections as morally significant in this context of silent complicity. Generally, we can distinguish between two categories of connections: an agent can either be actively connected or passively connected to the violation. Active connection essentially means actual involvement, that is, the agent actively contributes to the violation of human rights committed by the primary perpetrator. However, such cases of active involvement belong to the category of direct complicity, which establishes a passive negative obligation to do no harm. In such cases, active involvement or contribution to the human rights violation is the problem, rather than the agent's silence. Hence, the connections that are relevant for silent complicity are of the passive kind. A passive connection as the Office of the High Commissioner for Human Rights (2004, p. 18, emphasis added) argues correctly, requires association, rather than involvement: 'A company is complicit in human rights abuses if it authorises, tolerates, or knowingly ignores human rights abuses committed by an entity *associated with it*.'

The most common and relevant kind of passive association is established through benefit. In other words, an agent may be linked to the human rights abuse by directly or indirectly benefitting from it. While benefit is often dealt with separately under the category of 'beneficial complicity,' it can serve as a condition also for the further claim of silent complicity.[14] However, benefit is not the only way a company can be

associated with human rights violations. Such a connection can be established also through special relationships between the company and either the victims (for example, employees) or the perpetrator. Moreover, the state may be perceived as acting on behalf or in the name of the company; alternatively, protecting a company's interests may be (part of) the actual reason for a host government to violate rights. For example, in 2005, soldiers from the Nigerian Joint Task Force opened fire on demonstrators who protested against Chevron for allegedly breaking an agreement to provide jobs and development for the local community in which it operated. Chevron may or may not have benefitted from the crackdown. Even in the absence of benefit, however, the evident link between the protesters and the corporation would be enough to establish a morally significant connection. A recent cover story by the *New York Times* about 'one of the authorities' newest tactics for quelling dissent' in Russia provides a second example (Levy, 2010b, pp. 1–15). Russian police allegedly engaged in a systematic campaign to confiscate the computers of government-critical advocacy groups under the pretense that they contained unlicensed Microsoft software. What was particularly concerning about the raids was that they rarely if ever targeted pro-government groups and that computers were seized even in cases where they did not contain illegal software, giving rise to the suspicion that these investigations were politically motivated. At least in some of these incidents Russian authorities claimed to be acting on behalf and in the name of Microsoft, which prompted some groups to argue that 'Microsoft needed to issue a categorical public statement disavowing these tactics.' In such cases, the company indeed seems to have a duty to disassociate itself from the government's actions; silence will likely be perceived as support or endorsement, even if the company never gave its explicit approval for the human rights violation.[15] In response to the cover story run by the *New York Times*, Microsoft not only distanced itself from the stance of the Russian authorities and asked them to drop pending inquiries, but distributed free software licences to more than 500,000 advocacy groups, independent media outlets and non-governmental organizations (NGOs) in 12 countries with repressive governments, which effectively eliminated the legal basis for such investigations (Levy, 2010a, p. 6).

4.3.3 Influence/Power

While voluntariness and connection are necessary conditions for there to be a moral obligation for a company to speak out against human rights abuse, they merely establish a negative obligation for the company, that is, an obligation to disassociate itself from the perpetrator and its harmful

actions. However, on their own, these two conditions are insufficient to establish a positive duty to speak out to help protect the victims. For the company to have a positive obligation to speak out, it must be in a position to exert pressure or influence for the purpose of improving the situation of the victims.

As seen above, the condition of voluntariness derives from the general philosophical principle of 'ought implies can.' Attaching moral blame to a specific deed or action committed by an agent presupposes that the respective agent has the possibility or ability to act otherwise, that is, he voluntarily chooses to act the way he does. In the realm of positive obligations, this principle of 'ought implies can' must be reinterpreted in a consequence-sensitive way. For an agent to have positive obligations he must have the capacity or potential, that is, the alternative or option, to influence the situation in a positive way. This ability to have a positive impact by influencing the behavior of an actual or potential perpetrator is what we commonly associate with the concept of power (see, for example, Strange, 1996, p. 17).[16]

Hence, for a corporation to have a positive duty to address human rights violations with the appropriate authorities in a host country, its opposition to and condemnation of the human rights violation must matter to the actual or potential perpetrator. It must be important enough to raise a real possibly that the perpetrator will reconsider and change his or her problematic actions or policies.[17] Here is where the discussion of the normative burden becomes relevant. For there to be a positive obligation to confront a potential or actual perpetrator, the agent's normative burden, for example, in the form of retaliation by the perpetrator, must not be prohibitive.

While silent complicity presupposes the existence of a positive duty to come to the victims' assistance, failure to speak out does not necessarily and by itself signify that a corporation is silently complicit. To be silently complicit, failure to speak up must help to legitimize the violation or have an encouraging effect on the perpetrator. This constitutes the 'legitimization requirement,' which is the fourth and final condition for silent complicity.

4.4 ASSESSING THE 'LEGITIMIZATION REQUIREMENT': SOCIAL OR POLITICAL STATUS

The legitimization requirement consists of two elements. First, an agent's silence must imply implicit endorsement of the human rights violation.

Second, this implied endorsement must serve to legitimize or encourage the violation. The implied endorsement derives from the combination of voluntariness, connection and power as discussed above. Hence, an agent who is connected to the human rights violation and would be in a sufficiently powerful position to speak out against it can be perceived as endorsing it, if she chooses not to speak out. In order for an agent's implied endorsement to add legitimacy to the incident, her stance on the issue must carry some weight in the public perception. For this to be the case, the agent must be of a certain status or standing. This may involve high social regard and prestige. It may imply that the agent is representative of society or a relevant subset thereof. In the so-called companion report, SRSG John Ruggie makes a similar claim by evoking insights from criminal law:

> In international criminal law, individuals have been convicted of aiding and abetting international crimes when they were silently present at the scene of a crime or in the vicinity of a crime. However, in these cases presence was only one factor that led to a finding that the individuals' acts or omissions had a legitimizing or encouraging effect on the crime in the specific context, and all of the accused also had some form of *superior status*. (United Nations, 2008a, p. 12, emphasis added)

There is little doubt that corporations can acquire the kind of social status that is necessary to meet the legitimization requirement, both in principle and in practice. Branding has turned corporations like Apple or Nike into icons not only of Western consumerist societies but on a worldwide scale. Subsequently – and not surprisingly – the management of prestige and reputation has become a core concern especially of large, global businesses today. In her book *No Logo* (Klein, 2000), Naomi Klein helps us understand corporate brands as one of the main sources of corporations' social influence and power in today's day and age.[18] This phenomenon is not entirely new; by 1946, Peter Drucker was speaking of the large American corporation as an 'institution which sets the standard for the way of life and the mode of living of our citizens; which leads, molds and directs; which determines our perspective on our own society; around which crystallize our social problems and to which we look for their solutions' (Drucker, 1993, p. 6). Consistent with this assessment, John Micklethwait and Adrian Wooldridge propose that corporations have been at the forefront of all significant social changes since at least the middle of the nineteenth century, not merely 'as a matter of churning out society-changing products, like the Model T or Microsoft Word, but of changing the way that people behave – by disrupting old social orders, by dictating the pace of daily life' (Micklethwait and Wooldridge, 2003, p. 181). Social life

everywhere, as Charles Derber concludes, has turned 'into an expression of global corporate values' (Derber, 2002, p. 72). One does not need to endorse Derber's perception of all-out corpocratic rule to make sense of corporations as socially powerful institutions and thus to understand their capacity to legitimize human rights violations overtly or implicitly.

The question of political status is closely intertwined with Drucker's observation and has recently been addressed both by the broader discussion on global governance as well as that on business ethics and corporate responsibility. While scholars concerned with global governance have realized the relevance especially of multinational corporations for the regulatory structure of the global political economy (see, for example, Cutler, 1999; Hall and Biersteker, 2002; Kobrin, 2009), business ethicists have started to theorize the political nature of the corporation and to understand political engagement as a relevant aspect of corporate responsibility (see, for example, Matten and Crane, 2005; Scherer and Palazzo, 2007; Scherer et al., 2006; Scherer et al., 2009; Ulrich, 2001, 2008).

The literature on global governance has made important contributions toward making the growing political status of multinational corporations more visible; in particular, it has stressed the existence and importance of 'private political authority' (Kobrin, 2009), which, according to A. Claire Cutler, has long been obscured systematically by the basic assumptions of today's economic liberalism:

> [L]iberalism obscures the political significance of private economic power through the association of authority with the public sphere and its disassociation with private activities. Indeed liberalism renders private authority an impossibility by creating the distinction between public and private activities and locating the 'right to rule' or authority squarely in the public sphere. . . . [T]he public/private distinction renders the political significance of transnational and multinational corporations invisible. (Cutler, 1999, p. 73)

Contributions that attempt to correct this blind spot of conventional economic liberalism and to highlight the new political role and stature of multinational corporations commonly stress the profound transformations at the global level induced by the 'denationalization of capital and the disembedding of commercial activities from governmental and social controls' (Cutler, 1999, p. 73). Concordantly, the emergence of what is believed to amount to a 'post-Westphalian transition world order' (Kobrin, 2009, p. 350) puts the basic assumptions of state-centrism into question. It blurs the line between public and private spheres, whose neat separation is criticized by Cutler. It increases ambiguity around borders and jurisdictions (Kobrin, 2009, p. 350), and, as a result, leads to the fragmentation or reconfiguration of political authority (Cutler, 1999, p. 73; Kobrin 2009, p.

350). Within and through this process, transnational companies emerge as 'actors with significant power, influence and authority in the international political system' (Kobrin, 2009, p. 350).

As previous commentary points out, transnational companies today are involved at all stages of public policy formation, from participating in negotiations all the way to setting standards, supplying public goods and even on occasion the writing of legislation. As a result, they increasingly find themselves confronted with direct public demands that are not communicated via market signals nor imposed through government regulation (see Hertz, 2001, p. 112; Wettstein, 2009, p. 243). Accordingly, such demands cannot be dealt with by mere compliance with state-imposed laws and regulations or with business savvy (for demands mediated by the market mechanism) but must be directly engaged with (see Scherer and Palazzo, 2007). As a result of these developments, the modern corporation has acquired both political authority and political responsibility.

Political responsibility, as the late Iris Marion Young (2004) showed so convincingly, is to be understood as positive responsibility of an inherently communicative nature. Young points out that it is 'political in these senses that acting on my responsibilities involves joining with others in a public discourse where we try to persuade one another about courses of collective action that will contribute to ameliorating the problem' (Young, 2004, p. 380). Reflecting on this notion of political responsibility, Scherer and Palazzo (2007, pp. 1109–11) redefine corporate responsibility in deliberative terms. Building on these insights, a duty to publicly speak out against human rights abuse and to address the issue with the appropriate authorities seems indeed prototypical for this 'new political responsibility of the business firm' (Scherer and Palazzo, 2007, p. 1109).

In sum, silent complicity occurs if all four conditions as outlined in the previous two sections are satisfied. In such cases, the corporation can be identified as having a positive obligation to speak out to help protect human rights.

4.5 INNOCENT BYSTANDER OR SILENTLY COMPLICIT?: THE EXECUTION OF KEN SARO-WIWA AND SHELL'S 'ECOLOGICAL WAR' IN THE NIGER DELTA

On Tuesday 31 October 1995, Nigerian playwright and minority-rights activist Ken Saro-Wiwa, along with eight of his followers, were sentenced to death by a specially convened, 'hand-picked' (Duodu, 1995, p. 24) tribunal of the Abacha regime in Nigeria for inciting the murder of four

conservative, pro-government Ogoni chiefs. The four Ogoni chiefs were rounded up and killed by a rioting mob on 21 May 1994. On 10 November 1995, just ten days after the sentence was passed, Saro-Wiwa and his friends were executed while the world watched in outrage.

At the time of his arrest, Ken Saro-Wiwa and his activist group Movement for the Survival of the Ogoni People (MOSOP) were spearheading widespread protests against exploitation and environmental degradation by oil companies in the Ogoni land. Protests against the environmental destruction caused by oil companies had been growing throughout the Niger Delta since the 1970s.[19] When the protests grew bigger and more numerous in the early 1990s, the government started to repress them violently – often at the specific request of Shell (Rowell, 1995, p. 6, 1996, p. 295). Growing tension between Shell and the indigenous people in the Niger Delta led to increasing numbers of increasingly violent protests. The most devastating of these protests occurred in January 1993, when, at the dawn of the UN Year of Indigenous Peoples, the largest peaceful rally against oil companies to that point in time was silenced violently by government forces, resulting in the destruction of 27 villages, displacing 80,000 Ogoni villagers and leaving some 2000 people dead (Rowell, 1996, p. 297). As the struggle evolved, the Ogoni people became the 'vanguard movement for adequate compensation and ecological self-determination' in the Niger Delta and Shell became the symbol of their oppression (Rowell, 1995, p. 6). Saro-Wiwa was the driving force behind the Ogoni movement; 'No other person in Nigeria,' as one member of the Nigerian Civil Liberties Organisation put it, 'can get 100,000 people on the streets' (quoted in Rowell, 1996, p. 298).

The murder of the four chiefs provided the Nigerian government with an opportunity to arrest Saro-Wiwa and eight other leaders of his organization. The charges against Saro-Wiwa and his colleagues were anything but uncontroversial. It was even suggested that the Nigerian government itself was involved in provoking the murders as a justification for stronger military presence in the region. Not only was Saro-Wiwa 'miles away' when the murders took place, but he was, in fact, under military escort (for example, Rowell, 1996, pp. 303–5). Key witnesses admitted that they had been bribed to provide false evidence (Rowell, 1996, p. 308; Sweeney and Duodu, 1995, p. 24) and the tribunal, which was controlled by the military, was denounced as illegitimate by the international community due to blatant violations of international fair trial standards and a lack of respect for due process. The British government condemned the trial as 'judicial murder' (Rowell, 1996, p. 1).

The international protests did not remain limited to the Nigerian government. Shell too came under attack for idly standing by while the

tragedy unfolded. Shell was accused of not using its influence in Nigeria to stop the execution, the torturing of protesters and the violent crackdown of demonstrations. In other words, Shell was seen as being silently complicit by violating a positive duty to help protect them against the human rights violations of the Abacha junta. Our analysis now provides a tool with which to assess the validity of this claim. For Shell to be silently complicit, the two qualified conditions underlying the omission requirement (that is, connection and influence/power)[20] as well as the status condition underlying the legitimization requirement all need to have been met.

4.5.1 Connection

The connection between Shell and Ken Saro-Wiwa's and the roughly 2000 other Ogoni deaths is undisputed. The uprising of the Ogoni people was a direct response to Shell's operations in the Niger Delta; their protests were directly aimed at Shell. In some instances the police forces that put the demonstrations down were requested by Shell. Even when they were not requested, the suppression of large-scale protests benefitted Shell and secured the continuation of its operations. In his closing statement to the tribunal, Ken Saro-Wiwa explicitly addressed Shell's role and connection to the incidence:

> I repeat that we all stand before history. I and my colleagues are not the only ones on trial. Shell is on trial here, and it is as well that it is represented by counsel said to be holding a watching brief. The company has, indeed, ducked this particular trial, but its day will surely come and the lessons learned here may prove useful to it, for there is no doubt in my mind that the ecological war the company has waged in the delta will be called to question sooner than later and the crimes of that war be duly punished. The crime of the company's dirty wars against the Ogoni people will also be punished.[21]

Shell was both the main cause for the formation of the Ogoni protests and it was the main reason for the violent crackdown. Shell was, by every definition of the word, linked to the execution of Ken Saro-Wiwa and his friends in a morally significant way.

4.5.2 Influence/Power

For Shell to have a positive duty to help protect and thus to speak out against the trial and to put pressure on the Nigerian government, their connection to the incidents must come with a position of influence or power. While the degree of Shell's real influence at the time ultimately is subject to speculation, most of the evidence and, as we will see shortly, also

Shell's own assessment of its influence in Nigeria suggest that this condition too was met. Shell's position in Nigeria was and still is exceptionally powerful. The military government's power was dependent on the foreign earnings generated by oil and Shell was by far the major oil producer not only in the area but in the whole country (Babade, 1995). At the time of Saro-Wiwa's execution, Shell produced roughly half of Nigeria's crude oil output (Reuters, 1995). As a result, Shell's power and influence was by any measure considerable.[22] Thus, Andrew Rowell observes that Shell's position in Nigeria was 'both powerful and unique.' Quoting an anonymous Ogoni activist, he says: 'With such an illegitimate political system, each bunch of unelected military rulers that comes into power, simply dances to the tune of this company. Shell is in the position to dictate, because Nigeria is economically and politically weak' (Rowell, 1996, p. 289).

4.5.3 Status

At the time of the execution, Shell enjoyed the prestige of a company with global brand recognition. In the mid-1990s, Shell was the world's biggest oil company not owned by a government, it was producing 3 percent of the world's crude oil and 4 percent of its natural gas. It was the world's only private company to rank among the top ten biggest holders of oil and gas reserves (Prest, 1995, p. 4). Its influence both in Nigeria and globally was substantial. It was without doubt a company that led, molded and directed, a company that disrupted old social orders and dictated the pace of daily life in Nigeria and the Niger Delta. The very protests that erupted first in Nigeria against Shell's environmental record and later on an international scale against Shell's way of handling the turmoil in Nigeria underscore Shell's standing relative to society at large. Furthermore, they are a case in point regarding the politicization of corporations and the subsequent call for deliberative public engagement. In light of the worldwide attention that the Shell case received, it seems that it would at least be difficult to argue that the company lacked the status necessary to be implicated with silent complicity.

Based on such assessments, there certainly is a case to be made for Shell's silent complicity in Saro-Wiwa's execution. Many commentators believed and continue to believe that Shell was in a position to speak out against the trial. Saro-Wiwa's brother, Owens Wiwa, goes so far as to claim that if Shell 'had threatened to withdraw from Nigeria unless Ken was released, he would have been alive today. There is no question of that' (Owens Wiwa quoted in Ghazi, 1995, p. 1). Andrew Rowell's conclusions even reach beyond the specific incident around Saro-Wiwa: '[S]uch is the economic strength of the company that few people in Nigeria or

Britain doubt that it could have stopped the conflict outright – or at least stopped the use of excessive force against demonstrations' (Rowell, 1995, p. 6). Shell was well aware of its powerful position in the country and its potential to turn the events around. In fact, as the *Observer* reported nine days after Saro-Wiwa's execution, Brian Anderson, who was head of Shell Nigeria at the time, had in fact offered to Owens Wiwa to use Shell's influence with Nigeria's military regime to try to free his brother; however, his offer was conditional on the Ogoni leaders calling off any global protests against Shell. This bargain, irrespective of its questionable ethical quality, was unattainable for Wiwa: 'Even if I had wanted to, I didn't have the power to control the international environmental protests' (Owens Wiwa quoted in Ghazi, 1995, p. 1).

Shell defended its position of inactivity against the growing public outrage. The company's official position was that it would be 'dangerous and wrong' for Shell to 'intervene and use its perceived "influence" to have the judgment overturned.' 'A commercial organization like Shell,' as they claimed further, 'cannot and must never interfere with the legal processes of any sovereign state.'[23] A Shell manager reportedly stated in 1996:

> I am afraid I cannot comment on the issue of the Ogoni 9, the tribunal and the hanging. This country has certain rules and regulations on how trials can take place. Those are the rules of Nigeria. Nigeria makes its rules and it is not for private companies like us to comment on such processes in the country.[24]

These arguments appear at least hypocritical in light of Shell's secret proposal to Owens Wiwa. However, they reflect more than a subjective assessment of the situation; they represent a line of counter-argumentation that is frequently evoked in connection with corporate political activity. Such counter-arguments are based on two core assumptions. First, Shell's statements assume a neutral, apolitical role for corporations. Silence is perceived as neutrality, while speaking out denotes illegitimate political interference by the corporation. Second, corporations engaging in such political activity and exerting influence and pressure on host governments are perceived to illegitimately interfere with the sovereignty of the respective government. In the next section I examine both these propositions.

4.6 TWO OBJECTIONS: CORPORATE NEUTRALITY AND ILLEGITIMATE INTERFERENCE

The first objection outlined above only warrants a short response. Shell defended its silence as neutrality and implicitly presented itself as an

apolitical institution. It is the very purpose of this chapter to show that silence is not always neutral but can, in fact, denote a form of complicity. Shell was intimately connected to the human rights violation taking place in Nigeria. Taking a neutral position in such a situation is problematic in itself; it is a calculated political strategy disguised as moral virtue. Shell's connection to the human rights violations combined with its power and status turned its silence into moral approval. Jenik Radon rightly points out in regard to powerful corporations in the extractive sector: 'Even if they do nothing, remain silent, they are effectively acting, having an impact' (Radon, 2005). Thus, Shell's contention that silence was required because speaking out would be a public and political and thus an improper act was inherently flawed. Shell's silence was as much a politically relevant act as explicit opposition would have been. Shell had a choice to make; it could speak out in favor of human rights or keep silent in support of the perpetrator. Unfortunately, it chose the latter alternative.

Let us turn to the second part of the objection. Speaking out to help protect human rights, so the argument of opponents goes, denotes illegitimate interference with a host government's sovereignty. This argument warrants three specific responses. First, corporations rarely hesitate to make themselves heard when economic rules and regulations affect their business projections; pushing for tax breaks, subsidies in the millions or exemptions from restricting regulations have turned into regular and, in fact, lucrative parts of doing business. This kind of corporate political activity is rarely described as interference with the sovereignty of the countries in which they are operating. However, such policies and regulations (or lack thereof) for which corporations tend to push are by no means neutral in regard to their impact on human rights either. Hsieh (2009, p. 267), who has recently addressed the interference question in connection with a possible corporate responsibility to promote just institutions in host countries,[25] is quite right in arguing that 'if the objection is that MNEs [multinational enterprises] should not be involved in politics, then this would rule out any form of political involvement by MNEs.' In light of the political involvement of multinational corporations outlined above, such a scenario seems more and more unlikely to begin with.

Second, it seems all too easy to dismiss the call for corporate action to contribute to the protection of human rights as a violation of state sovereignty without having a discussion about the validity of sovereignty as a moral value or political concept beforehand. After all, the moral value of state sovereignty as a concept worth defending can at best be derivative. State sovereignty or autonomy is not valuable in and of itself but depends on its consistency with and contribution to more basic principles of justice (Beitz, 1999, p. 69). The importance of protecting state sovereignty derives

from the claim for autonomy and self-determination of human beings as the ultimate unit of moral concern. Thus, if state sovereignty is in direct conflict with the claim for justice and autonomy for human beings, that is, if it serves to protect perpetrators rather than their victims, the justification of upholding it seems questionable. Speaking out in defense of human rights, as also Sir Geoffrey Chandler argued, is a 'wholly legitimate role' for companies. 'It is not interference in domestic politics, an argument that companies have used as an escape route in the past' (Chandler, 1999, p. 43).

This leaves, third, the possibility of denying the universal validity of global justice and human rights at the outset. However, it seems peculiar how this argument can be reconciled with the converse assumption of global absoluteness of state sovereignty, which has to be respected and protected seemingly at all cost. It seems unclear what this absoluteness is based on if the validity even of the most fundamental human rights is denied at the same time. Thus, at the heart of this argument is a confusion of values, which gets more evident and troubling the more egregious the cases of rights violations at stake. As its ultimate consequence, it would suggest illegitimacy even of speaking out against mass murder and genocide in order to uphold the sovereignty and autonomy of the perpetrator.

4.7 CONCLUSION

Taking seriously the concerns of those who fear that a positive obligation of corporations to speak out against human rights is a first step toward corporate tyranny, this concluding part of the analysis proposes four safeguards that aim at ensuring that such corporate political activity contributes to and does not undermine the public interest. The proposed safeguards may not be and are not meant to be exhaustive, but are to be understood as connecting points for further research. I will relate all four safeguards back to the Shell example discussed above.

4.7.1 Scale of Human Rights Violations

There is room for interpretation even when it comes to the violation of human rights. Therefore, we might want to limit corporations' positive obligation to speak out to cases of severe, systematic and ongoing human rights violations, that is, to those human rights abuses whose condemnation is widely shared. This criterion becomes more important the less visible and direct a corporation's connection to the rights violation. As previous discussion has demonstrated, the condition of severity was met

in the Saro-Wiwa case. The violations of human rights were ongoing and systematic, and they were committed at a scale that led Nigerian writer and Nobel Laureate Wole Soyinka (1996) to speak of 'ethnic cleansing' in the Ogoni region.

4.7.2 Responsiveness

Connected to the claim made above, we do not want companies to turn into self-righteous moral arbiters of our global community (Chandler, 2000, p. 5). Rather, we want them to respond effectively to the concerns of the global public and its institutions and especially to those whose rights are spurned. Thus, the yardstick for a corporate obligation to speak out is forming a global consensus that action rather than inaction is needed. This can manifest itself as formal resolutions against an oppressive regime or in the form of widespread protests. This condition too was met in the Shell case. The Ogoni movement repeatedly called for Shell to address the issue, to denounce Saro-Wiwa's arrest and to use its influence to get him released. Governments and scores of concerned citizens around the world denounced the trial against Saro-Wiwa as flawed and unfair and the oppression of the Ogoni people as unacceptable.

4.7.3 Collaboration

We do not want corporations to act alone but ask them to consult and collaborate with other institutions, with a view to requesting and receiving assistance and advice in navigating sensitive moral issues in ways designed to ensure their interventions are legitimate and effective. Such institutions can be NGOs, activist groups to whose pressure corporations are responding, government agencies, international and supranational organizations, as well as other companies which find themselves in similar situations. What is more, where corporations may have little influence acting alone, they may nevertheless find themselves in positions of substantial leverage once they collaborate with other players. There is little doubt that Shell did have the authority and leverage to exert influence over the Nigerian government. Nevertheless, its doubts about the legitimacy of speaking out could have been eased through collaboration with local Ogoni rights groups, not least Saro-Wiwa's own MOSOP, and with foreign governments and NGOs such as Human Rights Watch, which repeatedly pressed Shell to oppose the government's human rights abuses at that time.

4.7.4 Publicness

Corporate political action must be paired with accountability. Accountability, however, requires some degree of transparency. Thus, corporations accused of silent complicity must take a public stance against the violation of human rights. In other words, 'quiet diplomacy' might do little to divert the accusation of silent complicity (Clapham and Jerbi, 2001, p. 349); it might even lead to increased suspicion about the harmful collusion between government and corporations. I am not advocating for full transparency of such interaction; however, corporations must make public the information that they are, in fact, engaging in such interaction and they must be transparent about their underlying intentions and the goals they are trying to achieve with it. Ensuring that the public is informed about its political activity means that it is open and subject to public deliberation and scrutiny. The Shell case underlines the importance of this point. Shell's alleged silent diplomacy contributed to further obscuring the company's position and its potential involvement into the human rights abuses in the region rather than to communicating clearly and openly what the company's stance on the issue really was.

NOTES

* I would like to thank three anonymous reviewers for their help and guidance. I am particularly grateful to 'Reviewer 2' and also to Wesley Cragg for engaging so very thoroughly with this chapter and for the thoughtful input they provided regarding the form and basic shape of my argument.

1. This may be the reason underlying Hoffman and McNulty's (2009, p. 546) recent observation that 'critics of globalization have missed the mark by focusing on obvious examples of corporate malfeasance while remaining relatively mute with respects to the more pervasive and significant problem, which is business's complicity in providing direct or indirect support to authoritarian regimes involved in human rights abuses.' Furthermore, existing responses to corporate complicity, as Hoffman and McNulty (2009, p. 548) point out, have been characterized by a 'general lack of consistency.'
2. I will refer to this duty as a 'duty to help protect' in order to ensure consistency with the terminology of the tripartite framework used by the UN Secretary-General's Special Representative on Business and Human Rights (see United Nations, 2008a, 2008b). Alternatively, the duty to speak out as outlined in this chapter may also be interpreted as a duty to promote or a duty to 'promote respect' (Cragg, 2004, p. 117) for human rights. In fact, in his 2010 report, UN Special Representative Ruggie also refers to the task of 'promoting respect' for human rights on several occasions within the section on the state's duty to protect (United Nations, 2010, pp. 5, 7). Perhaps more important than the terminology used is that the corporate duty advanced in this chapter (whatever we may ultimately call it) is positive and thus goes beyond a mere duty to respect human rights.
3. George Brenkert (2009, p. 459) has recently added the category of 'obedient complicity.' Obedient complicity refers to businesses engaging 'in actions mandated by a state that significantly and knowingly violate human rights,' which might not violate human

rights if undertaken by the company on its own. Brenkert refers to the specific case of Google's compliance with China's censorship laws as an example. The concept of obedient complicity is closely related to the notion of 'structural complicity,' which I have used and defined elsewhere (see Wettstein, 2009, pp. 304–5).

4. Note that complicity presupposes an actual contribution (active or passive) by the corporation to the human rights violation. While this contribution does not need to be indispensible, it must be substantial to amount to actual complicity (see, for example, Ramasastry, 2002, p. 150). This is why the perception of the corporation's mere endorsement or approval of the abuse is not sufficient to ground an accusation of complicity. While we can justifiably blame someone for endorsing and approving of a harmful practice, this endorsement must have a substantial effect on the human rights violation or the perpetrator in order to amount to actual complicity. This is the case if the endorsement can be perceived as legitimizing or encouraging the human rights violation or the perpetrator.
5. Beneficial complicity, in most cases, denotes a moral failure based on omission as well. Exceptions are cases in which corporations actively and deliberately exploit the situation for their own benefit.
6. http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle2.html.
7. See, for example, Hsieh (2009, p. 253), who attempts to reformulate positive duties of corporations in negative terms in order to avoid said controversy. The same reasoning has been used also by Thomas Pogge (2002, p. 198). See Wettstein (2010) for a counter-argument to this position.
8. I would like to thank Tom Campbell for alerting me to the possibility of passive positive obligations. Such obligations would have to be framed as a duty to abstain from certain actions in order to let more good happen. Thus, what distinguishes such a duty from a passive negative duty is that interfering (that is, acting) does not produce any harm, but merely prevents something good from happening. Hence, the question at the core of this scenario would be whether or not we do have an actual duty to let more good happen. This seems to be the case only in consequentialist/utilitarian ethics. It is questionable, however, in merely consequence-sensitive ethics, as it is the basis of this chapter.
9. Shue (1996, p. 52) uses a slightly different terminology; he speaks of duties to avoid depriving, duties to protect from deprivation and duties to aid the deprived. This framework has been adopted also by Professor John Ruggie (see, for example, United Nations, 2008b). Ruggie speaks of the duty to respect, the duty to protect and access to remedies.
10. Similarly, Peter Frankental and Frances House (2000, p. 11) claim that corporations should 'raise human rights concerns with government authorities either unilaterally or collectively with other companies.'
11. A public condemnation alone could be framed as an active obligation of the negative kind and would serve the mere purpose of refuting the suspicion of a company's supportive stance toward the perpetrator; it would not include an expectation that speaking out assists or contributes to the protection of the victims in any way. Such an interpretation of the duty to speak out seems incomplete especially if conditions 3 (influence/power) and 4 (status) are met. In that case, a mere public condemnation is never enough to entirely diffuse the accusation of silent complicity. There are two reasons for this: (a) powerful corporations that merely issue a public condemnation without actually doing anything to prevent human rights abuses to occur in their sphere of influence will likely be perceived as insincere or even hypocritical by the wider public, that is, as not walking the talk (or alternatively as not putting the money where their mouth is). Granted that by issuing a public condemnation they would formally disassociate themselves from the abuse and thus eliminate condition 2 in a narrow sense, but (b) the effect of legitimization and encouragement in which the accusation of silent complicity is ultimately grounded would likely persist; in fact, a perpetrator who is faced with a situation where powerful actors disapprove of its stance but do not act on

their disapproval might derive similar or even increased encouragement to continue the abuse. Thus, for a corporation that fulfills both the power and the status condition, the very act of disassociation must be interpreted as consisting of more than a mere public condemnation.

12. Ruggie does state that under certain circumstances corporations may have additional responsibilities; however, he limits these circumstances to cases in which corporations perform specific public functions or in which they have undertaken particular voluntary commitments (see United Nations, 2008b, p. 9).
13. The requirement that moral responsibility presupposes an agent's ability to act freely is reflected in the principle 'ought implies can.' David Widerker (1991) and later David Copp (1997, 2008) confirmed the logic of the argument put forth here by showing that the Principle of Alternate Possibilities can be derived from the 'ought implies can' principle. The Principle of Alternate Possibilities was famously refuted by Harry Frankfurt (1969).
14. Note that Anthony Ewing (2004, p. 39, emphasis added) argues that we may speak of silent complicity only if 'companies remain silent in the face of human rights abuse committed by others that is of *no particular benefit* to the company.' On the other hand, his definition of beneficial complicity clearly also includes elements of silent complicity: 'A company is beneficially complicit if it tolerates or knowingly ignores the human rights violations of one of its business partners, committed in furtherance of their common business objectives.' A more convincing way of dealing with these two forms of complicity is to acknowledge that, from a moral standpoint, we are dealing with two separate reasons or bases for moral blame, which, however, often – though not always – occur interdependently and at the same time.
15. Note that while the perception of endorsement is enough to trigger an active negative duty to disassociate oneself from the abuse, it is not enough to ground an actual accusation of silent complicity; for endorsement to turn into complicity it must have a legitimizing or encouraging effect on the abuse.
16. This insight seems to also inform Campbell's (2006, p. 262) argument for a corporate duty to put pressure on abusive host governments: 'Yet because they are in a position to bring economic pressure to bear on host governments it is arguable that MNCs [multinational corporations] have a moral duty to do so in the absence of political solutions and in preference to military ones.'
17. A similar claim underlies Santoro's (2009, pp. 14–17, 2010, pp. 290–2) '"fair share" theory of corporate responsibility for human rights.' Santoro argues that the extent to which corporations can reasonably be held responsible for remedying human rights violations, in which they have played no direct or indirect role, depends on the 'potential effectiveness of the corporation in promoting human rights (the greater chance of being effective, the stronger the duty)' (Santoro, 2009, p. 16). In addition to effectiveness as a criterion, Santoro (2009, p. 16, 2010, p. 292) outlines two more conditions to be met for such a responsibility to apply to corporations. The two conditions closely resemble the ones outlined in this contribution: the first one concerns the relationship of the company to the human rights victims. The stronger such a relationship, the stronger is the corporation's responsibility. In comparison to Santoro's condition, the connection criterion outlined here is broader and includes relations not only to the victims, but also to the perpetrator. The third of Santoro's conditions (with 'potential effectiveness' being the second) is a corporation's 'capacity to withstand economic retaliation or to absorb the costs of an action' (Santoro, 2010, p. 292). This condition aligns with my elaborations on the 'normative burden.'
18. Status, both social and political, has much to do with power and is closely related to the power condition discussed in the previous subsection. However, the two should not be confused; while the power condition specifically deals with power and influence over the perpetrator, the power notion underlying the status condition can, but does not have to, be defined in relation to the perpetrator. Thus, in most cases we are dealing with two separate power notions: one specifying the corporation's potential to influence

the perpetrator and one constituting or deriving from its general social or political status.

19. For an account of the nature and extent of the environmental damage caused by oil operations in the Niger Delta, one of the most fragile and endangered ecosystems on the planet, see Rowell (1996, pp. 288–97). The practices used by Shell and other oil companies in the Niger Delta were widely regarded as unacceptable and unthinkable in Europe or America (Rowell, 1996, p. 291).
20. I will limit my elaborations to the two qualified conditions (connection and influence/power), assuming that the first, general condition of voluntariness and thus Shell's general obligation to do no harm was fulfilled. While the financial hit resulting from a withdrawal of Shell from Nigeria would undoubtedly have been significant, it is unlikely that it would have threatened the very existence of the company. Given my above assessment that especially utility considerations are frequently trumped by human rights claims, it is safe to say that the company did have the option and thus the obligation to avoid its potential complicity.
21. http://archive.greenpeace.org/comms/ken/state.html.
22. The fact that Shell escaped largely unscathed when, in 1979, Nigeria nationalized the assets of BP (Prest, 1995, p. 4) may serve as an additional indicator of Shell's status vis-à-vis the Nigerian government.
23. 'Clear thinking in troubled times,' SPDC Press Statement, 31 October 1995, quoted in Human Rights Watch (1999).
24. E. Imomoh, General Manager, Eastern Division, Shell Petroleum, on 'Africa Express,' Channel 4 TV, UK, 18 April 1996, quoted in Avery (2000, p. 22).
25. Note that Hsieh explicitly excludes cases of complicity from his analysis. Nevertheless, his elaborations on corporate interference with state sovereignty hold relevance also for this chapter.

REFERENCES

Arnold, D. (2010). 'Transnational corporations and the duty to respect basic human rights', *Business Ethics Quarterly*, **20**(3), 371–99.

Avery, C.L. (2000). *Business and Human Rights in a Time of Change*, London: Amnesty International UK.

Babade, N. (1995). 'Nigerian activist Saro-Wiwa sentenced to hang', *Reuters News*, 31 October.

Beitz, C.R. (1999). *Political Theory and International Relations*, Princeton, NJ: Princeton University Press.

Brenkert, G.G. (2009). 'Google, human rights, and moral compromise', *Journal of Business Ethics*, **85**(4), 453–78.

Campbell, T. (2006). 'A human rights approach to developing voluntary codes of conduct for multinational corporations', *Business Ethics Quarterly*, **16**(2), 255–69.

Chandler, G. (1999). 'Keynote address: crafting a human rights agenda for business', in M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, The Hague: Kluwer Law International, pp. 39–45.

Chandler, G. (2000). 'Foreword', in P. Frankental and F. House (eds), *Human Rights – Is It Any of Your Business?*, London: Amnesty International UK and The Prince of Wales Business Leaders Forum, p. 5.

Clapham, A. (2006). *Human Rights Obligations of Non-state Actors*, Oxford: Oxford University Press.

Clapham, A. and S. Jerbi (2001). 'Categories of corporate complicity in human rights abuses', *Hastings International and Comparative Law Review*, **24**, 339–50.
Copp, D. (1997). 'Defending the principle of alternate possibilities: blameworthiness and moral responsibility', *Nous*, **31**, 441–56.
Copp, D. (2008). '"Ought" implies "can" and the derivation of the principle of alternate possibilities', *Analysis*, **68**(1), 67–75.
Cragg, W. (2004). 'Human rights, globalization and the modern stakeholder corporation', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Dordrecht: Kluwer Academic Publishers, pp. 105–28.
Cragg, W. (2010). 'Business and human rights: a principle and value-based analysis', in G.G. Brenkert and T.L. Beauchamp (eds), *The Oxford Handbook of Business Ethics*, Oxford: Oxford University Press, pp. 267–304.
Cutler, A.C. (1999). 'Locating "authority" in the global political economy', *International Studies Quarterly*, **43**(1), 59–81.
Derber, C. (2002). *People Before Profit: The New Globalization in an Age of Terror, Big Money, and Economic Crisis*, New York: St Martin's Griffin.
Drucker, P.F. (1993). *Concept of the Corporation*, New Brunswick, NJ and London: Transaction Publishers.
Duodu, C. (1995). 'The playwright, the doctor, the unionist and their president', *Observer*, 5 November, 24.
Ewing, A.P. (2004). 'Understanding the Global Compact Human Rights Principles', in UN Global Compact Office and OHCHR (eds), *Embedding Human Rights in Business Practice*, New York: UN Global Compact Office, pp. 29–42, available at http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/embedding.pdf.
Frankental, P. and F. House (eds) (2000). *Human Rights – Is It Any of Your Business?* London: Amnesty International UK and The Prince of Wales Business Leaders Forum.
Frankfurt, H. (1969). 'Alternate possibilities and moral responsibility', *Journal of Philosophy*, **66**, 828–39.
Ghazi, P. (1995). 'Shell refused to help Saro-Wiwa unless protests called off', *Observer*, 19 November, 1.
Gosepath, S. (2004). *Gleiche Gerechtigkeit: Grundlagen eines liberalen Egalitarismus*, Frankfurt a. M.: Suhrkamp.
Hall, R.B. and T.J. Biersteker (2002). *The Emergence of Private Authority in Global Governance*, Cambridge: Cambridge University Press.
Hertz, N. (2001). *The Silent Takeover: Global Capitalism and the Death of Democracy*, London: William Heinemann.
Hoffman, W.M. and R.E. McNulty (2009). 'International business, human rights, and moral complicity: a call for a declaration on the universal rights and duties of business', *Business and Society Review*, **114**(4), 541–70.
Hsieh, N. (2009). 'Does global business have a responsibility to promote just institutions?', *Business Ethics Quarterly*, **19**(2), 251–73.
Human Rights Watch (1999). *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, New York: Human Rights Watch, available online at http://www.hrw.org/reports/1999/nigeria/.
International Council on Human Rights Policy (2002). *Beyond Voluntarism:*

Human Rights and the Developing International Legal Obligations of Companies, Versoix: International Council on Human Rights Policy.
Kant, I. (1996). *The Metaphysics of Morals*, trans. Mary Gregor, Cambridge: Cambridge University Press.
Klein, N. (2000). *No Logo: Taking Aim at the Brand Bullies*, Toronto: Vintage Canada.
Kline, J.M. (2005). *Ethics for International Business: Decision-making in a Global Political Economy*, London and New York: Routledge.
Kobrin, S.J. (2009). 'Private political authority and public responsibility: transnational politics, transnational firms and human rights', *Business Ethics Quarterly*, **19**(3), 349–74.
Kutz, C. (2000). *Complicity. Ethics and Law for a Collective Age*, Cambridge: Cambridge University Press.
Levy, C.J. (2010a). 'Microsoft moves to help nonprofits avoid piracy-linked crackdowns', *New York Times*, 17 October, 6.
Levy, C.J. (2010b.) 'Using Microsoft, Russia suppresses dissent', *New York Times*, 12 September, 1, 15.
Matten, D. and A. Crane (2005). 'Corporate citizenship: toward an extended theoretical conceptualization', *Academy of Management Review*, **30**(1), 166–79.
Micklethwait, J. and A. Wooldridge (2003). *The Company. A Short History of a Revolutionary Idea*, New York: The Modern Library.
Office of the High Commissioner for Human Rights (2004). 'OHCHR briefing paper: the Global Compact and human rights: understanding sphere of influence and complicity', in UN Global Compact Office and OHCHR (eds), *Embedding Human Rights in Business Practice*, New York: UN Global Compact Office, pp. 14–26, available at http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/embedding.pdf.
Pogge, T. (2002). *World Poverty and Human Rights*, Cambridge: Polity Press.
Prest, M. (1995). 'Global heroes, local zeroes', *Observer*, 19 November, 4.
Radon, J. (2005). '"Hear no evil, speak no evil", see no evil spells complicity', *Compact Quarterly*, **2**, available at http://www.enewsbuilder.net/globalcompact/e_article000381758.cfm?x=b11,0,w.
Ramasastry, A. (2002). 'Corporate complicity: From Nuremberg to Rangoon. An examination of forced labor cases and their impact on the liability of multinational corporations', *Berkeley Journal of International Law*, **20**(1), 91–159.
Ratner, S.R. (2001). 'Corporations and human rights: a theory of legal responsibility', *Yale Law* Journa,l **111**(3), 443–545.
Rawls, J. (1971). *A Theory of Justice*, Cambridge, MA: Harvard University Press.
Reuters (1995). 'Shell expresses "deep regret" at Nigerian hangings', *Reuters News*, 10 November.
Rowell, A. (1995). 'Environment – trouble flares in the delta of death', *Guardian*, 8 November, 6.
Rowell, A. (1996). *Green Backlash: Global Subversion of the Environmental Movement*, London: Routledge.
Santoro, M.A. (2009). *China 2020: How Western Business Can – and Should – Influence Social and Political Change in the Coming Decade*, Ithaca, NY: Cornell University Press.
Santoro, M.A. (2010). 'Post-Westphalia and its discontents: business, globalization, and human rights in political and moral perspective', *Business Ethics Quarterly*, **20**(2), 285–97.

Scheffler, S. (2001). *Boundaries and Allegiances. Problems of Justice and Responsibility in Liberal Thought*, Oxford: Oxford University Press.
Scherer, A.G. and G. Palazzo (2007). 'Toward a political conception of corporate responsibility: business and society seen from a Habermasian perspective', *Academy of Management Review*, **32**(4), 1096–120.
Scherer, A.G., G. Palazzo and D. Baumann (2006). 'Global rules and private actors: toward a new role of the transnational corporation in global governance', *Business Ethics Quarterly*, **16**(4), 505–32.
Scherer, A.G., G. Palazzo and D. Matten (2009). 'Introduction to the Special Issue: globalization as a challenge for business responsibilities', *Business Ethics Quarterly*, **19**(3), 327–47.
Shue, H. (1996). *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Princeton, NJ: Princeton University Press.
Soyinka, W. (1996). 'Nigeria's long steep, bloody slide', *New York Times*, 22 August.
Strange, S. (1996). *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge: Cambridge University Press.
Sweeney, J. and C. Duodu (1995). 'Nigeria? Business as usual with the general, chaps', *Observer*, 5 November, 24.
Tripathi, S. (2005). 'International regulation of multinational corporations', *Oxford Development Studies*, **33**(1), 117–31.
Ulrich, P. (2001). *Integrative Wirtschaftsethik. Grundlagen einer lebensdienlichen Ökonomie*, Bern: Haupt.
Ulrich, P. (2008). *Integrative Economic Ethics: Foundations of a Civilized Market Economy*, Cambridge: Cambridge University Press.
United Nations (2008a). *Clarifying the Concepts of 'Sphere of Influence' and 'Complicity'*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Human Rights Council, Eighth Session, A/HRC/8/16, available at http://www.reports-and-materials.org/Ruggie-companion-report-15-May-2008.pdf.
United Nations (2008b). *Human Rights Council, Eighth Session. Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5, available at http://daccessdds.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement.
United Nations (2010). *Human Rights Council, Fourteenth Session. Business and Human Rights: Further Steps Towards the Operationalization of the 'Protect, Respect and Remedy' Framework*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/14/27, available at http://www.reports-and-materials.org/Ruggie-report-2010.pdf.
Wettstein, F. (2009). *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-governmental Institution*, Stanford, CA: Stanford University Press.
Wettstein, F. (2010). 'For better or for worse: corporate responsibility beyond "do no harm"', *Business Ethics Quarterly*, **20**(2), 275–83.
Wettstein, F. and S. Waddock (2005). 'Voluntary or mandatory: that is (not) the question: linking corporate citizenship to human rights obligations for business', *Zeitschrift für Wirtschafts- und Unternehmensethik*, **6**(3), 304–20.

Widerker, D. (1991). 'Frankfurt on "ought implies can" and alternative possibilities', *Analysis*, **51**, 222–4.
Wiggen, O. and L. Bomann-Larsen (2004). 'Addressing side-effect harm in the business context: conceptual and practical challenges', in O. Wiggen and L. Bomann-Larsen (eds), *Responsibility in World Business: Managing Harmful Side-effects of Corporate Activity*, New York: United Nations University Press, pp. 3–14.
Young, I. (2003). 'From guilt to solidarity: sweatshops and political responsibility', *Dissent*, **50**(2), 39–44.
Young, I. (2004). 'Responsibility and global labor justice', *Journal of Political Philosophy*, **12**(4), 365–88.

5. The case for leverage-based corporate human rights responsibility

Stepan Wood*

5.1 INTRODUCTION

In the field of business and human rights, should a company's 'leverage' over other actors with whom it has a relationship – that is, its ability to influence their decisions or activities for better or worse – give rise to responsibility, rendering it answerable for its exercise or failure to exercise such leverage? I argue that the answer is a qualified yes: leverage is one factor giving rise to responsibility even where the company is not itself contributing adverse human rights impacts. The case for leverage-based responsibility has not been articulated clearly in the scholarly literature. Instead this issue tends to be subsumed in debates about 'sphere of influence' (SOI) and complicity, with which it overlaps only partially. One of the few commentators to address the issue head-on is the Special Representative of the United Nations Secretary-General on Business and Human Rights, Professor John Ruggie (SRSG), who explicitly rejected leverage as a basis for the business responsibility to respect human rights (United Nations, 2008a, 2008b, p. 18). In this chapter I attempt to supply the missing normative argument in favor of leverage-based responsibility and in the process answer the SRSG's critique.

It is necessary first to distinguish three issues that are often obscured in debates about leverage and SOI: first, the relationship between companies' impacts on human rights and their leverage over other actors; second, the relationship between negative and positive forms of responsibility; and third, the relationship between companies' human rights obligations and their optional efforts to support human rights. I examine these distinctions in the first section. Next, I provide a concrete context for my argument by describing how the debate about leverage and SOI was brought into relief in the recent encounter between the SRSG's three-part *Protect, Respect and Remedy* framework (United Nations, 2008b) and the International

Organization for Standardization's ISO 26000 guide on social responsibility (International Organization for Standardization, 2010a).

I then turn to the normative case for leverage-based responsibility. I start by identifying some limitations of an impact-based conception of social responsibility. I then propose that leverage-based responsibility should arise when four criteria are satisfied: (a) there is a morally significant connection between the company and either the perpetrator of human rights abuse or the human rights-holder; (b) the company is able to make a difference to the state of affairs; (c) it can do so at an acceptable cost to itself; and (d) the actual or potential invasion of human rights at issue is sufficiently serious. I argue that such responsibility (e) is qualified rather than categorical; (f) is a matter of degree rather than a binary choice; (g) is context-specific; (h) can be both negative and positive in character; (i) satisfies the practicality criterion; and (j) is appropriate to the specialized social function of business organizations.

5.2 VARIETIES OF RESPONSIBILITY

Three interwoven distinctions are often obscured or conflated in the debate about corporate leverage and SOI: influence as 'impact' versus influence as 'leverage,' negative versus positive responsibility and obligatory versus optional human rights practices (Wood, 2011a, 2011b). To understand the debate it is necessary to tease apart these distinctions. First, as the SRSG points out, the SOI concept conflates two very different meanings of 'influence':

> One is 'impact,' where the company's activities or relationships are causing human rights harm. The other is whatever 'leverage' a company may have over actors that are causing harm or could prevent harm. (United Nations, 2008a, p. 5)

These two forms of influence have different practical and moral implications, and correspond to two different conceptions of responsibility. Impact-based responsibility attaches to an organization's direct and indirect contributions to social or environmental impacts. Leverage-based responsibility, by contrast, arises from an organization's ability to influence the actions of other actors through its relationships, regardless of whether the impacts of those other actors' actions can be traced to the organization. The business responsibility to respect human rights, as defined by the SRSG, is primarily impact-based. The SRSG initially rejected leverage-based responsibility (United Nations 2008a, 2008b,

p. 18), but as I will show, his final Guiding Principles on Business and Human Rights endorse a limited version of it (United Nations, 2011b).

The second distinction needing attention is that between negative and positive responsibility. I use these terms to refer, respectively, to a responsibility to 'do no harm' and a responsibility to 'do good' (Moore, 2009, p. 34). This is not the same as a responsibility not to act and a responsibility to act, as is often thought. The distinction between negative rights entailing negative obligations to refrain from certain actions, and positive rights entailing positive obligations to take action, is artificial and inconsistent with social reality. As Arnold points out, 'it is not possible to protect a person from harm without taking proactive steps,' for example, by designing, establishing, staffing, financing and operating the necessary institutions. As a result, the notion of negative versus positive rights loses its meaning: 'There are only rights and corresponding obligations, but the obligations that correspond to these rights are both negative and positive' (Arnold, 2009, pp. 65–6). The business responsibility to respect human rights, as articulated by the SRSG, is a negative responsibility to avoid causing or contributing to human rights violations, rather than a positive responsibility to fulfill or support the realization of human rights. That said, the SRSG recognizes that negative responsibilities may require an actor to take affirmative steps to discharge its responsibility (not least, by conducting human rights due diligence) and that consequently a company can fail to discharge its responsibility by both omission and action (United Nations, 2008b, p. 17, 2011b, p. 14).

The intersection of these two distinctions generates four types of social responsibility:

1. Impact-based negative responsibility: companies have the responsibility to avoid contributing to negative social or environmental impacts directly or through their relationships.
2. Leverage-based negative responsibility: companies have the responsibility to use their leverage to prevent or reduce the negative social or environmental impacts of other actors with whom they have relationships regardless of whether the companies themselves have contributed or are contributing to such impacts.
3. Impact-based positive responsibility: companies have the responsibility to contribute to positive social or environmental impacts directly or through their relationships.
4. Leverage-based positive responsibility: companies have the responsibility to use their leverage to increase or maximize the positive social or environmental impacts of other actors with whom they have relationships (Wood, 2011a).

The SRSG's framework for business and human rights endorses impact-based negative responsibility, leaves a little room for leverage-based negative responsibility and rejects both forms of positive responsibility. I will argue in favor of all four varieties of responsibility.

The third distinction at work in the debate about corporate leverage and spheres of influence is between companies' inescapable human rights obligations and optional practices which organizations may choose or be encouraged to adopt. Some commentators, the SRSG included, suggest that exercising leverage to support or fulfill human rights is an optional matter, not an obligation (Sorell, 2004, p. 140; United Nations, 2008a, p. 5, 2010, p. 13). In this chapter I am concerned only with defining the boundaries of the obligations owed by business to society. Following Goodpaster, I define corporate responsibility as 'the acknowledged or unacknowledged obligations that every company has as it pursues its economic objectives' (Goodpaster, 2010, p. 126; Cragg, 2010, pp. 283–4). No one disagrees that organizations may as a discretionary matter, on a voluntary basis and subject to certain caveats, use their leverage to promote positive social or environmental outcomes, or prevent or mitigate negative outcomes. I will argue that in certain circumstances they have an obligation to do so.

5.3 THE 'SPHERE OF INFLUENCE' DEBATE

5.3.1 Emergence of the SOI Concept

One of the abiding questions regarding corporate social responsibility is where to draw the boundaries of an organization's responsibility when other actors with whom it is connected engage in human rights abuses or other socially irresponsible conduct. In what circumstances and to what degree, for example, should an apparel company be responsible for violations of workers' rights in its suppliers' factories; should a mining company be responsible for illegal killings by security forces contracted to protect its assets and personnel; should a battery manufacturer be responsible for contamination caused by leaching of toxins when its products are disposed of improperly; should a firearms manufacturer be responsible when police use its products to shoot at citizens assembled peacefully; should banks be responsible when the proponents of projects they finance displace indigenous people forcibly; or should makers of fuels, solvents or adhesives be responsible when children sniff their products to get high?

The concept of SOI was introduced into social responsibility discourse in 2000 by the United Nations Global Compact in an effort to answer

this question. The Global Compact urges member companies to embrace, support and enact ten principles of socially responsible conduct 'within their sphere of influence' (United Nations Global Compact Office, n.d.). According to Professor Ruggie, the main drafter of the Global Compact before he became the SRSG, SOI can be a useful metaphor for thinking about a company's responsibilities beyond the workplace (United Nations, 2008a, p. 6). The concept of a 'sphere' reflects two core propositions: first, that organizations have the ability, within certain limits, to influence actions and outcomes outside their own organizational boundaries through their relationships with other actors, and second, that business firms and States perform distinct social functions in distinct social domains, giving rise to distinct roles and responsibilities (de Schutter, 2006, p. 12).

The SOI is often depicted as a series of concentric circles with the organization's workplace at the center, followed by its supply chain, marketplace, the communities in which it operates and, finally, an outermost sphere of government and politics (United Nations, 2008a, p. 4). This model assumes that a company's influence diminishes with distance from the center of its sphere (United Nations, 2008a, p. 4), an idea often operationalized in terms of 'proximity':

> The closer a company is to actual or potential victims of human rights abuses, the greater will be its control and the greater will be the expectation on the part of stakeholders that the company is expected to support and respect the human rights of proximate populations. Similarly, the closeness of a company's relationship with authorities or others that are abusing human rights may also determine the extent to which a company is expected by its stakeholders to respond to such abuse. (Business Leaders Initiative on Human Rights, United Nations Global Compact Office and Office of the United Nations High Commissioner for Human Rights, n.d.)

The draft United Nations *Norms* on the responsibilities of transnational corporations in relation to human rights employed the SOI concept in a literal sense to define corporate obligations: 'Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights' (United Nations, 2003, Article A.1). The potential significance of this direct, obligatory application of the SOI concept was magnified by two facts: first, the Norms defined corporate responsibility as including positive obligations to protect, promote and secure the fulfilment of human rights, not just a negative responsibility to avoid violating them; and second, the corporate human rights obligations identified by the Norms were of the same

general type and scope as those of States, leaving the concept of 'spheres of activity and influence' to do most of the work to distinguish between them.

The UN Human Rights Commission gave the draft *Norms* a chilly reception in 2004, noting that it had not requested them and that they had no legal standing. It nevertheless asked the Office of the High Commissioner to prepare a report on existing standards related to business and human rights that would identify outstanding issues and make recommendations for strengthening such standards and their implementation. The resulting 2005 report endorsed the use of the SOI concept to define the boundaries of business responsibility for human rights. Noting that the concept sets limits on responsibility according to a business entity's power to act, it concluded that it could 'help clarify the boundaries of responsibilities of business entities in relation to other entities in the supply chain . . . by guiding an assessment of the degree of influence that one company exerts over a partner in its contractual relationship – and therefore the extent to which it is responsible for the acts or omissions of a subsidiary or a partner down the supply chain' (United Nations, 2005a, p. 14). The High Commissioner also concluded that the SOI concept should help draw boundaries between the responsibilities of States and businesses, and to ensure that small businesses 'are not forced to undertake over-burdensome human rights responsibilities, but only responsibilities towards people within their limited sphere of influence' (United Nations, 2005a, p. 14). The report recommended that the Commission consider and further develop the SOI concept.

The Commission welcomed the High Commissioner's report and requested that the UN Secretary-General appoint a Special Representative on business and human rights for an initial period of two years, with a mandate to 'identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights' (United Nations, 2005b, para. 1(a)). One of the SRSG's tasks would be to clarify the implications of the concept of SOI (United Nations, 2005b, para. 1(c)).

5.3.2 The SRSG's Rejection of SOI

In his early research, the SRSG found that many companies' human rights policies and practices mirrored the Global Compact's SOI model (United Nations, 2007, p. 21), and that its assumption of responsibility declining gradually as one moves outward from the workplace 'appears to reflect an emerging consensus view among leading companies' (United Nations, 2006, p. 10). He nevertheless rejected the use of SOI to define the scope of

the business responsibility for human rights (United Nations, 2008a, p. 6; see also Ruggie, 2007, pp. 825–6, 2008, pp. 202–3).

The SRSG argued that while the SOI concept may have sufficed when the Global Compact was first introduced, companies now needed a clearer and more precise guide to their responsibilities, especially after SOI was incorporated in the draft UN *Norms* (United Nations, 2008a, p. 5). According to the SRSG, the SOI concept's conflation of 'influence as impact' with 'influence as leverage' was problematic because imposing responsibility whenever a company has leverage would require assuming, inappropriately, that 'can implies ought' (United Nations, 2008a, p. 5). The SRSG concluded, to the contrary, that 'companies cannot be held responsible for the human rights impacts of every entity over which they may have some leverage, because this would include cases in which they are not contributing to, nor are a causal agent of the harm in question' (United Nations, 2008a, p. 5). Moreover, requiring companies to act wherever they have leverage would invite political interference and strategic manipulation (Ruggie, 2007, p. 826; United Nations, 2008a, pp. 5–6, 2008b, p. 20).

The SRSG also took issue with the tendency to operationalize SOI in terms of 'proximity,' noting that its most intuitive meaning, geographic, is often misleading since companies' activities can have effects very far away (United Nations, 2008a, p. 6). The SRSG concluded that 'it is not proximity that determines whether or not a human rights impact falls within the responsibility to respect, but rather the company's web of activities and relationships' (United Nations, 2008a, p. 6). In short,

> the scope of due diligence to meet the corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence. Rather, it depends on the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities. (United Nations, 2008a, p. 8)

The SRSG also rejected the *Norms*' contention that corporations have positive human rights duties, defining the business responsibility to respect human rights in negative terms of avoiding harm (United Nations, 2008b). The Human Rights Council welcomed the SRSG's reports and extended his mandate for a further three years to elaborate and operationalize the framework (United Nations, 2008c). As a result of this endorsement, the SRSG's three-part *Protect, Respect and Remedy* framework is widely referred to as the 'UN Framework.'

According to the SRSG, the UN *Norms*, positive responsibility, SOI and leverage were 'out' as bases for defining business human rights

responsibilities, while impacts and negative responsibility were 'in.' This did not mean, however, that leverage was irrelevant. While rejecting leverage as a basis for defining the scope of responsibility, he emphasized that responsibility arises not only from the impacts of a company's own decisions and activities, but also from the impacts generated through its relationships (United Nations, 2010, p. 13). The SRSG thus contemplated responsibility arising in situations where the company itself was not contributing to negative impacts, but its relationships were. Responsibility in such circumstances would have to attach to the company's ability to influence other actors' contributions to negative impacts through its relationships rather than to its own contribution to such impacts, since such contribution is absent. This opens the door to a leverage-based conception of responsibility.

5.3.3 SOI and the Drafting of ISO 26000

The SRSG's skepticism and the apparent demise of the draft UN *Norms* notwithstanding, the SOI approach remained very much alive in international corporate social responsibility discourse and practice. In early 2005 the International Organization for Standardization (ISO) began to work on a guide on social responsibility, to be known as ISO 26000. ISO, a federation of the national standards bodies of approximately 160 countries, is the leading source of voluntary consensus standards for business (Murphy and Yates, 2009). The guide was developed by the ISO Working Group on Social Responsibility (WGSR), a multi-stakeholder body made up, ultimately, of 450 representatives of business, labor, government, non-governmental organizations (NGOs) and other interests from 99 ISO member countries and 42 international organizations (International Organization for Standardization, 2010b). Notably, no major international human rights organizations participated directly in the negotiations.

SOI featured prominently in the draft guide from the start, drawing on the Global Compact, the draft UN *Norms* and other sources. After several rounds of drafting, a near-final version known as a Draft International Standard (DIS) was circulated for ballot in 2009, more than a year after the SRSG published his views on SOI and 'leverage' (International Organization for Standardization, 2009). The DIS continued to give the SOI concept a central role. In several passages it stated that leverage over other actors can give rise to responsibility, and that generally, the greater an organization's leverage, the greater its responsibility to exercise it (International Organization for Standardization, 2009, clauses 5.2.3, 7.3.2, 6.4.3.2, 6.3.10.12, 6.5).

These passages did not escape the SRSG's attention. In November 2009

he sent a letter to the WGSR expressing concern about the DIS's treatment of leverage and SOI (United Nations, 2009). While acknowledging that the use of the SOI concept in the human rights portion of ISO 26000 (clause 6.3) was broadly consistent with the UN Framework, he cautioned that its use in the rest of the document was not, and that this would send confusing messages to companies and stakeholders (United Nations, 2009, p. 2). He reiterated his previously published concerns about leverage and SOI (summarized above), and urged the working group to bring the guide into closer alignment with the UN Framework.

The WGSR leadership took the SRSG's advice, substantially rewriting the definition of SOI and the main clauses elaborating upon the concept in consultation with the SRSG's team. Many references to responsibility arising from and increasing with the ability to influence other actors' decisions and activities were removed, and replaced with a stronger emphasis on influence as 'impact.' The changes were endorsed by the WGSR at its last meeting in Copenhagen in 2010, and later that year the final version of ISO 26000 was approved by a large majority of ISO member bodies and published (International Organization for Standardization, 2010a).

5.3.4 The Final Version of ISO 26000

Despite these last minute changes, influence and leverage continue to feature prominently in the published version of ISO 26000. The term 'sphere of influence' appears 34 times in the guide and is integral to its definition of and approach to social responsibility (Wood, 2011a, 2011b). ISO 26000 describes the relationship between impacts, leverage and responsibility as follows:

> An organization does not always have a responsibility to exercise influence purely because it has the ability to do so. For instance, it cannot be held responsible for the impacts of other organizations over which it may have some influence if the impact is not a result of its decisions and activities. However, there will be situations where an organization will have a responsibility to exercise influence. These situations are determined by the extent to which an organization's relationship is contributing to negative impacts. (International Organization for Standardization, 2010a, clause 5.2.3)

Emphasizing that organizations have a choice about the kinds of relationships they enter, the guide warns that 'There will be situations where an organization has the responsibility to be alert to the impacts created by the decisions and activities of other organizations and to take steps to avoid or to mitigate the negative impacts connected to its relationship with such organizations' (International Organization for Standardization,

2010a, clause 5.2.3). Where organizations are not causing or contributing to human rights violations or other negative impacts directly or through their relationships, ISO 26000 notes that exercising influence to minimize negative impacts or enhance positive impacts is an optional opportunity, not a responsibility, and warns that exercising leverage can also have negative or unintended consequences (International Organization for Standardization, 2010a, clauses 5.2.3, 6.3.2.2, 6.3.7.2, 7.3.2). In these respects ISO 26000 is aligned with the UN Framework.

Other parts of ISO 26000, however, suggest that business responsibility is not just negative but also positive, contrary to the SRSG's formulation. The clause on general principles of social responsibility calls upon organizations, for example, to 'respect and, where possible, promote' fundamental human rights (International Organization for Standardization, 2010a, clause 4.1). Even the human rights clause urges organizations (among other things) to contribute to promoting and defending the overall fulfillment of human rights; promote gender equality; contribute to disabled people's enjoyment of dignity, autonomy and full participation in society; promote respect for the rights of migrant workers; and make efforts to advance vulnerable groups and eliminate child labor (International Organization for Standardization, 2010a, clauses 6.3.4.2, 6.3.7.2, 6.3.10.3).

ISO 26000 recognizes that fulfillment of such positive responsibilities will often require organizations to exercise leverage over other actors. The clause on fair operating practices urges organizations to use their relationships with other organizations to promote the adoption of social responsibility throughout their sphere of influence, encourage the development of public policies that benefit society at large and raise the awareness of organizations with which they have relationships about principles and issues of social responsibility (International Organization for Standardization, 2010a, clauses 6.6.1.2, 6.6.4, 6.6.6). A passage on labor practices even asserts that 'a high level of influence is likely to correspond to a high level of responsibility to exercise that influence' (clause 6.4.3.2).

Other passages of ISO 26000 suggest that in some circumstances an organization may have a responsibility to contribute to solving problems caused by others. For example, it urges organizations to take action to reduce and minimize pollution, prevent the use of certain toxic chemicals and reduce greenhouse gas emissions by organizations within their sphere of influence (International Organization for Standardization, 2010a, clauses 6.5.3.2, 6.5.5.2.1). Finally, an organization may have a responsibility to refrain from exercising its leverage in particular ways, regardless of whether such exercise would have any impact. Thus, organizations should not engage in misinformation, intimidation, threats, efforts to control politicians or other activity that can undermine the public political

process, regardless of whether such nefarious activity actually bears fruit (International Organization for Standardization, 2010a, clause 6.6.4). Similarly, it is irresponsible to offer bribes or engage in other corrupt practices regardless of whether such bribes are accepted or such illicit efforts at influencing others' decisions and activities succeed (International Organization for Standardization, 2010a, clause 6.6.3).

In short, ISO 26000 contains a mix of negative, positive, impact-based and leverage-based responsibility, although the passages on human rights tend to emphasize the negative, impact-based variety (Wood, 2011a). In this respect it is more like the UN Global Compact, which exhorts companies to 'embrace, support and enact' the ten principles within their spheres of influence, than the UN Framework, which defines the business responsibility for human rights as negative and based on contribution to impacts.

5.3.5 Influence and Leverage in the SRSG's Guiding Principles

In March 2011 the SRSG submitted his final report to the UN Human Rights Council (United Nations, 2011b). The report proposes Guiding Principles for implementing the UN Framework. What is most interesting about the Guiding Principles for present purposes is their acknowledgment that a company may be responsible for human rights violations to which it has not contributed:

> The responsibility to respect human rights requires that business enterprises: . . . Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, *even if they have not contributed to those impacts*. (United Nations, 2011b, p. 14, emphasis added)

The operational guidance provided by the Principles distinguishes between three scenarios: where a business enterprise causes or may cause an adverse human rights impact, where it contributes or may contribute to an adverse human rights impact and where it 'has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship' (United Nations, 2011b, p. 18). In other words, in the Guiding Principles a company's responsibility is not defined solely by its own contribution to impacts. Companies have a responsibility to prevent or mitigate negative human rights impacts to which they have not contributed, if these impacts are 'directly linked' to the company via its business relationships. In such circumstances responsibility must attach to the company's ability to influence other actors through its relationships, since the company is

not making any contribution to negative impacts. In this way, the Guiding Principles embrace a modest version of leverage-based responsibility.

The Human Rights Council endorsed the Guiding Principles enthusiastically in a June 2011 resolution co-sponsored by several countries and supported almost unanimously by Council members (United Nations, 2011a). With the Special Representative's work done, the Council's focus will turn now to promoting the effective and comprehensive dissemination and implementation of the UN Framework and Guiding Principles. Elaborating the circumstances in which the link between a company and a negative human rights impact is sufficiently 'direct' to give rise to responsibility even where the company has not contributed to the impact will be one of the issues requiring attention as this work proceeds.

5.4 THE CASE FOR LEVERAGE-BASED RESPONSIBILITY

Insofar as the SRSG's Guiding Principles move toward accepting leverage-based responsibility, they make a step in the right direction. They do not go far enough, however. A comprehensive leverage-based conception of responsibility is needed. I make three assumptions for the purposes of this argument. The first is that business organizations bear responsibilities to society other than to maximize returns to their shareholders. While this assumption still has its critics, it is shared widely by the UN Framework, ISO 26000 and many commentators, and I do not intend to question it here. The second assumption is that the moral case of the individual can be projected onto the organization for purposes of social responsibility. Such projection raises difficult issues but is sufficiently accepted in the social responsibility and business ethics literature that it provides a workable starting point, provided that certain morally relevant differences between organizations and individuals are borne in mind (Archard, 2004, p. 55; Goodpaster, 2010, p. 131; Palmer, 2004, p. 69; Voiculescu, 2007, pp. 412–18).

My third assumption is that responsibility is individual rather than collective – that is (keeping in mind my second assumption, above), it attaches to individual organizations rather than to groups of organizations whose actions collectively advance or infringe human rights or environmental integrity. Many commentators, the SRSG included (Ruggie, 2007, p. 839), have noted the inadequacy of individualist accounts of responsibility in view of the often collective, networked character of human rights violations and other social evils (for example, Kutz, 2000; Voiculescu, 2007; Weissbrodt, 2008, p. 387; Wettstein, 2010c; Young,

2004). A collective theory of responsibility may ultimately be necessary to respond to this reality. In this chapter, however, I confine myself to exploring how we might address this challenge within an individualist conception of responsibility.

Finally, my defense of leverage-based responsibility should not be mistaken for a defense of the SOI approach. Like the SRSG, I consider the spatial metaphor of nested spheres radiating out from the workplace inapt and potentially misleading, and its tendency to conflate 'influence as impact' with 'influence as leverage' unhelpful. It should be replaced with a metaphor that is truer to social reality, such as the 'web of activities and relationships' suggested by the SRSG himself.

5.4.1 The Limitations of Impact-based Responsibility

The moral case for impact-based responsibility is strong. It is based on the moral intuition that we are responsible for the results of our own actions, barring exceptional situations such as incapacity or involuntariness (Hart and Honoré, 1985, pp. 63–5; Moore, 2009, pp. 30–3, 95). Our degree of culpability (for example intending or recklessly risking a result versus bringing about unforeseen results by mistake) and of contribution (for example, being a necessary and sufficient cause versus a substantial factor, or making a causal contribution versus non-causally occasioning an outcome) may affect the degree of blameworthiness or praiseworthiness attached to our conduct, but the 'ethical bottom-line,' as Wiggen and Bomann-Larsen put it, 'is simple: you are responsible for the actual harm you cause or contribute to, no matter where you operate' (Wiggen and Bomann-Larsen, 2004, p. 7).

An impact-based account of responsibility must overcome two challenges: unintended side effects and interactive social outcomes. The first challenge arises where an actor's decisions and activities bring about negative results that the actor did not intend. The principle of double effect offers one response to this challenge. Under this venerable doctrine, actors have a responsibility to prevent unintended but foreseeable side effects and take measures to minimize the harm caused (Bomann-Larsen, 2004, p. 91). Action that produces harmful side effects is nevertheless permissible provided that the primary goal of the action is legitimate, the side effects are neither part of the end sought by the actor nor means to this end, the actor aims to prevent or minimize them, and no alternative courses of action are available that would result in fewer or no side effects (Wiggen and Bomann-Larsen, 2004, p. 5). The issue of unintended side effects, however important for business ethics, is not relevant to this chapter because regardless of how one treats them, both the problem and its solution fall

clearly within the domain of impact-based responsibility and no question of leverage-based responsibility arises (Wiggen and Bomann-Larsen, 2004, pp. 10–11).

The second challenge facing impact-based responsibility is the prevalence of interactive social outcomes. Many social and environmental conditions are the products of complex social interactions in which chains of causation are long and convoluted, outcomes are not within the control of individual actors and contributions are difficult or impossible to tease apart. This does not fit well with a traditional conception of moral responsibility according to which 'one can only be held responsible for that over which one has control' (Beckmann and Pies, 2008, p. 91). This criterion of individual outcome control is an instantiation of the maxim 'ought implies can': 'you can only have a moral obligation if it is causally possible for you to carry it out' (Banerjee et al., 2006, p. 313). If we were to apply this criterion rigidly to require individual control of social outcomes as a condition for moral responsibility, no one would be responsible for many outcomes in today's complex world.

One response to this problem is to relax the causation requirement. This can be done in two ways. First, the relation between the agent's conduct and the outcome might be diluted from 'but-for' causation to 'substantial factor' or some otherwise lowered threshold of causal contribution (Moore, 2009, pp. 105, 300). Second, contribution can be defined in non-causal terms. Moral responsibility can and often does arise in the absence of causal contribution. Examples of non-causal contributions to undesirable outcomes that may in the right circumstances give rise to moral responsibility include omissions or neglect (in which the operative relationship is one of counterfactual dependence rather than causation), culpable imposition of risk (in which the operative relationship is probabilistic dependence rather than causation) and culpable but unsuccessful efforts to do harm (Hart and Honoré, 1985, pp. xlv–xlvi, 63–5; Moore, 2009, pp. 54–5, 307–11, 314–17, 444–51; Soule et al., 2009, pp. 541–3). To be clear, responsibility for omissions is non-causal: an omission does not cause the outcome it failed to prevent (Moore, 2009, pp. 54–5, 444–51).

The UN Framework reflects both of these general strategies: it rejects a narrow focus on causation in favor of 'causing or contributing' (United Nations, 2008a, p. 6, 2011b), and it embraces both causal and non-causal forms of contribution. To be precise, it emphasizes causal contributions, in the form of the direct and indirect impacts of companies' own decisions and operations (for example, United Nations, 2008b, p. 20). But it contemplates responsibility for both actions and omissions, and refers to such non-causal contributions as failing to conduct human rights impact assessments, failing to integrate human rights policies throughout a company,

failing to monitor human rights performance and silently encouraging or legitimizing human rights abuses (United Nations, 2008a, p. 12, 2008b, pp. 18–19, 21, 2010, p. 17, 2011b, p. 14). The Framework also sometimes uses the language of risk, which appears to imply a non-causal theory of responsibility (United Nations, 2011b, pp. 16–17).

Relaxing the causation requirement has the advantages of recognizing that causation is scalar, a matter of continuous variation (Moore, 2009, p. 300), and that non-causal contributions can be morally relevant. It allows responsibility to be graduated to reflect different kinds and degrees of contribution, causal and non-causal. It does not, however, allow responsibility to be imposed in cases where it is impossible to determine individual contributions. Under this approach, if no contribution can be established, there is no responsibility.

Some might say that this is as it should be: no one should be held responsible for a state of affairs to which he or she did not contribute, causally or otherwise. But individual responsibility can arise in the absence of contribution to outcomes, causal or otherwise. Leading examples are role-based responsibilities such as that of a principal for harm caused by an agent, a parent for the actions of a minor, an occupier of property for injuries sustained by visitors or a captain for the safety of a ship (Gibson, 2007, pp. 99–100; Hart, 1967, 2008). Another is the responsibility to come to the aid of someone in peril given the right circumstances, an issue to which I will return.

A second response to the problem of interactive social outcomes, which often accompanies the first, is to characterize responsibility as qualified rather than categorical. Faced with the lack of individual outcome control, an actor's responsibility should be defined in terms of what he or she can control – making an effort – rather than what he or she cannot – achieving a particular result. In such a scenario 'even if a company does not have a categorical responsibility, a responsibility to resolve the moral challenge on its own, it can still have a qualified responsibility to make an effort – or to participate in the efforts of others in seeking a collaborative resolution' (Goodpaster, 2010, p. 147). This satisfies the 'ought implies can' maxim by defining the moral responsibility in terms of actions a firm can achieve by itself. Qualified responsibility is justified in the complex arena of social responsibility where agency is often diffuse and interdependent, and causal pathways hard to trace.

A third response is to make actors responsible for the institutional order in which interactions occur, rather than for specific interaction outcomes. In this approach individual actors are responsible for contributing to the creation of the institutional order within which interaction occurs and for participating in a discourse aimed at identifying shared interests

(Beckmann and Pies, 2008; Pies et al., 2009; Ulrich, 2008). Social interaction outcomes remain no one's responsibility, except in the rare cases where individual outcome control exists. This approach is unsatisfactory insofar as it deflects attention from where it ought to be, on responsibility for the actual outcomes of social interaction.

In conclusion, impact-based responsibility works where a causal connection can be established between an agent's actions and the effects felt by others. It applies, for example, where a company fires employees it suspects of agitating in favor of unionization. In this situation the causal impact of the company's action on the employees' rights is direct and clear. It also applies where a company insists on keeping the prices paid to its suppliers as low as possible, and this insistence contributes to a supplier's decision to require its employees to work uncompensated overtime, in an effort to cut its costs. In this situation the first company's action has an indirect impact, as one causal factor (possibly among many) contributing to the second company's decision. So long as the first company's contribution rises above some *de minimis* threshold, the company will bear responsibility for the harm commensurate with its degree of contribution and culpability. Impact-based responsibility can also apply to cases of non-causal contribution such as omissions and culpable creation of risk, by broadening what we mean by 'contribution.'

Even with this expansion, a wide variety of situations where harm is being suffered, or good could be done, escape the application of impact-based responsibility because it is impossible to determine individual contributions to outcomes. The only answer impact-based responsibility offers in these situations is that no one is responsible. To say that this is justified because contribution is a prerequisite for responsibility fails to recognize that responsibility can and does arise in the absence not just of causal contribution, but of contribution of any kind. Such situations call for finer-grained moral judgments. Some actors are more closely connected to such situations than others, some act in more blameworthy ways than others and some have more opportunities to act than others. We need a theory of responsibility that allows us to make these kinds of distinctions. Leverage-based responsibility is one such theory.

5.4.2 Power and Responsibility

The kernel of a leverage-based approach is the proposition that, in some circumstances where a company is making no causal or other contribution to a state of affairs, it has a responsibility to exercise its leverage over actors with whom it has relationships in an effort to improve that state of affairs. Lack of contribution may not rule out a responsibility to con-

tribute. The same idea can be expressed in terms of impact: even where a company is having no impact, it may have an obligation to try to have an impact by exercising its leverage over others. The question in such cases is not 'are we contributing?' but 'could we contribute?' If we are not part of the problem, should we nevertheless be part of the solution?

The case for leverage-based responsibility starts with the fact of the substantial power of business enterprises to influence social conditions, including the enjoyment of human rights (Moon et al., 2008; Sorell, 2004, p. 138; Wiggen and Bomann-Larsen, 2004). This power is widely believed to be increasing under contemporary conditions of globalization, while the capacity of governments to protect human rights is under strain (Cragg, 2004, 2010; Scherer et al., 2009). In many cases corporations have substantial influence over people's material well-being; in some cases they exercise government-like functions, providing such public goods as education, security and health care; in rare cases they have the ability to determine life and death. Not only do they have substantial impacts on society and the environment, they often have the leverage to make a difference, for better or worse, to problems not strictly of their own making:

> The claim that businesses have obligations to protect and promote human rights is controversial, but the claim that they have opportunities to do so is not. . . . Businesses, especially big businesses, are influential, and governments that rely on their investment for economic development, or even for corrupt personal enrichment, will not be unwilling to listen to what businesses have to say about a wide range of topics, including human rights. (Sorell, 2004, p. 129)

What are the moral implications of this power? What is the relation between companies' size, resources and leverage, on the one hand, and their human rights obligations, on the other? This is, as Sorell notes, 'perhaps rhetorically and practically the hardest thing to get clear about when one discusses the human rights obligations of companies' (Sorell, 2004, p. 138). At the highest level of generalization, we might assert that with corporate power comes responsibility (Kobrin, 2009, p. 350; Scherer and Palazzo, 2007; Wiggen and Bomann-Larsen, 2004, p. 3; Windsor, 2001). According to Cragg, 'With the power of corporations to impact the enjoyment of human rights on the part of those affected by their operations comes the responsibility to protect and respect human rights in the exercise of that power' (Cragg, 2010, p. 288).

Some commentators go further, arguing not just that power must be exercised responsibly but that there may be a responsibility to exercise power. Campbell identifies companies' capacities, 'that is, their ability and opportunity to make a difference to fundamental human interests within and beyond their own core sphere of activity,' as one factor defining their

human rights responsibilities, and asserts that 'concentrating on what it is that different sorts of organisation are capable of achieving gives us a fruitful basis for looking not only to where the duties correlative to human rights may fall, but what those duties may actually be' (Campbell, 2004a, pp. 15–16). Sorell argues that 'when businesses have the opportunity to promote or protect human rights where they operate, they are often also obliged to do so' (Sorell, 2004, p. 130). Griffin argues that 'accidental facts such as being in a position to help can impose moral responsibilities – and nothing more special to the situation may bring the responsibility than that' (Griffin, 2004, p. 39). Do these observations support the proposition that corporations must in some circumstances exercise their leverage over other actors in an effort to ameliorate situations to which they did not contribute?

Some proponents of the SOI approach suggest a simple equation: leverage – understood in terms of a company's size, scale of operations, profits, capacity, financial and human resources, strategic position in particular networks, privileged access to elites and so on – equals responsibility, and the more leverage, the more responsibility. And size matters: the larger the company, 'the larger the sphere of influence is likely to be' (United Nations, 2005a, p. 14). The main author of the UN draft *Norms* put it this way:

> [T]he larger the resources of transnational and other businesses, the more opportunities they may have to assert influence. Accordingly, larger businesses, which generally engage in broader activities and enjoy more influence, have greater responsibility for promoting and protecting human rights. (Weissbrodt and Kruger, 2003, 912)

Surely this is too simple. If this logic were taken literally, it would mean that a large multinational company whose operations and value chain raise very few human rights issues would have greater responsibility than a small company operating in an industry and location with extremely high human rights risks, simply because of its greater resources. It would mean that a prosperous Canadian company with no operations, sources of supply, shareholders or consumers in Cambodia would have a responsibility to help improve the lot of Cambodian children, simply because it can. The SRSG's objection that this would turn the 'ought implies can' principle on its head is well founded (United Nations, 2008b, pp. 19–20; see also United Nations, 2008a, p. 5). He also rejected this proposition because leverage-based responsibility might push companies into performing roles that should be played by governments:

> [T]he proposition that corporate human rights responsibilities as a general rule should be determined by companies' capacity, whether absolute or relative to

> States, is troubling. On that premise, a large and profitable company operating in a small and poor country could soon find itself called upon to perform ever-expanding social and even governance functions – lacking democratic legitimacy, diminishing the State's incentive to build sustainable capacity and undermining the company's own economic role and possibly its commercial viability. Indeed, the proposition invites undesirable strategic gaming in any kind of country context. (United Nations, 2010, pp. 13–14)

The danger of such strategic manipulation may be overstated (Wood, 2011a, p. 19), but the underlying point is sound: anchoring responsibility in leverage alone is highly problematic. 'Can' does not imply 'ought.'

Sorell gives three convincing reasons why wealth and power are not, on their own, sources of responsibility. First, a company need not be rich and powerful to discharge many human rights obligations (Sorell, 2004, p. 139). Second, the risk of violating human rights and the difficulty of promoting or protecting them vary independently of companies' wealth and power:

> Undifferentiated talk of business obligations to promote human rights, and images of businesses with no specific location in the world but bestriding the world, ignore the greater foreseeable risks of human rights violations that attend some places and some forms of business and the greater obligations of companies in those businesses and those places to attend to human rights problems. (Sorell, 2004, p. 139)

Third, if companies' human rights obligations are tied to their economic fortunes, a small business with a razor-thin profit margin might blamelessly neglect worker safety or suppress unionization, while a huge company that falls on hard times might lose its human rights obligations along with its wealth and power (Sorell, 2004, p. 139). On the contrary, Sorell argues, 'a company that loses its wealth and power retains its obligations but may become less and less able to discharge them' (Sorrell, 2004, p. 139).

As a result, Sorell and the SRSG suggest that wealth, power and other indicia of leverage are relevant as means of discharging social responsibilities, not as sources of responsibility (Sorell, 2004, p. 139; United Nations, 2011b, pp. 14, 16, 18–19). I would not go this far. Leverage can be a source of responsibility, provided other factors are present. The leading example is the moral duty to come to the aid of those in distress (for example, Griffin, 2004, p. 39; Moore, 2009, p. 37; Sorell, 2004, pp. 130–5).

5.4.3 Good Samaritans

The moral duty to come to the rescue of people in distress is an example of leverage-based responsibility. In such cases capacity to help

is a prerequisite for responsibility, not simply a means of discharging it: someone who cannot swim is not under an obligation to save a drowning baby (Santoro, 2010, p. 292). It is worth repeating Griffin's affirmation that being in a position to help, even if entirely accidental, can impose moral responsibilities (Griffin, 2004, p. 39). Harm and suffering generate objective reasons for everyone to cut them short (Nagel, 1986, pp. 152–6; Sorell, 2004, p. 135).

When will such reasons be sufficiently compelling to impose a moral obligation on particular actors (Moore, 2009, p. 37)? Speaking generally, four criteria must be satisfied: urgency, ability, opportunity and affordability (Archard, 2004; Griffin, 2004; Moore, 2009, p. 37; Schmidtz, 2000; Sorell, 2004). First, the situation must be urgent. Urgency is a function of the importance of the interest at stake (for example, life, limb or basic human rights) and the immediacy and severity of the threat to that interest. Second, the putative helper must have the ability to help the person in distress, that is, the requisite knowledge, resources or experience. Third, the putative helper must have the opportunity to help, that is, must be in the right place at the right time to deliver the needed help. As Archard reminds us, there is a critical difference between ability and opportunity:

> I am able to administer First Aid to the victims of a road traffic accident. I can do so because I have secured the appropriate qualification, have the First Aid kit, know what I am doing, and have past experience of providing such help. However I only have the opportunity to render such aid if I am there when a traffic accident has taken place and there is a victim to whom I can give First Aid. (Archard, 2004, p. 58)

Some commentators add that the helper must be uniquely qualified to help – that is, there must be no one in a better position (Schmidtz, 2000). Finally, the putative helper must be able to help at modest (some would say insignificant) cost, inconvenience or danger to himself or herself (Soule et al., 2009, pp. 547–8).

The duty to rescue applies to anyone and everyone who satisfies these conditions, including total strangers who are in a position to help purely by accident – whether passers-by who come upon a child flailing in a pond, tourists who witness a road accident while driving through a foreign country or patrons who watch passively as a rape is committed in a bar (Moore, 2009, p. 304). Since it applies to total strangers, it is appropriate that the duty be restricted to situations of urgent threats to fundamental interests, where the cost of helping is relatively small.

There is a good argument that this duty applies to companies (Dunfee, 2006; Griffin, 2004; Schmidtz, 2000; Sorell, 2004; Soule et al., 2009, pp. 547–8). Sorell gives the example of a company learning that, on its door-

step, 'people's lives are being threatened, or their labour or land seized at the whim of the local military' (Sorell, 2004, p. 132). The urgency of the victims' needs and the relative scarcity of alternative help put 'claims on the resources of the company, even if the company, like a passing tourist, is in no way responsible for the emergency' (Sorrell, 2004, p. 130). While the analogy between the individual bystander and the company is not perfect, the disanalogy adds force to the argument. Companies that invest directly in a country are more like permanent residents than tourists:

> What goes on in the country has more to do with them than with people who are quickly passing through. The human rights abuses that companies confront do not crop up suddenly and unexpectedly, like the road accident: they often predate the entry of the company and are known in advance to be features of local life. Again, they are not features of life which, like the accident on the road, can pass unnoticed if one's eyes are averted at the right moment, or that can be kept at a distance by driving away. (Sorell, 2004, p. 132)

Sorell argues that companies 'have obligations to help those whose lives or liberty are under serious threat in their vicinity, because some of these threats put people in urgent and undeniable need of help from anyone who can help, and companies in their vicinity sometimes can' (Sorell, 2004, p. 133).

The SRSG neither explicitly endorses nor rejects a business responsibility to come to the aid of those in distress. He recognizes that in some circumstances, 'such as natural disasters or public health emergencies, there may be compelling reasons for any social actor with capacity to contribute temporarily' (United Nations, 2010, p. 14), but he does not develop this idea further in his reports. He does explore the implications of a company's presence in a place where human rights are being violated, but only in the context of defining the scope of complicity and due diligence. Firstly, he concludes that mere presence in a place where human rights violations are occurring does not usually by itself constitute complicity (United Nations, 2008a, pp. 12, 21, 2008b, p. 21). The question of whether presence 'at the scene' makes one complicit in others' abuses is not, however, the same as whether it can give rise to an independent responsibility to come to the aid of those in distress. If nothing else, the shaky moral and metaphysical ground on which the entire edifice of accomplice liability stands (Moore, 2009, chapter 13) should lead us to explore other avenues.

The second context in which the SRSG discusses doing business in the presence of human rights violations is in defining the scope of human rights due diligence. Assessing human rights challenges in the specific country contexts where business activities take place is a key element of due diligence (United Nations, 2008a, p. 7, 2008b, p. 17, 2011b, p. 17).

Operating in contexts where human rights abuses occur should raise 'red flags' for companies to proceed with caution (United Nations, 2008a, p. 21), but does not on its own violate the responsibility to respect. Again, the question of the scope of due diligence is not the same as that of the existence of a free-standing responsibility to come to the aid of those in distress. Due diligence is the standard against which fulfillment of the responsibility to respect human rights is measured. Defining its content does not tell us whether there may be other duties beside the responsibility to respect, or whether the responsibility to respect should be defined differently.

In conclusion, there are good arguments for the existence of a moral duty on corporations to aid the distressed when they find themselves in the position of capable bystanders, and nothing in the SRSG's reports precludes such a possibility.

5.4.4 Beyond Rescue

Even if we accept the existence of a business duty to aid the distressed, it is simultaneously too narrow and too broad to support my argument for a general leverage-based responsibility. It is too narrow because it applies only in situations of immediate and serious threat to such fundamental human interests as life and liberty. Under this logic leverage-based responsibility would be limited to emergency situations, which we can only hope will be marginal and exceptional. It would not apply in mainstream, routine business conditions, except in contexts where abuse of fundamental rights is the norm. On the other hand, it is too broad insofar as it applies to anyone and everyone in a position to help, including total strangers with no connection to the case aside from their fortuitous presence at a given time and place. Restricting the duty to narrowly defined emergencies is justified in light of the potentially unlimited range of duty-bearers, and the potentially unlimited range of duty-bearers is justified by the urgency of the threats at issue. But there is a place for an intermediate form of leverage-based responsibility that is not restricted to dire threats to the most basic interests and does not extend potentially to everyone in the world.

Responsibilities are determined by other moral considerations than just urgency and ability to help. The most important for my purposes is the prior existence of a special relationship between the company, on the one hand, and the human rights-holder or rights-violator, on the other. By narrowing the range of potential duty-bearers to those with such a relationship, we are justified in broadening the circumstances in which leverage-based responsibility will arise.

The SRSG himself points to this possibility. Recall that the Guiding

Principles on Business and Human Rights recognize that business enterprises have a responsibility to 'seek to prevent or mitigate adverse human rights impacts that are *directly linked* to their operations, products or services *by their business relationships*, even if they have not contributed to those impacts' (United Nations, 2011b, p. 14, emphasis added). In such cases the company should exercise any leverage it has to prevent or mitigate the adverse impact. If it lacks leverage it should explore ways to increase its leverage by, for example, offering capacity-building to the related entity or collaborating with other actors. If it lacks leverage and is unable to increase its leverage it should consider ending the relationship, taking into account the potential adverse human rights impacts of doing so, the importance of the relationship to the company and the severity of the abuse. 'As long as the abuse continues and the enterprise remains in the relationship,' the guidelines warn, 'it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection' (United Nations, 2011b, p. 19).

As I showed earlier, this is an example of leverage-based responsibility as I define the term, despite the SRSG's earlier rejection of leverage as a basis for determining the scope of corporate responsibility. Responsibility attaches to the company's ability to influence other actors through its relationships, rather than to its contribution to negative impacts, since it is not making any such contribution. The key factor giving rise to responsibility in this situation is the 'direct link' between the enterprise's operations, products or services, on the one hand, and human rights impacts, on the other, via its business relationships. The Guiding Principles are silent on what constitutes a 'direct link.' One of my goals in this chapter is to specify what kind of link should suffice to ground this form of responsibility, putting some flesh on the bones provided by the Guiding Principles. I consider this issue next.

5.4.5 Criteria for Leverage-based Responsibility

I argue that leverage-based responsibility arises when four criteria are satisfied: (a) there is a morally significant connection between the company and either the perpetrator of human rights abuse or the human rights-holder; (b) the company is able to make a difference to the state of affairs; (c) it can do so at an acceptable cost to itself; and (d) the actual or potential invasion of human rights at issue is substantial. This list draws inspiration from Wettstein's work on silent complicity and positive moral obligations (Wettstein, 2010a, 2012), but extends it beyond the confines of complicity and positive responsibility to the case of corporate leverage more

generally. Our proposals, while highly complementary, are also partly grounded in different moral considerations and literatures: mine in the duty to come to the aid of those in distress, Wettstein's in the concept of private political authority. That we reach similar conclusions from somewhat different premises adds force to the central proposition that leverage gives rise to responsibility, in the proper circumstances.

(a) Morally significant connection

The first criterion for the existence of a responsibility to exercise leverage is a morally significant connection between the company, on the one hand, and the human rights-holder or rights–violator, on the other. In the basic rescue cases the connection is provided by the urgency of the victim's plight and the rescuer's being in the right place at the right time with the right resources. This connection crystallizes only at the moment these factors coincide. Often, however, there is a pre-existing relationship between a company and either the rights-holder or the perpetrator of harm. This can provide the morally significant connection sufficient to generate a broader leverage-based responsibility. For individuals, such relationships may be constituted by love, affection, friendship, vulnerability, family, employment or business; or by shared experiences, places, values, beliefs, interests and so on. Although corporations are not capable of some of these connections they have myriad commercial, contractual, political, cultural and other links to a wide variety of actors. Like individuals, they can have 'deep commitments to particular persons, causes, careers, and institutions' (Griffin, 2004, p. 40). They may be tied by investments and commercial relations to a place where human rights abuses are taking place, and they may depend on the services or good will of those who are guilty of the abuses (Sorell, 2004, p. 130). Some of these connections are created by choice, others arise involuntarily. Some are known to the parties, others are not.

These relationships generate moral responsibilities. The closer the relationship, the stronger the responsibility (Santoro, 2010, p. 292). At the 'closer' end of the spectrum are what Moore (2009, p. 58) refers to as 'obligations to the near and dear.' Applied to companies this would likely include employees, on-site contractors, consumers of goods and services, direct suppliers and the communities in which companies operate (Goodpaster, 2010, p. 134). If a company is blatantly and systematically polluting water supplies, exploiting workers or intimidating union organizers in a particular local community, other companies who are also established in that community have a stronger moral obligation to exercise their leverage to get it to desist than companies with no presence there, all else being equal. When public authorities interfere with employees' rights to

assembly or expression or take away their land without due process, their employer has a stronger responsibility to intervene than does a stranger. Where security forces use a company's products to commit human rights violations, or where individuals use a company's products (for example, cough syrups, adhesives, solvents or fuels) to get high, the maker of the product has a stronger responsibility to do something about it than does a company that does not make such products. A company with operations in a specific developing country, employing its inhabitants and contributing to its economy, has more of a responsibility for human rights in that country than it does in a country in which it does no business, and more responsibility than does a company that has no operations in that country (Archard, 2004, p. 58).

Responsibility is not determined solely by the closeness of the relationship to the rights-holder or rights-infringer. The character of the interest at stake also matters. The closer the connection between the interest that is threatened and the company's activities, products or services, the stronger the responsibility. A company has a stronger responsibility to exercise leverage over public officials who interfere with its employees' rights of expression when the subject of such expression concerns the company itself or its economic sector, than when it concerns something completely unrelated to the company, its operations, activities, products or services. This point can be understood in terms of relevance: the more relevant the interest at stake to the company's activities, products or services, the stronger the responsibility (Sorell, 2004, p. 133).

I have identified two types of connections that can be morally significant: the company's relationship to the person(s) involved and the relevance of the interests at stake to the company's activities, products and services. Either can be sufficient on its own to generate leverage-based responsibility. If the relationship to the rights-holder or violator is close enough, responsibility will arise regardless of whether the interest at stake concerns the company's activities, products or services. This might be the case, for example, when public authorities or security contractors kill or menace a company's long-time employee for reasons unconnected to the company, such as the employee's alleged political activities; or when a company is so pivotal to a local economy that the taxes and royalties it pays provide a substantial portion of the government's revenue that is then used to repress civil rights. Obversely, if the connection between the interest at stake and the company's activities, products or services is close enough, responsibility will arise even if the relationship between the company and the rights-holder or violator is weak (as, for example, in the case of the glue-sniffing addicts). Responsibility will be strongest where both types of connection are strong, and weak or non-existent where both are weak or absent.

So, for example, a Norwegian oil company with operations in Nigeria does not have a responsibility to protest a Nigerian court's sentencing of a young woman to death by stoning in a different state in which the company has no investments, operations, suppliers or consumers, provided it has no relationship with the case or parties and the case does not concern its activities or products, or those of the oil industry (Bomann-Larsen, 2004, p. 95). Likewise, to cite Lord Macaulay's famous example, 'a surgeon need not take a train from Calcutta to Meerut in order to save someone not his patient, even though unless the doctor takes the train that person will die' (Moore, 2009, pp. 58–9).

The relationships and connections that form the basis for this form of responsibility are often multiple and interwoven. In any given human rights risk situation a company might have relationships with workers, labor unions, contractors, suppliers, customers, subsidiaries, affiliates, consumers, local residents, security forces, national public authorities, local governments, competitors, industry associations, NGOs and more; and the human rights risks at play might be relevant to one or more of the company's products, services, labor practices or political activities. The metaphor of a 'web of relationships,' suggested by the SRSG, is apt for describing this interconnecting, networked reality. Even if no single strand in the web is strong enough on its own, responsibility will still arise if the company's relationships with rights-holders or violators and the relevance of the interests at stake to its activities, products or services, taken together, constitute a significant connection. The determination of a morally significant connection should be holistic, considering all the relevant strands in the company's web of relationships.

The general idea I am advancing here, that a company's relationships provide the morally significant connection, giving rise to responsibility, is reflected in the Guiding Principles. They state that responsibility arises where a business enterprise has not contributed to an adverse human rights impact, 'but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity' (United Nations, 2011b, p. 18). 'Business relationships' include 'relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services' (United Nations, 2011b, p. 14). This is potentially too restrictive in two ways. First, there is no reason to think that morally significant connections will be restricted to 'business' relationships, if this term is understood as excluding 'political,' 'social' or 'cultural' relationships. ISO 26000 is on a better track insofar as it speaks of 'political, contractual, economic or other relationships' (International Organization for Standardization, 2010a, clause 2.19). Second, the insistence on a 'direct link' to the com-

pany's operations, products or services is too restrictive if it excludes cases where the connection is mediated through more than one party (for example, via two or three tiers of suppliers). The SRSG's effort to delimit the connection is important, so that responsibility not be all-encompassing. But this connection can arise in two ways, as I have argued: either via the relationship between the company and the rights-holder or violator, or via the relevance of the interest at stake to the company's activities, products and services. The Guiding Principles' 'direct link' criterion appears to conflate these two kinds of connection, and potentially to draw the line around responsibility too close to the company, excluding some morally significant connections.

It would nevertheless be inappropriate to draw the line too far from a company. O'Neill (1985, 1996, p. 99) argues, for example, that a moral agent has obligations to everyone whose actions the agent presupposes in conducting his or her own activity. Thus, 'when I buy a sweatshirt or a pair of shoes, my action presupposes the actions of all the persons connected with the process that transforms raw materials into clothes and brings them to my local store' (Young, 2004, p. 372). As Young acknowledges, this approach might be appropriate for a collective form of responsibility, but it is too broad to fix the responsibilities of individual actors (Young, 2004). My approach reaches for middle ground, by focusing on the dual factors of a company's connection to the rights-holder or violator and the relevance of the interest at stake to the company's activities, products or services.

The existence of a morally significant connection also satisfies or partially substitutes for the opportunity criterion that usually applies in rescue cases. A special relationship to the rights-holder or violator or a strong link to the company's activities, products or services, or both, provides the company with the opportunity to act. It is what puts the company in 'the right place at the right time' to exercise whatever leverage it has to ameliorate the situation.

To sum up this section, the existence of a morally significant connection between the company and the rights-holder or violator is a prerequisite for leverage-based responsibility. Such connection can be created by a pre-existing relationship between the company and the person(s) involved, or the relevance of the interest at stake to the company's activities, products or services. The stronger these connections, the stronger the company's responsibility. As Arnold (2010, p. 387) points out, where special relationships exist in the global economy, rights-claims are binding on specific obligation-bearers; and wherever corporations do business they are already in special relationships with a variety of stakeholders, such as workers, customers and local communities. These special connections

are the fulcrum of my argument for leverage-based responsibility. To paraphrase Griffin (2004, p. 40), unless one stresses these connections, my proposal that ability (that is, leverage) can determine where responsibility lies looks distinctly odd.

(b) Ability

Campbell (2004a, p. 15) remarks that companies' ability 'to make a difference to fundamental human interests within and beyond their own core sphere of activity' is an essential factor in determining their human rights duties. In line with this observation, the second criterion for leverage-based responsibility is the company's ability to make a difference by exercising influence over others with whom it has relationships. As with the first criterion, the strength of responsibility varies with this ability. The greater the actor's chance of being effective and the greater its capacity to absorb the cost of action, the stronger the correlative responsibility (Santoro, 2010, p. 292).

As in the basic rescue case, ability is a prerequisite for responsibility, not simply a means of discharging it. Unlike in the basic rescue scenario, however, the required degree of ability is modest. In the basic rescue situation a high degree of ability is usually required for a duty to arise. According to some commentators, the duty to rescue arises only if the putative rescuer is uniquely qualified to relieve the sufferer's plight and success is more or less assured within a limited time (Soule et al., 2009, pp. 547–8). This high standard may be justified when imposing moral responsibilities on total strangers who are in a position to help purely by accident. When the range of duty-bearers is limited by the requirement of an independent, morally significant connection, a lower threshold is appropriate. It is also appropriate in light of the reality, discussed earlier, that the individual outcome control presumed by the higher threshold is rare in our complex contemporary world. The standard should therefore be that the company has the ability to make an appreciable contribution to ameliorating the situation over a foreseeable period by exercising leverage through its relationships, not that it has a high probability of solving the problem by itself in a short time.

Furthermore, the relevant question is whether the company has the ability to make a difference not just by itself but in combination with others. Moore (2009, p. 304) cites a case in which bar patrons passively watched a rape, concluding that the patrons 'had the *ability* to prevent the rape and did not, and that is sufficient to ground their responsibility' (emphasis in original) Let us assume that no single patron could have stopped the rape alone. This does not mean that none of them had a responsibility to act. On the contrary, they had a responsibility to make

an effort to get other patrons to act jointly to stop the rape. Their ability to make a difference together gave rise to a duty to use their leverage over others toward that end.

The relationships through which companies can exercise leverage are sometimes the same relationships that establish the morally significant connection to the rights-holder or the perpetrator of abuse, sometimes not. For example, a morally significant connection may be established by the company's relationship to its workers or local community members, while leverage may be exercised through the company's relationship to public authorities, industry associations or competitors.

(c) Affordability

The third criterion is that the company can make its contribution to ameliorating the situation at an acceptable cost to itself. In the basic rescue scenario there is a duty to rescue only if the cost and inconvenience to the rescuer are insignificant or small (Dunfee, 2006; Griffin, 2004, pp. 35, 39; Moore, 2009, pp. 37, 59; Schmidtz, 2000). Soule et al. (2009, p. 548) insist that the cost must 'not disrupt the business, significantly impact earnings, or compromise other moral obligations,' concluding not surprisingly that the duty will arise rarely in a business context. As with the other criteria, however, it is appropriate to relax this criterion when the range of potential duty-bearers is limited by the prior existence of a morally significant connection to the rights-bearer or rights-violator. Where there is a special relationship, we can reasonably expect the duty-bearer to incur somewhat more cost, inconvenience and risk than we would expect of the total stranger. Moreover, the cost we can expect the company to absorb will increase both with the strength of its morally significant connection to the state of affairs and with its ability to make a difference (Santoro, 2010, p. 292).

As with the first two criteria, determining affordability is more a question of identifying a continuum than drawing a sharp line. The basic rescue principle is at the low end of the continuum, with its insistence on little or no cost to the rescuer. At the other extreme is the proposition that the rescuer must incur any cost consistent with mere survival as an agent (Griffin, 2004, p. 35). As Griffin argues, the former standard is too lax, the latter too demanding. In his view the answer to the question of what cost is acceptable 'is inevitably rough, but it is along these lines: at a cost within the capacities of the sort of persons we should want there to be' (Griffin, 2004, p. 36). These sorts of persons – including companies and their managers – would not be utterly impartial, rather they would be committed to specific goals, institutions, relationships, places and people, willing to sacrifice themselves but only up to a point. Their obligation to

exercise leverage does not go on until the their marginal loss equals the marginal gain of those they are helping; on the contrary, they are allowed to substantially honor their own commitments and follow their own interests, and these permissions limit their obligations (Griffin, 2004, p. 40). Perhaps the most we can say is that companies have a responsibility to make reasonable efforts at modest risk or cost to themselves (Sorell, 2004, pp. 132, 135), and that the cost they are expected to incur will increase with the strength of their morally significant connection to the state of affairs in question.

(d) Urgency

The final criterion for the existence of leverage-based responsibility is a substantial threat to or infringement of a human right. Once again, given the requirement of an independent morally significant connection to the rights-holder or rights-infringer, we are justified in relaxing the urgency criterion relative to that which would apply in a basic rescue scenario. Instead of an immediate threat to fundamental rights to life, limb, liberty or basic subsistence – a threat that generates objective reasons for anyone who can to help the affected people – it is sufficient that there be a substantial threat to or interference with any human right. An immediate threat to a fundamental human interest is not a minimum threshold for leverage-based responsibility to arise, but a factor enhancing the strength of the responsibility. The more fundamental the interest at stake and the more severe the harm to that interest, the stronger the responsibility.

5.4.6 Characteristics of Leverage-based Responsibility

Four implications follow from my argument: that leverage-based responsibility is qualified, not categorical; graduated rather than binary; context-specific; and both negative and positive in character. Moreover, it is practicable and appropriate to the specialized social function of business.

(e) Leverage-based responsibility is qualified, not categorical

One implication of my analysis is that leverage-based responsibility is qualified. It is a responsibility to make a reasonable effort to influence the behavior of relevant others through relationships, rather than to achieve defined social interaction outcomes. As Goodpaster (2010, p. 147) argues, 'even if a company does not have a categorical responsibility, a responsibility to resolve the moral challenge on its own, it can still have a qualified responsibility to make an effort – or to participate in the efforts of others in seeking a collaborative resolution.' This follows from the lack of individual outcome control in contemporary social interaction

and is consistent with the 'ought implies can' maxim, which demands that responsibilities be defined in terms of results that are within the capacity of moral agents to achieve.

The Guiding Principles reflect this differentiation. Impact-based responsibility is defined in terms of expected outcomes, while leverage-based responsibility is defined in terms of efforts. Companies have a responsibility to avoid causing or contributing to adverse human rights impacts (impact-based responsibility), but where they are not contributing to impacts, their responsibility is limited to seeking to prevent or mitigate adverse impacts that are directly linked to their operations, products or services (leverage-based responsibility) (United Nations, 2011b, p. 14).

(f) Leverage-based responsibility is graduated, not binary

A second implication is that leverage-based responsibility is a matter of degree, not an 'on/off' choice. The strength of responsibility varies positively with the strength of the company's morally significant connection to the state of affairs in question, its leverage over other actors and the seriousness of the threat to or infringement of human rights; and negatively with the cost of exercising leverage. The threshold between no responsibility and responsibility is necessarily broad and indistinct. It is defined not by a bright line but a combination of open-textured standards: a morally significant connection; the ability to make an appreciable contribution at modest cost; and a substantial human rights threat. Paraphrasing what Moore (2009, p. 105) says of the 'substantial factor' test for causation, responsibility is a matter of degree and the break point between no responsibility and responsibility is often arbitrary. The job of a responsibility framework is to set an appropriately vague line below which one's connection to the rights-holder or violator, one's leverage over relevant others, the cost of exercising leverage and the threat to human rights will be ignored for purposes of assessing responsibility. As an aside, impact-based responsibility is also graduated, since culpability, causation and non-causal contributions are also matters of degree (Moore, 2009, pp. 72, 300, 319–20); but this issue is beyond the scope of my argument.

Not only is there graduation within leverage-based responsibility, there is also graduation between leverage-based and impact-based responsibility. All else being equal, a company bears greater responsibility for human rights harms it has caused than those to which it has contributed causally or non-causally (for example, by omission or risk imposition); and more for problems to which it has contributed than for those to which it has not, but could help solve. The SRSG recognized this when he wrote that the steps a company takes to address the human rights impacts of its own operations may differ from those regarding its relationships with other

social actors, and that its actions regarding the human rights impact of a subsidiary may differ from those in response to impacts of suppliers several layers removed (United Nations, 2008a, p. 8). These distinctions are reflected in the Guiding Principles. Responsibility requires different action depending on whether the company causes or may cause human rights impacts, contributes or may contribute to human rights impacts or does not contribute to impacts but such impacts are nevertheless directly linked to it via its business relationships. In the first situation the company's responsibility is stringent: to take the necessary steps to stop or prevent the impact. In the second it is relaxed somewhat: to take the necessary steps to stop or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. In the third its responsibility is relaxed even further: it should exercise its leverage, if it has any; seek ways to increase its leverage, if it has none; and if it can do neither, it should consider ending the relationship, taking into account the importance of the relationship to the company, the severity of the human rights impacts of the relationship and the potential human rights impacts of ending it (United Nations, 2011b, pp. 18–19). This differentiation reflects the realization that when responsibility is imposed in the absence of contribution to a given state of affairs, it is not appropriate to demand that a company remedy the state of affairs, but it is appropriate to demand that it make reasonable efforts to influence those over whom it has some leverage (for example, by making representations to local officials or home country diplomats) (Sorell, 2004, p. 132).

(g) Leverage-based responsibility is context-specific

Although corporate human rights obligations are defined in terms of universal human rights to which all individuals are equally entitled, their concrete content must be determined in relation to a range of contextual factors including the responsible actor's social functions, relationships, impacts, capabilities and environment (Cragg, 2010, pp. 272, 289–96). So, although the Guiding Principles insist that the responsibility to respect human rights applies fully and equally to all business enterprises regardless of context (United Nations, 2011b, p. 14), the reality is that at any level of concrete detail that has application to actual situations, corporate human rights obligations mean very different things in different contexts (Campbell, 2004a, p. 19).

(h) Leverage-based responsibility is both negative and positive

The same moral considerations supporting leverage-based responsibility in general also support positive responsibility. The morally significant connection between the company and the rights-holder or rights-infringer

and the ability to contribute to improving the rights-holder's situation generate not just a negative responsibility to use leverage to avoid or mitigate the negative impacts of other actors with whom the company has relationships, but also a positive responsibility to use leverage to enhance the positive social or environmental impacts of other actors with whom the company has relationships, even though the company did nothing to cause or contribute to the current state of affairs (Wettstein, 2010a). As Wettstein argues against Hsieh (2009), such positive obligations cannot be grounded convincingly in a negative responsibility to do no harm, but entail a positive responsibility to protect human rights (Wettstein, 2010c).

The idea that corporations have positive human rights obligations – to protect, promote or fulfill human rights – is increasingly prevalent in business and human rights theory and practice despite the UN Framework's rejection of it. Arnold (2009, p. 66), for example, asserts that corporations 'have obligations to both ensure that they do not illegitimately undermine the liberty of any persons, and the additional obligation to help ensure that minimal welfare rights to physical well-being and the development of basic human capacities are met within their sphere of influence.' Cragg (2010, p. 289) claims that the task of the corporation in areas without well-defined human rights laws 'is to mitigate the negative human rights impacts of its activities and enhance positive impacts.' ISO 26000 and the UN Global Compact are two high profile examples from the realm of practice that embrace both negative and positive corporate responsibility.

I do not attempt a systematic defense of positive corporate human rights responsibilities here. My objective is simply to suggest that the moral considerations giving rise to leverage-based responsibility also support positive responsibility. Nor do I claim that my account exhausts the positive responsibilities of corporations, which might alternatively be grounded in multinational corporations' political authority (Kobrin, 2009; Wettstein, 2010b, 2010c) or in basic Kantian deontological ethics (Arnold, 2009, p. 66); but these possibilities are beyond the scope of my inquiry.

(i) Leverage-based responsibility satisfies the practicality criterion

Any account of corporate human rights obligations must fulfill the criterion of practicality (Archard, 2004; Campbell, 2004a, 2004b, p. 35; Cragg, 2010; Griffin, 2004). At one level this means that the obligations must be within the capacity of the individual obligation-bearer to carry out, an issue I have already addressed. It also means that the obligations must be capable of being embedded, operationalized and enforced in a concrete institutional framework. My account of leverage-based responsibility satisfies this requirement. Human rights in general are already concretely institutionalized via many international and national instruments, agencies

and tribunals. They have 'a tangible, palpable existence, which gives them a social objectivity in an institutional facticity' (Campbell, 2004a, p. 12). Moreover, the UN Framework and Guiding Principles go some way toward providing a concrete framework to institutionalize the human rights obligations of business, both within individual companies and at a broader institutional level. The Guiding Principles may contemplate a narrower form of leverage-based responsibility than I do, but the concrete processes they propose for assessing human rights impacts, exercising or enhancing leverage, ending relationships and providing remedies is, to a first approximation, suitable for the broader responsibility I propose.

Vagueness is the only serious objection that might be raised against my proposal under the heading of practicality. How can companies and other actors implement, monitor and enforce obligations based upon such open-textured standards as 'significant,' 'appreciable,' 'modest' and 'substantial'? One answer is that they do so routinely in other fields, from financial disclosure to environmental impact assessment to risk management to negligence liability. In the field of human rights the open texture of rules and standards is demanded by the moral characteristics of the problems at issue. As I have shown, the criteria giving rise to leverage-based responsibility are continuous rather than dichotomous, and the resulting responsibility is a matter of degree, not an on/off switch. Furthermore, many – perhaps most – of the human rights to which business human rights responsibilities correspond are themselves vague and open-textured. To the extent that this prevents satisfaction of the practicality requirement, this impugns all accounts of business human rights responsibilities, not just mine.

The inherent open-endedness of human rights responsibilities calls for attention to the practical tools and processes by which such responsibilities can be operationalized, a task on which the SRSG's reports, ISO 26000, the UN Global Compact and other initiatives have already made progress. And it calls for recognition that allocation of human rights responsibility, like the identification of a 'substantial causal factor' in law, has an irreducible element of arbitrariness that may conflict with what many writers on human rights think (Griffin, 2004, p. 40; Moore, 2009, p. 105). This is as true of the General Principles' 'direct link' criterion as it is of my account of leverage-based responsibility. Such arbitrariness can be moderated by operational guidance and institutional practice, but not eliminated.

Leverage-based corporate human rights responsibilities can be and are being embedded in stable, recurring, rule-governed patterns of behavior, incorporated in corporate management systems, integrated in business operations, monitored, reported and verified (Cragg, 2010, p. 292). It is beyond the scope of this chapter to provide a detailed description of or

prescription for this process of institutionalization; all I do here is to make a prima facie case that it is possible.

(j) Leverage-based responsibility is appropriate to the social function of business

One of the SRSG's strongest objections to leverage as a basis for allocating responsibility was that it would be inconsistent with the specialized social function of business enterprises. If responsibility arises from leverage, he warned, 'a large and profitable company operating in a small and poor country could soon find itself called upon to perform ever-expanding social and even governance functions – lacking democratic legitimacy, diminishing the State's incentive to build sustainable capacity and undermining the company's own economic role and possibly its commercial viability' (United Nations, 2010, p. 14). Corporations are 'specialized economic organs, not democratic public interest institutions' and as such, 'their responsibilities cannot and should not simply mirror the duties of States' (United Nations, 2008b, p. 15; see also Arnold, 2010, p. 374; Cragg, 2010, p. 287).

This might have been a valid complaint against the draft UN *Norms* and some of the more grandiose applications of the SOI approach in which corporate spheres of influence and activity provided the only distinction between business and governmental duties, but it does not apply to my proposal for leverage-based responsibility. My requirement of a context-specific, morally significant connection between the company and the rights-holder or perpetrator of human rights harm, like the Guiding Principles' 'direct link' criterion, limits the scope of responsibility and prevents corporations from being called upon, or taking it upon themselves, to become surrogate governments for entire communities or regions. Business enterprises exist primarily to pursue private interests, generating wealth by satisfying demands for goods and services. By restricting their human rights responsibilities to cases where they have a special relationship with the perpetrator or rights-claimant, or where the human rights risk situation is relevant to their activities, products or services, my approach ensures that their responsibility flows from their social role as business enterprises, not simply from their capacity to protect or fulfill human rights.

It is important also to emphasize that leverage-based responsibilities, like business human rights obligations generally, do not arise due to a failure by States to fulfill their own responsibilities. They arise independently, due to moral considerations that make businesses obligation-bearers in their own right (Sorell, 2004, p. 141). Furthermore, the State's responsibility to protect human rights is independent of these business responsibilities,

and its failure to fulfill its own responsibility is not excused in the least by companies' actions to fulfill theirs. Finally, if the concern is that firms might misuse their leverage to usurp governments and democratic processes, surely this would be inconsistent with social responsibility however defined. Social responsibility implies responsible political involvement (for example, International Organization for Standardization, 2010a, clause 6.6.4). There is no question that abuses occur, but there is also no question that companies are capable of exercising their political influence responsibly. A framework for business human rights responsibility should demand that companies do so, not assume that they will not.

As for the SRSG's concern about leverage-based responsibility undermining a company's commercial viability, this is resolved by the criterion of modest cost. Leverage-based responsibility arises only if and to the extent that the cost to the company of exercising leverage is modest relative to the closeness of the connection to the rights-holder or violator, the severity of the human rights threat and the company's capacity. By definition, therefore, leverage-based responsibility may not force a company out of business. The same is not true, however, of impact-based responsibility. Where a company is causing or contributing to adverse human rights impacts or has the potential to do so, and the price of avoiding or remedying such impacts is to cease doing business, the company must cease doing business – in that place, in that way or altogether. A corporation has no right to 'life' equivalent to that of an individual. It is not a living organism. This fact, plus its lack of a conscious mind or physical body and its potential immortality, distinguish it in moral terms from individuals. Despite some commentators' claims to the contrary (for example, Archard, 2004, pp. 57–8), a corporation can and should be expected to take actions that would put it out of business, if such actions are required to fulfill its moral obligation not to cause or contribute to adverse human rights impacts. This distinction between impact- and leverage-based responsibility is justified by the greater moral blameworthiness attached to causing or contributing to harm (Moore, 2009), and the correspondingly weaker moral imperative to exercise leverage over others to improve a state of affairs not of one's own making.

5.5 CONCLUSION

The contemporary debate about corporate leverage emerged mainly in response to the SOI approach to corporate responsibility. The SOI metaphor is seriously flawed and should be replaced with one more apt such as a 'web of relationships,' but the idea of leverage as a determinant of

human rights responsibility should be preserved alongside impact-based responsibility. Leverage, understood as a company's ability to contribute to improving a situation by exercising influence over other actors through its relationships, is a consideration in determining who bears corporate human rights obligations. It is not simply a means of discharging responsibility, but can be a source of responsibility where (a) there is a morally significant connection between the company and a rights-holder or rights-violator due either to a relationship to the person or the relevance of the rights-holder's interest to the company's activities, products or services; (b) the company is able, on its own or with others, to make an appreciable contribution to ameliorating the situation by exercising leverage through its relationships; (c) it can do so at modest cost, relative to its resources and the strength of its morally significant connection to the state of affairs; and (d) the threat to the rights-holder's human rights is substantial. In such circumstances companies have a responsibility to exercise their leverage even though they did nothing to contribute to the existing state of affairs. This responsibility is qualified, graduated, context-specific, practicable and consistent with the specialized social role of business. Moreover, it is not merely a negative responsibility to exercise leverage to avoid or reduce harm, but also a positive responsibility to protect, promote and fulfill human rights.

The Guiding Principles go part of the way toward recognizing leverage-based responsibility, but they restrict it too narrowly and fail to articulate the meaning of the 'direct link' between adverse impacts and the company's activities, products or services. This chapter is an effort to put leverage-based responsibility on firmer normative ground and to elaborate its characteristics, including the nature of the required link. Ultimately, as I have tried to show, while the distinction between impact and leverage is morally significant, it is the strength of the connections constituted by a company's web of activities and relationships that does most of the moral work in setting the scope of corporate human rights responsibilities.

NOTE

* I would like to thank Denis Arnold, Wesley Cragg, Peter Muchlinski, Fabrizio Cafaggi, Michel Doucin, Olivier Dubigeon, Alan Fine, Adam Greene, Adrian Henriques, John Ruggie and his staff, Kernaghan Webb, Florian Wettstein, participants in a CBERN Symposium on Business and Human Rights at York University, participants in a graduate seminar on Transnational Private Regulation at the European University Institute, and three anonymous reviewers for valuable feedback on earlier versions, as well as the Social Sciences and Humanities Research Council of Canada and the Robert Schuman Centre for Advanced Studies for research support.

REFERENCES

Archard, D. (2004). 'Welfare rights as human rights and the duties of organisations', in T. Campbell and S. Miller (eds),
Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, Dordrecht: Kluwer Academic Publishers, pp. 45–59.
Arnold, D.G. (2009). 'The human rights obligations of multinational corporations', in J.D. Smith (ed.), *Normative Theory and Business Ethics*, Lanham, MD: Rowman & Littlefield, pp. 61–71.
Arnold, D.G. (2010). 'Transnational corporations and the duty to respect basic human rights', *Business Ethics Quarterly*, **20**(3), 371–99.
Banerjee, S., N. Bowie and C. Pavone (2006). 'An ethical analysis of the trust relationship', in R. Bachmann and A. Zaheer (eds), *Handbook of Trust Research*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing, pp. 303–17.
Beckmann, M. and I. Pies (2008). 'Ordo-responsibility: conceptual reflections towards a semantic innovation', in J. Conill, C. Luetge and T. Schönwälder-Kuntze (eds), *Corporate Citizenship, Contractarianism and Ethical Theory: On Philosophical Foundations of Business Ethics*, Farnham, UK: Ashgate, pp. 87–115.
Bomann-Larsen, L. (2004). 'Reconstructing the principle of double effect: towards fixing the goalposts of corporate responsibility', in L. Bomann-Larsen and O. Wiggen (eds), *Responsibility in World Business: Managing Harmful Side-effects of Corporate Activity*, Tokyo: United Nations University Press, pp. 82–98.
Business Leaders Initiative on Human Rights, United Nations Global Compact Office and Office of the United Nations High Commissioner for Human Rights (n.d.). 'A guide for integrating human rights into business management (2nd ed.): global business case: supporting tools', available at http://www.integratinghumanrights.org/global_business_case_sphere_of_influence (accessed 16 July 2012).
Campbell, T. (2004a). 'Moral dimensions of human rights', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Dordrecht: Kluwer Academic Publishers, pp. 11–30.
Campbell, T. (2004b). *Rights: A Critical Introduction*, London: Routledge.
Cragg, W. (2004). 'Human rights, globalisation and the modern shareholder owned corporation', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Dordrecht: Kluwer Academic Publishers, pp. 105–27.
Cragg, W. (2010). 'Business and human rights: a principle and value-based analysis', in G.G. Brenkert and T.L. Beauchamp (eds), *The Oxford Handbook of Business Ethics*, New York: Oxford University Press, pp. 267–304.
de Schutter, O. (2006). 'The challenge of imposing human rights norms on corporate actors', in O. de Schutter (ed.), *Transnational Corporations and Human Rights*, Oxford: Hart Publishing, pp. 1–39.
Dunfee, T.(2006). 'Do firms with unique competencies for rescuing victims of human catastrophes have special obligations? Corporate responsibility and the AIDS catastrophe in Sub-Saharan Africa', *Business Ethics Quarterly*. **16**(2), 185–210.

Gibson, K. (2007). *Ethics and Business: An Introduction*, Cambridge: Cambridge University Press.
Goodpaster, K.E. (2010). 'Corporate responsibility and its constituents', in G.G. Brenkert and T.L. Beauchamp (eds), *The Oxford Handbook of Business Ethics*, New York: Oxford University Press, pp. 126–57.
Griffin, J. (2004). 'Human rights: whose duties?', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Dordrecht: Kluwer Academic Publishers, pp. 31–43.
Hart, H.L.A. (1967). 'Varieties of responsibility', *Law Quarterly Review*, **83**, 346–64.
Hart, H.L.A. (2008). *Punishment and Responsibility: Essays in the Philosophy of Law*, 3rd edn, Oxford: Oxford University Press.
Hart, H.L.A. and T. Honoré (1985). *Causation in the Law*, 2nd edn, Oxford: Clarendon Press.
Hsieh, N. 2009. 'Does global business have a responsibility to promote just institutions?,' *Business Ethics Quarterly* **19**(2): 251–73.
International Organization for Standardization (2009). *Draft International Standard ISO/DIS 26000, Guidance on Social Responsibility*, Geneva: International Organization for Standardization.
International Organization for Standardization (2010a). *ISO 26000:2010, Guidance on Social Responsibility*, 1st edn, Geneva: International Organization for Standardization.
International Organization for Standardization (2010b). *ISO 26000 Project Overview,* Geneva: International Organization for Standardization.
Kobrin, S.J. (2009). 'Private political authority and public responsibility: transnational politics, transnational firms and human rights', *Business Ethics Quarterly*, **19**(3), 349–74.
Kutz, C. (2000). *Complicity: Ethics and Law for a Collective Age*, Cambridge: Cambridge University Press.
Moon, J., A. Crane and D. Matten (2008). 'Corporate power and responsibility: a citizenship perspective', in J. Conill, C. Luetge and T. Schönwälder-Kuntze (eds), *Corporate Citizenship, Contractarianism and Ethical Theory: On Philosophical Foundations of Business Ethics*, Farnham, UK: Ashgate, pp. 9–27.
Moore, M.S. (2009). *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics*, Oxford: Oxford University Press.
Murphy, C.N. and J. Yates (2009). *The International Organization for Standardization (ISO): Global Governance through Voluntary Consensus*, London: Routledge.
Nagel, T. (1986). *The View From Nowhere*, New York: Oxford University Press.
O'Neill, O. (1985). *Faces of Hunger*, London: Allen & Unwin.
O'Neill, O. (1996). *Towards Justice and Virtue*, Cambridge: Cambridge University Press.
Palmer, E. (2004). 'Real corporate responsibility', in J. Hooker and P. Madsen (eds), *International Corporate Responsibility: Exploring the Issues*, Pittsburgh, PA: Carnegie Mellon University Press, pp. 69–83.
Pies, I., S. Hielscher and M. Beckmann (2009). 'Moral commitments and the societal role of business: an ordonomic approach to corporate citizenship', *Business Ethics Quarterly*, **19**(3), 372–401.
Ruggie, J.G. (2007). 'Business and human rights: the evolving international agenda', *American Journal of International Law,* **101**, 819–40.

Ruggie, J.G. (2008). 'Protect, Respect and Remedy: a framework for business and human rights' *Innovations*, Spring, 189–212.

Santoro, M.A. (2010). 'Post-Westphalia and its discontents: business, globalization, and human rights in political and moral perspective', *Business Ethics Quarterly*, **20**(2), 285–97.

Scherer, A.G. and G. Palazzo (2007). 'Toward a political conception of corporate responsibility: business and society seen from a Habermasian perspective', *Academy of Management Review*, **32**, 1096–120.

Scherer, A.G., G. Palazzo and D. Matten (2009). 'Introduction to the Special Issue: globalization as a challenge for business responsibilities', *Business Ethics Quarterly*, **19**(3), 327–47.

Schmidtz, D. (2000). 'The moral and legal limits of samaritan duties', *Law and Philosophy*, **19**(6), 683–705.

Sorell, T. (2004). 'Business and human rights', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Dordrecht: Kluwer Academic Publishers, pp. 129–43.

Soule, E., M. Hedahl and J. Dienhart (2009). 'Principles of managerial moral responsibility', *Business Ethics Quarterly*, **19**(4), 529–52.

Ulrich, P. (2008). *Integrative Economic Ethics: Foundations of a Civilized Market Economy*, Cambridge: Cambridge University Press.

United Nations (Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights) (2003). *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 23 August.

United Nations (Office of the High Commissioner for Human Rights) (2005a). *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/2005/91, 15 February.

United Nations (Commission on Human Rights) (2005b). *Resolution 2005/69, Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. E/CN.4/2005/L.87, 15 April.

United Nations (Special Representative of the Secretary-General on Business and Human Rights, John Ruggie) (2006). *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. E/CN.4/2006/97, 22 February.

United Nations (Special Representative of the Secretary-General on Business and Human Rights, John Ruggie) (2007). *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/4/35, 19 February.

United Nations (Special Representative of the Secretary-General on Business and Human Rights, John Ruggie) (2008a). *Clarifying the Concepts of 'Sphere of Influence' and 'Complicity': Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc. A/HRC/8/16, 15 May.

United Nations (Special Representative of the Secretary-General on Business and Human Rights, John Ruggie) (2008b). *Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative*

of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/8/5, 7 April.
United Nations (Human Rights Council) (2008c). *Resolution 8/7, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 18 June, 28th meeting; adopted without a vote.
United Nations (Special Representative of the Secretary-General on Business and Human Rights, John Ruggie)(2009). 'Note on ISO 26000 Guidance Draft Document', November 2010, available at http://www.business-humanrights.org/media/documents/ruggie-note-re-iso-26000-nov-2009.pdf (accessed 16 July 2012).
United Nations (Special Representative of the Secretary-General on Business and Human Rights, John Ruggie) (2010). *Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/ HRC/14/27, 9 April.
United Nations (2011a). 'Council establishes Working Group on Human Rights and Transnational Corporations and Other Business Enterprises', Media release, United Nations Human Rights Council, Geneva.
United Nations (Special Representative of the Secretary-General on Business and Human Rights, John Ruggie) (2011b). *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (advance edited version), UN Doc. A/HRC/17/31, 21 March.
United Nations Global Compact Office (n.d.). 'The ten principles', available at http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (accessed 16 July 2012).
Voiculescu, A. (2007). 'Changing paradigms of corporate criminal responsibility: lessons for corporate social responsibility', in D. McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press, pp. 399–430.
Weissbrodt, D. (2008). 'International standard-setting on the human rights responsibilities of businesses', *Berkeley Journal of International Law*, **26**, 373–91.
Weissbrodt, D. and M. Kruger (2003). 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', *American Journal of International Law*, **97**(4), 901–22.
Wettstein, F. (2010a). 'Breaking the silence: when corporations must speak out for human rights', Paper presented at CBERN Symposium on Business and Human Rights, Toronto, February.
Wettstein, F. (2010b). 'The duty to protect: corporate complicity, political responsibility, and human rights advocacy', *Journal of Business Ethics*, **96**(1), 33–47.
Wettstein, F. (2010c.) 'For better or for worse: corporate responsibility beyond "do no harm"', *Business Ethics Quarterly*, **20**(2), 275–83.
Wettstein, F. (2012). 'Silence as complicity: elements of a corporate duty to speak out against the violation of human rights', *Business Ethics Quarterly*, **22**(1), 37–61.
Wiggen, O. and L. Bomann-Larsen (2004). 'Addressing side-effect harm in the

business context: conceptual and practical challenges', in L. Bomann-Larsen and O. Wiggen (eds), *Responsibility in World Business: Managing Harmful Side-effects of Corporate Activity*, Tokyo: United Nations University Press, pp. 3–13.
Windsor, D. (2001). 'Corporate citizenship: evolution and interpretation', in J. Andriof and M. McIntosh (eds), *Perspectives on Corporate Citizenship*, Sheffield, UK: Greenleaf, pp. 39–52.
Wood, S. (2011a). 'Four varieties of social responsibility: making sense of the "sphere of influence" and "leverage" debate via the case of ISO 26000', Osgoode Comparative Research in Law and Political Economy Research Paper No. 14/2011, Osgoode Hall Law School, Toronto, available at http://ssrn.com/abstract=1777505 (accessed 16 July 2012).
Wood, S. (2011b). '"Sphere of influence" in ISO 26000', in A. Henriques (ed.), *Understanding ISO 26000: A Practical Approach to Social Responsibility*, London: British Standards Institution, pp. 115–30.
Young, I.M. (2004). 'Responsibility and global labor justice', *Journal of Political Philosophy*, **12**(4), 365–88.

PART II

Business, human rights and international trade

6. Human rights and international trade: normative underpinnings

Alistair M. Macleod

6.1 INTRODUCTION

In the period following the Second World War, a number of important steps were taken to forge international agreements both to foster international trade and to protect human rights. Thus, in 1947 *The General Agreement on Tariffs and Trade* (GATT) was adopted, and in 1948 there was worldwide endorsement of *The Universal Declaration of Human Rights*. These decisions – together with (in the economic domain) the establishment of the International Monetary Fund (IMF), the World Bank and (more recently) the World Trade Organization (WTO), and (in the political domain) the elaboration in more detail of a doctrine of human rights in such documents as *The Covenant on Civil and Political Rights* (1966) and *The Covenant on Economic, Social and Cultural Rights* (1966) – have contributed to 'trade liberalization' going hand in hand with protection of human rights during much of the past half century or so. However, the relationships that have been taking shape to regulate global economic and political conduct both between the various international institutions that have evolved and between the branches of international law that have developed have been marked by some not insignificant tensions, mainly in the area of the 'structural adjustment' policies demanded by the IMF. For example, these tensions have made it necessary for special steps to be taken (a) to support agriculture on a sustainable basis; (b) to assist the rural poor; and (c) to create safety nets and job-retraining programs for low-skilled workers in developed countries.

Efforts have of course been made from time to time both to mitigate these tensions and to develop 'linkages' between trade regulation arrangements and arrangements for the protection of human rights. For example, United Nations embargoes have been imposed on countries in which human rights were being grossly violated (a notable example being the embargo on trade with apartheid South Africa). Again, in the International Labour Organization, there have been attempts to ratchet

up labor standards in the global marketplace, although these standards are not yet embedded in the multilateral trading system under WTO rules. Moreover, human rights conditions are not infrequently attached both to domestic trade promotion programs and to bilateral or regional agreements for preferred market access. And human rights considerations are to some extent reflected in the conditions the IMF imposes on the loans it grants as well as in the World Bank's project guidelines on indigenous peoples.

There have also been some new developments in debates about the relationship between trade and human rights. For one thing, there has been an expansion of trade regulation into fields of intellectual property and services – which is reflected, most clearly, in the patent protections built into *The Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), an agreement reached in 1997 under the auspices of the WTO. Widespread opposition to TRIPS for the contribution it makes (even if only indirectly) to the violation of human rights, especially rights of access to health care, has been fueled by the HIV-AIDS crisis as well as by the resurgence of such diseases as malaria (especially on the African continent).[1] Again, the tough enforcement arrangements in the WTO (automatic rulings, sanctions for violation of WTO rules, procedures for the adjudication and enforcement of these rules and so on) have raised general human rights concerns. These rules – whether permissive or restrictive – are thought by critics to be at variance in certain recurring situations with the effective recognition and protection of human rights. Finally, these rights-based concerns about trading system rules parallel a number of other trade-related concerns, whether or not these are articulated in terms of human rights – concerns about the impact of trading arrangements on labor standards or on the environment or on culture.

All these developments have forced attention by trade lawyers (at the WTO and elsewhere) to the question of how trade regulation arrangements can be reconciled with – ideally, perhaps, harmonized or integrated with – arrangements for the protection of human rights and for the effective recognition of concerns about labor standards, the environment and culture.[2]

Among the most general of the questions to which consideration has been given[3] is the question of the normative underpinnings of trade regulation law and human rights law. While this is not the question I take up in this chapter, the question I would like to consider is at no great distance from it in that I want to try to identify the normative underpinnings of a defensible doctrine of human rights and of defensible versions of global market arrangements, but without having to refer in detail either to existing human rights law or to current trade regulation law, and without

having to make any assumptions about the degree to which these bodies of international law already give recognition to a defensible doctrine of human rights or to a defensible version of a global free market system.

In exploring the normative underpinnings both of the doctrine of human rights and of the voluntary transactions principle embedded in global free market arrangements, I shall argue (1) that principles of distributive justice have a crucial role to play both in the justification of human rights and in the defense of any morally acceptable version of the voluntary transactions principle that underlies the free market system; and (2) that consequently there need not be any fundamental conflict between arrangements in the international domain for the protection of human rights and measures for the promotion of international trade through the development of a global free market system that is respectful of a defensible version of the voluntary transactions principle.

6.2 THE NORMATIVE UNDERPINNINGS OF THE DOCTRINE OF HUMAN RIGHTS

A defensible doctrine of human rights[4] – one that hopes to be able to establish the existence of human rights and to determine their content and scope – cannot simply invoke the documents, national and international, which purport to identify and list such rights, impressive though the similarities no doubt are between such documents. The mere fact that *The Universal Declaration of Human Rights* and the international *Covenants on Civil and Political Rights* and on *Economic, Social and Cultural Rights* can be cited as giving recognition to largely overlapping lists of human rights doesn't settle the question whether – normatively speaking – such rights exist let alone whether the rights on these lists are either the only human rights there are or all the human rights there are, any more than the fact that legal recognition is given, within this or that domestic jurisdiction, to readily identifiable rights serves to show, conclusively, that the rights in question are normatively unproblematic. Nor, of course, can questions about the existence (or content or scope) of human rights be established by appeal to people's intuitions, not only because such intuitions are notoriously variable but also because the rights to which people are ready to accord recognition are rights for which they give reasons – which is incompatible with the supposition that the rights in question are self-evident.

When questions arise about the rationale for normatively interesting rights – rights that have a claim to endorsement that is independent of whether recognition is actually accorded them within some system of law, domestic or international – it is commonplace that reasons must be given

in support of statements about their existence. It is particularly clear that reasons have to be given when disputes surface about the precise content or scope of such rights. This familiar feature of our attitude towards the existence and content of more than merely legal rights strongly suggests that the attention of defenders of a doctrine of human rights should be fixed on the arguments there are for supposing that such rights exist and that they have the content (and the scope) they purport to have.

Human rights are by definition rights human beings have simply as human beings rather than because of some special action they have performed, or because of some group or organization or association to which they happen to belong, or because of some special relationship in which they stand to others. This means that human rights must be attributable to human beings on the basis of features they share and on the basis of shared features of the circumstances under which they live their lives. Each of the ingredients in arguments for human rights must consequently highlight considerations to which weight is assignable independently of characteristics only some human beings have and independently of features of the conditions under which only some human beings have to live their lives.

There are three familiar facts about human beings and the circumstances of their lives that arguably form the natural backdrop to the considerations emphasized in persuasive arguments for human rights. The first is that human beings, whatever their differences, attach importance to the protection and promotion of their own well-being – or, to put the same point in other familiar terms, that they all attach importance to the protection and promotion of their fundamental interests. The second is that, despite the many capacities they have as individuals to protect and promote their own interests – the many capacities they have as individuals to contribute, by the doing of things within their power, to the achievement of their own well-being – human beings lack the power, on their own, to do all that is needed to secure their own well-being or to protect their most basic interests. The third is that human beings – again regardless of the many differences there are in their individual capacities – are all dependent on others for the establishment of the most basic conditions of personal well-being, unavoidably dependent on others for the effective protection and promotion of their most fundamental interests. In many of the areas in which they lack the power, as individuals, to secure their own well-being or to protect their own basic interests, what they need for these purposes can be supplied by others provided cooperative arrangements for the meeting of the needs in question are put in place.

What, then, are the normative considerations embedded in arguments for human rights? Three recurring ingredients, I want to suggest, can be distinguished within such arguments.

1. First, it's crucial to a persuasive argument for the view that human beings have a right to, say, X, to show that X is indeed something that stands in some plausible relationship to the securing of their own well-being – to the securing of their own fundamental interests. (This is what might be called the well-being or interest component in arguments for human rights.)
2. Second, if a successful argument is to be constructed in support of the view that human beings have a right to X, it must be possible to assume, or to show, that securing X isn't something they have, as individuals, a duty or responsibility to do. There are cases in this connection of two different kinds.
   (a) Sometimes all that is needed to secure fulfillment of what might be dubbed the non-responsibility condition is to show that securing X by their own unaided efforts is something they are incapable of doing. Obvious examples are cases where what people have a right to is security of the person – where it's clearly impossible for individuals on their own to do all that might be needed to protect themselves against the risk of being assaulted or killed or tortured. Again, there are cases where what they have a right to is education – where, again, it's impossible (perhaps even more obviously) for individuals to secure on their own the sorts of education that are essential to the achievement of their well-being or to the protection and promotion of their fundamental interests over time.
   (b) Sometimes, however, what needs to be shown is that, even if it were possible – just possible, perhaps – for individuals, if left to their own devices, to secure X for themselves, it would be unreasonably demanding to regard them as having a duty to do so when much less onerous cooperative strategies for the securing of X either lie to hand or can be devised.

   In cases of the first of these two sorts, a duty to secure X cannot meaningfully be ascribed to individuals. If individuals are simply incapable of securing X by their own efforts, it is unintelligible to suppose that they have a duty or responsibility to do so. In cases of the second sort, what needs to be shown is that it's only on the basis of an indefensibly demanding version of the self-reliance or self-help ideal[5] that it could be supposed that an individual has a duty or responsibility to secure X by her own efforts whenever it is possible for such efforts, if made with sufficient seriousness and single-minded determination, to result in the securing of X.
3. The third crucial ingredient in arguments for human rights involves appeal to considerations of distributive justice. This justice or fairness

> condition requires that any putative right that satisfies the first two conditions must be distributed fairly or justly among human beings. Since, *ex hypothesi*, human rights are rights enjoyed by human beings as such – and since it is crucial to the meeting of the first two conditions that it be demonstrable, for any putative right to X, both that X is a necessary condition of the well-being of any human being and that it is either impossible or unreasonable to expect any human being to secure X without the forbearance or assistance of others – it seems clear that the appropriate 'just distribution' requirement is one that calls for equality in the enjoyment of human rights. As a matter of elementary justice or fairness, all human beings, and all equally, ought to be provided with those opportunities for the living of their lives in ways that protect their fundamental interests that they are either powerless to bring about by their own unaided efforts or that it would be unreasonable to expect them to try to bring about without the cooperation of others, whether the needed cooperation has to take the form of forbearance merely or, more demandingly, of assistance.

To say that the 'just distribution' rule that helps to underpin a doctrine of human rights is an 'equal distribution' rule is consistent, it should be noted, with the recognition that justice in distribution doesn't always call for equal distribution. Indeed, justice in the distribution even of rights doesn't always call for equal distribution. The rights that people have in virtue of the morally unproblematic special relationships[6] in which they stand to others or in virtue of the special roles they play within morally unproblematic institutions, associations and organizations need not, and typically do not, satisfy any 'equality' requirement. But where the fundamental interests protected by rights are interests human beings share – and where the general conditions for the protection of these interests are conditions they all have the same stake in enjoying on an assured basis – justice considerations require that the rights in question satisfy an equal distribution rule, which is to say, of course, that they are the sorts of rights embedded in the doctrine of human rights.

If human rights have the kind of basis in considerations of justice or fairness I've been discussing, then the duties that would have to be fulfilled for effective recognition to be accorded to such rights are appropriately describable as duties of justice. Although the duties in question – like the rights with which they can be correlated – are duties ascribable to all human beings, and although, abstractly characterized, they are duties to do whatever may be needed to secure effective protection of human rights, the concrete content of these duties is of course bound to be highly variable. This variability in their content is a natural – and untroublesome –

consequence of the fact that what individuals can in fact do individually to secure recognition and protection of human rights is highly variable. The variability in what they can do is an inevitable consequence both of the fact that their capacities as individuals are different and that the circumstances of their lives are different. If (as seems likely) the greater part of what needs to be done if human rights are to be universally recognized and respected will be mediated by institutional arrangements of a wide variety of kinds – social, economic, political, legal; local, regional, national, international; public, private and so on – the duties of justice that individuals must be presumed to have under a doctrine of human rights will for the most part be duties to be supportive of the formation and maintenance of institutional arrangements that help to ensure that human rights are everywhere protected. It is not surprising, consequently, that much of the burden of adopting measures for the effective protection of human rights falls in practice on those who play important decision-making roles within institutions of all these kinds. To recognize, for example, that people in important government positions (local, regional, national, international) or that people with leadership responsibilities in economic institutions (businesses, unions, investment firms, banks and so on) have crucial duties of justice to discharge if human rights are to be respected is wholly consistent with recognizing that all human beings have such duties because, even when they are not in a position to participate directly in the making of the decisions at these levels called for by considerations of justice, there are many indirect ways in which they can hope to be able to influence such decisions.

6.3 HUMAN RIGHTS, MARKET FREEDOMS AND THE VOLUNTARY TRANSACTIONS PRINCIPLE

It is sometimes thought that a close relationship between rules governing international trade and human rights can be established by noting either (a) that the 'market freedoms' that are presupposed by a global trading system are themselves among the economic rights embedded in the doctrine of human rights or (b) that there are certain rights – notably, the right to freedom of expression and the right to freedom of association – that are crucial to the maintenance of free market arrangements even though they are generally classified as civil and political rights rather than as economic rights in familiar catalogues of human rights.

Both of these suggestions run the risk of being too hasty even if both can be defended if adequately qualified.

(a) The first of these suggestions is potentially problematic unless considerable care is taken in specification of the rights that go hand in hand with recognition of market freedoms within a global trading system. If, for example, the 'market freedoms' to which market participants are said to have a right are all the freedoms to which recognition is given in still-influential 'neo-liberal' versions of the free market ideal,[7] an indefensibly expansive account is being given of the 'economic' rights allegedly built into the doctrine of human rights. This inflated view of the freedoms that ought to be enjoyed as a matter of right by all participants in (what is taken to be) a genuinely 'free market' system is reflected in the so-called Economic Freedom Index underwritten by the *Wall Street Journal*, the Heritage Foundation in Washington and the Fraser Institute in Canada.

Many of the freedoms to which recognition is given in this index are in fact freedoms to which, arguably, market participants do not have any (human) right. Indeed, they are freedoms to which, when not further constrained, there are human rights objections.[8] For example, it's assumed by the sponsors of the Economic Freedom Index that non-tariff barriers to trade are undesirable because they restrict economic freedom. Among other things, this is taken to imply that laws requiring the labeling of goods are objectionable because they restrict the freedom of those who manufacture or market such goods. Yet labeling requirements are needed by consumers if they are to be in a position to make informed purchasing decisions. Since it is clearly much more important that this sort of consumer right be protected than that manufacturers be granted the freedom to market their products unconstrained by product-labeling rules, the idea that market participants have a human right to the marketing of inadequately labeled goods must be rejected.

Again, the fewer 'regulatory' burdens there are on business in a country, the better the economic freedom rating it receives from sponsors of the Economic Freedom Index. Countries in which there are no health and safety regulations to which businesses and industries are subject, or in which there are no environmental protection rules to burden their operations, receive, other things being equal, a higher economic freedom rating. Yet it's obvious that countries that do not impose significant requirements on businesses and industries for the protection of the health and safety of workers or for the protection of members of the community from industry-caused degradation of the environment are precisely not respecting certain basic human rights.

(b) The view that free market global arrangements can be squared with

– and perhaps grounded in – the doctrine of human rights because such undoubted human rights as freedom of expression and freedom of association provide a crucial part of the normative underpinning for a global free market system is potentially problematic for at least two reasons.

First, rights to freedom of expression and association may have to be defended, when applied to market relations, in ways that reflect some of the special features of economic activity. For example, it's at least highly controversial whether, when freedom of speech is to be protected under a doctrine of human rights, this protection has a straightforward application to 'commercial' speech. Significant restrictions on freedom in the advertising of products and services may have to be recognized, not only to prevent fraudulent misrepresentation, but also to require provision of adequate information about products and services. As for freedom of association, anti-combines (or anti-trust) legislation in its familiar forms points clearly to the fact that it is far from being an unproblematic freedom in the economic domain.

There is a second objection to supposing that the rules governing a global market can be brought into harmony with the doctrine of human rights by highlighting the role played by such rights as the right to freedom of expression and freedom of association. Even when these rights are formulated circumspectly as rights that can be properly invoked in the economic domain, the possibility of conflict on other fronts between the rules governing international trade and important human rights has to be allowed for. For example, it isn't because there is any violation of benign versions of the rights to freedom of expression or freedom of association that there are human rights objections to rules of international trade when they permit economic transactions that breach morally important labor or environmental standards.

While there is general agreement that the voluntary transactions principle is the principle that animates a free market system, this principle can be more or less heavily constrained in its application to economic decision-making.[9] In its least constrained version – the version in which it would permit market participants to make, freely, decisions of absolutely any of the sorts it lies within their power to make – it would be incompatible with all freedom-restricting rules. Although careless defenders of free market arrangements may sometimes talk as though this is the ideally preferred version of the principle, it seems clear that no serious advocate of the free market ideal could on reflection recommend an approach to the making

of decisions that permitted market participants to advance their economic interests by resorting, whenever they had the power to do so, to force, fraud or theft. It is not surprising, consequently, that even the staunchest defenders of economic freedom – those who are most strongly opposed to legal or regulatory constraints on economic decision-making – recognize that a free market system is not only consistent with but requires enforceable rules prohibiting resort to force, fraud and theft on the part of market participants.

More heavily constrained versions of the voluntary transactions principle – and thus also of a free market system – are possible. For example, market interaction can be further constrained by various forms of anti-combines (or anti-trust) legislation, which significantly restricts the freedom of powerful market participants to make deals with one another that reduce the market options of other participants. Again, with a view to mitigating the problem presented by 'asymmetries of information' in the marketplace, additional constraints on the voluntary transactions principle may be needed in the form of measures to restrict the freedom of market participants to devise and implement their own promotional strategies. These measures may not only prohibit misleading advertising; they may also require more adequate information to be provided about proffered products and services. Yet again, the voluntary transactions principle may have to be qualified in ways that disallow appeals to the principle in defense of exploitative market transactions (for example, employment contracts that take advantage of the weak bargaining position of workers) or of economic decisions that are seriously harmful to third parties (as is the case when industries are permitted either to ignore altogether the environmental concerns of members of the public or to persevere in the use of pollution-generating processes that are damaging to the environment on condition that they pay pollution taxes).

The fact that the voluntary transactions principle in its application to market arrangements can be formulated in a number of ways and that a choice among these can only be made by careful review of the considerations that support the constraints (whether they are modest or more substantial) which serve to differentiate the various versions provides the basis for at least two normatively interesting conclusions. The first is that it's a mistake to view the voluntary transactions principle as a self-vindicating or free-standing principle, one that can be endorsed simply by noting that it underwrites freedom in the making of economic decisions. The second is that, if the rationale for several of the constraints built into a defensible version of the voluntary transactions principle is a justice or fairness rationale – and this is arguably the plausible view to take when the principle calls for voluntary market interaction to be constrained by

the right workers have not to be taken advantage of or by the right of members of the public not to have to accept the damaging consequences of pollution-generating industrial processes – then the view that a sharp distinction should be drawn between free market arrangements and fair or just market arrangements must be rejected. There need be no barrier in principle to the rules of an international trading system that purports to exemplify the free market ideal giving recognition, expressly, to the principles of distributive justice that underpin the doctrine of human rights. Indeed, insofar as the rules regulating global trading relationships countenance economic transactions that violate human rights, the idea that these rules, whatever the objections to them, can at least be defended in the name of freedom – on the basis of appeal, in effect, to the voluntary transactions principle that animates a free market system – will have to be rejected. Any defensible version of the voluntary transactions principle, I suggest – and thus any defensible version of the free market ideal – must give recognition to the importance of constraining voluntary market interaction on the basis of justice or fairness considerations. And if I'm right about the doctrine of human rights having, in part, a distributive justice rationale, this means that the economic decisions and practices of market participants, operating under the auspices of the voluntary transactions principle, must be consonant with human rights. Consequently, no systematic conflict between human rights and the rules that regulate trade within a global market system need be faced.

I shall return in the concluding section to take up briefly the question of whether this means that all trade-related injustices (including all trade-related violations of human rights) can be prevented by judiciousness in the articulation of the rules governing international trade.

I turn first to a brief critical discussion of an 'economic perspective' on the relationship between human rights and a global free market system that differs in some respects from the account I have been offering.

6.4 INTERNATIONAL TRADE AND HUMAN RIGHTS: CRITIQUE OF AN 'ECONOMIC PERSPECTIVE'

In a paper entitled 'International trade and human rights: an economic perspective,' Alan Sykes (2006) (Greenberg Professor of Law at the University of Chicago) tacitly opts for a version of the voluntary transactions principle that lies at the 'less constrained' end of the spectrum I have alluded to. It is a version, for example, that does not incorporate the kinds of fairness or justice constraints that would require participants in

the global marketplace not to violate human rights in any of the economic activities in which they engage. However, Sykes argues that international trade, even under the more permissive rules he favors, can be expected, on the whole, to increase respect across the world for human rights through the contribution it makes to boosting the gross national product (GNP) of all countries. He also claims – and it's a claim (he says) most economists would endorse -- that, if and so far as, here or there, international trade is found to violate certain human rights, the preferred (and the more 'efficient') response is to deal with these piecemeal by adopting small-scale remedial measures, measures specifically tailored to addressing the specific violations. The wrong response is to try to modify the rules of the international trading system by imposing tighter constraints on the decisions of participants in the global marketplace.

An example that seems to illustrate the sort of local remedy Sykes has in mind is perhaps provided by the plight of workers whose jobs are threatened by the relocation of the enterprises that have employed them to countries with significantly lower wages. If these job losses (and the resultant reductions in income) are deemed to be unfair or unjust – unfair or unjust, even, in ways that breach economic rights workers might be thought to have – a choice may have to be made between, on the one hand, revising the rules that regulate the global marketplace in ways that would protect the jobs (and thus the incomes) of workers who are at risk of losing their jobs under the existing rules and, on the other hand, retaining the rules while arranging, at the appropriate local level, for income-maintenance and job-retraining programs to be adopted. Sykes argues that the second of these options should normally be preferred, for two reasons. (1) First, local measures – suitably designed and implemented – are probably a more effective means of protecting workers who lose their jobs because of the way the global market typically operates under the rules of the existing trading system. (2) Second, there may be good reason to think that changing the rules of the trading system in a generally protectionist direction, through the imposition of constraints on the relocation of manufacturing enterprises to take advantage of lower wages in developing countries, would have a seriously harmful impact on efforts, through international trade, to improve living standards across the world, the sort of improvement that people everywhere have a right to expect. Changing the rules in a protectionist direction may be open to objection on several grounds. For one thing, preserving threatened jobs in developed countries in the short run is no guarantee that these jobs can be protected in the long run by protectionist measures. Again, such measures are arguably at odds with a fairer distribution across the world of opportunities for paid employment, because the relocation of enterprises of certain kinds from 'advanced'

to 'less advanced' economies not only expands the job opportunities of poorer members of the world community but also provides economically advanced societies with an incentive to create new jobs, whether in 'service' industries or in enterprises that call for the sorts of expertise that can be more readily developed in wealthier societies. Yet again, even currently threatened workers in developed countries have a longer-term stake in being able to participate in the more vibrant economy that greater openness in global trading relationships might be expected to help bring about.

However, while there may well be cases where trade-related human rights violations can be best dealt with by the adoption of piecemeal remedial measures, there are also cases – including some that Sykes would prefer to see handled in a piecemeal way – where the human rights threatened by global trading rules cannot be adequately protected by local action that leaves the rules intact and where, consequently, modification of the rules may be needed. Take, for example, the human rights violations commonly associated with child-labor practices.[10]

In view of the stark conflict there often is between employment practices that countenance child labor and respect for the rights of children,[11] what is needed (arguably) is the elimination of morally offensive child labor practices. If that is the case, then piecemeal measures, with local application, are unlikely to be superior to more systematic alternatives, alternatives that take the form of incorporating constraints on the hiring practices permitted by rules governing the global market.

One obvious reason is that strategies that rely on the well-intentioned policies of particular multinational enterprises – policies prohibiting the hiring of underage workers, for example – are likely to be too piecemeal to deal with a problem that has global dimensions. Even if enterprises that sponsor such benign employment policies are able to survive and prosper without finding it necessary to resort to child labor practices, other enterprises with less benign policies may continue to employ underage workers for as long as this is permitted by the rules of the international trading system. Moreover, enterprises that attempt to implement their own ban on child labor may find their profitability declining in ways that threaten their very survival in face of the competition offered by their less scrupulous rivals in the global marketplace.

Much the same argument can be presented against reliance on a piecemeal approach to the implementation of labor standards more generally – standards that call for health and safety in the workplace or for the avoidance of a broad range of potentially profitable but exploitative workplace practices. Here, too, piecemeal measures are not only – by definition – insufficiently comprehensive in their scope to prevent the human rights abuses that lax rules of market interaction permit but they also generate

avoidance incentives. They make it advantageous for enterprises that are more concerned about maximizing their profitability than about minimizing human rights violations to locate (or relocate) in jurisdictions not affected by merely local measures for the upholding of labor standards. And where fair labor practices are practices to which, on a voluntary basis, 'socially responsible' economic enterprises are committed, it is only too likely both (a) that there will be too few enterprises prepared to adopt these kinds of 'socially responsible' labor employment practices and (b) that competitive pressure from less scrupulous rival enterprises may make it impossible for them to survive, even when their ambitions, on the posting of profits front, are comparatively modest.

6.5 HUMAN RIGHTS CONSTRAINTS ON GLOBAL MARKETS AND THE ELIMINATION OF TRADE-RELATED INJUSTICES

I have been arguing in this chapter – albeit only in outline and in highly abstract terms – that there is no barrier in principle to harmonization of human rights and the rules of a global free market system provided recognition is given to the role principles of distributive justice play both in the justification of human rights and in the vindication of the version of the voluntary transactions principle that underpins a defensible version of the free market ideal. However, if my argument is on the right lines, it clearly needs both to be fleshed out in various ways and to be defended against objections I have not even attempted to identify. It must also be supplemented in several ways if a rounded account is to be given of what it would take to eliminate trade-related injustices across the world.

Let me identify some of these supplementary tasks.

First, even if the human rights constraints that should ideally be embedded in the rules regulating international trade have to be seen as grounded in principles of distributive justice, it remains to be determined both what the content of these constraints should be and how precisely it would be best for recognition to be accorded them within a global market system. As I recognize in my discussion of Sykes's 'economic perspective' on the relationship between human rights and international trade, a distinction needs to be drawn between the sorts of human rights violations that might fruitfully be combated by revision of the rules regulating international trade and those that call for a variety of piecemeal remedies that are independent of the structure of the global trading system. Although I have pointed to examples of human rights violations that seem to fall on different sides of this line, how this distinction is to be refined and applied

needs to be worked out. While exploration of the nature of the connection between these violations and principles of distributive justice is presumably one part of this task, even more importance is likely to attach, it seems safe to say, to trying to determine, on empirical grounds, whether trade-related or trade-independent institutional measures are more likely, in practice, to reduce the incidence of human rights violations.

Second, even if the rules that regulate international trade within a global marketplace were to be circumspectly articulated to take proper notice of the human rights constraints to which they should be subject – and even if arrangements for the proper implementation of these rules could be devised and adhered to – international trade under these rules could still be expected to generate distributive injustices of various sorts. The reason is that it is impossible to establish and apply any general system of rules that can anticipate, and cope with, all relevant contingencies. For example, it would be much too sanguine to hope that the economic inequalities, both within and between societies, that would be generated, even if only indirectly, by market interaction under feasibly ideal trading rules are all inequalities that can be accepted with equanimity from the standpoint of justice. Yet, although unjust economic inequalities of this kind are trade related, in that they must be seen to be among the consequences of interaction in the global marketplace even under circumspectly articulated trading rules, the fact that these consequences are unpreventable (and for the most part, unpredictable) means that it wouldn't be reasonable to hope that they could be moderated by any practicable change in the rules themselves.

Third, there is another reason why conformity within a global system even to benignly formulated free market rules can't be expected to generate a distribution of income and wealth across the world that is wholly consonant with principles of distributive justice. There is a very important general condition of the justice of market outcomes that is independent of the rules that govern market interaction. As Robert Nozick famously noted in *Anarchy, State and Utopia* when he set out the principles of distributive justice to which he was committed as a defender of what he called 'the historical entitlement' approach to questions of economic distribution (Nozick, 1974, pp. 149–82), meticulous conformity on the part of market participants to the principle of 'just transfer' (his version of what I have been referring to as the voluntary transactions principle) will not contribute to a just – market-generated -- economic distribution unless the initial (that is, 'pre-transaction') distribution of economic resources ('holdings' in Nozick's terminology) can be presumed to have been just. Unlike advocates of a broadly 'libertarian' approach to questions about the justice of markets – an approach that seems to be somewhat uncritically endorsed

by 'neo-liberal' defenders of the ideal of economic freedom presupposed by the Economic Freedom Index – Nozick rejects the view that the distribution of income and wealth that eventuates from market interaction can be assumed to be just provided (only) all the transactions to which market participants have been parties have been concluded freely or voluntarily. While his principle of justice in 'transfer' does indeed call for all market transactions to be fully voluntary, meticulous observance of this principle by market participants is only a necessary – not a sufficient – condition of the justice of the distribution of income and wealth yielded over time by market interaction. A second necessary condition is the justice of the baseline – or 'pre-transaction' – distribution of the resources at the command of market participants.

Although Nozick's own account of the principle that must be satisfied if this additional (baseline) condition is to be met – the principle of 'justice in acquisition,' as Nozick dubs it – is highly problematic,[12] and although Nozick's principle of justice in 'transfer' is an insufficiently constrained version of what I have been calling the voluntary transactions principle, Nozick is quite right to insist that the voluntary interaction of market participants in an ideally 'free' market cannot be expected to yield a just distribution of economic resources if the baseline distribution of marketable assets isn't a just distribution. Nozick is surely also quite right to take for granted that the principle of justice in transfer cannot do double-duty (so to speak) as a principle for determining the justice of the pre-transaction distribution of economic assets.[13]

It follows that, since what constitutes a just initial (or pre-transaction) distribution cannot be explicated by appeal to the voluntary transactions principle, the explication must proceed independently of the question whether the transactions to which market participants are parties have been wholly in conformity with the voluntary transactions principle. While injustices in the pre-transaction distribution will almost certainly be reflected in some of the injustices that eventuate from market interaction under rules mandated by the voluntary transactions principle, these injustices will precisely not be attributable to any (correctable) deficiency in the rules. Remedial strategies – whatever the precise form they are to take – consequently cannot be expected to take the form of further adjustment in the rules of a free market trading system.

6.6 CONCLUSION

In developing the argument of this chapter – by assigning to principles of distributive justice an indispensable role in the defense both of a doctrine

of human rights and of a version of the voluntary transactions principle that underlies international trading arrangements within a global free market system – I have nowhere taken up any of the hard questions that have to be faced about what the conditions are under which it would be reasonable to hope for the adoption by the international community of global trading rules that are adequately constrained by respect for human rights. However, current prospects for the adoption of more fully just rules of interaction in the global marketplace do not appear to be particularly good given the stranglehold the most powerful political and economic players on the world stage have over the decision-making procedures of such major international institutions as the WTO, the IMF and the World Bank. Indeed, it seems unlikely that the required changes in the structure of global markets will come about until those who make decisions within these institutions are more representative of, and accountable to, the peoples of the world who have hitherto played little or no role in giving shape to the processes of economic globalization.

NOTES

1. Here the target of criticism has been not trade liberalization but curtailment of trade in the form of patent protection. Some critics of TRIPS who, like Thomas Pogge, are skeptical of the prospects for securing international agreement for the modification of TRIPS, have been trying to generate support for the Health Impact Fund initiative with a view to providing medical scientists with an economic incentive to undertake research into the diseases that afflict the global poor – an incentive that would enable researchers to waive the right to patent protection guaranteed under TRIPS and thereby provide immediate and affordable access by the world's neediest people to the fruits of their research.
2. The World Trade Forum, which was founded in 1997 to facilitate discussion of issues facing the world trading system, devoted its fifth annual meeting (12–14 August 2001) to consideration of the topic 'International Trade and Human Rights – Foundations and Conceptual Issues.' The conference was the first in a series of conferences on Human Rights and International Trade sponsored by the American Society of International Law in cooperation with the Georgetown University Law Center (in Washington, DC), the Max-Planck-Institute for International Law (in Heidelberg) and the World Trade Institute (in Berne). Two volumes of papers presented at these conferences have been published in Cottier et al. (2005) and Abbott et al. (2006).
3. For example, by participants in the International Trade and Human Rights project and by contributors to the two volumes of papers arising out of the conferences sponsored by the project (Abbott et al, 2006; Cottier et al., 2005).
4. I have set out the principal ingredients in (what I take to be) a defensible doctrine of human rights in Macleod (2005a).
5. While it is widely recognized that self-reliance is a desirable human quality, there is a good deal of disagreement – much of it tacit – about the content and contours of the virtue. One of the commonest (and deepest) of the disagreements that divide political 'conservatives' from political 'liberals' concerns the extent to which individuals can reasonably be regarded as responsible for ensuring that their lives go well. For example, while conservatives complain that liberals call for society as a whole to assume

responsibility for the well-being of its individual members instead of requiring them to fend for themselves, liberals point out that conservatives exaggerate the degree to which life-enhancing opportunities can be created by individuals who are left to their own devices.

6. The special relationships that generate normatively defensible duties and rights for the parties to these relationships must be 'morally unproblematic.' The more general doctrine that special relationships, whatever form they take and regardless of their content, just are the source of an important sub-class of any given individual's (normatively defensible) duties and rights can easily be refuted: consider, for example, the special relationships in which the members of criminal organizations stand to one another or the rights and duties of members of the Nazi S.S.
7. These freedoms provide the basis for the Economic Freedom Index ratings cited by Alan O. Sykes in his contribution to *International Trade and Human Rights* when he is constructing his own argument in defense of WTO trading rules against critics who think human rights are threatened by some of these rules (see Sykes, 2006).
8. For a critique of the economic freedom ideal embedded in the Economic Freedom Index, see Macleod (2005b), especially pp. 152–5.
9. For a discussion of the importance of distinguishing between qualified and (virtually) unqualified versions of the voluntary transactions principle that underpins free market arrangements, see Macleod (2010).
10. Here I don't take up the question of how precisely child labor practices normally constitute a violation of the human rights of children or the question of whether there are forms of child labor (or special conditions under which children can be permitted to work) that do not violate their human rights. For the limited illustrative purposes that are relevant to the argument of this chapter, all that is needed is agreement that, in certain constantly recurring situations (especially in so-called 'developing' societies), child labor practices that are deeply damaging to the health and well-being of young children and to their prospects for receiving a decent education are often kept in place because they enhance the profitability of already profitable economic enterprises.
11. The recent philosophical literature contains many careful discussions of children's rights. See, for example, the essays in *The Moral and Political Status of Children* (2002).
12. Nozick's account of the principle of justice in 'acquisition' is problematic partly (but only partly) because it is severely underdeveloped.
13. While it's of course true that market participants can 'acquire' certain assets (property in land, for example) by buying them from other market participants who already own these assets – in which case the transaction that transfers ownership has to be vetted by appeal to Nozick's principle of justice in transfer – the Nozickian principle of justice in acquisition applies only to the question of how property may be (justly) acquired when unowned resources are appropriated and thus not to the question of how property rights in what is already owned may be (justly) transferred.

REFERENCES

Abbott, F.M., C. Breining-Kauffman and T. Cottier (eds) (2006). *International Trade and Human Rights*, Ann Arbor, MU: University of Michigan Press.

Archard, D. and C. Macleod (eds) (2002). *The Moral and Political Status of Children*, Oxford: Oxford University Press.

Cottier, T., J. Pauwelyn and E. Bürgi Bonanomi (eds) (2005). *Human Rights and International Trade*, Oxford: Oxford University Press.

Macleod, A.M. (2005a). 'The structure of arguments for human rights', in D.A. Reidy and M. Sellers (eds), *Universal Human Rights*, Lanham, MD: Rowman & Littlefield, pp. 17–36.

Macleod, A.M. (2005b). 'Globalization, markets, and the ideal of economic freedom', *Journal of Social Philosophy*, XXXVI (2), Summer, 143–58.
Macleod, A.M. (2010). 'The voluntary transactions principle and the free market ideal', in N. Snow (ed.), *Poverty, Justice, and Markets*, Vol. 27, Philosophy Documentation Center, pp. 31–6.
Nozick, R. (1974). *Anarchy, State, and Utopia*, Oxford: Basil Blackwell.
Sykes, A.O. (2006). 'International trade and human rights: an economic perspective', in F. Abbott, C. Breining-Kauffman and T. Cottier (eds), *International Trade and Human Rights*, Ann Arbor, MI: University of Michigan, pp. 69–91.

7. Coordinating corporate governance and corporate social responsibility

Pitman B. Potter*

Corporate governance and corporate social responsibility (CSR) involve internal and external expressions of the operational imperatives of business firms. Whereas corporate governance generally entails principles of business efficiency, CSR involves principles of social justice. While CSR involves primarily issues of relations between business firms and the outside community, corporate governance is largely an internal matter. And while CSR concerns challenges of justice (social, economic, environmental and so on) for those who are affected by business behavior in the world, corporate governance generally addresses internal issues of efficiency in business management within the firm.

Including CSR norms in the processes for strengthening corporate governance faces challenges similar to those facing the problem of coordinating compliance between international trade and human rights standards. These difficulties stem in part from conceptual differences and assumed trade-offs between regimes of efficiency and justice, as well as from general lack of communication and collaboration between specialists involved in these different sectors of trade and human rights. While these tensions may be somewhat less pronounced in relationships between corporate governance and CSR discourses, due in part to their being subsumed under the broader rubric of company law, they are significant nonetheless. Drawing on the author's paradigms of 'selective adaptation' and 'institutional capacity,' this chapter will examine the normative and organizational challenges to coordinating CSR norms with corporate governance practices in China. Drawing on these normative and organizational perspectives and local examples, the chapter will examine the possibilities and obstacles to coordinating CSR and corporate governance standards. The chapter will serve as a case study on the broader topic of coordinated compliance.

7.1 COORDINATED COMPLIANCE

Coordinating norms of CSR with practices of corporate governance mirrors many of the challenges facing coordination of trade and human rights compliance. Such coordination is an issue of critical importance for a world of increased globalization and interdependence. International academic and policy discourses have made significant contributions to understanding and defining the parameters for international trade policy and human rights policy. Challenging academic and policy discourses that treat trade and human rights as separate and potentially conflicting regimes, coordination of trade and human rights compliance involves building normative and institutional foundations that encourage enforcement of international standards in both sectors (International Law Association, 2008; Weiss et al., 2008).

International trade regimes are centered on normative principles associated with liberalism in the European and North American tradition. Proceeding from tenets about human equality and natural law, the liberal tradition of political ideology asserts that government should be an agency of popular will and should be restrained from active intervention of socio-economic relations.[1] As expressed in international trade standards associated with the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), norms of liberalism are manifest in part through provisions on transparency (GATT, Article 10, 'government responsibility to publish trade laws and regulations'); national treatment and non-discrimination (GATT, Articles 3 and 13, 'responsibility to avoid protection of local industries'); as well as the requirements on reducing and eliminating tariffs and trade subsidies.[2] These derive from liberal principles accepting the theory of comparative advantage, which essentially relegates the role of government to promoting efficiency though maximizing the utility of existing or acquired economic attributes, and limiting anti-competitive activities of other states such as mercantilism and protectionism.[3]

International human rights standards reflect a normative orientation toward socio-economic justice, combining liberal norms with ideals associated with socialism. Human rights standards articulated in the Universal Declaration of Human Rights, as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR),[4] combine priorities of civil and political rights with protection of economic, social and cultural rights. Despite efforts to present these as a unified and undifferentiated set of norms, political discourses over rights enforcement reveal conflicts over priorities and timing.[5] Yet, underlying commonalities about

socio-economic justice remain, even if complicated by questions about implementation.

Despite their apparent differences of normative priorities regarding efficiency and justice, international trade and human rights discourses have multiple related contexts and mutual influences. For example, trade liberalization rules restricting government assistance to nascent industries have potential impacts on human rights issues over labor standards in developing economies. As well, human rights imperatives on issues of health and environmental protection can affect multilateral efforts to entrench efficiency priorities in trade relations. Coordination also affects the policy-making context within which trade and human rights matters are considered and decided. Linkages between trade and human rights outcomes merit intensive research on conditions for coordinated compliance with international trade and human rights standards. Research-driven policy proposals on coordinated compliance with international trade and human rights standards can offer a range of best practices to facilitate international cooperation in a wide array of socio-economic and political relationships.

While there is an emerging recognition of the need to explore coordinated compliance with international trade and human rights standards, (Abbot et al., 2006; Cottier et al., 2005) empirical research and policy analysis are lacking. One important reason for this is that the 'interpretive communities' (Fish, 1998) of officials, legal specialists and business and political elites that are at the heart of local interpretation and implementation of international trade and human rights regimes are often comprised of very different groups of specialists and stakeholders who neither share conceptual perspectives nor interact organizationally (Petersmann, 2007). These entrenched institutional arrangements often inhibit development of alternative approaches that might support coordinated compliance. The lack of consensus over the meaning and purpose of trade and human rights goals has compromised local efforts at coordinated compliance (Steiner and Alston, 2000, Section E16). For example, compliance with international trade standards on production tends to privilege consumption (Barber, 2003), local business models (Barney, 2003) and reliance on financial and regulatory incentives for private behavior (Frame and Taylor, 2005; Kysar, 2005) but all too often is unconnected with local human rights conditions and policies. International discourses on private property and trade liberalization often work to limit the range of approaches available locally to promote human rights (Petersmann, 2005). Similarly, human rights discourses often tend to confront the norms and institutions of international trade as obstacles rather than potential contributors to human rights conditions (Mares, 2004a; Steiner and Alston, 2000, chapter 16).

Better coordination of trade and human rights practices will support efforts to build more effective international institutions for coordinated implementation of trade and human rights standards, a critical need for international law reform (Fijalkowski, 2007; Steiner and Alston, 2000, Section C). It is useful, therefore, to examine conditions for coordinated compliance with international trade and human rights standards with particular attention to underlying norms of efficiency and justice. Coordination in trade and human rights compliance can in turn facilitate stronger cooperation in trade and human rights relations more broadly, such that expanded trade connections can be demonstrated to contribute to improved human rights conditions and vice versa. Coordinated compliance also has implications for performance of international treaty standards in areas such as security, climate change and resource and technology policy. Thus, building understanding about coordinated compliance with international trade and human rights standards has intrinsic value for its potential to prevent and avoid disputes over trade and human rights and thus reduce costs of international cooperation.

This approach has particular relevance in China, where commitments to trade liberalization and human rights performance mandate broader understanding of conditions that can support coordinated compliance with international standards. For example, China has already faced bilateral disputes over trade and human rights as separate issues, and has also seen disputes in one sector threatening relationships in the other.[6] Relations with other economies in Asia face the prospect of similar conflicts. By building better understanding of the potential for coordination of local trade and human rights standards in China, we can hope to strengthen understanding of a crucial policy challenge in a significant region of the world. Understanding the potential for unifying contending policy and political constituencies associated with trade and human rights in China can also help to overcome competition for influence and resources among these constituencies that can be counterproductive to efforts to build common purposes and cooperation domestically and internationally. Such an approach would strengthen China's ability to respond to different kinds of trade and human rights compliance challenges and to encourage coordination of trade and human rights policies and practice. Thus, focused examination of coordination of efficiency and justice goals as expressed through local regulatory regimes can further understanding of China's potential responses to coordination of trade and human rights standards more broadly. China's regulatory regimes for corporate governance and CSR are particularly instructive in this regard.

7.2 EXAMPLES FROM PEOPLE'S REPUBLIC OF CHINA (PRC) BUSINESS LAW: CORPORATE GOVERNANCE AND CSR

Business law in China combines attention to market efficiencies and socio-economic justice. Noteworthy examples may be found in the regulatory discourses for corporate governance and CSR. In each of these sectors, implementation reflects a range of normative and organizational dynamics.

7.2.1 Corporate Governance

China's economic reform process has seen increased attention to limited liability forms for doing business and to accompanying issues of corporate governance (Guanghua, 2007; Jing, 2009). The Company Law (CL) of the PRC[7] provides that company business operations must comply with PRC law and administrative regulation and also conform to social morality and business morality (CL, Article 5). Companies must act in good faith, accept the supervision of the government and the general public and bear social responsibility. These general provisions are augmented by specific provisions on company decisions. Companies must protect the lawful rights and interests of employees, conclude employment contracts with employees, buy social insurance and strengthen labor protection so as to realize safe production (CL, Article 17). Companies must support vocational education and in-service training for employees so as to improve their personal quality (CL, Article 17).

Key aspects of corporate governance law and policy center on company decision making and ensuring that the interests of investors are protected. For both Limited Liability Companies (LLCs) and Joint Stock Limited Companies (JSLCs) (CL, Article 3), corporate governance extends to protection of shareholder interests – particularly interests of minority shareholders. LLCs (CL, Section II) are analogous to privately held companies in common law jurisdictions and civil law models such as the *Gesellschaft mit beschränkter Haftung* (GmbH) under German law. Companies Limited by Shares are analogous to publicly trade companies in common law jurisdictions and civil law models such as the *Aktiengesellschaft* (AG) under German law.

Shareholders of LLCs have the right to inspect company records including articles of association, records of the shareholders' meetings, resolutions of the meetings of the board of directors, resolutions of the meetings of the board of supervisors, as well as financial reports (CL, Article 34). In JSLCs, individual shareholder rights are more limited – focused on right

to access corporate documents and records. However, in both LLCs and JSLCs the authority of shareholders is expanded through the authority of the shareholders' meeting, which exercises a number of governance functions, including:

(1) determining operation guidelines and investment plans;
(2) electing and changing directors and supervisors;
(3) approving reports of the Board of Directors;
(4) deliberating and approving the reports of the Supervisory Board;
(5) deliberating and approving annual financial budget plans and final account plans of the company; and
(6) deliberating and approving profit distribution plans and loss recovery plans of the company. (CL, Article 38 for LLCs, extended to JSLCs by CL, Article 100)

In carrying out their functions, shareholders in both LLCs and JSLCs must comply with PRC law and administrative regulation, as well as the company's articles of association (CL, Article 20). Shareholders may not injure the interests of the company or of other shareholders by abusing the shareholders' rights, or injure the interests of any creditor of the company by abusing the company's independent status as a juridical person or the shareholders' limited liability status. Controlling shareholders as well as directors, supervisors or senior managers may not injure the interests of the company by taking advantage of their relationship with the company (CL, Article 21). Thus, while shareholders are nominally granted significant powers over business decision making, the imperative to further the interests of the company militates in favor of subordination to decisions by management and the board of directors.

In both LLCs and JSLCs the board of directors exercise considerable power over company decisions. The board's authority extends to the following:

(1) convening shareholders' meetings and reporting the status on work thereto;
(2) carrying out the resolutions made at the shareholders' meetings;
(3) determining the operation plans and investment plans;
(4) working out the company's annual financial budget plans and final account plans;
(5) working out the company's profit distribution plans and loss recovery plans; . . .
(8) making decisions on the establishment of the company's internal management departments;
(9) making decisions on management staff and systems. (CL, Article 47 for LLCs, extended to JSLCs by CL, Article 109)

Company directors are bound to avoid conflicts of interest that injure the company and otherwise to perform their duties to further the interests of the company (CL, Article 21). While bound by general principles of compliance with PRC law and administrative regulation, company directors are primarily responsible for protecting the interests of the company and ensuring its profitability. As well, directors in JSLCs must recuse themselves from decisions pertaining to outside entities in which they have a relationship (CL, Article 125). In an effort to strengthen the capacity of boards of directors to conform to standards of fiduciary duty to the company, the 2005 revisions to the CL included a provision for appointment of independent directors (CL, Article 123). A similar provision is under consideration for state-owned enterprises controlled by the central government (*zhongyang qiye*).[8]

Following the German company law model, the CL provides for a supervisory committee to supervise acts of directors in performance of their duties (CL, Article 52). Supervisory boards are mandatory for JSLCs, while they may be established for LLCs (CL, Articles 52 and 118). The supervisory board exercises general oversight over the activities of the board of directors, including:

(1) oversight of financial affairs;
(2) supervising directors and senior managers in carrying out their duties;
(3) bringing forward proposals on the removal of any director or senior manager who violates any law, administrative regulation, the articles of association or any resolution of the shareholders' meeting;
(4) demanding any director or senior manager to make corrections if his act has injured the interests of the company;
(5) proposing to convening temporary shareholders' meetings, and convening and presiding over shareholders' meetings when the board of directors does not exercise the functions of convening and presiding over the shareholders' meetings as prescribed in the Company Law;
(6) bringing forward proposals at shareholders' meetings;
(7) initiating actions against directors or senior managers. (CL, Article 54 for LLCs, extended to JSLCs by CL, Article 199)

Supervisory committees may complement the use of outside directors, by providing additional independent oversight over company affairs. Indeed, supervisory committees may achieve greater supervisory effect because of their separate and specific institutionalized role, whereas independent directors remain confined within the board of directors system. The supervisory committee system, while currently required only for JSLCs, might potentially be expanded in future.

Subject to the authority of the board of directors, the company's general manager has delegated authority over company operations, including:

(1) taking charge of the management of the production and business operations of the company, and organizing to implement the resolutions of the board of directors;
(2) organizing the execution of the company's annual operational plans and investment plans;
(3) drafting plans on the establishment of the company's internal management departments;
(4) drafting the company's basic management system;
(5) formulating the company's concrete bylaws;
(6) proposing to hire or dismiss the company's vice manager(s) and person(s) in charge of finance;
(7) deciding on the hiring or dismissing of the persons-in-charge other than those decided by the board of directors. (CL, Article 50 for LLCs, extended to JSLCs by CL, Article 114)

Aside from the general provisions on compliance with law and social and business morality (CL, Article 5), management responsibilities are constrained by the private purposes of the company as interpreted and applied by the board of directors. Thus, whether at the level of shareholders, directors, supervisors or managers, the priorities of corporate governance lie mainly in the area of furthering the business interests of the company and protecting the interests of shareholders. Operational and governance priorities center on efficiency and return on investment – following in broad terms international liberal models of property and contract rights.[9]

Particular issues of corporate governance have been addressed through the China Securities Regulatory Commission's 'Principles of Corporate Governance of Listed Companies' (2002) (see Xianchu, 2009, pp. 6.3.39-1–6.3.39.42.), which provides expanded protections for minority shareholders. Under these corporate governance rules issued in 2002 by the China Securities Regulatory Commission (CSRC) and the State Economic and Trade Commission,[10] listed companies are required to establish a corporate governance structure sufficient for ensuring the full exercise of shareholders' rights. In particular, the corporate governance structure of a company 'shall ensure fair treatment toward all shareholders, especially minority shareholders.' In order to satisfy the requirements of the CL on shareholder access to company information, listed companies are required to 'establish efficient channels of communication with its shareholders.'

Under the CSRC's principles, shareholders also have rights to pursue civil litigation to protect their rights. Shareholders may seek injunctive relief against decisions of shareholders' meetings or board of directors' resolutions that are in violation of laws and regulations or infringe on shareholders' rights and interests. This is consistent with the provisions of CL Articles 20–22 allowing for compensation for damage to the company and permitting shareholders to seek judicial remedies to revoke decisions

of the shareholders meeting that violate company charters. Article 22 in particular provides for appeals by shareholders for judicial revocation of unlawful or improper board of directors' or shareholders meeting resolutions. China's Securities Law (rev. 2005) also provides for civil liability for violations of securities rules on matters such as disclosure, although administrative processes through the CSRC must first be exhausted.[11] The Supreme People's Court issued a directive in 2003 on civil litigation in securities fraud cases that effectively restrained access to local courts for shareholder actions.[12] Shareholder derivative actions have gradually become more possible as local courts have relaxed restrictions (Chao and Chen, 2005). Restrictions on shareholder litigation have also been eased for actions over claims in bankruptcy. Following a national judicial work conference held in September 2009, the Supreme People's Court issued guidelines on judicial handling of cases involving company liquidation ('*gongsi qingxuan anjian*').[13] The court called for attention to be paid to principles of equity and fairness and to ensuring that claims of creditors, shareholders and employees as well as social interests are balanced.

In sum, provisions on corporate governance in China are focused primarily on internal accountability of companies to shareholders. While the CSRC's principles also take note of the interests of outsiders ('stakeholders') in acquiring information about and participation in company affairs, the thrust of the legal and regulatory regime is on protecting the rights of corporate insiders. This attention to internal accountability is aimed primarily at protecting the interests of companies and their owners over such issues as profitability and return on investment. In this respect, China's corporate governance regime (as with similar regimes elsewhere) is oriented mainly toward the efficiency and liberalization typologies of international trade regimes. This poses normative obstacles to enforcement of the public interest components of the CL. The capacity of enforcement organs to ensure compliance with CL requirements of corporate governance is also uncertain (Tomasic and Fu, 2006).

7.2.2 Corporate Social Responsibility

In contrast to the dynamic of internal accountability that characterizes corporate governance, CSR may be appreciated as an exercise in external accountability. While international discourses on CSR tend to focus on voluntary codes of conduct, such efforts often result mainly in hortatory efforts that articulate ideals but do little to encourage operational coordination (Mares, 2004b). China has given significant attention to CSR, as indicated in part by the establishment of central and local organizations aimed at publicizing best practices of business behavior.[14] Chinese regula-

tory authorities are increasingly suggesting that formal commitments to CSR principles be included as conditions for business license approval. Civil awareness campaigns on CSR are also aimed at building business compliance. CSR is particularly important in three areas: labor, health and environment.

Labor relations

Policy initiatives aimed at privatization of Chinese enterprises, along with greater attention to efficiency and reduced production costs, contributed to declining labor conditions for industrial workers in the early and mid-1990s.[15] Such problems have continued.[16] Increased worker unrest has become a major challenge for Chinese labor policy. The Public Security Bureau reported 87,000 public order disturbances in 2005, up from 74,000 in 2004, and 58,000 in 2003 (McGregor, 2006; Ni, 2006). The global economic crisis that erupted in late 2008 has caused widespread plant closings in China, raising the prospect of further social unrest – during 2008 some 170,000 demonstrations were recorded.[17] The PRC Labor Law is emblematic of the tension between protecting workers' rights and maintaining state control.[18]

The Labor Law extends a number of specific benefits to workers, including various 'guarantees' of equal opportunity in employment, job selection, compensation, rest, leave, safety and health care, vocational training, social security and welfare, and the right to submit disputes to arbitration. Juxtaposed to these benefits are a number of obligations that workers must honor, including the duties to fulfill work requirements, improve vocational skills, carry out work health and safety regulations, and observe labor discipline and vocational ethics. Official reviews of the PRC Labor Law described it initially as the complete articulation of the rights of workers,[19] such that workers' rights were as articulated in the law and did not extend beyond the text of the legislation.[20]

Thus, similarly with the conditional grants of civil and political rights under the PRC Constitution,[21] the Labor Law conditioned the rights of workers on their submission to authority.

The centrality of state power is protected more specifically in the Labor Law through provisions on labor unions, collective bargaining and dispute resolution. Consistent with the PRC trade union regime generally,[22] the Labor Law entrenches the Party-dominated labor union system as the basic mechanism for enforcing workers' rights.[23]

All local trade unions are subject under PRC Trade Union Law to the overall authority of the All China Federation of Trade Unions (ACFTU), a CPC United Front organization. There is no legal sanction for the creation of independent labor unions that might challenge the Party's official

policies.[24] The Trade Union Law also grants the Communist Party of China (CPC) cadres close access to trade union leadership. As well, the members of the labor union may be drawn from management, thus further diluting the potential for independent action by the union.[25] The centrality of the state as the sole protector of workers' rights and interests has contributed to concerns about lax enforcement of the Labor Law's limited protections.[26]

During the late 1990s and early 2000s, China's booming economy was seen as evidence of the superiority of a Chinese model of development (Peerenboom, 2007), even while labor conditions in China's factories remained largely unimproved. Yet the increase in number and severity of worker demonstrations over matters such as unpaid wages and working conditions revealed the extent to which the socialist market economy has apparently been unable to protect workers' rights and interests fully (US Department of State Bureau of Democracy, Human Rights and Labor, 2004).

China's newly enacted Labor Contract Law (2008) formalized a number of significant principles including requirements for written contracts; compliance with labor law requirements on working hours, overtime requirements and working conditions; and legal remedies (Dyer, 2007). The new legislation holds the prospect of improving the enforcement mechanisms for protecting labor rights in China, although as indicated by foreign business groups concerned about the new measures, the prospect of discriminatory enforcement remains high. Even while the Labor Contract Law reflects a degree of normative complementarity between local official norms of development and international human rights standards potential problems of enforcement reflect the challenge posed by 'institutional capacity.'[27]

Health care

China's State Council passed a landmark Public Health Reform Plan in January 2009. This was the culmination of a policy process begun in 2006 that included extensive interagency consultation as well as public discussion.[28]

The plan builds on efforts to expand the system of rural cooperative medical service units begun in 2002 and expanded in 2003 following the SARS outbreak. Following a critical report by the State Council Development Research Center in 2005 that criticized health sector reforms and noted the increase of patient contributions to medical fees from 20 percent in 1978 to 52 percent in 2005, the State Council established a joint working committee to draft a new health reform plan. Statistics from the Ministry of Health show that personal spending on medical services

doubled from 21.2 percent in 1980 to 45.2 percent in 2007 while government funding dropped to 20.3 percent from 36.2 percent in 1980.[29]

The health care plan is aimed in part at providing state subsidies for personal medical expenses.

Comprehensive medical insurance was enacted for urban residents in 2007 and the rural cooperative system was expanded continuously in 2006–08. In the fall of 2008 the draft Public Health Reform Plan was released for public debate. The plan was endorsed by the State Council in January 2009[30] and taken up in Premier Wen Jiabao's Government Work Report to the Second Session of the 11th NPC in March (Jiabao, 2009, Section VI.B.5). The plan was published for implementation in April.[31] The health care plan aims to provide universal coverage of basic health care by the end of 2020; such coverage will involve complete subsidization of 'essential public health care' (*jiben gonggong weisheng fuwu*) as well as expanding social health insurance (*shehui yiliao baoxian*) with the aim of 90 percent coverage for rural and urban residents by the end of 2011. Rural migrants and other at risk populations will be particularly targeted. The plan also involves reform of the pharmaceutical system under the guise of an 'essential medicine system' (*jiben yaowu zhidu*). Key points in the three-year Public Health Reform Plan include expanding the basic medical insurance for urban and rural residents; reimbursing rural migrant workers for medical expenses outside the cities or counties where they registered for medical insurance; expanding availability of medical doctors and clinicians in rural areas; and reforming processes and cost structures for distribution of medicines.

The health care plan also includes commitments to build 2000 county hospitals and 5000 township clinics in rural areas over the next three years.[32] Under the health plan the government is committed to build or renovate 3700 community clinics and 11,000 health service centers in urban areas within three years and to build 2400 such centers in underdeveloped urban areas during the same period. The government will sponsor 1.9 million training sessions for village and township medical clinics and urban community medical institutions during the period of the reform plan, 2009–11.

The outlines of the Public Health Reform Plan were affirmed in China's Human Rights Action Plan issued in April 2009, which underscored the importance of health care as a human right. The Human Rights Action Plan affirms the government's commitment to establishing 'the basic framework for a basic medical and health system covering the entire nation (State Council Information Office, 2009). While normative consensus around expanding access to public health care seems high, budgetary and operational resources remain uncertain.

Environmental protection

China's environmental challenges have long been evident, and much written about (Economy, 2004; Smil, 2004). Problems of water scarcity, flooding and pollution remain critical and have been exacerbated by economic growth. Official sources acknowledge that 70 percent of China's rivers and half of China's marine areas are contaminated as a result of economic growth and inadequate regulation (Ying, 2006). Air pollution also presents a significant problem for China's natural environment. The ninefold increase in China's fossil fuel emissions has contributed to an air pollution crisis that has resulted in 16 of the world's 20 most polluted cities being in China (Watts, 2005; Zijun, 2006a). Degradation of forests and grasslands and resulting erosion remains a problem.[33] China's natural resources present particular problems for natural environmental conservation, as the natural resource base is insufficient to supply the needs of China's growing economy. China's energy needs are driven by its economic growth patterns, with implications for political arrangements and regulatory capacity (Yeh and Lewis, 2004).

The Chinese government has expressed awareness of the importance of preserving sustainability in these and other elements of the natural environment. China's State Environmental Protection Agency (SEPA) has done an admirable job of raising awareness about the need for environmental protection; developing environmental protection policies and regulations; and including environment issues in development policy discourses. The Chinese government has urged cooperation on environmental issues of 'clean development'[34] and to promote collaborative efforts to develop clean technologies (Lewis, 2006). Premier Wen Jiabao has affirmed a commitment to sustainable development and the curbing of environmental degradation (Siu-sin, 2005). The State Council's 2006 plan for environmental protection focused on sustainable development and called for evaluation of local cadres to include 'Green GDP' requirements of environment and sustainability as categories in the cadre evaluation form.[35] Policy commitments to restore water resources and conserve natural resources and energy suggest important levels of awareness. China has set a goal to reduce energy consumption by 20 percent by 2010, although the capacity to meet this challenge remains uncertain (Brahm, 2006). A renewable energy law may help, but as with other regulatory measures, enforcement remains problematic (Zijun, 2006b).

China has enacted numerous laws and regulations to address protection of the natural environment. Achieving sustainability in natural environment sectors of water, natural resources and energy is inseparable from constitutional and legal provisions for state ownership of resources (Constitution, Article 9). Regulation of water, resources and energy use

depends on institutional effectiveness of government regulatory systems and institutions. While the enactment of laws and regulations on water, resources and energy, and pollution control reflects formal support for norms of sustainability, conservation and other ideals, enforcement is uneven. Government ministries in areas such as economic development, transportation, agriculture, water resources and industry include environmental protection in their policy activities. Major municipalities have come to emphasize environmental protection in local policies (Lingyi, 2006). However, policy priorities and regulatory enforcement on environmental protection have been inconsistent.[36]

Challenges of labor relations, health care and environmental protection are key policy issues for the PRC government. All involve normative dimensions of 'selective adaptation' that lead to conflicts of policy priorities and resource allocations. As well, organizational issues of 'institutional capacity' are evident as enforcement processes and mechanisms face continuing challenges. Public sector measures alone will likely be inadequate to address these problems effectively. Greater participation by the private sector will be essential. Hence, there is a great need to coordinate public sector efforts to redress labor, health and environmental issues with private sector initiatives. This provides an important opportunity for strengthening CSR and managing a transition from voluntary efforts to genuine compliance.

7.3 APPROACHES TO COORDINATION

The corporate governance provisions under China's CL and Securities Law regimes and the policy attention paid to CSR appear to reflect conflicting priorities regarding efficiency and justice. The internal accountability orientation of China's corporate governance standards stand apart from the external accountability orientation of China's CSR norms, as tensions arise between the fairness discourse of corporate social responsibility and the efficiency priorities of the CL regime. These different perspectives are compounded by power dimensions in the political economy of China's economic growth policies that would seem to distort government policy priorities toward the efficiency goals of corporate governance over the justice goals of CSR.[37] From the standpoint of 'selective adaptation,' normative perspectives have a significant influence on the interpretation and implementation of legal texts and standards.[38] Thus, the pressures exerted by norms of efficiency are likely to inhibit strict enforcement of textual commitments in the CL on issues of social responsibility and social and business morality. Similarly, from the standpoint of 'institutional

capacity,' the ability of regulatory institutions to encourage and monitor CSR effectively in areas such as labor, health and the environment is often compromised by factors of policy disagreements, location, inappropriate regulatory methods and weak organizational discipline (Potter, 2006). As some commentators have noted, the tension between efficiency and justice is a major challenge facing the Party leadership.[39]

One approach to ensuring that the efficiency goals of corporate governance also satisfy the justice requirements of CSR is through contract law. In particular, corporate decision making, either through contract mechanisms or resulting in contracts, might usefully be required to meet general requirements for contract validity set forth in the Contract Law of the PRC ('Unified Contract Law' or UCL) and in the General Principles of Civil Law of the PRC (GPCL).[40] Under GPCL Article 7 civil acts such as contracts must be in accordance with social ethics, and not harm the public interest or disrupt social economic order. GPCL Article 55 requires that civil acts such as contracts must not violate the law or the public interest.

Part One (Articles 1–8) of the UCL contains general requirements for contract formation and performance. UCL Article 5 requires that contracting parties abide by the principle of fairness in determining their contractual rights and obligations. UCL Article 6 requires that contracting parties abide by the principle of good faith in exercising their contract rights and performing their obligations. UCL Article 7 provides that '[w]hen concluding and performing contracts, the parties shall comply with the laws and administrative regulations and respect public morals, and they may not disrupt the social or economic order or harm the public interest.'

The UCL also provides that contracts are void that are concluded through fraud or coercion; that conspire to harm the interests of the state, a collective or a third party; that conceal an illegal purpose; that harm the public interest; or that violate mandatory provisions of laws and regulations (UCL, Article 52). Corresponding provisions are contained in GPCL Article 58. These prohibitions must be avoided in order for contracts to be valid under Chinese law.

Implementing these provisions can assist in giving enforcement power to general requirements of CSR. Thus, aside from voluntary commitments and public regulatory efforts to facilitate labor rights, health rights and environmental protection efforts, implementation of contract law rules can make agreements related directly to corporate governance and that result from corporate decision making more consistent with CSR goals. Since contract commitments and behavior are primarily matters of private law between the parties, compliance need not rely solely on public regula-

tory institutions, thus perhaps avoiding the challenges of 'institutional capacity' in enforcing CSR goals (Potter, 2008). Similarly, since contracting parties are able to a significant extent to codify their normative preferences into contract terms, civil and economic actors who are intent on securing the benefits of socially responsible corporate behavior in areas of labor relations, health care and environmental protection might be more able to secure tangible commitments to such ideals from their contractual counterparts. By adopting in essence a civil law approach that empowers economic and civil society actors to balance the goals of corporate governance with those of CSR, a contract approach may prove an effective complement to the role of public regulatory institutions.

7.4 SUMMARY

The relationship between corporate governance and CSR echoes many of the tensions that hamper coordination between trade and human rights policy and practice. Corporate governance models, such as that expressed through the CL of the PRC, emphasize shareholder interest and accountability of directors and managers, but these are couched in terms of business interest – return on investment, profitability and the like. CSR addresses a number of themes in relations with society at large, of which labor management, health care and environmental protection are key examples. While the themes of efficiency that inform corporate responsibility paradigms and the imperatives of fairness that characterize CSR ideals tend to operate at cross-purposes, they need not do so. One possible approach to ensuring that corporate governance dynamics support the goals of CSR would be through enforcing the public interest criteria for validity of contracts under the PRC Contract Law.

NOTES

* This chapter is reprinted from Pitman B. Potter (2009), 'Coordinating corporate governance and corporate social responsibility,' *Hong Kong Law Journal*, **39**(3), 675–96.

1. Classic works include Kymlicka (1991), Cotterrell (1989), Heller (1988) and (1977).
2. See text of the GATT in *Basic Instruments and Selected Documents* (BISD). Among the many useful treatises on the GATT are Jackson (1969) and Stone (1984).
3. For a skeptical review, see generally Brown (1994). For discussion of the role of governments in directing foreign trade policy, see Cohen (1991).
4. International Covenant on Civil and Political Rights, United Nations (UN) GA Resolution 2200A (XXI), 16 December 1966; International Covenant on Economic, Social and Cultural Rights, UN GA Resolution 2200A (XXI), 16 December 1966.
5. Compare 'Vienna Declaration and Program of Action,' 12 July 1993, A/Conf/157/23

with 'Final Declaration of the regional meeting for Asia of the World Conference on Human Rights,' Bangkok Declaration, 2 April 1993, *Human Rights Law Journal* (1993), **14**, 370.

6. Congressional Executive Committee on China, *Annual Report 2009*, http://www.cecc.gov/pages/annualRpt/annualRpt09/CECCannRpt2009.pdf (accessed July 14, 2012); US Trade Representative's Office, *2008 Report to Congress on China's WTO Compliance*, http://www.ustr.gov/sites/default/files/asset_upload_file192_15258.pdf (accessed July, 14 2012).
7. Company Law of the PRC (rev. 2005), *China Daily*, 17 April 2006, http://www.china-daily.com.cn/bizchina/2006-04/17/content_569258.htm (accessed July 14, 2012). Full text available at 'PRC Company Law (Amended), *China Law & Practice* (2006–07), December/January, 21–71.
8. 'Dongshihui shidian zhongyang qiye zhuanzhi waibu dongshi guanli banfa (shixing)' (Management methods for boards of directors experimenting with central enterprises appointing outside directors (for trial implementation),' 13 November 2009.
9. On property, compare Smith and Coval (1986) with Wang (1998). On contract, see Potter (2007) and He (1990).
10. China Securities Regulatory Commission and State Economic and Trade Commission, 'Code of Corporate Governance for Listed Companies in China,' 7 January 2002 (Zhengjianfa No.1), http://www.acga-asia.org/public/files/China%20Corporate%20Governance%20Code%202002.pdf (accessed July 14, 2012).
11. Securities Law of the PRC, Article 232, http://www.chinadaily.com.cn/bizchina/2006-04/18/content_570077_19.htm (accessed July 14, 2012).
12. 'Trial of civil damages cases arising from misrepresentation in the securities market several provisions,' *China Law & Practice*, March 2003, pp. 53-62; see also Lu Guiping (2003).
13. 'Zuigao renmin fayuan yinfa Guanyu shenli gongsi qiangzhi qingxuan anjian gongzuo zuotanhui jiyao de tongzhi' (Notice of the Supreme People's Court issuing Notes concerning the work conference on adjudication of cases of compulsory settling of company accounts), Fa fa, No. 52, 4 November 2009.
14. See, for example, the Corporate Social Responsibility website, http://www.chinacsr.com/en/, which extols the virtues of CSR and publicizes efforts by government agencies and business groups to encourage voluntary support.
15. See generally, Gao (1994, pp. 12–13, 27) and Liu (1994, pp. 14-15, 27). For discussion of privatization policies, see Walder (1995).
16. Congressional Executive Committee on China, *Annual Report 2005*, Section III(c), http://www.cecc.gov/pages/annualRpt/annualRpt05/2005_3c_labor.php#safetyb (accessed July 14, 2012).
17. 'Risk of social turmoil as number of jobless grows, researcher warns,' *South China Morning Post*, 6 December 2008; Jing (2008), Dyer (2008) and Cha (2009).
18. See generally, Potter and Li (1996).
19. See, for example, Ji (1994, pp. 30-32, 69) and Xiang (1995, p. 5).
20. See Xiang (1995). While China claims adherence to international treaties on the rights of workers, it claims as a developing country that some international labor standards are inapplicable to China. See Zhang (1994).
21. See Constitution of the PRC, Article 33.
22. Under the 1992 Trade Union Law trade unions receive once again the authority to represent staff and workers in concluding collective contracts with enterprises and institutions. Article 26 of the 1983 'Charter of China's Trade Unions' passed by the Tenth National Congress of China's Trade Unions authorized basic-level trade union committees to represent staff and workers to sign collective labor contracts. See ''Zhongguo gonghui zhangcheng' (1994), in *Gonghui fa shouce* (Handbook of trade union law) (Beijing: Democracy and Legal System Press), pp. 63 and 380).
23. See 'Laodong fa jiaqiangle gonghui de weihu zhineng' (The Labor Law has strengthened the safeguarding capacity of the unions), *Gongren ribao* (Workers Daily), 5

January 1995, p. 4; 'Jiaqiang gonghui gaige he jianshe de qiaoji' (A useful scheme for strengthening reform and construction of the unions), *Gongren ribao* (Workers Daily), 23 January 1995, p. 1; Xiang (1995, p. 5).

24. See generally, Biddulph and Cooney (1993).
25. See NPC Standing Committee Report on investigation of issues on implementation of the Labor Law of the PRC, 30 October 2009, http://www.npc.gov.cn/npc/zfjc/ghfzfjc/2009-10/30/content_1524883.htm (accessed July 14, 2012).
26. See 'Laodong fa zhi jianshe de lichengbei' (The milestone established by the Labor Law system), *Gongren ribao* (Workers Daily), 9 January 1995, p. 1; 'Qixin xieli tuijin laodong fa zhi jianshe' (Make consolidated efforts to promote the establishment of the Labor law system), *Gongren ribao* (Workers Daily), 27 January 1995, p. 1; Cao Min, 'State vows to protect interests of labourers,' *China Daily*, 8 July 1994, p. 1; *FBIS Daily Report-China*, 8 July 1994, pp. 17–18.
27. 'Assessing the new Labor Contract Law,' *Global Action*, 11 January 2008, http://flaglobalaction.blogspot.com/2008/01/assessing-new-china-labor-contract-law.html; 'China's new Labor Contract Law: harmonized out of existence?,' *China Law Blog* (Harris and Moure), 8 December 2008, http://www.chinalawblog.com/2008/12/chinas_new_labor_contract_law_3.html (accessed July 14, 2012).
28. New China News Service (*Xinhua*), 'Backgrounder: chronology of China's Health Care Reform,' 6 April 2009.
29. 'China unveils healthcare guidelines,' *People's Daily*, http://english.people.com.cn/90001/90776/90785/6630595.html (accessed July 14, 2012).
30. 'Guowuyuan changwu huiyi shenyi bing tongguo yiyao weisheng tizhi gaige yijian' (State Council Standing Committee meeting considers and passes opinion on reform of medicine and health system), 21 January 2009, http://www.gov.cn/Idhd/2009-10/21/content/1211859.htm (accessed July 14, 2012).
31. 'China passes new medical reform plan,' *Xinhuanet*, 21 January 2009, http://news/xinhuanet.com/english/2009-01/21/content_10698501.htm (accessed Ju;y 14, 2012); 'Road map charted for universal healthcare,' *China Daily*, 7 April 2009, http://english.sina.com/china/2009/0406/231829/html; 'China unveils healthcare guidelines,' *People's Daily*, http://english.people.com.cn/90001/90776/90785/6630595.html (accessed July 14, 2012).
32. 'China to set up clinics in every village within 3 years,' *Xinhua*, 7 April 2009, http://english.sina.com/china/2009/0406/231866.html (accessed July 14, 2012); 'Road map charted for universal Healthcare,' *China Daily*, 7 April 2009, http://english.sina.com/china/2009/0406/231829/html (accessed July 14, 2012).
33. International Committee of Red Cross and Red Crescent Societies, China Floods Appeal No. 18/2003, 22 July 2003; Brown and Halwell (1998).
34. Hu Jintao, 'Chinese President delivers speech at G20 meeting,' *People's Daily Online*, 15 October 2005; Hua Jianmin, 'Strengthen cooperation for clean development and protect the common homeland of human beings,' Statement at the Inaugural Ministerial Meeting of the Asia Pacific Partnership on Clean Development and Climate, 12 January 2006.
35. 'Guowuyuan guanyu huoshi kexue fazhan guan jiaqiang huanjing baohu de jueding' (Decision of the State Council on achieving a scientific conception of development and strengthening environmental protection), 3 December 2005; 'China offers environmental plan: focus is sustainable development,' *Associated Press*, 15 February 2006; 'The greening of China,' *The Economist*, 20 October 2005.
36. 'Huanbao zongju zhichu woguo huanbao lifa muqian cunzai wu da qushi' (SEPA points out five deficiencies on our environmental protection legislation at present), *Xinhua net*, 17 May 2005.
37. See, for example, Huang (2008) and McNally (2008).
38. See generally, Potter (2008).
39. See 'Central Party School – five cancers,' *Secret China*, http://www.secretchina.com/news/299484.html.

40. For text of the contract law of the PRC, see http://www.novexcn.com/contract_law_99.html (acessed July 14, 2012); also see Supreme People's Court, 'Zuigao renmin fayuan guanyu shixing Zhonghua renmin gongheguo hetong fa ruogan wenti de jieshi' (Interpretation of the Supreme People's Court on some issues related to implementation of the Contract Law of the PRC), 9 December 1999. For text of the General Principles of Civil Law, see http://www.novexcn.com/civil_law_1994.html (accessed July 14, 2012). For commentary, see Potter (2007) and Trebilcock and Leng (2006).

REFERENCES

Abbot, F.M., C. Breining-Kaufmann and T. Cottier (eds) (2006). *International Trade and Human Rights: Foundations and Conceptual Issues*, Ann Arbor, MI: University of Michigan Press.

Barber, J. (2003). 'Production, consumption, and the World Summit on Sustainable Development', *Environment, Development and Sustainability*, **5**, 63–93.

Barney, I. (2003) 'Business, community development and sustainable livelihoods approaches', *Community Development Journal*, **38(**3), 255–65.

Biddulph, S. and S. Cooney (1993). 'Regulation of trade unions in the People's Republic of China', *Melbourne University Law Review*, **19**, December, 255–92.

Brahm, L. (2006). 'Counting the costs of growth', *South China Morning Post*, 7 March.

Brown, B.S (1994). 'Developing countries in the international trade order', *Northern Illinois University Law Review*, **14**, 347–406.

Brown, L.R. and B. Halweil (1998). 'The Yangtze flood: the human hand, local and global', *Worldwatch Institute*, 13 August.

Cha, A.E. (2009). 'As China's jobless numbers mount, protests grow bolder: economic woes shining a light on social issues', *Washington Post*, 13 January, A7.

Chao, Z.H. and J. Chen (2005). 'China introduces statutory derivative action', *International Financial Law Review*, Supplement: The IFLR Guide to China, 1 July, available at http://www.iflr.com/Article/1984802/China-introduces-statutory-derivative-action.html (accessed July 19, 2012).

Cohen, B.J. (1991). *Crossing Frontiers: Explorations in International Political Economy*, Boulder, CO: Westview.

Cotterrell, R. (1989). *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, Philadelphia, PA: University of Pennsylvania Press.

Cottier, T., J. Pauwelyn and E. Burgi (eds) (2005). *Human Rights and International Trade*, Oxford: Oxford University Press.

Dyer, G. (2007). 'China's labor law raises US concerns', *Financial Times*, 2 May, available at http://www.ft.com/cms/s/0/09d35e16-f8c4-11db-a940-000b5df10621,dwp_uuid=9c33700c-4c86-11da-89df-0000779e2340.html.

Dyer, G. (2008). 'Top Chinese official warns of downturn', *Financial Times*, 27 November, available at http://www.ft.com/cms/s/0/621f0ec4-bca1-11dd-9efc-0000779fd18c.html.

Economy, E. (2004). *The River Runs Black: The Environmental Challenge to China's Future*, Ithaca, NY: Cornell University Press.

Fijalkowsi, A. (ed.) (2007). *International Institutional Reform*, The Hague: TMC Asser Press.

Fish, S. (1998). *Is There a Text in this Class: The Authority of Interpretive Communities*, Cambridge, MA: Harvard University Press.
Frame, R. and R. Taylor (2005). 'Partnerships for sustainability: effective practice?', *Local Environment*, **10**(3), 275–98.
Gao, C.F.M. (1994). 'On the sharp end of China's economic boom – migrant workers', *China Rights Forum*, Spring, 12–13, 27.
Guo, X. (1995). 'Laodong fa: Weihu zhigong hefa quanyi de jiben fa' (The Labor Law: a basic law for protecting the lawful rights of staff and workers), *Gongren ribao* (Worker's Daily), 5 January, 5.
He, G.H. (1990). 'Continue to deepen reform by centering on economic improvement and rectification,' *Zhongguo jingji tizhi gaige* (Reform of the Chinese Economic Structure), **2**, translated in *FBIS Daily Report: China*, 23 March, 21.
Heller, A. (1988).'On formal democracy,' in J. Keane (ed.), *Civil Society and the State: New European Perspectives*, London and New York: Verso.
Huang, Y.S. (2008). *Capitalism with Chinese Characteristics: Entrepreneurship and the State*, Cambridge: Cambridge University Press.
International Law Association (2008). *Draft Eighth Report of the International Trade Law Committee*, Rio De Janeiro: International Law Association.
Jackson, J.H. (1969). *World Trade and the Law of GATT*.
Jackson, J. (2006).'Reflections on the possible research agenda for exploring the relationship between human rights norms and international trade rules', in F.M. Abbot, C. Breining-Kaufmann and T. Cottier (eds), *International Trade and Human Rights: Foundations and Conceptual Issues*, Ann Arbor, MI: University of Michigan Press, pp. 19–28.
Ji, Y.X. (1994). 'Weihu laodongzhe hefa quanyi de jiben falu' (A basic law for safeguarding the legitimate rights and interests of workers), *Jingji jingwie* (Economic transit) (Zhengzou), June, 30–32, 69.
Jing, L. (2008). 'The CPC's crisis and China's lease on life', *Zhengming* (Hong Kong), November.
Jing, L. (2009). *Corporate Governance and Financial Reform in China's Transition Economy*, Hong Kong: Hong Kong University Press.
Kymlicka, W. (1991). *Liberalism, Community and Culture*, Oxford: Clarendon Press.
Kysar, D.A. (2005). 'Sustainable development and private global governance', *Texas Law Review*, **83**, 2109–66.
Lewis, S. (2006). 'Climate fund's $100m kickstart', *The Australian*, 9 January.
Li, Z.J. (2006a). 'Filthy air choking China's growth, Olympic goals', *Worldwatch Institute*, 14 February.
Li, Z.J. (2006b). 'China's renewable energy law takes effect: pricing and fee-sharing rules announced', *Worldwatch Institute*, 18 January.
Lindblom, C.E. (1977). *Politics and Markets: The World's Political-economic Systems*, New York: Basic Books.
Liu, P. (1994). 'Dying for development', *China Rights Forum*, Fall, 14–15, 27.
Lu, G.P. (2003). 'Comment: private enforcement of securities fraud law in China', *Pacific Rim Law & Policy Journal*, **12**, May, 781–803.
Mares, R. (ed.) (2004a). 'Introduction', *Business and Human Rights: A Compilation of Documents*, The Hague: Martinus Nijhoff.
Mares, R. (ed.) (2004b). *Business and Human Rights: A Compilation of Documents*, The Hague: Martinus Nijhoff.

McGregor, R. (2006). 'Data show social unrest on the rise in China', *Financial Times*, 29 January.
McNally, C. (2008). *China's Emergent Political Economy: Capitalism in the Dragon's Lair*, London: Routledge.
Ni, C.-C. (2006). 'Wave of social unrest continues across China', *Los Angeles Times*, 10 August.
Peerenboom, R. (2007). *China Modernizes: Threat to the West or Model for the Rest?*, Oxford: Oxford University Press.
Petersmann, E.-U. (2005). 'Human rights and international trade law: defining and connecting the two fields', in T. Cottier, J. Pauwelyn and E. Burgi (eds), *Human Rights and International Trade*, Oxford: Oxford University Press, pp. 29–94.
Petersmann, E.-U. (2007). 'Multilevel judicial governance of international trade requires a common conception of rule of law and justice', *Journal of International Economic Law*, **10**(3), 529–51.
Potter, P.B. (2006). 'Selective adaptation and institutional capacity: perspectives on human rights in China', *International Journal*, **61**(2), 389-407.
Potter, P.B. (2007). 'Contract law', in M. Mosher and Fu Yu (eds), *Doing Business in China*, Huntington, NY: Juris, Looseleaf.
Potter, P.B. (2008). 'Globalization and business regulation in local context', in P.B. Potter and L. Biukovic (eds), *A Guide to Business Law in Asia*, Markham: Lexis/Nexis, pp. 4–19.
Potter, P.B. and L. Jianyong (1996). 'Regulating labour relations in China: the challenge of adapting to the socialist market economy', *Cahiers du Droit* (Université Laval).
Siu-sin, C. (2005). 'Wen warns that growth must be sustainable', *South China Morning Post*, 24 November.
Smil, V. (2004). *China's Past, China's Future: Energy, Food, Environment*, New York and London: Routledge Curzon.
Smith, J.C. and S. Coval (1986). 'The foundations of property and property law', *Cambridge Law Journal*, **35**(3), 457–75.
State Council Information Office (2009). 'National Human Rights Action Plan of China 2009–2010', 13 April, available at http://www.china.org.cn/archive/2009-04/13/content_17595407.htm (accessed July 19, 2012).
Steiner, H.J. and P. Alston (2000). *International Human Rights Law in Context: Law, Politics, Morals*, Oxford: Oxford University Press.
Stone, F. (1984). *Canada, the GATT and the International Trade System*, Halifax: Institute for Research on Public Policy.
Tomasic, R. and J. Fu (2006). 'Legal regulation and corporate governance in China's top 100 listed companies', *Company Lawyer*, **27**(9), 278.
Trebilcock, M. and J. Leng (2006). 'The role of formal contract law and enforcement in economic development', *Virginia Law Review*, **92**(7), November, 1517–80.
US Department of State Bureau of Democracy, Human Rights, and Labor (2004). *2004 Country Report on Human Rights Practices – China*, available at http://www.state.gov/g/drl/rls/hrrpt/2004/ (accessed 24 April 2008).
Walder, A.G. (1995). 'China's transitional economy: interpreting its significance', *China Quarterly*, Special Issue, December, 963–79.
Watts, J. (2005). 'Satellite data reveals Beijing as air pollution capital of world', *Guardian*, 31 October.

Wang, L.M. (1998). *Wuquan fa lun* (Property rights theory), Beijing: China University of Politics and Law Press.
Wang, L.Y. (ed.) (2006). *Jieyuexing shehuizhong de Shanghai zhihui* (Shanghai wisdom on the resources saving type society), Beijing: Social Science Academic Press.
Weiss, E.B., J.H. Jackson and N. Bernasconi-Osterwalder (eds) (2008). *Reconciling Environment and Trade*, 2nd edn, Leiden: Martinus Nijhoff.
Wen, J.B. (2009). *Report on the Work of the Government*, Second Session, 11th NPC, Section VI.B.5, 13 March.
Yeh, E. and J.I. Lewis (2004). 'State power and the logic of reform in China's electricity sector', in J.H. Williams and N.K. Dubash (eds), *Pacific Affairs*, **77**(3), Special Issue on The Political Economy of Electricity Reform in Asia, Fall, 437–66.
Ying, W. (2006). 'Half of marine areas polluted, says survey', *China Daily*, 10 January.
Yu, G.H. (2007) *Comparative Corporate Governance in China: Political Economy and Legal Infrastructure*, London: Routledge.
Zhang, Z.Y. (1994). 'Zhongguo laodong lifa' (China's labor legislation), *Zhengfa luntan* (Theory and discussion on politics and law), **6**, 1–4.
Zhang, X.C. (2009). 'Company law', in M. Mosher and Fu Yu (eds), *Doing Business in China*, Huntington, NY: Juris, Looseleaf rev., section 6.3.

8. Challenges to secure human rights through voluntary standards in the textile and clothing industry

Brigitte Hamm*

8.1 INTRODUCTION

In 2008, John Ruggie, the Special Representative of the Secretary-General of the United Nations (UN) on Business and Human Rights, presented his policy framework. His aim is to strengthen the corporate responsibility for human rights and to close governance gaps with regard to the global economy, thereby considering internationally recognized social, ecological and human rights standards. Ruggie's framework is based on three pillars: the state duty to protect, the business responsibility to respect and access to effective remedies (Ruggie, 2008). He understands these three dimensions as being interdependent and reinforcing each other. Based on this, the UN Human Rights Council endorsed the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* in June 2011.

Ruggie perceives the corporate responsibility to respect human rights as an obligation to perform due diligence at all levels of business activity. To this end, he emphasizes the need to incorporate a human rights impact assessment into corporate risk assessments. In defending his recommendations, he points to the many already existing codes of conduct and their references to human rights as an expression of the willingness of business to accept that they have a responsibility to respect human rights and to include human rights in their day-to-day business. However, the impact of voluntary codes is subject to controversial debate, and only few impact assessments on the effectiveness of such voluntary codes exist, for example, Barrientos and Smith, 2007. Stephanie Barrientos and Sally Smith state that 'after 15 years of existence, questions are increasingly being asked as to how effective corporate codes are as a means of improving labour standards in global production' (Barrientos and Smith, 2007, pp. 713ff.). While some critics disclaim them as mere window-dressing, evaluations

of the impact of codes of conduct (for example, Barrientos and Smith, 2007; COMO, 2008) indicate that some positive impact exists, especially in respect to issues such as health and safety. However, there is little impact with regard to the political rights of workers, in particular the rights to freedom of association, to self-organization and unionization. These rights are especially important as they may contribute to the empowerment of workers, which is a precondition to improve their general working and living conditions (Barrientos and Smith, 2007; Burghardt, 2009).

This chapter will address the debate on voluntary standards by looking at the textile and clothing industry.[1] The rationale for choosing this sector is the abundant literature dealing with the subject. It may be divided more or less into three major strands which are, however, partly interlinked. First, there is theoretical literature that deals with the set-up of the sector and changes through the globalization process. These studies are based on various differentiations of the value chain approach and network capitalism (for example, Barrientos, 2007; Gereffi, 1994, 2002; Wills and Hale, 2005). In this context, also the governance of the global value chain in the textile and clothing industry is addressed (Gereffi et al., 2005). A second line of literature deals with the composition of the workforce in the sector, the situation of workers and how it can be improved through the organization of workers (for example, Barrientos, 2007; Garwood, 2005) as well as through initiatives that promote decent work, for example, by the International Labour Organization (ILO).[2] Thirdly, some literature also addresses the importance of voluntary codes of conduct for the working conditions within supply chains (for example, Barrientos and Smith, 2007; Wick, 2006). There exist diverse definitions of supply and value chains, some also add the demand chain (Porter, 1985; Walters and Rainbird, 2004). One may understand the supply chain as the process from the product to the customer, while the demand chain takes the adverse direction from the customer to the production site. This also influences the conditions for production and thus the supply chain, for example, through changing demands of buyers. Both processes should be seen as being integral parts of the value chain. In the following the terms supply chain and value chain are used in the defined sense.

The discussion of the relevance of voluntary standards for the textile and clothing sector will be guided by the following questions. What is the impact of voluntary standards? How may voluntary standards contribute to strengthen the human rights situation of workers? Are codes of conduct an adequate instrument to secure social and human rights standards along the supply chain? Why do voluntary standards have so little impact in the lower tiers of the chain, and what are the main impediments? What could help to strengthen existing standards? What emerges from the analysis is

that the complexity of value chains in the clothing and textile industries undermines the effective application of codes of conduct. This complexity, which is the outcome of a global economy that includes an increase in global sourcing and intra-trade within big corporations, their affiliates and branches, has resulted in increasingly complex economic relations together with new power and conflict constellations and governance gaps. These developments need to be considered in the design of codes of conduct whose purpose is to guide economic activity in supply chain environments and in determining whether additional measures will also be necessary.

In Section 8.2, the chapter will examine working conditions in the textile and clothing sector from a human rights perspective. Against this background, Section 8.3 will discuss the content and mode of operation of some prominent current voluntary standards in the sector. Major actors responsible for the construction and implementation of codes of conduct in the industry will be identified and the increasingly complex and interlocking nature of the supply chains within which they work will be analysed. The argument brought forward is that voluntary standards do not work well because of trends resulting from globalization. These include the growth of the informal economy, a weakening of control potentials of big corporations or brand companies at the end of such chains and also a decrease of the steering capacities of governments to protect human rights in supply chains. The Section 8.4 will examine the policies of Gap Inc. and Nike as possible conceptual approaches to deal with these challenges.

8.2 LABOUR CONDITIONS IN THE TEXTILE AND CLOTHING SECTOR

The textile and clothing industry was among the first to undergo a process of globalizing production, starting already in the 1960s. According to Traub-Merz (2006, p. 10), the textile and clothing industry was the first manufacturing sector to become dominated by developing countries. In 2003, developing countries accounted for half of the world's textile exports and nearly three quarters of clothing exports (ILO, 2005, p. 5).

Globalization of the textile and clothing industry has been important particularly for least developed countries (LDCs). 'For LDCs, it is by far the main source of growth in manufacturing output that can be sold in the world market' (Traub-Merz, 2006, p. 11). As a result, this industrial sector has become important for the enhancement of national economies in developing countries that offer low wages and cheap production conditions. Many developing countries consider attracting investments in

this sector as a door opener for future foreign direct investments (FDIs) (Hurley and Miller, 2005).

Until 2005, the textile and clothing industry was the only manufacturing sector that was not subject to the rules of the General Agreement on Tariffs and Trade (GATT) (ILO, 2005, p. 1). Instead, it was covered by a quota system that had been established with the Long-Term Arrangement Regarding International Trade in Cotton Textiles and Substitutes (LTA) in 1962 (ILO, 2005, p. 1). In 1974, the LTA was extended to materials other than cotton by the Multifibre Arrangement (MFA). The latter limited the quantity of textiles and clothing that each country could export to the United States, Canada and Europe. As a consequence of these quotas the clothing industry spread out over nearly 200 countries (Garwood, 2005, p. 21).

The MFA expired on 1 January 2005 resulting in a relocation of many textile and clothing industry sites to China, which already had become one of the major producers of textile and clothing commodities. Compared with 2004, Chinese exports to the United States grew by 47 per cent and to the European Union by 43 per cent. At the same time, the Chinese share of worldwide clothing exports grew from 20 per cent to 27 per cent (CCC, 2009b). Bangladesh also profited from the expiration of the MFA, as their labour costs were very low. This relocation of textile and clothing sites happened at the cost of other developing countries. For example, stiff competition particularly from China resulted in a sharp decline in the textile and clothing industries in sub-Saharan Africa (Garwood, 2005, p. 21; Jauch and Traub-Merz, 2006, p.7).

8.2.1 Dominance of Cheap and Unskilled Labour

In addition to the changes after the expiration of the MFA, the complexity of global production has had a strong impact on the set-up and the composition of the workforce in long and complex value chains in the textile and clothing sector.

Two interdependent characteristics are striking. One is the predominance of unskilled work leading to low wages. Second, due to relatively few obstacles because of qualification, a rather extensive part of the textile and clothing production is increasingly carried out in the informal economy. Formal, regular employment is more and more replaced by flexible, informal and insecure work directly linked to global production. This means that formal, law-governed labour contracts are missing or inadequate, leading to legally unstable and unprotected employment (ILO, 2002, p. 36). Thus, Barrientos comments: '[A] change has occurred in the composition of the labour force, with greater female participation and

use of "non-regular" workers such as migrant and contract labour' (2007, p. 3). This development in turn has opened the door to pressure on wages and working conditions.

The typical working conditions along the supply chain in the textile and clothing sector are described as a work pyramid (Barrientos, 2007, p. 10): only a small part of the overall workforce is in formal and permanent work relations. This kind of employments may be regulated by international law and national legislation and may also be covered by voluntary standards. Referring to her evaluation of the Ethical Trading Initiative (ETI), Barrientos discovered that even at the top of the pyramid few workers had access to their rights. Migrant and third party contract workers were least likely to have access to any employment benefits (Barrientos, 2007, p. 13). Below the so-called 'see level' the overwhelming bulk of work was carried out in the informal economy with temporary work in varying forms. Predominantly migrant workers were employed in insecure and flexible work relations. Barrientos reports that '[s]uch workers are often denied access to their rights, collective organization and trade union representation are difficult, and neither employers nor state provide them with adequate protection' (Barrientos, 2007, p. 12). The same was true for casual workers (Barrientos and Smith, 2007, p. 722). The bottom of the pyramid was the layer of homework which is quite common in the textile and clothing industry and is also predominantly done by women.

8.2.2 Human Rights at Stake

In order to properly shape the working conditions in the textile and clothing industry, human rights would need to be considered. The following list represents some of the most pressing human rights related problems in the textile and clothing sector:

- the right to the enjoyment of just and favourable conditions of work, which includes health and safety concerns, fair wages and equal remuneration for work as well as legal labour contracts
- non-discrimination
- freedom of association
- the prohibition of child and forced labour.

Wages in the textile and clothing industry are mostly very low and working conditions are poor. According to Anna McMullen and Sara Maher (2009, p. 2), the majority of workers in the global fashion industry rarely earns more than $2 US a day, which represents only around 0.5–1.5 per cent of the retail price of the final product. Income of $2 US

per day constitutes one of the common thresholds to describe people living in poverty. This income is usually insufficient to meet the workers' needs and to nourish their families.

Mainly two reasons are given for the low wages in the textile and clothing industry: the increasing global competition after the phasing out of the MFA, which is putting further pressure on wages (ILO, 2005, p. 31), and the specific composition of the workforce in the sector. Firms try to produce as cheaply and flexibly as possible, which may lead to a race to the bottom. Moreover, the workload is high and overtime work is common. Van Yperen (2006, pp. 7ff.) relates this situation to external and internal factors. External factors refer to the effects of global production. An internal factor is the circumstance that many workers are unskilled and therefore need more time for the production of goods than skilled employees (ILO, 2005, p. 7).

Van Yperen (2006) also considers the behaviour of consumers as an external factor. Through their buying decisions they determine which products will be in demand. However, consumer aspirations may extensively be influenced through branding, which has been critically described by Klein (2000, p. 68). For example, insecure youth striving for identity by wearing a specific brand are vulnerable to the influence of branding. Thus, considerable responsibility for consumer attitudes lies with the brand companies and the way they shape their branding. At the production side, fast and frequent changes of consumer preferences may lead to tight production times and to an increasing pressure on the manufacturers with negative effects for workers.

Discrimination constitutes a paramount problem in the textile and clothing sector as disproportionately many women suffer from the low wages that are paid. For example, more than 89 per cent of workers in the clothing sector in Cambodia are female; in Bangladesh, the rate of women workers amounts to 80 per cent, in Sri Lanka, 82 per cent and in Mauritius, 73 per cent; in India and Turkey, more than half of the employees are female (ILO, 2005, p. 7). Various authors assert that employers in the textile and clothing industry deliberately employ women, especially young women, since this makes it easier to maintain exploitative working conditions. Hale and Wills (2007, p. 455) explain that textile and clothing corporations rely on women because of the fact that they are mostly disadvantaged, due to patriarchal family structures. This means that women in most of the textile and clothing manufacturing countries have a lower social standing than men, which permits lower wages. Furthermore, they often suffer from the double workload of paid labour and household work which makes it more difficult for them to organize. Another important issue is seen in the fact that they mostly come from rural areas and do not have any experience

with paid work, which results in an inability to compare their working conditions with those of other employees (Wick, 2006, pp. 10ff.).

The right to freedom of association, to form trade unions and join the trade union of one's choice is of paramount importance as it is the basis for the empowerment of workers and thus can serve as a precondition for the concession of other rights, for example, in respect to wages as well as health and safety conditions. In addition to simply denying this right on the part of some companies, the right to freedom of association is marginalized in the textile and clothing sector especially for two reasons. On the one hand, the overwhelming bulk of work is in the informal economy. There, typical characteristics such as irregular working times, unstable work relations as well as the local dispersion of homeworkers make self-organization difficult.

A second reason is the fact that textile and clothing manufacturers often operate in so-called export processing zones (EPZ) (Garwood, 2005, p. 23; Kyvik Nordås, 2004, p. 3). These zones are characterized by cheap production conditions, the elimination of tariffs and bureaucratic hurdles as well as the prohibition of labour unions in order to attract enterprises. It is therefore extremely difficult if not illegal for workers in EPZs to organize and to demand their rights. Workers are also aware of the risk that companies might relocate their manufacturing sites to union-free countries (Garwood, 2005, p. 23). This critical view of EPZs, however, is not always entirely fair and needs to be put in context. In Bangladesh, for instance, between 1980 and 2004, approximately 3,280 factories in the textile and clothing sector emerged with some 1.8 million mostly female workers. Less than 10 per cent of them were working in the largest factories in two EPZs with relatively good working conditions. Most were in smaller factories or working at home, and often in informal work relations with worse conditions than those in the factories of the EPZs. Trade unionists in Bangladesh struggle to establish workplace organization in all these production sites (Wills and Hale, 2005, p. 10).

Child labour is widespread in many of the most important exporting countries of the textile and clothing sector. According to the BBC World Service, child labour is a particular problem in Bangladesh (Melik and Bartlett, 2009) where many of the working children suffer from poor health due to hazardous labour conditions. Also, in China, children participate in the cotton harvest. The UK-based independent network of labour, human rights and governance experts, Ergon, reports that children live in dormitories for up to six weeks every year and work from 7 a.m. until evening with only half an hour lunch break (Ergon, 2008, p. 55). In India, child labour in the cotton industry is even more common and is exacerbated through the use of piece-rate contracts. Because of the

very low wages for an adult female worker, women tend to involve their children in their work in order to raise their daily income (Ergon, 2008, p. 57). Such conditions not only infringe on laws and international standards banning child labour; they also violate the right of every child to an education and impede the chances of the children involved to improve their living conditions in the future.

8.3 VOLUNTARY STANDARDS IN THE TEXTILE AND CLOTHING SECTOR

Against the background of such indecent working conditions in the supply chains of the textile and clothing sector, voluntary standards have been developed and introduced by individual companies as a result of the increasing pressure that comes largely from non-governmental organizations (NGOs) and consumer organizations. An increasing number of companies are forming partnerships and collaborating with NGOs and labour unions.

A study by the Organization of Economic Cooperation and Development (OECD) (2001) documents 37 codes of conduct that applied to the textile and clothing sector in the mid-1990s. The study indicates that child labour had been addressed by all of them. A reasonable working environment, no discrimination, adequate compensation, no forced or bonded labour and acceptable working hours are also included in the great majority of company codes. Thus, most of the human rights concerns to which the textile and clothing industry has given rise have been addressed by these corporate codes. However, freedom of association, which is essential for employees in order to demand better working conditions, was included in only 15 of the 37 codes of conduct. Moreover, provisions for training to enable unskilled workers to do more effective work have found only little consideration. The right to information that could enhance the workers' understanding of company proceedings and thus of their possibilities to improve their conditions have not attracted much attention in these codes either.

The OECD study constitutes a rough overview. In addition, five well-known instruments that have either been explicitly designed for the textile and clothing sector or are applied therein will be briefly sketched out with the focus on the integration of human rights in the codes. The five instruments are:

- Clean Clothes Campaign (CCC)
- SA8000

- Ethical Trading Initiative (ETI)
- Fair Wear Foundation (FWF)
- Business Social Compliance Initiative (BSCI).

The contents of the five instruments coincide. They are based on workplace norms outlined in ILO Conventions, the Universal Declaration of Human Rights and the Convention on the Rights of the Child as well as further UN human rights treaties. All of them cover those human rights that have been identified as being most relevant for the textile and clothing industry. All include the right to freedom of association but no indication is made that the realization of this right might be impeded because of restrictions for EPZs and a lack of practicability in the informal economy. The problem of employment in the informal economy is predominantly addressed by explicitly demanding formal legal labour contracts.

To summarize, the content of the voluntary standards discussed does cover the human rights at stake in the supply chains of the textile and clothing sector, although the codes for the most part do not use the human rights language. This is true also for the BSCI standard, which in contrast to the other initiatives looked at is business-dominated (Merck and Zeldenrust, 2005). At first sight, one could conclude that voluntary standards are thus effective means to tackle human rights concerns. However, their human rights content does not mean that the situation of workers in the textile and clothing manufacturing countries covered by these standards has improved fundamentally. Unfortunately, establishing the impact of these voluntary standards is difficult as only the ETI and in respect to implementation also the BSCI have been evaluated (Barrientos and Smith, 2007; Merck and Zeldenrust, 2005).

8.3.1 Impact of Voluntary Standards

One of the key concerns with voluntary standards, as already indicated, is the lack of monitoring. Merck and Zeldenrust (2005, pp. 15ff.) criticize among other things the weak monitoring of the BSCI, the lack of verification and the lack of transparency in respect to the audit results. The critics see the danger of the increasing role of commercial auditing firms that are not really independent but follow their economic interests, namely, attracting further social auditing contracts.

For a preliminary assessment of the impact of voluntary standards, the study of Barrientos and Smith (2007), who analyse the effects of the ETI base code on workers, is most relevant. They identify some clear benefits from the code, but not for all code principles, and not for all workers. Barrientos and Smith differentiate between corporations that focus on

compliance with outcome standards and civil society organizations that emphasize process rights directed at empowering and enabling of workers to claim their rights.

Barrientos and Smith see major improvements in respect to outcome standards such as health and safety, legal employment and working hours. In spite of such positive findings, they also identify some negative effects in respect to income as work time regulation may negatively affect worker income and income increases based on codes of conduct often will not reach minimum wage standards. In contrast to outcome standards, Barrientos and Smith see little impact concerning process rights such as union rights and non-discrimination. However, in respect to the ban on child labour, which is also categorized as a process right, there is progress. For example, Barrientos and Smith found little evidence of the use of child labour in the upper tiers of the supply chains of the companies surveyed (Barrientos and Smith, 2007, p. 723). However, this progress is not the result of the ETI base code. Rather suppliers are aware that there is a buyer non-tolerance in respect to violations of this right and try, therefore, to avoid child labour. In these cases, the presence or absence of a voluntary code is largely irrelevant (Barrientos and Smith, 2007, p. 720).

At this point, it is important to further identify possible hurdles that impede the better implementation of voluntary standards and thus the realization of workers' human rights. Two issues will be considered in more detail:[3]

- How are voluntary standards implemented? This question relates above all to the actors involved.
- What may be structural impediments that affect the impact of voluntary codes? This second question requires considering trends in the set-up of the sector.

8.3.2 Actors for the Implementation of Voluntary Standards

Actors involved in the implementation of voluntary codes of conduct are above all the brand companies, buyers and suppliers along the chain, workers and to some extent also certifiers and auditors.

The major impetus to ensure that codes are implemented lies with the brand companies. They want to protect their brand and they may have the power and resources to create an enabling environment for the implementation. For example, many codes in the textile and clothing sector, among them the five discussed initiatives, are constructed so that failure to comply will not automatically lead to a termination of the contract. Instead, training and consultation are offered.

Yet, despite efforts of brand companies to make voluntary standards work, their role is ambiguous as they may also be mainly responsible for low labour standards in the tiers of the supply chain in the first place (Barrientos, 2007, p. 11). This is the case when brand companies press for lean production, which may in turn lead to overtime work. Thus, one may criticize those companies for holding to double standards with policies of promoting a positive image by endorsing high labour standards through voluntary codes of conduct while at the same time hampering the effective implementation of such codes. In addition, low standards may result from enhanced competition among suppliers, thereby pushing them to lower production costs by, among other things, reducing wages.

In addition to the problem of working conditions along the tiers of the supply chain, one further major problem rests with the extensive informal economy. There exist varying approaches to tackle this challenge. One is the quest to diminish informal work through pressing for formal contracts in codes of conduct. Although such demand is important, it cannot address the systemic problems that lead to the existence of this type of work as described above. Second, the focus is on measures to improve the working conditions in the informal economy with a strong emphasis on the self-organization of the workers concerned (for example, Wick, 2009). Third, companies try to avoid the problem by being more restrictive with regard to the suppliers they choose in order to protect the brand. This may be effective in specific cases. But it is not clear whether setting an example in this way will influence other buyers to follow along in the same way or to cooperate in resolving the problem at a systemic level.

Furthermore, many buyers do not need to protect a brand, and therefore have nothing to lose by positioning themselves at the lower end of the supplier price market. As a result, the tools available for solving the problem of bad working conditions along the tiers of the supply chain through the adoption of voluntary standards are limited.

Although voluntary standards may include multistakeholder participation, in principle, they are a top-down approach with little participation of the workers concerned. Workers are rather seen as objects of standards than as active participants in their design and implementation. Thus, it may not be surprising that there is little information available about how workers use and appreciate voluntary standards. From a worker's perspective, such standards may not be a helpful tool for empowerment and one reason why unions worldwide are not involved for the most part in the so-called voluntary standards movement (Burghardt, 2009).

Auditors and certifiers also have a role in influencing the impact of voluntary standards. Barrientos and Smith (2007, p. 725) speak of a 'rising tide of criticism of social auditing for its failure to ensure sustained

improvements in working conditions'. In their evaluation of the ETI base code implementation, they discovered compliance failures although sites in question had been audited positively. This may be due to the fact that auditing organizations and certifiers want to sell their products to companies and thus may have a positive bias towards their customers. In addition, to this point in time, there is little to no independent evaluation of the effectiveness of the work of organizations such as Social Accountability International (SAI). As a result, there is uncertainty about the reliability of claims that voluntary codes are having a positive impact. A more critical approach by voluntary code advocates involving effective systems of verification is required if progress is to be achieved and voluntary standards improved.

8.3.3 Economic Context of Voluntary Standards

Quite independently of the partly ambivalent behaviour of business actors with regard to voluntary standards, one has to ask whether such standards are or could be turned into an adequate instrument for raising corporate human rights standards in the textile and clothing sector.

The global production of this industry has been undergoing a process of deep transformation. The new types of value chains that have emerged are characterized by their complexity and integration in the form of networks with regionally quite distant production sites. They are defined by Gereffi as 'buyer-driven commodity chains' typical for those industries in which large retailers, marketers and branded manufacturers play pivotal roles in setting up decentralized production networks in a variety of exporting countries, mostly located in developing countries (Gereffi, 1999). Therefore, some authors speak of networked capitalism, whereby 'multinational corporations (MNCs) have reconfigured their operations, shedding their in-house production capacity and using subcontracted value chains to source goods and get them to market' (Wills and Hale, 2005, p. 5). This 'subcontracted capitalism' (Wills and Hale, 2005, pp. 7ff.) is fuelling competition between subcontractors and involves geographical distance. The trend is especially true for the clothing industry where the economic set-up affects the situation of workers as well as the control of the supply chain. Buyers and brand companies more and more dissociate from the actual production. This restructuring has increased the power and profit of lead firms (Hurley and Miller, 2005, p. 21), who are able to offset any risks of production to the suppliers (Barrientos, 2007, p. 7).

Barrientos (2007, p. 1) characterizes the transformation of global production as being caused, among other influences, by global sourcing. '[T]he trend now is towards direct sourcing by large corporations from global

networks of producers over whom they have no formal ownership or legal ties. Employment within global production systems is both driven by the requirements of global buyers, and affected by specific local labour market norms and circumstances.'

The impact of voluntary standards in these global production systems depends to a large extent on the type of value chains companies are engaged in. Based on three characteristics, namely, the complexity of transactions, the ability to codify transactions and the capabilities in the supply base.[4]

Gereffi et al. (2005) distinguish between five types of global value chains. These are schematically portrayed in Table 8.1. This typology emphasizes the complexity of information exchanged between buyer and supplier as well as the product specificity.

One may assume that the implementation of voluntary social and human rights standards will be least complicated in hierarchical chains as the brand company can more readily exercise control and create an enabling environment. The evaluation of the ETI base code by Barrientos and Smith (2007) also revealed that positive impacts were most easily identified in the highly integrated global value chains with a brand corporation on top. However, most of the companies surveyed revealed arm's length market-based or modular value chains with their suppliers (Barrientos and Smith, 2007, p. 724). This may be one reason for the little positive impact of the ETI code.

Because of an increasing supplier competence, Gereffi et al. (2005, p. 92) see for the clothing industry a change from the more captive value chains to relational ones. In combination with a progressive concentration process, the trend may even go in the direction of modular value chains. Considering the implementation of voluntary social and human rights standards, such a tendency may lead to two challenges. First, if the just described trend towards more modular value chains in the clothing industry occurs, this would imply – because of an easy switch in relations – a decrease of power asymmetry between buyers and suppliers. This might negatively impact the implementation of voluntary social and human rights standards as buyers will have less control over suppliers. Second, conversely and in contrast to the present focus on the responsibility of buyers, this reveals the need to put much more emphasis on the duties for effective regulation of governments of production countries and on the responsibilities of supplier companies.

Another characteristic of the transformation of the global production system is the emergence of transnational global sourcing agents: 'Corporate buyers may be international agents, brands or retailers. They are not necessarily northern based, and increasingly dominant firms are

Table 8.1 Five ideal types of global value chain governance based on three charateristics

	Market-based	Modular	Relational	Captive	Hierarchy
Complexity of transactions	Low	High	High	High	High
Ability to codify transactions	High	High	Low	High	Low
Capabilities in the supply base	High	High	High	Low	Low
General description	Standard products (commodity suppliers) through arm's length market relationship. Product specification and costs of switching partners are low.	Fluid, flexible network structure with highly competitive suppliers, which can be added or subtracted as needed. Products are ready-made to a customer's specification (turn-key).	Complex interactions between buyers and sellers, often mutual dependence and high levels of asset specificity; managed through reputation or family/ethnic ties. Full-package supply and high competence of suppliers.	Small suppliers are transactionally dependent on large buyers; high switching costs for suppliers and high degree of monitoring by lead firms. Assembly of imported inputs and use of machinery adapted to the buyer's needs.	Vertically integrated firms; managerial top-down control.
	Degree of Explicit Coordination				
Low	←				→ High
	Degree of Power Asymmetry				

Source: Based on Gereffi et al. (2005).

emerging within regional production networks inside Asia, Africa and Latin America' (Barrientos, 2007, p. 3). One example is Li & Fung, which is based in Hong Kong. The company plays a dominant role within the garments and accessories production networks in Asia (Barrientos, 2007, p. 3), and is also active as a global supply chain manager (Li & Fung, 2009). Li & Fung splits orders from corporate buyers into different production steps and buys, for instance, yarns and fabrics from different suppliers in various countries. Li & Fung has access to a network of 10,000 suppliers and is thus able to shorten production lead time and lower costs (Schömann-Finck, 2007).

Li & Fung recognizes the importance of corporate social responsibility (CSR). The company has been a member of the Global Compact since 2002 and has listed three Communications on Progress (COPs) on the Global Compact website for the years 2006, 2007 and 2008 covering the ten principles of the pact. In respect to human rights, the COP 2006 speaks of a 'strict compliance program to ensure the highest ethical sourcing standards' (Li & Fung, 2007, p. 3). The company also has an internal Company's Code of Conduct that covers policies on equal employment opportunity and non-discrimination as well as an external Vendor Code of Conduct that is accessible at the website. A Vendor Compliance Division assesses compliance with the provisions of this code.

In spite of explicit CSR engagement, Li & Fung has many critics, especially the CCC (2009a). They point to the weakness of auditing procedures, a lack of transparency in respect to the implementation of its code of conduct as well as to specific labour standards such as overtime work and the lack of formal labour contracts.

An overall assessment of Li & Fung's commitment for social standards and human rights would need further research. However, it is surprising that, in contrast to general empirical data for the textile and clothing sector, all three COPs state that Li & Fung was not aware of any cases of discrimination in respect to employment and occupation. Moreover, there is no information available on how brand companies communicate their own social and human rights standards with global sourcing agents such as Li & Fung.

8.4 TWO CASES: GAP INC. AND NIKE

As is clear from the discussion of the transformation of the global production system, value chains are becoming increasingly complex. However, corporate or brand buyer disengagement from the real production processes does not entail diminished responsibility for the conditions under

which their products are produced although it does alter their relationship and influence over the production process. The complexity is not a veil behind which brand companies can hide their responsibility. Barrientos (2007, p. 11) mentions Gap Inc. and Nike as two leading brand corporations that have reacted to the challenges in a positive way, intensifying cooperation with global union federations and transnational NGOs with the goal of improving working conditions within their supply chains and becoming more transparent with regard to their suppliers.

8.4.1 Gap Inc.

The clothing retailer Gap Inc. has been a member of the Business Leaders Initiative on Human Rights since 2004 (BLIHR, 2009), and has explicitly committed itself to respect human rights in its operations. This commitment would seem to be the result of a lengthy process of 'institutional learning following several scandals' (Ansett, 2007, p. 303).

It is also reflected in Gap's Code of Vendor Conduct (COVC), which was extensively revised by Gap Inc. in 2008. As a result, Gap's COVC is now explicitly based on the Universal Declaration of Human Rights and ILO core labour standards. A further aim of this revision was to adjust the code to the challenges of global supply chains by addressing key global issues, such as the practice of using temporary contracts, the practice of terminating contracts in order to avoid providing benefits or treating workers in an inhumane way. Furthermore, the standard for non-discrimination was extended to further groups concerned. The revised code also stipulates that in the case that a national law restricts the right to collective bargaining, workers have the right to use parallel measures to organize and bargain collectively. Gap Inc. is now committed to requiring all companies with which it engages to comply with its COVC.

In its *2007/2008 Social Responsibility Report* (Gap Inc., 2009), the company addresses structural issues that impede the effectiveness of its voluntary standards. Following the BLIHR, the company has defined its sphere of influence at different levels and has identified activities that influence working conditions (Table 8.2). The company has committed itself to working with trade unions, factory owners, NGOs and governments to ensure that its activities and policies influence working conditions in positive ways (Gap Inc., 2009, p. 23). It sees its strongest influence to be on the attitude of brands with whom Gap Inc. cooperates and on retailers, and has committed to using its influence to address grievances in its supply chain. Gap Inc. has also committed to addressing tensions caused by corporate expectations in respect to speed and costs. Moreover, Gap Inc. promises to ensure that its 'purchasing practices are aligned with

our social responsibility performance goals. This work includes providing our Gap Inc. sourcing and brand partners with the information they need to make decisions that improve factory performance against our Code of Vendor Conduct standards' (Gap Inc., 2009, p. 29).

In order to meet its commitments Gap Inc. developed a strategy with the goal of achieving improved working conditions in its supply chain by 2010. Among the steps to be taken was collecting information and reporting on human rights in its supply chain by 2007. In 2009, a pilot supply chain traceability system was installed, and in 2010, various steps were planned, including additional training and the installation of human resources management systems to improve the working conditions in the supply chain.

8.4.2 Nike

Like Gap Inc., Nike emphasizes the importance of cooperation with labour unions, NGOs and other civil society organizations in its 2005–06 *Corporate Social Report*. However, Nike takes a slightly different approach. The development of Nike's *Corporate Responsibility Report* is advised by an independent Report Review Committee, composed of representatives of civil society, science as well as the private sector and controlled by a feedback process developed by SustainAbility.[5] Global Reporting Initiative (GRI)[6] and AccountAbility[7] standards form the basis of the report (Nike, 2007, p. 127).

Nike has also increased the transparency of its supply chains, publishing the names and places of all contract factories. This information is included as an attachment to its *Corporate Social Report.* In order to address the problem resulting from the fact that many suppliers produce for a multitude of brand companies, Nike has joined the Fair Labor Association aiming at the harmonization of workplace standards across the industry.

Summarizing, one can state that the CSR reports of Gap Inc. and Nike, as two big brand corporations of the textile and clothing industry, reveal efforts at the policy level to better confront problems that arise from the complexity of their supply chains. Both companies have explicitly committed to cooperate with unions and NGOs to improve labour conditions in their supply chains and have thus accepted the need for worker empowerment and negotiations. Both are also making an effort to harmonize standards across brand companies and to cooperate on monitoring with a view to strengthening working condition standards and diminishing standard lowering pressures on subcontractors and workers. Both companies have also published a time frame to take specific steps to improve labour conditions.

Table 8.2 The spheres of influence of Gap Inc.

Factors Contributing to Poor Working Conditions in Garment Factories

Working Conditions				
Brand or Retailer	Garment Manufacturers	Industry Conditions	Country Conditions	International Conditions
• Lack of understanding of factory conditions and how purchasing decisions can impact them • Inefficient buying practices • Insufficient emphasis on labor standards in sourcing decisions • Unreasonable expectations regarding cost and speed	• Inefficient processes and operating practices • Poor supervisory and management skills • Acceptance of production orders without full assessment of capacity and capabilities • Lack of modern technology and equipment • Lack of regard for the rights of workers • Insufficient understanding of labor laws and standards	• Fragmented nature of garment industry • Intense competition and focus on reducing costs • Conflicting standards, lack of uniform code of conduct, and lack of industry coordination • Chronic price deflation	• Inadequate or outdated labor laws • Insufficient enforcement by local government • Lack of understanding of rights among workers • Poor economic, financial and civic infrastructure	• Global trading requirements, including complex bi- and multilateral restrictions • Tariffs • Geographic shifts in production following expiration of quotas • Increasing expectations of consumers regarding cost and selection
Significant Influence	Some Influence	Some Influence	Some Influence	Less Influence
Gap Inc. Level of Influence				

Source: Gap Inc., 2009, p. 24

8.5 CONCLUSION

The purpose of this chapter has been to evaluate the impact of voluntary standards on working conditions in the textile and clothing industrial sector and whether voluntary codes work to strengthen the human rights of workers in this sector. Any positive impacts turn out to be restricted to the improvement of so-called outcome standards (for example, health and safety) while the political rights of workers, especially freedom of association, have hardly improved. More important is that effectiveness is largely restricted to the 'see level' of formal work contracts. Voluntary standards typically do not reach down into value chains. In addition, the relevance of such standards is more or less restricted to brand companies in higher quality segments but does not cover companies with low-price policies. In short, voluntary standards have so far not proved to be an effective instrument for protecting human rights along value chains.

Voluntary standards have had little impact in the lower tiers of the chain because they have failed to address properly the conditions within the textile and clothing sector. While the content of these standards is quite satisfactory from a human rights perspective, they have been shown to be very difficult to implement effectively.

What is required is more transparency on the part of brand companies and global sourcing agents like Li & Fung around: supply chain relationships and contracting; more and more effective cooperation with unions and NGOs; intensified cooperation around monitoring and auditing among brand companies; and the harmonization of standards and codes of conduct.

These empirical findings point to a need for further research on the relationship of implementing voluntary social and human rights standards and the structure of the respective value chain. The view of both Barrientos (2007, p. 5) and Gereffi et al. (2005, p. 93) that the implementation of technical standards varies according to the type of value chain and that this also applies to labour standards requires empirical substantiation with respect to the more complex process rights as well as human rights.

A key additional issue is the informal economy. One option may be the expansion of the 'see level' through formal contracts. However, the working situation in the informal economy should be addressed by brand companies by supporting self-organization, but also by influencing governments to install more efficient labour standards and labour inspections.

NOTES

* I wish to thank Diana Burghardt, Lisa Hollmann, Christian Scheper, Antje Weber and Susanne Wendt, members of the research project Human Rights, Corporate Responsibility and Sustainable Development for important input and support. This project is funded by the German Ministry for Economic Cooperation and Development and conducted by the Institute for Development and Peace (INEF).

1. The textile sector comprises the processes of spinning, weaving and finishing of fabrics, while the clothing sector covers the production steps that are necessary to complete one product out of a bundle of unfinished fabric (Kyvik Nordås, 2004, pp. 5, 7). The textile sector relies much on equipment, machinery and technology and is thus capital-intensive and lead time is quite long. In contrast, the clothing industry is labour-intensive and production is subject to rapid changes (Plank and Staritz, 2009, p. 67). Often these two sectors are looked at as a package, and many companies claim to cover the whole process from the raw material to the garment with their codes of conduct.
2. The ILO defines decent work as work that takes place 'under conditions of freedom, equity, security and dignity, in which rights are protected and adequate remuneration and social coverage is provided' (Barrientos, 2007, p. 1).
3. Another important question refers to the reach of these standards and possibilities of scaling up. However, the answer would require more detailed data on the whole sector than space allows in this chapter.
4. These characteristics are determined by the technological level of products and processes (due to the fact that some transactions are more complex and difficult to codify than others) and they often depend on the social surrounding, the performance of industry actors, dissemination and adoption of codification schemes and standards (Gereffi et al., 2005, p. 98).
5. SustainAbility – a consultancy and think tank founded in 1987 – works with senior corporate decision makers in order to achieve transformative leadership on the sustainability agenda (see http://www.sustainability.com/aboutsustainability/, accessed 1 May 2010).
6. GRI is a multistakeholder initiative that has developed a framework for the reporting on sustainability issues including a system of indicators to evaluate corporate sustainability reports. According to its website, these indicators are used by more than 1,500 companies (see http://www.globalreporting.org/AboutGRI/WhatIsGRI/, accessed 1 May 2010).
7. AccountAbility – a multistakeholder initiative founded in 1995 – works to promote accountability standards for sustainable management (see http://www.accountability21.net/default2.aspx?id=54, accessed 1 June 2010).

REFERENCES

Ansett, S. (2007). 'Mind the gap: a journey to sustainable supply chains', *Employee Responsibilities and Rights Journal*, **19**(4), 295–303.

Barrientos, S. (2007). *Global Production Systems and Decent Work*, Geneva: International Labour Office.

Barrientos, S. and S. Smith (2007). 'Do workers benefit from ethical trade? Assessing codes of labour practice in global production systems', *Third World Quarterly*, **28**(4), 713–29.

Burghardt, D. (2009). 'Documentation of the workshop: scaling up voluntary standards for human rights – the challenge of measuring impact', Duisburg: Institute for Development and Peace, available at http://www.humanrights-business.org/files/workshop_documentation.pdf (accessed 31 October).

BLIHR (Business Leaders Initiative on Human Rights) (2009). 'Policy report 4', available at http://www.blihr.org/Legacy/Downloads/BLIHR%20Report%202009.pdf (accessed 4 January 2010).

CCC (Clean Clothes Campaign) (2009a). Clean Clothes Campaign home page, available at http://www.cleanclothes.org (accessed 22 December 2009).

CCC (Clean Clothes Campaign) (2009b). 'Welttextilabkommen: 40 Jahre Handelsquoten', available at http://www.saubere-kleidung.de/ccc-40_kampagnen/ccc-44_welttextilabkommen.html (accessed 21 December 2009).

COMO (Consulting für Projektmanagement und Organisation) (2008). 'Introduction of voluntary social and ecological standards, evaluation reports', Federal Ministry for Economic Cooperation and Development, Bonn and Berlin, available at http://www.bmz.de/en/service/infothek/evaluation/BMZEvaluierungsberichte/BMZ_Eval-043e_web.pdf (accessed 22 December 2009).

Ergon (2008). 'Literature review and research evaluation relating to social impacts of global cotton production for ICAC Expert Panel on Social, Environmental and Economic Performance of Cotton (SEEP)', available at http://www.ergo-nassociates.net/news_publications/publications/social_impact_of_coton_production.html (accessed 22 December 2009).

Gap Inc. (2009). 'Gap Inc. 2007/2008 Social Responsibility Report', available at http://www.gapinc.com/GapIncSubSites/csr/Utility/report_builder.shtml (accessed 22 December 2009).

Garwood, S. (2005). 'Politics at work: transnational advocacy networks in the global garment industry', *Gender and Development*, **13**(3), 21–33.

Gereffi, G. (1994). 'The organization of buyer-driven global commodity chains: how US retailers shape overseas production networks', in G. Gereffi and M. Korzeniewicz (eds), *Commodity Chains and Global Capitalism*, Westport, CT: Praeger, pp. 95–122.

Gereffi, G. (1999). 'A commodity chains framework for analyzing global industries', available at http://eco.ieu.edu.tr/wp-content/Gereffi_CommodityChains99.pdf (accessed 22 December 2009).

Gereffi, G. (2002). 'Outsourcing and changing patterns of international competition in the apparel commodity chain', Paper presented at the conference Responding to Globalization: Societies, Groups, and Individuals, Boulder, Colorado, 4–7 April.

Gereffi, G., J. Humphrey and T. Sturgeon (2005). 'The governance of global value chains', *Review of International Political Economy*, **12**(1), 78–104.

Hale, A. and J. Wills (2007). 'Women working worldwide: transnational networks, corporate social responsibility and action research', *Global Networks - A Journal of Transnational Affairs*, **7**(4), 453–76.

Hurley, J. and D. Miller (2005). 'The changing face of the global garment industry', in A. Hale and J. Wills (eds), *Threads of Labour: Women Working Worldwide*, Oxford: Blackwell Publishing, pp. 16–39.

ILO (International Labour Organization) (2002). *Decent Work and the Informal Economy*, Report VI, Geneva: International Labour Office.

ILO (International Labour Organization) (2005). *Promoting Fair Globalization in Textiles and Clothing in a Post-MFA Environment*, Report for discussion at the Tripartite Meeting on Promoting Fair Globalization in Textiles and Clothing in a Post-MFA Environment, Geneva: International Labour Office.

Jauch, H. and R. Traub-Merz (eds) (2006). 'The future of the textile and cloth-

ing industry in Sub-Saharan Africa', Friedrich-Ebert-Stiftung, Cape Town, available at http://library.fes.de/pdf-files/iez/03796/03796toc.html (accessed 6 January 2010).
Klein, N. (2000). *No Logo*, London: Flamingo.
Kyvik Nordås, H. (2004). 'The global textile and clothing industry post the agreement on textiles and clothing', Discussion paper, World Trade Organization, Geneva.
Li & Fung (2007). 'Global Compact communication on progress 2006', available at http://www.unglobalcompact.org/data/ungc_cops_resources/322984D6-10BD-4785-B385-3B35F8F8486C/COP.pdf (accessed 21 December 2009).
Li & Fung (2009). 'Global Compact communication on progress 2008', available at http://www.unglobalcompact.org/data/ungc_cops_resources/1F071D0F-6F75-411E-8E0A-A85B07A827C0/COP.pdf (accessed 21 December 2009).
McMullen, A. and S. Maher (2009). *Let's Clean up Fashion 2009: The State of Pay Behind the UK High Street*, Bristol: Labour Behind the Label/ Clean Clothes Campaign.
Melik, J. and D. Barlett (2009). 'The harsh necessity of child labour', BBC News, available at http://news.bbc.co.uk/2/hi/business/8054960.stm (accessed 28 December 2009).
Merck, J. and L. Zeldenrust (2005). *The Business Social Compliance Initiative (BSCI): A Critical Perspective*, Amsterdam: Clean Clothes Campaign.
Nike (2007). 'Innovate for a better world: Nike FY05-06 corporate responsibility report', available at http://www.nikebiz.com/responsibility/documents/Nike_FY05_06_CR_Report_C.pdf (accessed 21 December 2009).
OECD (Organization for Economic Cooperation and Development) (2001). 'Codes of corporate conduct: expanded review of their contents', Working Papers on International Investment, available at http://www.oecd.org/dataoecd/57/24/1922656.pdf (accessed 28 December 2009).
Plank, L. and C. Staritz (2009). 'Global production networks, uneven development and workers: experiences from the Romanian apparel sector', *Journal für Entwicklungspolitik*, **25**(2), 62–87.
Porter, M. (1985). *Competitive Advantage, Creating and Sustaining Superior Performance*, New York: The Free Press.
Ruggie, J.G. (2008). *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, Geneva: United Nations Human Rights Council, 7 April, available at http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf (accessed 7 January 2010).
Schömann-Finck, C. (2007). 'Einkäufer für die Welt: Das Handelshaus beschafft Waren für Wal-Mart, Karstadt & Co. – die Aktie ist ein Kauf: FOCUS Money', available at http://www.focus.de/finanzen/boerse/li-und-fung-einkaeufer-fuer-die-welt_aid_259360.html (accessed 28 December 2009).
Traub-Merz, R. (2006). 'The African textile and clothing industry: from import substitution to export orientation', in H. Jauch and R. Traub-Merz (eds), *The Future of the Textile and Clothing Industry in Sub-Saharan Africa*, Cape Town: Friedrich-Ebert-Stiftung, pp. 9–35.
United Nations Human Rights Council (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, available at http://www.business-humanrights.org/media/

documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf (accessed 31 October 2011).
van Yperen, M. (2006). *Corporate Social Responsibility in the Textile Industry: International Overview*, Amsterdam: IVAM Research and Consultancy on Sustainability.
Walters, D. and M. Rainbaird (2004). 'The demand chain as an integral component of the value chain', *Journal of Consumer Marketing*, **21**(7), 465–75.
Wick, I. (2006). *Werbegag oder Hebel für Beschäftigte? Ein Leitfaden für internationale Kodizes der Arbeitspraxis*, Bonn and Siegburg: Friedrich-Ebert-Stiftung and Südwind- Institut.
Wick, I. (2009). *Frauenarbeit im Schatten – Informelle Wirtschaft und Freie Exportzonen*, Siegburg and München: Südwind and Evangelisch-Lutherische Kirche in Bayern.
Wills, J. and A. Hale (2005). 'Threads of labour in the global garment industry', in A. Hale and J. Wills (eds), *Threads of Labour: Women Working Worldwide*, Oxford: Blackwell Publishing, pp. 1–15.

9. Mining, human rights and the socially responsible investment industry: considering community opposition to shareholder resolutions and implications of collaboration

Catherine Coumans*

9.1 INTRODUCTION

In 2008, a group of Socially Responsible Investment firms and *pension* funds (the SRI group)[1] issued a press release praising Canadian mining company Goldcorp Inc. (Goldcorp) for agreeing to their request to conduct a Human Rights Impact Assessment (HRIA) at its conflict-ridden Marlin mine in Guatemala.[2] Preceding this public announcement, a Memorandum of Understanding (MOU) had been signed between the SRI group and Goldcorp setting out the terms of the proposed assessment. One year later, one of the members of the SRI group, the Public Service Alliance of Canada, withdrew its involvement in the HRIA noting that it had:

> become increasingly concerned with the HRIA process and its relationship with the local communities. We have been especially concerned about the lack of free and informed prior consent of the communities in regards to the HRIA, and that the interests of Goldcorp are being put before the interests of the local people.[3]

Shortly thereafter, Bill Law, a BBC Radio 4 reporter, interviewed a participant in the SRI group from the Ethical Funds Company who, he reports, acknowledged 'that the HRIA had had the unintended consequence of "inflaming the situation" in Guatemala' (Law, 2009). In spite of the withdrawal of the Public Service Alliance of Canada, which necessitated the withdrawal of SHARE as advisor to the Public Service Alliance

of Canada's staff pension fund,[4] the three remaining members of the SRI group decided to continue with the controversial HRIA.

A new target date for completion of the HRIA was set for the end of July 2009.[5] The website that was to provide transparency into the HRIA process provided an update on 27 May 2009. This update affords glimpses into the turmoil going on behind the scenes. It announced a 'change in scope' that consisted primarily of abandoning an approach 'founded on community participation' as the consultants who had been hired to carry out the HRIA 'concluded that the conditions necessary to engage local communities and organizations in open dialogue do not exist in the current circumstances.'[6] This significant shift in methodology and focus was reflected in a name change to Human Rights Assessment (HRA). The update also announced the departure, in January 2009, of a human rights specialist from the team that had been assembled to carry out the HRIA, but provided no explanation for this departure. Finally, the update noted the departure of the Public Service Alliance of Canada, also without providing an explanation. This was the last update to the website until the much delayed release of the HRA on 17 May 2010.

In the past decade, there have been a number of shareholder resolutions, 'guided by responsible investment policies,'[7] presented to Canadian mining companies by members of Canada's Socially Responsible Investment (SRI) industry. Placer Dome, Alcan, Barrick Gold and Goldcorp have all been targeted by shareholder resolutions. A number of these resolutions have been met with distress by community members who are affected by the specific mine projects featured in these resolutions. This undoubtedly unintended response to mining-related shareholder resolutions by the SRI industry is under-theorized and needs to be better understood. Furthermore, as SRI firms[8] enter into agreements with mining companies as a result of shareholder resolutions, they enter into potentially multi-year relationships that may have further consequences for community activism.

In this chapter, I explore opposition to mining-related shareholder resolutions by the SRI industry. I situate this dynamic within the broader context of increasing interventions by a range of corporate social responsibility (CSR) actors on social and human rights issues at specific mining projects. I analyse these CSR efforts from the perspective of respect for human rights, in particular the right to participation, and from the related perspective of community 'agency,' or right to self-determination, with respect to protecting local social, cultural and environmental values. I focus on specific characteristics of SRI firms and the dynamics and trends related to shareholder resolutions that are relevant to an understanding of community opposition to some shareholder resolutions. I also consider potential consequences for community activism of the relationships that

evolve between SRIs and mining companies as a result of joint agreements coming out of shareholder resolutions. The Goldcorp HRIA resolution provides a case study for an in-depth exploration of these issues.

9.2 THE ELUSIVE 'SOCIAL LICENSE TO OPERATE,' GOVERNANCE GAPS AND THE HUMAN RIGHTS IMPLICATIONS OF CSR PARTNERSHIPS

The last ten years have seen a number of inter-related developments with respect to social opposition to mining projects. Opposition to specific mining projects by local communities and increasingly by indigenous communities is now being more widely acknowledged by the industry itself, by financial institutions and by governments. Mining companies and industry associations recognize this reality when they refer to the need for a 'social license to operate' if they are to avoid reputational risk, costly delays and the potential loss of mining projects resulting from local opposition, disruption and protests.[9] Community-level conflict is increasingly catching the attention of the media, regulators, investors and downstream consumers such as jewelers and the electronics industry. Mining companies are also increasingly being challenged in the courts in a range of innovative legal cases and in quasi-legal proceedings.[10] These pressures are leading to demands on mining companies not only to address community grievances, but also to demonstrate 'responsible' processes and practices with respect to host communities.

The World Bank's (2003) three-year extractive industry review process and final report is evidence of the financial sector's recognition of challenges posed by the mining sector to local communities and environments. In contrast, governments of the home countries of the world's multinational mining companies have generally lagged behind in publicly recognizing and addressing the problem of negative human rights and environmental impacts associated with their extractive companies operating overseas. While Canadian parliamentarians have made strong calls for domestic legislation to address these issues in a groundbreaking parliamentary report (SCFAIT, 2005) and through a private members bill, C-300, in 2009 (McKay, 2009), the Government of Canada (2009) has shied away from regulation and legal reform in favor of voluntary CSR measures.

Collectively, the world's governments, through the UN, have opted to examine the role of transnational corporations with respect to human rights. In 2005, the UN Secretary-General appointed a Special

Representative, John Ruggie, to undertake this task. Ruggie's initial work identified the extractive industries as being particularly problematic. Ruggie (2008) studied 320 randomly chosen cases of human rights abuses by corporations (between February 2005 and December 2007) and found that of eight sectors studied, and a further category of 'other,' the extractive sector dominated the cases of human rights abuses with 28 percent. Ruggie also, importantly, identified what he has called the 'root cause of the business and human rights predicament today' as being:

> the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate *sanctioning or reparation*. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge. (Ruggie, 2008, p. 3, emphasis added)

Having identified the problem, Ruggie pointed to a potential solution in home state regulation. Ruggie noted that:

> Experts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory. There is greater consensus that those States are not prohibited from doing so. . . . Indeed, there is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas. (Ruggie, 2008, p. 7)

As pressure for regulatory and legal reform continues to grow, voluntary CSR approaches are increasingly supported by industry and governments. The burgeoning field of CSR with relevance to mining, with its proliferating voluntary codes of conduct and standards, its steadily expanding roster of consultants and 'CSR experts' from academics to development non-governmental organizations (NGOs), is largely supported by the mining industry. CSR is the industry's response to the need to gain a 'social license to operate' – or at the very least to manage social conflict at mine sites. It is also the industry's preferred alternative to increasing efforts to establish effective international or home country regulation and better access to legal sanctions and remedies for people whose rights have been abused.[11] For many civil society groups, however, voluntary CSR measures, while necessary, are not sufficient to address the social and environmental impacts related to mining.

While voluntary CSR instruments have proliferated over the past 10–15 years, alleged abuses associated with mining have not abated. Ruggie notes that 'escalating charges of corporate-related human rights abuses

are the canary in the coal mine, signaling that all is not well' (Ruggie, 2008, p. 3). CSR is an inadequate response to long-term environmental and social harm that may be caused by sectors such as mining (Coumans, 2010). Overarching concerns are that voluntary CSR approaches do not deal adequately with the problem of 'laggards,' companies that choose not to apply CSR standards at all, or do not apply them consistently at a particular operation or uniformly across all operations. Application of CSR programs has often proved to be reflective of the commitment of a particular company's chief executive officer (CEO) or mine site manager and vulnerable to turnover of personnel at all levels, as well as to mergers and acquisitions. Of particular concern with respect to human rights is the fact that all existing CSR codes and instruments are weak on human rights, frequently referencing only a sub-set of human rights (Coumans, 2010).[12] An important defect of voluntary CSR instruments that has been recognized by Ruggie is that CSR instruments do not provide for sanction and remedy.

Two characteristics of CSR need careful examination. As a voluntary approach, CSR puts a significant level of control in the hands of corporations. A mining company, or project-level manager, may decide to adopt a CSR approach, or not, can choose between programs, codes or standards, can decide to adopt CSR measures at all operations or only at some, whether and how to phase in application and whether to stop application of CSR measures at any time and for any reason. Additionally, mining companies choose their CSR 'partners,' whether these be consultants, academics, development or conservation NGOs, SRI firms or any of a growing number of CSR experts. Mining companies also foot the bill both for the CSR measures to be adopted as well as for the partners they bring in to help them implement these measures. The financial dependencies and contractual aspects of CSR partnerships are significant features of CSR in the mining industry. These arrangements give mining companies considerable direct and indirect say in such things as what measures will be undertaken, how they will be undertaken and levels of transparency. The impact of power relationships, inherent in CSR partnerships, on the implementation and outcomes of CSR programs at particular mine sites remains under-examined.[13]

Related, and also under-examined, is the potential impact of CSR partnerships in the mining industry on the right to self-determination, or agency, of mining-affected communities who are struggling to protect social, cultural, economic and environmental values of importance to them. It must be recognized that CSR programs and CSR partnerships may be used strategically by mining companies to manage or thwart community opposition. Fundamental to this concern is the fact that

community members in situations of conflict with a mining company are rarely, if ever, included in the decision making surrounding CSR programs to be adopted or partners to engage. They are often not privy to the terms and goals of potential partnerships that will have an impact on their struggle, let alone afforded a position to shape these programs or provide or withhold consent for CSR programs or partnerships. They are commonly denied an essential right to participation with respect to CSR decision making even though these CSR initiatives may have a negative impact on their own goals, strategic alliances and undertakings. While CSR partnerships with mining companies may be empowering for mining companies, in situations of conflict, they are inherently disempowering for the communities who are affected by them. It is, then, perhaps not surprising when communities-in-struggle around mine sites react negatively to the imposition of CSR strategies that they perceive as harmful.

The SRI group's intervention in Goldcorp's Marlin mine in Guatemala illustrates some of these issues. Ruggie and others emphasize the need for corporations to exercise 'due diligence' with respect to their operations. HRIAs are an emerging tool in the corporate 'due diligence' toolkit. However, by requesting that Goldcorp carry out a HRIA and partnering with the company in this endeavor without consulting the local communities, the SRI group showed itself more interested in operationalizing and testing the HRIA tool than in addressing the human rights impacts that had already been raised by the local communities themselves and confirmed by outside institutions they had engaged to provide them with guidance.

9.3 GOLDCORP'S MARLIN MINE IN GUATEMALA: CONFLICT AND COMMUNITY OPPOSITION[14]

9.3.1 Background

Goldcorp's Marlin mine is located in the Department of San Marcos in the western highlands of Guatemala, approximately 300 kilometers northwest of Guatemala City. The silver-gold mine occupies an area of approximately 5 square kilometers, of which 85 percent lies in the municipality of San Miguel Ixtahuacan (SMI), comprised of 19 villages, and 15 percent in the municipality of Sipacapa, comprised of 13 villages (Compliance Advisor Ombudsman, 2005; MiningWatch Canada, 2007). The people of SMI and Sipacapa are predominantly indigenous, Maya-Mam and Maya-Sipacapense, respectively, and predominantly poor.

The Marlin mine is 100 percent owned by Montana Exploradora de

Guatemala (Montana), itself a wholly owned subsidiary of Goldcorp whose headquarters are in Vancouver, British Columbia. In August 1999, the Government of Guatemala granted Montana an exploration license for the Marlin area. Glamis Gold Ltd acquired Montana in 2002 and intensified exploration. In November 2003, the Government of Guatemala granted Montana a 25-year exploitation license for an area of 20 square kilometers. In 2004, Glamis received a $45 million loan from the International Finance Corporation of the World Bank Group to develop the Marlin mine and commercial production commenced the following year. Goldcorp acquired Glamis in November 2006 and the CEO of Glamis, Kevin McArthur, became the CEO of Goldcorp (Imai et al., 2007; OECD Request for Review, 2009).

The mine is located in a country whose people are still reeling from the after-effects of 36 years of bloody internal conflict during which Mayan communities in particular suffered severe violence. Fifteen massacres took place in the Department of San Marcos alone where the Marlin mine is located (Imai et al., 2007, p. 122). In spite of the Peace Accord signed by the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG) in 1996, the country continues to suffer from high levels of violence, drug wars, government corruption and a weak justice system.[15] In particular, political, cultural and economic rights and protections for indigenous peoples enshrined in the Peace Accord have not been upheld.[16] Reforms to the Constitution that would provide greater recognition for indigenous communities never became a reality (Imai et al., 2007). Guatemala has been criticized by the UN Human Rights Council for its failure to ensure the respect of rights of its indigenous peoples.[17] Guatemala has also emerged impoverished from years of brutal conflict. In order to attract foreign investment in mining, the country passed a mining code in 1997 that allows 100 percent repatriation of profits by foreign firms and reduced royalties from 6 percent to 1 percent.[18]

The historical, political, economic and cultural context sketched above is one that is rife with potential for social conflict and one that should signal loudly to any mining company expecting to respect human rights in this environment that it will need to exercise due diligence with great care.

9.3.2 A history of conflict and opposition to the Marlin mine

Conflict related to the Marlin project dates back to the first land purchases made in the mine lease area in 1999 and with the initial mining-related work done in that year. Local indigenous people soon started to raise concerns about environmental impacts (Imai et al., 2007, pp.102–3). Conflict and opposition to the mine has escalated over time, particularly after 2003

when Glamis received its mining permit and when construction of the mine started in 2004.[19] In 2004, following protests starting in February, the municipality of Sipacapa decided to poll its members with respect to the mine. A poll released on 4 November 2004 indicated that 95.5 percent of those surveyed opposed the mine. A meeting that was held in Sipacapa on 6 November resulted in a declaration against the mine stating: '*We publicly declare at the national and international level, that the granting of a license for open pit metal mining violates the collective rights of the indigenous peoples who inhabit our territories*' (Imai et al., 2007, p.110, emphasis added). Importantly, the community was clear on its reasons for opposition based on a desire to protect the environment and to pursue alternative means of development (Imai et al., 2007, p. 110).

In December 2004, an indigenous group 150 kilometers away from the mine, in the town of Los Encuentros, began a 42-day blockade on the Pan-American highway to prevent passage of a ball mill for the Marlin mine. On 11 January 2005 the blockade was put down by over a thousand soldiers and hundreds of police who allegedly opened fire on unarmed protestors killing Raul Castro Bocel and injuring some 20 others. A few weeks later, Bishop Alvaro Ramazzini led 3000 people in a protest against the mine in San Marcos (Imai et al., 2007, pp. 110–11). In March 2005, the Compliance Advisor Ombudsman of the IFC of the World Bank accepted a formal complaint from the people of the municipality of Sipacapa. The complaint was facilitated by a Guatemalan civil society organization called Colectivo MadreSelva and maintained that: water demand from the mine will deny access by communities to their water supply; the mine will use unsafe processing methods that will contaminate the environment and the water supplies used by downstream people; the rights of indigenous people have been violated as a result of failure by the project to consult with them (as required by the International Labour Organization (ILO) Convention 169) about the proposed development and its environmental and social impacts; the presence of the mine is resulting in social conflict, violence and insecurity (Compliance Advisor Ombudsman, 2005, p.1). Significantly, based on its own interviews 'with a cross section of people from Sipacapa,' the Compliance Advisor Ombudsman accepted that 'the complaint raises concerns and apprehensions that are widely-held in the area' (Compliance Advisor Ombudsman, 2005, p. 4).

The violent confrontation between villagers and Guatemalan forces at the blockade in Los Encuentros significantly raised the profile of the struggle and the level of international awareness and interest. MiningWatch Canada posted information on the protest and violence on its website, Amnesty International issued an urgent action alert, reporter Kelly Patterson wrote about the issue in the *Ottawa Citizen* and Glamis put out

a press release to give its side of the story. From this event to the present, incidents of intimidation and violence, such as the fatal shooting of Alvaro Benigno Sanchez in SMI on 13 March 2005 by an off-duty mine security guard, have been reported internationally and Glamis, later Goldcorp, have had to respond publicly. In 2005, the municipality of Sipacapa furthered plans to hold a *'consulta,'* or referendum, to determine whether local people were in favor or against the exploration and extraction activities of the Marlin mine.[20] The ILO's Convention 169 formed a basis for the referendum as it requires states to consult with indigenous peoples and achieve their consent before permitting activity on their lands through legislative or administrative measures (MiningWatch Canada, 2007, p. 15).[21] The referendum was organized in the context of strong public statements by the company discrediting the proposed community vote (Imai et al., 2007, p. 113). The level of threatened and actual violence increased in the run-up to the referendum leading the government to place Bishop Álvaro Ramazzini under protection and leading the Inter-American Commission on Human Rights to seek protection for the environmental group Madre Selva, which was one of the observer groups. Ultimately, Glamis attempted to stop the vote through a court injunction and, according to Imai et al. (2007, p.113), was implicated in efforts to stymie the vote by spreading false information that the vote had been cancelled. Nonetheless, the referendum went ahead on 18 June 2005 in 13 Sipakapense communities under the watchful eye of some 70 national and international observers the communities had invited to oversee the vote. Ultimately, 11 of the communities voted against mining, one abstained and one voted for mining with the outcome of the vote being announced on 21 June 2005 (MiningWatch Canada, 2007, p. 15).[22] The Municipal Council confirmed the decision of the citizens to reject mining exploration and exploitation and agreed to abide by the outcome of the referendum. Guatemala's Constitutional Court confirmed the legality of the referendum in 2007, but also ruled it not to be binding on the state as authority for mining rests with the Ministry of Energy and Mines. Glamis continued exploration activities in Sipacapa after the *consulta* (Imai et al., 2007, pp. 125–6).

Since 2005, opposition to the mine, and associated conflict and violence, has continued not only in Sipacapa, but also in the municipality of SMI where 85 percent of the mine lease is located. This opposition led in 2009 to the filing of a Specific Instance Request for Review by The Front in Defense of San Miguel Ixtahuacan (FREDEMI) with the Canadian National Contact Point (NCP) of the Organisation for Economic Cooperation and Development (OECD Request for Review, 2009).[23] The Request for Review maintains that 'Goldcorp's activities are not consistent with Guatemala's Human Rights Obligations' and reiterates concerns

the community has articulated and communicated over the years related to: the violation of communal property rights and the right to free prior and informed consent of the people of San Miguel Ixtahuacan; violation of the right to property, including housing, as a result of structural damage to houses caused by Goldcorp's use of explosives and heavy equipment; violation of the right to health as a result of water contamination related to Goldcorp's mining activities; violation of the right to water as a result of the depletion of water related to Goldcorp's mining activities; violation to the right to life and security of the person as a result of Goldcorp's alleged retaliation against persons who oppose its operations.

The outcomes sought by FREDEMI reflected concerns that have been articulated by community members of Sipacapa and SMI for many years: suspension of mine operations and closure of the mine; termination of plans to expand the mine; cessation of intimidation and persecution of community members; third party monitoring of water contamination; the establishment of an account to finance environmental rehabilitation and water treatment post closure; the adoption of a corporate policy to respect the free prior and informed consent of indigenous peoples. The Request for Review also called on the Canadian NCP to undertake an investigation into Goldcorp's activities at the Marlin mine and to issue a statement, including recommendations to ensure the company's compliance with the OECD Guidelines for Multinational Enterprises.[24]

In 2010, the ILO urged the Government of Guatemala to 'suspend the exploitation' of the Marlin mine until studies to assess the impacts of the mine (ILO 169, Article 7(3)), and prior consultation of the affected people regarding operations (ILO 160, Article 15(2), could be carried out.[25] Also in 2010, the Inter-American Commission on Human Rights (IACHR) responded to a request from 18 Mayan communities affected by the Marlin mine by issuing Precautionary Measures requiring the State of Guatemala to 'suspend mining of the Marlin I project . . . until such time as the Inter-American Commission on Human Rights adopts a decision on the merits of the petition' (IACHR, 2010).[26] The statement notes that Precautionary Measures are necessary in light of a range of human rights violations related to alleged contamination by the mine of critical water resources.[27] IACHR Precautionary Measures are by definition urgent and are binding on the State of Guatemala.

On 4 March 2010, following a visit to the Marlin-affected communities, James Anaya, UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, found that 'the State and the company Goldcorp should comply with the precautionary measures issued by the IACHR in relation to the situation of the communities affected by the Marlin mine . . .' (Anaya, 2010, p. 40). Following the visit

by Anaya, the Government of Guatemala committed to implementing the measures but instead initiated an administrative process that led to a decision not to suspend the mine and a request to the IACHR to modify or lift the precautionary measures.[28]

9.3.3 Case History Conclusions

This brief history of opposition to the Marlin mine by members of the communities of Sipacapa and SMI provides the basis for a number of observations. These observations are in no way unique to this particular history of struggle by community members seeking to protect values of importance to them in the face of a large-scale mining project. These common features of mining struggles are important and lie at the heart of the issues explored in this chapter.

Opposition to the Marlin mine by community members from Sipacapa and SMI started in the exploration phases and has expanded over the life of the mine. This opposition has been characterized by public manifestations and position statements resulting from a series of strategic deliberations, decisions and actions taken by community members over many years. These actions are collective expressions of the 'agency' of these community members – their willingness and ability to take action on their own behalf, to act in shaping their own futures, even in dangerous circumstances and at great personal risk. Some key examples of this agency are activities such as: blockades; demonstrations and referenda that community members have undertaken; public statements they have made that articulate their positions and goals; alliances they have entered into, first with national and later international organizations and individuals (for example, the Roman Catholic Church, NGOs, scientists[29]; local organizations the community formed to work towards common goals; and formal complaints community members have filed with government and constitutional bodies in Guatemala and with international organizations and grievance mechanisms. The formal complaints include: the complaint to the World Bank in 2005 leading to a Compliance Advisor Ombudsman report; a petition that was filed to the IACHR in 2007; a complaint regarding degradation of water quality and quantity to the Latin American Water Tribunal in 2008; and the OECD Request for Review that was filed in 2009.

As is the case with the Marlin mine, in community struggles against mines globally, most of the efforts undertaken by affected community members, particularly in the early years of the struggle, occur with little or no international awareness or attention. Efforts by members of local communities to protect values of critical importance to them go on around the

world all the time. Many of these struggles for various reasons are never elevated to a level of broad international awareness and focus. In the case of the Marlin mine, opposition to the mine that began in 1999 and consequences suffered by local people who openly opposed the mine appear not to have become a matter of significant international awareness until late 2004 and early 2005, with the blockades and violence in Los Encuentros.

Once a local struggle is elevated to a level of international interest and becomes 'high-profile,' – usually at great cost to local community members – it is not uncommon for it to draw the attention of international CSR actors who, as I have argued elsewhere, 'occupy spaces created by conflict' by entering into negotiations with mining companies as 'problem solvers' and 'risk managers' (Coumans, 2011).

9.4 ENGAGING GOLDCORP: SOCIALLY RESPONSIBLE INVESTOR INTERVENTION LEADS TO PARTNERSHIP

Canadian SRI firms began to engage Glamis over the Marlin mine in 2005 and 2006, shortly after conflicts surrounding the Marlin mine began to receive international attention. These engagements would appear to have contributed to the company entering into several commitments to meet international standards with respect to cyanide management, training of security personnel and reporting standards,[30] but did not diminish allegations by community members about human rights abuses and environmental degradation at the Marlin mine.

9.4.1 A Controversial Collaboration with Goldcorp on a Human Rights Impact Assessment

In February 2008, a delegation of SRI representatives[31] traveled to Guatemala for a ten-day site visit, an unusual undertaking for members of the SRI community in Canada. The delegation met with a range of Marlin mine stakeholders. Shortly after the delegation's return home on 20 February, a decision was made to file a shareholder resolution asking the company to commission an independent HRIA of its operations in Guatemala. The filing date was 2 March 2008. There was no prior consultation about this course of action with any of the affected communities or their representatives and organizations in Guatemala. The shareholder resolution was filed by The Ethical Funds Company (Ethical Funds),[32] PSAC Staff Pension Fund and the first and fourth Swedish National Pension Funds.[33]

After filing the resolution, the SRI group entered into a dialogue with Goldcorp about conditions under which the SRI group would agree to withdraw the resolution, in which case it would not be included in the management circular to shareholders prior to the annual general meeting (AGM) and would not be on the agenda of the AGM.[34] It is common for SRI firms to use shareholder resolutions as a vehicle for drawing companies into dialogue around issues they believe to be important. Goldcorp agreed to commission a HRIA and a MOU was signed on 19 March 2008 by the company, the members of the SRI group who had filed the shareholder resolution and SHARE. On 24 April, the SRI group issued a press release to announce the agreement they had reached with Goldcorp.

On 30 April, Jantzi Research (now Jantzi Sustainalytics), also a participant in the fact-finding trip to Guatemala, referred to the findings of that trip, in addition to other sources, in recommending to investors 'that the company be considered ineligible for SRI portfolios.'[35] Jantzi Research highlighted 'growing opposition from local indigenous communities to Goldcorp's Marlin mine in Guatemala based on community compensation and land rights, inadequate consultation with indigenous peoples, threats to safety and security in addition to the environmental impacts of the mine's operations' as well as Goldcorp's singularly negative environmental record pointing out that 'Goldcorp has the highest environmental fine total among mining companies on the TSX Composite Index, according to the Canadian Social Investment Database.'[36] Jantzi Research also noted as a concern that Goldcorp had 'refused to circulate another shareholder resolution filed by an individual shareholder on behalf of Breaking the Silence, a Canadian-based NGO. This resolution called on the company 'to halt any plans to expand the [Marlin] mine and/or acquire new land in the Municipalities of Sipakapa and San Miguel Ixtahuacan without the free, prior and informed consent of the affected communities.'[37] While Jantzi Research commented on the agreement to conduct a HRIA as 'a positive step,' the firm also found that Goldcorp's implementation of any recommendations coming from that process would 'not be measurable for a number of years' and concluded that 'Goldcorp should commit to attaining the free, prior and informed consent of affected communities prior to expanding the Marlin mine or acquiring new land in the region, respecting the results of the referendum in Sipacapa.'[38]

The public announcement of the agreement between the SRI groups and Goldcorp unleashed significant and sustained concern about the arrangement and the pending HRIA process. This concern was expressed both publicly and privately to members of the SRI group by Canadian civil society organizations and academics familiar with the Marlin mine

issues, as well as by Guatemalan civil society organizations and mine-affected community groups and individuals.

Public response to the arrangement between the SRI group and Goldcorp was first registered by the organization RightsAction in an open letter to Goldcorp and Shareholders on 1 May 2008.[39] RightsAction noted, as did later commentators, that statements praising Goldcorp in the 24 April press release were undeserved and/or unsubstantiated. In particular, RightsAction questioned a statement in the press release that found that by agreeing to take on the HRIA 'Goldcorp is behaving responsibly and responding to local concerns raised by local stakeholders in Guatemala.' RightsAction questioned how the SRI group could come to this conclusion when they had not asked local people if they wanted a HRIA. There is no evidence that local communities had ever included such a demand in their various public statements. RightsAction also noted that the SRI group had failed to address the 'clear and authoritative recommendations' local community members were in fact expressing with regard to the mining operations.

MiningWatch Canada met with staff of SHARE, one of the organizations in the SRI group on 29 May 2008[40] to express concern that this latest shareholder resolution fell into a pattern of SRI shareholder resolutions on mining companies that did not reflect community demands and were opposed by mining-affected communities who saw them as harmful to their own stated aims and goals. MiningWatch raised the concern that the HRIA would increase the burden on local community members already engaging Goldcorp and asked the SRI organization to open a space for dialogue about how SRI shareholder resolutions could better be matched to the demands of local communities-in-struggle.[41]

At the time of MiningWatch's meeting, a MOU between Goldcorp and the SRI group was mentioned but not provided. By 30 July, the MOU had been made public and a Steering Committee for the HRIA process had been created. Both the text of the MOU and the composition of the Steering Committee caused further concern. In particular, the MOU set out that the objective of the HRIA was to: 'improve the opportunities of the company to continue to operate profitably in Guatemala by ensuring that the company has in place and is implementing effectively policies and procedures designed to mitigate the risks of potential conflicts with internationally recognized human rights standards and norms given the context in Guatemala.' This objective placed the HRIA at odds with the stated objectives of community members who called for a cessation of mining.[42] The Steering Committee was made up of one member from the SRI group, a representative from Goldcorp and one Guatemalan,[43] but no representative from the directly affected communities.

Another organization that followed up personal communications with a member of the SRI group with a letter of concern was the Maritimes-Guatemala Breaking the Silence Network (BTS).[44] BTS expressed its concern with the 'lack of input from, agreement by and participation of the affected communities in the development of the HRIA, in membership on the Steering Committee and in the selection of the group or individual that will carry out this study . . . [and in] . . . developing the Terms of Reference of this assessment.' BTS also noted that in setting out in the MOU that the objective of the project was to allow for the continued operations of the mine, the project was in contradiction with the 'right to free, previous and informed consent of the indigenous communities, as stated in International Labour Organization Covenant 169. . . .'

In Guatemala, community members of Sipacapa and SMI protested the HRIA, as did civil society organizations that supported the struggle of these communities such as the Roman Catholic Church. Members of significant organizations such as the Municipal Council of Sipacapa, ADISMI (a Mayan community development organization of SMI) and the Indigenous Mayor's Council of SMI (Consejo del Alcaldes Comunales) reportedly refused to participate in the HRIA. On 4 September 2008 ADISMI, sent a letter to the SRI group in response to an invitation to participate in the study severely questioning the project's transparency: 'from the very beginning of the planning of this process you did not consult the communities, even less were communities present from the beginning of the planning. So what transparency are you referring to?' This letter also questioned the independence of the project given the company's position on the Steering Committee pointing out that '(m)eanwhile, none of the affected communities has a presence on this committee, even though this is our territory, these are our resources that are being robbed and these are our rights that we are demanding.'[45]

On 23 January 2009, Dr Douglas Cassel, Director of the Center for Civil and Human Rights of Notre Dame Law School, Notre Dame, Indiana in the United States, wrote a letter to Goldcorp's representative on the HRIA Steering Committee and copied the other members of the Steering Committee to inform them that Cardinal Quezada Toruno of Guatemala had asked the Center to form an Independent International Panel to conduct a HRIA of Goldcorp's Marlin mine. Cassel noted: 'As you may be aware, I was invited to have the Center for Civil and Human Rights bid on the company's RFP [Request for Proposals] for the human rights impact assessment. After reviewing the RFP, we were not confident that the process assured us the full degree of independence we consider essential to our work. Accordingly we chose not to bid on the contract.'[46] Also in January, a highly respected human rights advocate, Eduardo

Bryce, who had been brought on as a consultant for the Goldcorp HRIA, resigned.[47] On 4 February 2009, the Council of Indigenous Mayors of SMI met and the mayors present decided unanimously that they would not participate in the HRIA.

On 18 March 2009, following careful consultations with members of the SRI group and with the SRI group's representative on the HRIA Steering Committee, PSAC withdrew its involvement in the HRIA.[48] As noted earlier, in spite of this withdrawal, and the reported acknowledgment by a member of Ethical Funds that 'the HRIA had had the unintended consequence of "inflaming the situation" in Guatemala' (Law, 2009), the renamed HRA project carried on. The project was initially projected to be completed around April 2009. In May, a new target date for completion was set for the end of July 2009.[49] The report was finally released in May 2010.

The delayed HRA report recognized that 'the assessment appeared to be escalating tensions and increasing polarization both among and between communities and undermining conditions for carrying out a participatory human rights impact assessment as intended' (HRA, 2010, p. 8). As a consequence, the report acknowledged that 'recommendations for Montana and Goldcorp reflect the judgments of the assessment team, rather than the affected communities' (HRA, 2010, p. 8).

Overall, the HRIA report's recommendations focused on improving performance and did not reflect community members' calls for cessation of mining.[50] Nonetheless, the report did discuss unaddressed impacts from the Marlin mine that had been raised over many years by affected communities, and its recommendations support some important community demands. In particular, the report found 'allegations of coercion and pressure in the land sales that would undermine the voluntary nature of transactions and would infringe upon the right to own property' (HRA, 2010, pp. 21–2).[51] The HRA recommended immediate action to:

> Adopt a moratorium on land acquisition. Halt all land acquisition, exploration activities, mine expansion projects, or conversion of exploration to exploitation licenses, pending State involvement in consultation with local communities, and agreements put in place with communities to structure future land acquisitions. (HRA, 2010, pp. 21–2)

Goldcorp has responded selectively to the recommendations in the final report of the HRA. In particular, the company has not committed to halting land acquisitions. In its second update of 29 April 2011, Goldcorp notes that the mine 'continues to acquire land' (Goldcorp, 2011, p. 33).

Jantzi Research noted in 2008 that the HRIA process would only delay

actions that the company should take immediately, notably to abstain from further land acquisitions without the free prior and informed consent of affected indigenous communities. It is now clear that the HRA process not only delayed action on this key issue but actually failed to persuade Goldcorp to commit to abstaining from land acquisition. Nor has Goldcorp adopted the principle of free prior and informed consent (FPIC). A human rights and CSR policy adopted by Goldcorp in 2011 does not commit the company to FPIC, one of several areas of weakness identified by the International Human Rights Program at the University of Toronto (Mandane, 2011).

9.4.2 Implications of Collaboration between SRIs and Goldcorp

The decision by Goldcorp to carry out a HRIA as requested by SRI group led to the signing of a MOU, in 2008, between Goldcorp and the SRI firms. This agreement solidified a relationship between the SRIs and Goldcorp that lasted not only until the delayed completion of the HRA in 2010 but beyond, with ongoing implications for efforts by Marlin-affected communities to achieve recognition for, and a positive response to, their as yet unaddressed concerns.

In 2011, two individuals jointly filed a shareholder resolution following consultation with affected community members and their representative organizations. The resolution reflects long-standing demands as reflected in public statements by community members.[52] Referencing the ILO and IACHR recommendations to the Government of Guatemala of 2010, the resolution asks Goldcorp to voluntarily suspend operations at the Marlin mine, pending further investigation into alleged human rights and environmental abuses. The resolution also references Goldcorp's own HRA calling for a halt to the project's expansion 'until it complies with international law. . . .'[53]

The resolution received support from PSAC, the investor that had pulled out of the SRI group involved in the HRA. National President John Gordon said, 'We think this resolution warrants serious consideration. . . . The potentially harmful repercussions of neglecting root issues are too serious to ignore.' In spite of attempts to find support among other socially responsible investors, it soon became apparent that key Canadian players such as Ethical Funds, in its new corporate form as NEI, and SHARE, both members of the SRI group involved with Goldcorp on the HRA, would neither endorse the resolution, nor lend support to efforts to persuade other SRIs to support the resolution.

Goldcorp advised its investors to vote against the resolution and referenced its relationship with the SRI group, the HRA and its new human

rights and CSR policies[54] as evidence of positive action regarding the Marlin mine.[55] Significantly, while protestors, including members of the Marlin mine's affected communities, protested outside the Goldcorp AGM and spoke in support of the resolution inside, a representative of NEI read out a statement opposing the resolution. The statement by NEI explained the firm's opposition to the resolution as 'ultimately' a 'question of tactics and how best to achieve change for the benefit of all stakeholders.'[56] NEI asserted that 'respectful dialogue can achieve the results we are looking for, as it has since Goldcorp bought the Marlin mine and especially since the full human rights assessment was published last May.' NEI added that 'we are assured that Goldcorp is moving forward on the recommendations in the report and on its obligation to respect human rights wherever it operates.'[57] The NEI statement concludes that:

> It seems to us, as shareholders that care about human rights issues, that we should all support a strategy that is based on dialogue, mutual respect, meaningful action, and that includes the voice of governmental authorities nationally and locally. Shutting down the Marlin Mine does not support this strategy and has the potential to cause even more conflict.[58]

NEI has recently indicated that it is reconsidering the shareholder resolution tool. In its news publication of February 2011, NEI questions whether shareholder resolutions are the best tool for corporate engagement, calling it a 'blunt instrument' that can lead to 'not always the best possible result' (NEI Investments, 2011a). Positioning itself as problem solver interested in 'thinking through solutions' with corporations, NEI notes that '[n]obody likes being backed into a corner, and filing a proposal can have a chilling effect on dialogue over the longer term' (NEI Investments, 2011a). NEI also indicates that the firm is 'seeing results in many dialogues without the need to focus public attention through a shareholder resolution' (NEI Investments, 2011a).

NEI has also taken aim at shareholder activism by those outside the SRI industry. In a publication titled 'AGM season: will the real investors please stand up?,' NEI implies that some shareholders or shareholder actions are more legitimate than others (NEI Investments, 2011b). Corporate law clearly sets out eligibility criteria for the submission of shareholder proposals. Those who meet these criteria are considered 'real enough' from the perspective of the Canadian Business Corporations Act. Perhaps more disturbing is the fact that NEI seems to have forgotten the very roots of shareholder activism that underlie its own existence. This is brought to the fore particularly starkly when NEI argues that: '[a] new type of shareholder activism has become increasingly common with individual

shareholders filing proposals while seeking support from other investors. . . . the demands tend to be more closely linked to the campaigns of social and environmental groups than to the corporate objective of sustainable value creation' (NEI Investments, 2011b).

One of the two examples given by NEI was the Goldcorp shareholder resolution of 2011. NEI states that 'frivolous' shareholder resolutions 'risk doing more harm than good,' that they are unlikely 'to attract much support from institutional shareholders' and '[w]orse still, they make it more difficult for responsible investment institutions to progress soundly – argued proposals on similar issues . . .' (NEI Investments, 2011b).

The relationship Goldcorp entered into with the SRI group in 2008 has been protective of the company's interests in a number of ways. It provided immediate praise for the company's willingness to undertake the HRA at a time that the company was experiencing a lot of international criticism over the Marlin mine. It provided a response to ongoing criticism for the duration of the HRA process, even in the face of increased local tensions and conflict associated with the HRA itself. And in the aftermath of the publication of the HRA, Goldcorp's partnership with NEI has provided it an ally that is willing to speak for the company on its behalf and to actively thwart efforts by the companies' critics to further community demands. As these SRI firms aligned with Goldcorp in opposing cessation of the mine's operations, even temporarily, the SRIs found themselves, with Goldcorp, on the opposite side of recommendations made in 2010 by the ILO and the IACHR. The engaged SRI firms act out of their self-interested need to assert their ability to effect change, protect their investment, and prove to companies such as Goldcorp that they can 'manage' the shareholder activism arena. As a result, Goldcorp's interests and those of the involved SRI firms effectively converged, to the detriment of the affected communities.

9.5 CSR, SRI AND HUMAN RIGHTS

9.5.1 Limitations of CSR

The voluntary nature of CSR initiatives means that a company is empowered to shape significantly a CSR process that it initiates, or in which it volunteers to participate, in ways that may serve the company's interest, as well as those of its partners, but not those of affected community members. This empowerment is most immediately apparent in a company's choice of CSR partners. In the case of SRI firms, there is an existing 'alignment of interests' in 'the company's financial performance' making SRI firms a preferred CSR partner (Sosa, 2011).

Goldcorp's participation in drafting the initial MOU contributed to a definition of goals for the HRIA process that included the mine's continued operation, which alienated many community members who saw it as predetermining outcomes and as a setback for their expressed desire to see the mine cease operations. Similarly, Goldcorp's participation on the Steering Committee, which cost the project trust, was an outcome of the company's involvement in shaping the process. Only CSR consultants who could accept these existing conditions would be interested in taking on the HRIA contract, although not without consequences in terms of lack of credibility and trust in the affected communities.[59] Conversely, as Goldcorp was funding the process, another common feature of CSR projects, it is unlikely that consultants would have been hired with which the company was not comfortable. As a process, the HRA met the goals of the SRI group, as well as Goldcorp's short-term goals, but it did not further the goals of affected community members.

The HRIA process proved damaging for community members struggling to protect their rights as they found themselves having to devote time and energy not just in opposing the negative social and environmental impacts of the Marlin mine, but also what they called 'Goldcorp's HRIA,' which they saw as polishing the company's image, even as they continued to seek international recognition for the harm they experienced. Community opposition to the HRIA also became another source of division and strife within the communities, which was costly to some community members.

Arguably, persistent local opposition and calls for the mine to close – even at great cost to some community members – provided the SRI group leverage to bring Goldcorp to the table. However, the power imbalance in favor of Goldcorp inevitably shaped the HRIA process from its earliest conception in ways that alienated community members and constrained the SRI group from seeking outcomes sought by the affected communities, and later by international rights bodies, that would not be acceptable to the company. A glimpse into this power dynamic and the resulting 'real politik' on the part of the SRI group is evident in a written statement by the SRI group's representative on the HRIA Steering Committee. In a passionate defense of the SRI group's engagement with Goldcorp, just ahead of the withdrawal of PSAC from the HRIA, he wrote in a file called 'hitting back' that the SRI group had based its approach on the determination 'that (sic) Marlin mine is a reality that is not going to go away . . . most certainly, Goldcorp Inc. will not voluntarily close up shop and vacate the premises.'[60]

9.5.2 Constraints of SRI Firm Interventions

As noted above, SRI firms become interested in a particular mine site when a local struggle becomes high profile enough to draw sustained international attention. SRI firms note the elevation of a local-level struggle to a 'high-profile' struggle in part because they know that the implicated mining company may be feeling enough pressure to be willing to sit down with a SRI firm to discuss its options. Additionally, high-profile community conflict concerning a company the SRI firm holds is problematic for the SRI firm as it may lead to concerns being raised by the SRI firm's investors.

The primary focus and the primary interlocutors of SRI firms are not communities-in-struggle, they are: (1) corporations in which they hold shares; (2) investors in the SRI firm, in this case Canadians who want to make sure the money they have to invest does not contribute to environmental harm or abuse of human rights; and (3) other investors and organizations that may be willing to support a shareholder resolution, for example, through their votes.[61]

It is the interests of these stakeholder groups that shape shareholder proposals put forward by SRI firms. With respect to their clients, socially conscientious investors, SRI firms need to be able to argue that they are actively engaging companies and changing their behavior for the better. Otherwise, clients may demand that a SRI firm simply divest from lucrative corporations if these corporations are causing serious environmental and social harm. The argument SRI firms make for holding these corporations is that they are making them 'better.' One of the SRI firms that made up the SRI group engaged in the Goldcorp HRA used catchy phrases on its website to make this point. Under the heading 'Make money. Make a difference,' Ethical Funds described its engagement with companies as 'making good companies better' and with money as 'money is energy . . . to create change.'[62] Ethical Funds called itself 'the conduit' for 'empowering our investors' with a view to 'reshaping the way it [a company] does business.' Ethical Funds explained that: 'You can't change a company you don't own. Thus, the power of shareholder action lies not in divesting or avoiding companies with poor practices, but by helping to improve them.'[63]

In order to maintain credibility with socially conscientious investors, as agents of change through effective leverage on corporations, SRI firms must get significant shareholder support for a vote on a resolution that demands 'transformative action' from a corporation. Such a vote is typically followed by a press release from the SRI firm claiming to have brought significant pressure to bear on the company. Alternatively, the

SRI firm must persuade a corporation to take a particular course of action, thus allowing the SRI firm to withdraw its resolution before the vote and put out a press release saying the corporation has been persuaded to take the action required by the SRI firm. Each of these strategies requires a degree of cooperation from other investors (typically institutional investors) to support a resolution. These relationships necessarily command a lot of the attention of SRI firms.

SRI firms need to be able to exert enough pressure, or use the pressure created by, for example, communities-in-struggle, to bring a corporation to the table. But once there, SRI firms need to put forward a set of issues to discuss, and propose courses of action, on which the company will be willing to engage. This negotiation with companies forms the basis for carefully crafted shareholder proposals. It also sets the scene for the withdrawal of those shareholder proposals and the conditions under which this will occur.

'Successful' shareholder proposals have quite narrowly defined boundaries. They need to suggest courses of action that companies, in this case mining companies, may be willing to take in return for good press, potential risk reduction and relief, even if temporary, from pressure from communities, regulators or consumers. But shareholder resolutions also need to be seen to be pushing the company towards more responsible practices in order to satisfy the clients of SRIs and persuade others in the SRI community to vote in favor of the resolution. None of these conditions for success necessarily require a shareholder resolution to align with demands coming from the affected communities themselves. In fact, they may explain, in part, why this alignment has been missing in recent SRI firm resolutions on mining.

Shareholder proposals have commonly been put forward without anyone from the SRI firm setting foot in the community. They are typically based on desk research, information gathering from NGOs who are engaged with the communities-in-struggle, reports from SRI research firms and dialogue with the mining company in question. Recently, some SRI firms have started to make limited field visits, but these have not yet changed the essential nature of the resolutions put forward, or the lack of convergence with community goals of some of these resolutions.

This lack of convergence between the 'asks' of shareholder resolutions and the demands from mining-affected communities struggling to have their human rights respected is particularly marked in cases in which SRI firms develop shareholder resolutions that relate to conflicts in which community members have clearly articulated a demand that a company not mine, cease to mine or not expand mining in a particular area. This is, of course, the case in the Marlin mine struggle and was also the case in

similar shareholder resolutions regarding Barrick Gold's planned Pascua Lama project in Chile and Alcan's planned Utkal project in India.[64] From the perspective of the communities concerned, these resolutions did not reflect their demands and were harmful to their struggle.[65]

9.6 CONCLUSIONS

Professionalization of shareholder activism and its evolution into a lucrative SRI industry in Canada[66] has coincided with greater scrutiny over the human rights impacts of the SRI industry itself. Ruggie, in his 2008 report, defined the corporate 'duty to respect' human rights as the obligation to 'do no harm.' In recent years, community members affected by Canadian mining companies in India, Chile and Guatemala have complained about activities undertaken by these mining companies in order to comply with requests in shareholder resolutions from Canadian SRI firms.

In these cases, exemplified by the 2008 resolution regarding Goldcorp's Marlin mine, local opposition was based on the fact that the SRI firm's resolutions did not reflect community members' stated positions and goals. Furthermore these resolutions undermined community agency in one or more of the following ways: (a) by providing the company with immediate praise and good press for dialoguing with the SRI firms and agreeing to carry out activities requested by the firms while nothing had changed for the affected communities, effectively undermining their efforts to communicate the ongoing harm they were experiencing; (b) by shifting the focus of home and host country decision makers and media away from community actions, messages and goals to those of the SRIs and the companies with which they were engaging – sometimes for years; and (c) by asking the companies to undertake activities that were seen to be duplicating or directly undermining work the community itself had already done, or was doing, on its own or with experts of their choosing.

In addition to these concerns, the Goldcorp case highlights the fact that in partnering with a company in a particular course of action, a SRI firm's interests may become further aligned with those of the company against its critics. This became evident at Goldcorp's AGM in 2011 when the SRI firm Northwest and Ethical Investments L.P. (NEI) aligned itself with Goldcorp in opposition to a resolution on the Marlin mine by individual shareholders. NEI spoke against the resolution at the shareholder meeting, even though it reflected community demands.

In analysing why some shareholder resolutions by SRI firms have been met with dismay by community members in conflict with Canadian mining companies, this chapter argues that SRI firms may use high-profile

community struggles to encourage corporations to enter into dialogue with them. In doing so, SRI firms in effect 'occupy a space' created by the conflict generated by community struggle (Coumans, 2011). However, in occupying that space, they present themselves to companies as 'problem solvers' and 'risk mitigators.'

Furthermore, the primary focus and the primary interlocutors of SRI firms are not communities-in-struggle against a mine, they are: (1) the corporations in which they hold shares; (2) investors in the SRI firm, in this case Canadians who want to make a return on their investment but also want to be assured that the money they have to invest does not contribute to environmental harm or abuse of human rights; and (3) other investors and organizations that may be willing to support a shareholder resolution, for example, through their votes. It is the interests of these stakeholder groups that shape shareholder proposals put forward by SRI firms. For these reasons, when a mine project is one that community members are trying to stop from going ahead, or stop from continuing or expanding, it is highly unlikely that a shareholder resolution or any other engagement by an SRI with a company on that project will reflect and advance community goals.

As actors in the CSR arena, SRI firms are subject to some of the same restrictions as other CSR actors that engage or partner with mining companies. As an inherently voluntary relationship with significant power differential, mining companies have considerable influence over the outcomes of these engagements. When a mining company is in conflict with a particular community, CSR engagements or partnerships with that company have considerable potential to negatively impact community members' right to self-determination, or agency, in their struggle to protect values of critical importance to them (Coumans, 2011).

Given the history of shareholder resolutions by SRI's that have been opposed by communities in conflict over a mining project, and the analysis provided in this chapter, the following recommendations intend to contribute to assuring that SRI firm's engagements with mining companies embroiled in community conflict do not harm community agency.

While communities are not primary interlocutors of SRI firms, it is important that SRI firms understand the history of struggle in a community and the stated aims of significant segments of a community to assure that they do not propose courses of action, through resolutions or in dialogue with the company, that may undermine community agency in pursuit of their own goals. If a shareholder resolution calls for a company to undertake activities (such as a HRIA) that may directly affect a community's struggle, or requires community engagement, or will extract data from a community, this should not be done without the FPIC of the com-

munity. NEI has published a brief encouraging extractive companies to adopt the principle of FPIC in their operations.[67] It is important that NEI and other SRIs recognize themselves as corporate actors that also have the capacity to negatively affect communities through their engagements. The principle of FPIC should then also apply to their own interventions.

Finally, SRI firms should avoid shareholder resolutions aimed at 'problem solving' or 'mitigating risk' at a project site if a significant segment of the community has expressed a clear opinion against a project. In other words, SRI firms need to recognize that if a community conflict around a mine is focused on stopping operations from starting or continuing, it is unlikely that the SRI firm's resolution can be aligned with community objectives.

NOTES

* Earlier versions of this chapter were presented at a meeting of the Canadian Business Ethics Research Network (CBERN) on Responsible Investment, Ethics and the Global Financial Crisis in May 2009, at the Expert Meeting on Corporate Law and Human Rights held in conjunction with the work of the Special Representative of the UN Secretary-General on Business and Human Rights, John Ruggie, in 5–6 November 2009, at CBERN's Human Rights and Business Symposium in February 2010 and at a symposium on Socially Responsible Investment and Canadian Extractive Industries hosted by the University of British Columbia's Law Faculty in September 2011. The author thanks the participants of these symposiums for their feedback, in particular Wesley Cragg, Aaron Dhir (2012) and Sara Seck, as well as colleague Jennifer Moore for her careful review of the Goldcorp case study. A different version of this chapter appeared in the *Journal of Sustainable Finance & Investment* (Coumans 2012).

1. The SRI group was comprised of: The Public Service Alliance of Canada Staff Pension Fund (an institutional investor); the Ethical Funds Company (now Northwest and Ethical Investments L.P. (NEI)) (a socially responsible investment firm that markets screened mutual funds and engages the companies it holds regarding their social, environmental and governance risks); the First Swedish National Pension Fund and the Fourth Swedish National Pension Fund; Shareholder Association for Research and Education (SHARE) (an organization that consults and advises shareholders on responsible investing and corporate engagement); and GES Investment Services (an organization that consults and advises shareholders on responsible investing and corporate engagement).
2. 'Investors spur Goldcorp to address human rights in Guatemala,' News release, 24 April 2008, http://hria-guatemala.com/en/docs/Shareholders/Joint_Release_on_Goldcorp_080423.pdf (accessed 29 November 2011).
3. 'Statement from the Public Service Alliance of Canada on the Human Rights Impact Assessment with Goldcorp,' 18 March 2009.
4. SHARE was involved in the HRIA MOU as advisor to the Public Service Alliance of Canada, an institutional investor. When the Public Service Alliance of Canada withdrew, SHARE's connection to the MOU was severed.
5. HRIA Steering Committee Update, May 2009, http://hria-guatemala.com/en/docs/Impact%20Assessment/Steering_Committee_Update_May_2009_05_27_09.pdf (accessed 29 November 2011)..
6. See update on the HRIA process at http://www.hria-guatemala.com/en/docs/

Impact%20Assessment/Steering_Committee_Update_May_2009_05_27_09.pdf (accessed 29 November 2011)..

7. HRIA Implementation Initiated, 2 December 2008, http://www.hria-guatemala.com/en/docs/Steering%20Committee/Steering_Committee_Release_12_02_08.pdf (accessed 29 November 2011)..
8. For the purposes of this chapter, 'SRI firms' are companies that sell investment products screened on the basis of environmental social and governance (ESG) criteria and engage companies they hold on this basis (such as the Ethical Funds Company), as well as firms that provide research, advice and proxy voting services (such as SHARE), and firms that provide research and advice based on ESG evaluations of companies (such as Jantzi Sustainalytics).
9. The single most significant public recognition by the global mining industry of the social challenges it faces came through the two-year international industry-led Mining, Minerals and Sustainable Development process that culminated in a final report (2002).
10. For information on the Ok Tedi case of Papua New Guinea villagers against BHP, see Kirsch (1997). For information on the case of the Philippine Island of Marinduque against Barrick Gold, see http://www.diamondmccarthy.com. For information on the case of Ecuadorian villagers against Copper Mesa, see http://www.ramirezversuscoppermesa.com (accessed 29 November 2011). United Nations (UN) treaty bodies are an example of quasi-legal fora where mining cases are being brought.
11. Positions taken against regulation and against legal reform by mining industry associations during National CSR Roundtables, and in response to Bill C-300, support this line of argument.
12. These CSR weaknesses with respect to mining are observations of the author. See Coumans (2010).
13. For an important recent publication that starts to address this issue, see Welker (2009).
14. This section of the case study is by no means comprehensive. For more detailed accounts the reader is directed to source materials for this section, particularly OECD Request for Review (2009), MiningWatch Canada (2007), Imai et al. (2007) and Compliance Advisor Ombudsmen (2005). See also Stevens (2009).
15. In 2008, the UN signed an agreement with the Government of Guatemala to create the International Commission Against Impunity in Guatemala (CICIG) in order to assist in the investigation and prosecution of organized crime that is tied to the failure of the justice system to enforce the rule of law and protect the rights of its citizens, especially as it relates to human rights defenders (OECD Request for Review, 2009). In June 2010, the first head of the Commission, Carlos Castresana, quit citing lack of adoption of the Commission's recommendations by the Colom administration and the appointment of an attorney general with alleged ties to organized crime.
16. *Agreement on the Identity and Rights of Indigenous Peoples*, 31 March 1995, Guat.-URNG, UN Doc.A/49/882--S/1995/256 (1997), 36 I.L.M. 285, online: United States Institute for Peace, http://www.usip.org/library/pa/guatemala/guat_950331.html.
17. UN Human Rights Council, Working Group on the Universal Periodic Review, Compilation Prepared by the Office of the High Commissioner for Human Rights, In Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1, ¶6, 28, UN Doc. A/HRC/WG.6/2/GTM/2, 10 April 2008) (hereinafter UPR Report). Fn. 1, p. 3 in OECD Request for Review (2009).
18. A report on the economic benefits and environmental costs of the Marlin mine concludes that 'when juxtaposed against the long-term and uncertain environmental risk, the economic benefits of the mine to Guatemala and especially to local communities under a business-as-usual scenario are meagre and short-lived' (Zarsky and Stanley, 2011). An important Master's thesis by Pedersen (2011) discusses the Marlin mine struggle in the context of an examination of Mayan perspectives of development.
19. The Marlin project received a $45 million dollar International Finance Corporation (IFC) loan from the World Bank in 2004.

20. The question put out to the communities was: 'Are you in favour of mining on the territory of the Sipakapense people?' (Imai et al., 2007, p.113).
21. See in particular ILO 169 Articles 6, 15, 17, 22, 27, 28 on the right to be *'consulted'*; Article 7 on the right of indigenous peoples to *'decide their own priorities';* Article 6 on the obligation to seek *'agreement or consent'* from indigenous peoples; and Article 16 on the obligation to seek *'free and informed consent'* from indigenous people.
22. The number of people who participated in the referendum was 2502. In total, 2426 persons voted against mining, 35 persons voting for mining, eight ballots were illegible, one was blank and 32 abstained (Imai et al., 2007, p. 114).
23. FREDEMI is a coalition of four community organizations in the municipality of SMI. The OECD Request for Review was prepared on behalf of FREDEMI by The Center for International Environmental Law in Washington, DC. For a copy of the complaint, see http://www.ciel.org/Publications/FREDEMI_SpecificInstanceComplaint_December%202009.pdf (accessed 29 November 2011).
24. On 3 May 2011 the Canadian NCP issued a final statement and closed the file, which did not progress past the Initial Assessment phase. The NCP offered its 'good offices' to facilitate a dialogue between the parties, but as this was explicitly ruled out in the Request for Review due to 'lack of trust' between the parties, and as the Canadian NCP, unlike those in other countries, does not investigate cases nor make determinations of fact about whether the OECD Guidelines have been breached, the case did not proceed. For the NCP's final statement, see http://www.miningwatch.ca/sites/miningwatch.ca/files/Canadian%20NCP%20Final%20Statement,%20May%202011.pdf (accessed 29 November 2011).
25. International Labour Conference, 99th Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2010), http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282010-99-1A%29.pdf), p. 770 (accessed 29 November 2011).
26. The IACHR noted that the petitioners had raised the fact that the mine was granted a concession and mining rights without the 'prior, complete, free and informed consultation' of the affected communities and 'has produced grave consequences for the life, personal integrity, environment, and property of the affected indigenous people . . . .' (IACHR, 2010); PM 260-07 Communities of the Maya People (Sipakenpense and Mam) of the Sipacapa and San Miguel Ixtahuacan Municipalities in the Department of San Marcos, Guatemala, http://www.cidh.oas.org/medidas/2010.eng.htm (accessed 29 November 2011).
27. A scientific study by Physicians for Human Rights (2010) found elevated levels of metal levels in water, soil and humans in the area affected by the mine and recommended a 'rigorous human epidemiological study' for the populations near the mine.
28. For more information, see http://www.miningwatch.ca/article/what-you-may-not-know-about-goldcorps-marlin-mine-guatemala and http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282010-99-1A%29.pdf (accessed 29 November 2011). On 30 March 2011, 15 members of the US Congress wrote to the President of Guatemala to 'express serious concerns about the Marlin gold mine in San Miguel Ixtahuacan, operated by the Caandian company Goldcorp' urging him to 'fully implement the May 2010 IACHR ruling and your government's subsequent decision to halt operations at the Marlin mine.'
29. One such scientist is Robert Moran (2004) who specializes in issues related to environmental assessment and impacts from mining on water.
30. International Cyanide Management Code; Voluntary Principles on Security and Human Rights (Goldcorp is not a member); Global Reporting Initiative.
31. The members of this delegation included the following shareholders: The Ethical Funds Company; Public Service Alliance of Canada (PSAC) Staff Pension Fund; The Swedish National Pension System's Ethical Council. The delegation also included shareholder representatives and research firms: SHARE; Jantzi Research (now Jantzi Sustainalytics); GES Investment Services (Sweden) and PSAC Humanity Fund.

32. Ethical Funds merged with Northwest Funds to create Northwest and Ethical Investments L.P. (NEI) on 26 October 2009.
33. A copy of the shareholder resolution used to be available on the Ethical Funds website but following merger with the NEI Investments' website (22 November 2010) past resolutions no longer appear to be available. The resolution is also not available on the website of the HRIA, http://www.hria-guatemala.com/en/default.htm (accessed 29 November 2011).
34. Corporations prefer not to circulate shareholder resolutions that call attention to shortcomings in their operations as these affect corporate reputation and may signal risk to investors, analysts and brokers.
35. See http://www.jantziresearch.com/jantzi-research-recommends-goldcorp-ineligible-sri-portfolios (accessed 29 November 2011).
36. See http://www.jantziresearch.com/jantzi-research-recommends-goldcorp-ineligible-sri-portfolios (accessed 29 November 2011).
37. See http://www.jantziresearch.com/jantzi-research-recommends-goldcorp-ineligible-sri-portfolios. In 2010, this shareholder again asked the company to 'create and adopt . . . a corporate policy on the right to free, prior and informed consent (FPIC) for its operations impacting indigenous communities and all communities dependent on natural resources for survival.' See Maritimes-Guatemala Breaking the Silence Network, http://arsncanada.blogspot.com/2010/03/resolution-submitted-to-goldcorps.html (accessed 29 November 2011). Following sustained protest, the resolution was circulated in 2010, albeit without the 'whereas' statement that provided the rationale for the resolution. The resolution won 10 percent of the vote.
38. See http://www.jantziresearch.com/jantzi-research-recommends-goldcorp-ineligible-sri-portfolios (accessed 29 November 2011).
39. See http://www.rightsaction.org/artciles/Goldcorp_Open%20Letter_050108.html (accessed 29 November 2011).
40. For more detail regarding the concerns MiningWatch Canada raised at this meeting, see MiningWatch's subsequent letters to the SRI group of 4 December 2008 and 16 March 2009, http://www.miningwatch.ca/sites/miningwatch.ca/files/sites/miningwatch/files/Shareholder_ltr_2008-12-04.pdf (accessed 29 November 2011).
41. For more detail regarding the concerns MiningWatch Canada raised at this meeting, see MiningWatch's subsequent letters to the SRI group of 4 December 2008 and 16 March 2009, http://www.miningwatch.ca/letter-shareholder-group-re-human-rights-impact-assessment-goldcorps-guatemala-mine (accessed 29 November 2011).
42. In March 2009, the MOU was revised to better reflect the objective of the HRIA as a means to determine the human rights impacts of the Marlin mine and on the basis of findings of the HRIA to provide recommendations to Goldcorp. See http://hria-guatemala.com/en/docs/Impact%20Assessment/Revision_to_RFP_objectives.pdf (accessed 29 November 2011).
43. The Guatemalan representative was Manfredo Marroquin, Executive Director of Accion Ciudadana.
44. As noted earlier in this chapter, BTS itself presented Goldcorp with a shareholder resolution in 2008 with respect to the Marlin mine, which Goldcorp refused to circulate to its shareholders. This resolution called on the company 'to halt any plans to expand the [Marlin] mine and/or acquire new land in the Municipalities of Sipacapa and San Miguel Ixtahuacan without the free, prior and informed consent of the affected communities.' This resolution clearly does reflect demands coming from the communities themselves.
45. September 4 2008, San Miguel Ixtahuacán, San Marcos, Guatemala. Community Response to the 'Human Rights Impact Assessment' of Goldcorp Inc's Marlin Mine Project in San Miguel Ixtahuacan, Guatemala By ADISMI, Parroquía de San Miguel Ixtahuacán, the Alcaldía del Pueblo and the Mam Maya communities in resistance (Ágel, San José Ixcaniche, Salitre, trans. Rosalind Gill).
46. The author is aware of other academics and human rights experts who were asked to

bid on the RFP and declined while providing the SRI group feedback on their concerns with the process. It would have aided transparency if the SRI group had made public how many bids it had actively solicited on the HRIA contract and how many had been turned down expressing concern about the process itself.

47. The HRIA website's May 2009 update only mentions that Mr Eduardo Bryce 'ceased to be involved in the project.' See http://www.hria-guatemala.com/en/docs/Impact%20Assessment/Steering_Committee_Update_May_2009_05_27_09.pdf (accessed 29 November 2011).
48. The HRIA website states that PSAC 'did not discuss with the Steering Committee any matter regarding the Assessment prior to the PSAC making its decision,' http://www.hria-guatemala.com/en/docs/Impact%20Assessment/Steering_Committee_Update_May_2009_05_27_09.pdf (accessed 29 November 2011). The author is of the view, based on her personal involvement in this case, that this statement is inaccurate.
49. Steering Committee Update, May 2009.
50. Goldcorp released a response to the report on 29 June 2010, http://www.goldcorp.com/operations/marlin/hria/ (accessed 29 November 2011).
51. Also in May 2010, the Committee on the Elimination of Racial Discrimination (CERD) issued a country report on Guatemala that said that 'the Committee, is deeply concerned about the growing tension among indigenous peoples occasioned by the exploitation of natural resources in the country . . . the State party continues to allow indigenous peoples to be dispossessed of land that has historically belonged to them, even though title to the property in question has been duly recorded in the appropriate public registries, and that indigenous peoples' right to be consulted prior to the exploitation of natural resources located in their territories is not fully respected in practice' (CERD, 2010, p. 4).
52. For press release, see http://www.miningwatch.ca/news/shareholders-announce-resolution-suspend-controversial-goldcorp-mine-guatemala. For resolution, see http://www.miningwatch.ca/article/goldcorp-shareholder-resolution-asks-suspension-marlin-mine-guatemala (accessed 29 November 2011).
53. The requests of the 2011 shareholder resolution were: pursuant to Goldcorp's own HRA, the company halt all land acquisitions, exploration activities, mine expansion projects or conversion of exploration to exploitation licenses, until it complies with international law; the Board of Directors require that Goldcorp's HRA be made easily available on Goldcorp's main website; the Board of Directors announce its commitment to voluntarily implement recommendations of international human rights bodies; the company suspends operations at the Marlin mine in accordance with the recommendations of IACHR. The resolution received approximately 6 percent of the shareholder vote.
54. In April 2011, Goldcorp's Board of Directors approved new human rights and CSR policies. For a critique of these policies by the International Human Rights Program of the Faculty of Law at the University of Toronto, see Mandane (2011), http://www.utorontoihrp.com/index.php/resources/reports (accessed 29 November 2011).
55. For Goldcorp's advice to shareholders, see http://www.goldcorp.com/_resources/financials/circular-apr-11.pdf (accessed 29 November 2011).
56. See http://www.neiinvestments.com/Pages/ESGServices/EngagingCompanies/ProxyVoting.aspx (accessed 29 November 2011). Also, e-mail from Jennifer Coulson of NEI to sio-professionals list serve of 19 May 2011.
57. See http://www.neiinvestments.com/Pages/ESGServices/EngagingCompanies/ProxyVoting.aspx (accessed 29 November 2011). Also, e-mail from Jennifer Coulson of NEI to sio-professionals list serve of 19 May 2011.
58. See http://www.neiinvestments.com/Pages/ESGServices/EngagingCompanies/ProxyVoting.aspx (accessed 29 November 2011). Also, e-mail from Jennifer Coulson of NEI to sio-professionals list serve of 19 May 2011.
59. The consultants who did take the contract clearly recognized the liability posed by the

MOU objectives, which had already come under criticism, and were later successful in having these objectives changed.

60. *A Summary of Issues Relevant to the Human Rights Impact Assessment (HRIA) of Marlin Mine, Guatemala* (February 2009, p. 6), http://cule.ca/wp-content/uploads/2009/02/hitting-back-feb-09-revised-pdf.pdf (accessed 29 November 2011).
61. A 'significant' number of votes is usually considered to be 20 percent or more, as it is thought that this level of shareholder support will put enough pressure on a company to assure further dialogue on the investors' concerns.
62. Ethical Funds merged with Northwest Funds to create NEI Investments on 26 October 2009. Quotes in this chapter from the Ethical Funds website were accessed before the site was taken down on 22 November 2010.
63. See The Ethical Funds Company, https://www.ethicalfunds.com/en/Investor/ChangingTheWorld/HowWeWork/EngagingCompanies/Pages/ShareholderActionProgram.aspx (accessed 13 July 2008).
64. See 2006 shareholder resolutions on Alcan and Barrick, https://www.ethicalfunds.com/en/Investor/ChangingTheWorld/DifferencesWeMake/ (accessed 26 June 2009).
65. NEI has prepared a Code of Conduct for its engagement with external parties. See http://www.neiinvestments.com/NEIFiles/PDFs/5.1.2%20Accountability/3%20SI_Program_Code_of_Conduct%203.pdf . While undated, the file name would suggest it was developed in 2009, as critiques over the Goldcorp HRIA were being publicized and raised with the SRI group. This Code of Conduct addresses key concerns raised with the SRI group and highlighted in this chapter. However, the code is drafted in such a way that it would not require that NEI withdraw from or abandon activities that 'may be in direct conflict' with the 'objectives' of 'those affected' by their 'Program Implementation,' only that NEI will 'remain open to a dialogue to determine if or how our strategies may be reconciled.' The code did not cause NEI to withdraw from further involvement in the HRIA, as the Public Service Alliance of Canada did in 2009.
66. By the end of 2008, responsible investments in Canada had grown to over CAN$609 billion (Sosa, 2011).
67. NEI has endorsed FPIC as a principle to be followed by extractive companies, see http://www.neiinvestments.com/neifiles/PDFs/5.4%20Research/FPIC.pdf. This chapter argues that FPIC should also apply to SRI firms.

REFERENCES

Anaya, J. (2010). 'Observations about the situation of the rights of indigenous peoples in Guatemala in relation to extractive projects, and other forms of projects, on their traditional lands', 4 March, available at http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions (accessed 29 November 2011).

CERD (Committee on the Elimination of Racial Discrimination) (2010). 'Consideration of reports submitted by States parties under Article 9 of the Convention: Guatemala. May 19', available at http://www.cao-ombudsman.org/pdfs/CAO-Marlin-assessment-English-7Sep05.pdf (accessed 29 November 2011).

Compliance Advisor Ombudsman (2005). Assessment of a complaint submitted to CAO in relation to the Marlin Mining Project in Guatemala', 7 September, available at http://www.cao-ombudsman.org/pdfs/CAO-Marlin-assessment-English-7Sep05.pdf (accessed 29 November 2011).

Coumans, C. (2010). 'Alternative accountability mechanisms and mining: the

problems of effective impunity, human rights, and agency', *Canadian Journal of Development Studies*, **30**(1–2), 27–48.
Coumans, C. (2011). 'Occupying spaces created by conflict: anthropologists, development NGOs, responsible investment, and mining', in J.P. Damani, M. Welker and R. Hardin (eds), *Current Anthropology*, *Corporate Lives: New Perspectives on the Social Life of the Corporate Form*, Suppl. to April 2011, **52**(S3), S29–S43.
Coumans, C. (2012). 'Mining, human rights and the socially responsible investment industry: considering community opposition to shareholder resolutions and implications of collaboration', *Journal of Sustainable Finance and Investment* (Special Edition 'SRI and Extractive Industries') **22**(11), 44–64.
Dhir, A. (2012). 'Shareholder engagement in the embedded business corporation: investment activism, human rights, and TWAIL discourse', *Business Ethics Quarterly*, **22**(1), 99–118.
Goldcorp (2011). 'Second update to the Marlin Mine Human Rights Assessment Report, April 29, 2011', http://www.goldcorp.com/Theme/GoldCorp/files/docs_operations/Goldcorp_Response_to_Marlin_Mine_HRA_Report_Update_04_29_2011_English.pdf (accessed 29 November 2011).
Government of Canada (2009). 'Building the Canadian advantage: a Corporate Social Responsibility (CSR) strategy for the Canadian international extractive sector', available at http://www.international.gc.ca/trade.../csr-strategy-rse-stategie.aspx (accessed 29 November 2011).
HRA (Human Rights Assessment) (2010). 'Human Rights Assessment of Goldcorp's Marlin Mine', Commissioned on behalf of Goldcorp by the Steering Committee for the Human Rights Impact Assessment of the Marlin Mine, On Common Ground Consultants Inc., Vancouver, May, available at http://www.hria-guatemala.com/en/MarlinHumanRights.htm (accessed 29 November 2011).
IACHR (Inter-American Commission on Human Rights) (2010). 'Precautionary measures granted by the Commission during 2010', available at http://www.cidh.oas/medidas/2010.eng.htm (accessed 29 November 2011).
ILO (International Labour Organization) (2009). 'Report of the Committee of Experts on the Application of Conventions and Recommendations', 98th Session, Geneva, available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_103484.pdf (accessed 29 November 2011).
Imai, S., L. Mehranvar and J. Sander (2007). 'Breaching indigenous law: Canadian mining in Guatemala', *Indigenous Law Journal*, **6**(1), 101–39.
Kirsch, S. (1997). 'Is Ok Tedi a precedent? Implications in the settlement, in G. Banks and C. Ballard (eds), *The Ok Tedi Settlement: Issues, Outcomes and Implications*, Canberra: National Centre for Development Studies and Resource Management in Asia-Pacific, Australia National University.
Law, W. (2009). 'Canada goldmine worries grow', BBC Radio 4, 'Crossing Continents', 30 March, available at http://news.bbc.co.uk/2/hi/americas/7968888.stm (accessed 29 November 2011).
Mandane, R. (2011). 'actions speak louder than words: a critical analysis of Goldcorps's human rights and corporate social responsibility policies', International Human Rights Program, Faculty of Law, University of Toronto, 11 May.
McKay, J. (2009). 'Bill C-300 an Act respecting corporate accountability for

the activities of mining, oil or gas in developing countries', available at http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4 (accessed 29 November 2011).

Mining, Minerals and Sustainable Development (2002). 'Breaking new ground: mining, minerals and sustainable development', Available at http://www.idrc.ca/en/ev-86493-201-1-DO_TOPIC.html.

MiningWatch Canada (2007). 'Goldcorp analysis', September, available at http://www.miningwatch.ca/sites/miningwatch.ca/files/Goldcorp_Analysis_Sept_2007.pdf (accessed 29 November 2011).

Moran, R. (2004). 'New country, same story: review of the Glamis Gold Marlin Project EIA, Guatemala', February, available at http://www.miningwatch.ca/sites/miningwatch.ca/files/Moran_Marlin_rpt_Feb_2005.pdf (accessed 29 November 2011).

NEI Investments (2011a). 'Corporate engagement: getting to "yes"', *ESG@NEI*, February, available at http://www.neiinvestments.com/NEIFiles/PDFs/5.1.4%20Sustainable%20Investing%20Update/ESG%20Newsletter%202011/ESG_02_11_En_web.html (accessed 29 November 2011).

NEI Investments (2011b). 'AGM season: will the real investors please stand up?', *ESG@NEI*, June, available at http://www.neiinvestments.com/NEIFiles/PDFs/5.1.4%20Sustainable%20Investing%20Update/ESG%20Newsletter%202011/ESG_06_11_En_web.html (accessed 29 November 2011).

OECD Request for Review (2009). 'Specific instance complaint submitted to the Canadian National Contact Point pursuant to the OECD Guidelines for Multinational Enterprises concerning: the operations of Goldcorp Inc. at the Marlin Mine in the indigenous community of San Miguel Ixtahuacán', 9 December, Guatemala, submitted by Frente de Defensa San Miguelense (FREDEMI, The Front in Defense of San Miguel Ixtahuacán), available at http://www.ciel.org/Publications/FREDEMI_SpecificInstanceComplaint_December%202009.pdf (accessed 29 November 2011).

Pedersen, A. (2011). 'Amplifying voices of development: insights from indigenous Maya leaders of El Quiche, Guatemala', Thesis submitted in partial fulfillment of the requirements for the degree of Master of Arts in International Studies, University of Northern British Columbia, April.

Physicians for Human Rights (2010). 'Toxic metals and indigenous peoples near the Marlin Mine in Western Guatemala: potential exposures and impacts on health', May.

Ruggie, J. (2008). *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5. 7, April, available at http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf (accessed 29 November 2011).

SCFAIT (Parliamentary Standing Committee on Foreign Affairs and International Trade) (2005). *Mining in Developing Countries – Corporate Social Responsibility*, 38th Parliament, 1st Session, Fourteenth Report, June, available at http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=8979&Lang=1&SourceId=178650 (accessed 29 November 2011)..

Sosa, I. (2011). 'Responsible investment case studies: Newmont and Goldcorp', in J. Sagebien and N. Lindsay (eds), *Governance Ecosystems: CSR in the Latin American Mining Sector*, UK: Palgrave Macmillan.

Stevens, J. (2009). 'Mining for solutions, extracting discord: corporate social responsibility and Canadian mining companies in Latin America', Research project submitted in partial fulfillment of the requirements for the degree of

Master of International Studies, School of International Studies, Simon Fraser University, British Columbia.
Welker, M. (2009). '"Corporate security begins in the community": mining, the corporate social responsibility industry, and environmental advocacy in Indonesia', *Cultural Anthropology*, **24**(1), 142–79.
World Bank Group (2003). *Striking a Better Balance: The World Bank Group and the Extractive Industries, Final Report of the Extractive Industries* Review, Vol 1, December.
Zarsky, L. and L. Stanley (2011). 'Searching for gold in the highlands of Guatemala: economic benefits and environmental risks of the Marlin Mine', Global Development and Environment Institute, Tufts University, September, available at http://ase.tufts.edu/gdae/policy_research/marlinemine.pdf (accessed 29 November 2011).

10. To ban or not to ban: direct-to-consumer advertising and human rights analysis*

Alex Wellington

10.1 INTRODUCTION

The topic of direct-to-consumer advertising (DTCA) of pharmaceuticals has provoked a flurry of discussion and prompted heated policy debates, appearing prominently and frequently in the pages of medical journals and newspapers around the globe. The Australian Medical Association (2007) defines DTCA as follows: advertising directed at the general public that may include any statement, pictorial representation or design, intended directly or indirectly only to promote the use of therapeutic goods as well as medical and health-related services.

At present, all of the Organization of Economic Cooperation and Development (OECD) countries, other than New Zealand and the United States, have in place prohibitions against what are known as 'product claim' advertisements, that is, ones that refer to a condition to be treated and a prescription drug treatment by name together, and make claims about the effectiveness of the named drug for that condition. Such ads must either include or make reference to sources which set out risk information.

There are two other types of direct-to-consumer ads: one referred to as 'reminder' ads and the other as 'help-seeking ads'. Reminder ads provide only brand identification without mentioning conditions or diseases the product could be used to treat. Help-seeking or disease awareness ads, otherwise known as 'Ask Your Doctor' ads, typically recommend that people who suffer from a condition or disease consult their physicians to obtain further information about it. Consumers may also be invited to seek out information about a disease from other sources, and those may contain information about individual branded products. In Australia and Canada, for instance, the second and third types of ads are legally permitted, whereas the first type (product claims ads) are legally prohibited

under the Therapeutic Goods Act in Australia and the Food and Drugs Act and accompanying regulations in Canada.

Persuasive speech directed at matters of health and wellness is not problematic per se. Health-related public service announcements, for instance, can be highly effective tools for health promotion. However, persuasive speech that is funded and disseminated by for-profit companies has generated significant public policy debate around the globe. The range of promotional activities undertaken by pharmaceutical companies includes those directed at physicians, such as detailing (in-person visits by pharmaceutical sales representatives), advertising in medical journals and continuing medical education events as well as those directed at consumers through print, broadcast and online advertising. The crucial ethical issue is whether providing pharmaceutical companies with marketing opportunities targeting the ultimate consumers, that is, patients, is more likely to empower patients or to endanger them.

Patient autonomy is a core value underpinning contemporary medical ethics, as articulated in professional codes of ethics for health care providers and in seminal court decisions (Beauchamp and Childress, 2008; Faden and Beauchamp, 1995). Patient autonomy is a subset of the value of respect for persons (Beauchamp and Childress, 2008). Autonomy is often defined in contrast with paternalism; the latter is characterized as interference with the liberty or autonomy of a person in order to benefit that person directly and/ or others indirectly (Dworkin, 1972). There has been in the past several decades a shift in medical ethics from paternalism to an emphasis on patient autonomy. The full implications of the shift from paternalism to autonomy in the health care context are matters of considerable ethical controversy and DTCA presents a striking example of the complexities.

For patients and consumers to make autonomous, and thus fully informed choices regarding their health care, they need to be able to access reliable, and especially balanced, information that is readily understood (Zachry and Ginsburg, 2001). The Australian Medical Association has issued a Position Statement on DTCA that explicitly rejects the prospect of DTCA for prescription medicines in that country. That Position Statement implies that informed consent would be compromised by the influence of commercial considerations on the communication of health information, and a ban on DTCA is supported for that reason. Yet, there are competing concerns that blanket prohibitions of commercially motivated persuasive speech venture too far down the path of paternalism (Gold, 2003; Lau, 2005: Shuchman, 2007). This particular claim has been the focus of sustained debate in Canada, New Zealand and the United States (Gold, 2003; Lau, 2005: Shuchman, 2007); that debate is discussed

below in Section 10.7. Further contributions to those debates can be made by expanding the focus beyond freedom of commercial expression and incorporating a focus on the human right to health.

The most commonly invoked policy options in the context of DTCA are either (1) an outright ban or (2) strengthening regulatory oversight in combination with voluntary guidelines. Other measures that can supplement and strengthen the benefits of regulatory oversight include public education campaigns (along the lines of public service announcements), media literacy training and access to alternative, non-commercially oriented, sources of information. Whether or not DTCA is allowed, prescription drugs remain subject to government regulation to ensure that they meet requisite standards of safety as well as efficacy. A human rights analysis can help to assess the relative merits and demerits of the different policy options, with particular salience being granted to issues respecting human rights. As elaborated below, application of a human rights analysis to the topic of DTCA lends support to the position that, where a DTCA ban exists, it should not be dissolved unless and until other policy measures (as specified below in Section 10.8) are instituted. Where a ban does not exist, regulatory oversight should be strengthened in combination with other policy measures, in order to ensure the fulfilment of patient autonomy, promotion of health and avoidance of harm.

Human rights are not the only measure of the desirability of policy options, and human rights impact analysis will provide only a partial picture of the policy landscape. Other treatments of the broader economic context within which DTCA is situated are needed, and policy scholars, and governments in Canada, New Zealand and the United States have been pursuing assessments of the economic and social costs and benefits of DTCA (Calfee, 2002, 2003; Health Canada, 2003; Kaiser Family Foundation, 2001; Mintzes, 2006; New Zealand Ministry of Health, 2000; Toop et al., 2003; US General Accountability Office, 2002, 2006). An expert advisory committee in Australia, the Pharmaceutical Health and Rational Use of Medicines (PHARM) Committee, has specifically addressed the topic of DTCA in the Australian context (Australian Government Department of Health and Ageing, 20004). Human rights are among the most widely accepted of international norms, and considered to be of paramount importance for deepening democracy, and ensuring good governance (Beetham, 1999; Donnelly, 2003). It is critical to assess what the human rights implications are of banning or not banning DTCA, and to do so with extensive scrutiny of a diverse selection of human rights.

10.2 SITUATING/CONTEXTUALIZING HUMAN RIGHTS ANALYSIS

Debates over policy options for DTCA involve interaction between human rights claims of natural and artificial persons, at the intersection of moral and legal rights. Corporations have moral and legal obligations not to harm consumers by their products. Governments have moral and legal obligations not to interfere with the freedom of expression of their citizens, and to take positive measures to ensure the realization of the right to health of their citizens. The present discussion, due to space limitations and in order to maintain fidelity to the intended scope, can only provide a very brief survey of the most salient aspects of what is an enormous literature on theories of rights, generally, and human rights, specifically, as the context for a human rights analysis.

Concepts of rights are prominent and influential within accounts of justified morality, and within both domestic and international law (Nickel, 2007). Governing rules of legal systems and moral principles recognize rights as high priority norms (Campbell, 2004; Feinberg, 1970). Moral rights provide the basis on which moral agents make claims to protection of their crucial interests, protection from harm and protection of their dignity. The scope or object of a right, including a human right, comprises a freedom, power, immunity or benefit (Nickel, 2007). The assertion of moral rights as claims by rights-holders imposes duties on moral agents who recognize the validity of those claims (Feinberg, 1970). Familiar accounts of rights as claims distinguish between negative and positive rights. The former set out claims against others to act or refrain from acting in certain ways; the latter set out claims to positive actions to be taken by others to fulfil the rights in question (Nickel, 2007). Rights function as 'trumps' in that they can outweigh competing considerations, including social and political goals aiming at collective benefit (Dworkin, 1977). Legal rights are those specific rights that have been given express and explicit recognition in legal codes.

Human rights are rights that are held by natural persons, that is, flesh and blood human beings, simply in virtue of being human, and justified by their role in constituting human dignity (Donnelly, 1982; Gardner, 2008; Griffin, 2008). Human rights aim to secure for individuals' necessary prerequisites for living a minimally good life, and in particular, an autonomously chosen and freely pursued minimally good life (Griffin, 2008; Nickel, 2007). Such rights reflect the intuition that human beings are entitled to be treated in ways that promote, protect, preserve and realize essential human attributes, capacities or potentials (Donnelly, 1982; Gardner, 2008; Griffin, 2008). People are entitled to protection of

their human rights even if those rights are not recognized or respected by their societies (Nickel, 2007). Contemporary human rights are indebted to theories of natural rights, yet they go beyond older accounts of natural rights in at least three respects: (1) placing much greater significance on requirements for positive actions by states, institutions and organizations; (2) emphasizing the importance of family and community ties in the lives of individuals; and (3) having a decidedly international and global orientation (Nickel, 2007).

There is widespread acknowledgement amongst human rights scholars that while rooted in moral norms, human rights have become closely identified with legislation, rulings of courts and tribunals and especially with international norms as expressed in the International Bill of Rights (Nickel, 2007). That so-called International Bill of Rights includes three seminal documents: the Universal Declaration of Human Rights (UDHR, 1948) the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). The UDHR is not a binding legal treaty, but the two covenants are treaties binding on their members, that is, the signatory states. Human rights do not depend upon legal enactment for their validity or justification, yet such enactment helps to ensure that there will be enhanced motivation for human rights to be upheld and given practical effect.

Theorists of human rights posit a distinction between a 'first generation' of human rights that corresponds to the civil and political rights (that is, the ICCPR rights) and a 'second generation' most closely associated with economic, social and cultural rights (that is, the ICESCR rights) (Vasak, 1977). Familiar examples of first generation human rights include rights to life, to vote, to free speech and to private property, as well as rights not to be arbitrarily detained or tortured or subjected to cruel and unusual punishment. Sometimes, the umbrella term 'liberty rights' is used for these rights. Second generation human rights include rights to food, shelter, work, education, welfare and health. They are sometimes characterized by the umbrella term of 'welfare rights', although they encompass a much wider array of entitlements than welfare strictly understood (Archard, 2004). Such rights are a necessary condition for liberty rights to be of value (Griffin, 2008; Ruggie, 2010). Although it can be more difficult to specify the duty-bearers corresponding to welfare rights than is the case typically for liberty rights, welfare rights deserve the same status as human rights (Archard, 2004; Griffin, 2008).

The distinction between the generations of rights is affiliated with qualitative and quantitative differences in the forms and modes of protection, differences that arise from wording in Article 2 for each document.

Article 2 of the ICCPR ensures that the rights contained therein are to be given immediate effect, and obliges states to develop possibilities of legal remedies (ICCPR, 1966). The parallel provision in the ICESCR, Article 2, uses strikingly different words in key passages (ICESCR, 1966). The rights contained therein are to be realized progressively, and steps towards their fulfilment are subject to resource constraints (with reference to maximum of available resources on the part of a state). The phrase 'legislative measures' is used rather than legal remedies. The ICCPR provides for states and/ or individuals to present their complaints to a reviewing body, whereas there is no similar complaint procedure anticipated in the ICESCR.

A highly significant conceptual and practical matter of contemporary concern is the issue of the human rights obligations of companies or corporations. The Special Representative of the Secretary-General has advocated a framework that rests upon three core principles, or pillars: (1) the State Duty to Protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; (2) Corporate Responsibilities to Respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and (3) greater access to Remedies, judicial and non-judicial (Ruggie, 2010). The framework builds on well-established norms of international law that ensure that states have duties to protect their citizens from abuses and violations of human rights, including those for which businesses are responsible. It is recommended that states and corporate entities undertake human rights impact assessment (HRIA), especially in relation to proposed development projects or privatization initiatives, in order to identify, prevent and ameliorate potential human rights abuses (Aim for human rights, 2009; Business leaders' initiative on human rights, UN global compact and United Nations High Commissioner for Human Rights, 2006; Rights and Democracy, 2008; Ruggie, 2007). A first step towards the undertaking of a comprehensive HRIA could be the type of human rights analysis pursued here.

The most fundamental of human rights is the right to life, a foundational right without which other human rights cannot be exercised or fulfilled. Article 3 of the UDHR guarantees that 'everyone has the right to life, liberty and security of the person' (UDHR, 1948). The right can be construed to incorporate the right not to be harmed by unsafe consumer products through corporate malfeasance or negligence, especially the right not be killed thereby. Two other core human rights at stake in the policy debates over DTCA are the human right to health and the right to freedom of commercial expression, or commercial speech. The right to freedom of expression, like the right to life and the right to health, is a right held by

natural persons (that is, flesh and blood human beings), but extended by association to artificial persons (that is, companies and corporations), for reasons of strategy and logistics.

Human rights can be characterized in terms of the basic capabilities that make a life fully human and support our powers as moral agents (Nussbaum, 2001; Sen, 2004). Of exceptional importance amongst basic capabilities is the ability to live to the end of a normal life span, and the ability to have good health (Nussbaum, 2001). The human right to health is found in Article 12 of the ICESCR, and its content and contours have been articulated by the United Nations (UN) Committee on Economic Social and Cultural Rights (CESCR) and the World Health Organization (WHO) (Office of the High Commissioner for Human Rights and WHO, n.d.; UN CESCR, 2000). Article 12 guarantees everyone the right to enjoyment of the highest attainable standard of physical and mental health. The WHO has characterized health as a state of complete physical, mental and social wellbeing, and not just an absence of disease or infirmity.[1] The human right to health clearly encompasses an aspirational goal, given the exigencies of resource constraints facing all nations to greater or lesser degrees. Philosophers have criticized the overly idealistic construction of the right to health, while still recognizing the crucial contributions of health to human functioning and flourishing (Bok, 2004; Callahan, 1973; Grifin, 2008). Health policy scholars have linked proposals for health care reform, both domestic and global, to human rights, as well as to social justice more broadly conceptualized (Chapman, 1994).

In the General Comment Number 14, the UN CESCR (2000) elaborates on the legal obligations resting on states under international law to respect, protect and fulfil the human right to health. Those obligations include preventing the marketing of unsafe drugs (paragraph 34), and avoiding limitations on people's access to health-related information and services due to the activities of third parties (paragraph 35). State actions or policies or laws that are likely to result in bodily harm, unnecessary morbidity and preventable mortality will contravene Article 12 of the ICESCR (paragraph 50), as will state failures to properly regulate the activities of corporations (UN CESCR, 2000). State failure to protect consumers from the products of manufacturers of medicines is presented as one of several examples of violations of the obligation to protect the right to health (UN CESCR, 2000, paragraph 51).

Article 19 of the ICCPR provides that: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'(ICCPR, 1966) The wording of the ICCPR is echoed

in Section 14 of the New Zealand Bill of Rights Act (1990). The Canadian Charter of Rights and Freedoms, Section 2(b) guarantees 'freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication' (Canadian Charter of Rights and Freedoms, 1982). The right to freedom of expression, as with many in the Canadian Charter, is subject to 'such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society' (Section 1). The First Amendment of the United States Constitution ensures that 'Congress shall make no law… prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press' (US Constitution, Amendment 1).

DTCA is a type of corporate speech or commercial expression. The European Court of Human Rights has defined commercial expression as the dissemination of information for the purpose of inciting the public to purchase a particular product (Emberland, 2006). Philosophers and legal scholars have stressed that it can be difficult to justify the extension of the moral right to freedom of expression to commercial and corporate speech (Barendt, 1994; Shiner, 2003). It is important to highlight the fact that legal systems in liberal democratic societies, such as Australia, Canada, New Zealand and the United States, provide legal status to companies and corporations, as notional 'legal persons' with separate juristic personhood, in order that they may sue and be sued, have legal privileges and legal responsibilities. In the implementation of human rights as legal rights, some 'human' rights can be designated as ones that can be held by all legal persons, including companies and corporations. The right to freedom of expression, or free speech, is such a right.

The human right to freedom of expression is justified on the basis of core values, or rationales, including: (1) the argument from truth; (2) the argument from democracy; and (3) individual self-development (Barendt, 2005; Campbell, 1994; Schauer, 1982) Other rationales thought to support the right include: (4) stimulus to tolerance; (5) flourishing of pluralism; (6) intrinsic worth of communicative experiences; and (7) contributions to public policy goals regarding the efficient allocation of resources (Campbell, 1994). Philosophers and legal scholars typically recognize the need for limitations on the right to freedom of expression, and those limitations are motivated by similar concerns that underlie the rationales in favour of freedom of expressions. Such concerns include: (a) harm avoidance (physical and other types of harm); (b) prevention of detriment to the interests of individuals through invasion of privacy or damage to reputation; and (c) other public policy considerations (for instance, dealing with hate speech, pornography or threats to national security) (Campbell, 1994).

The truth rationale starts from the premise that rooting out the suppression of ideas, opinions and expressions increases the likelihood that truth will prevail (Mill, 1859). Truth is more probable since a supposed falsehood (that we may be tempted to stamp out through censorship) may turn out to be true, or at least contain some portion of the truth (Mill, 1859). We cannot assume that we are infallible. Moreover, it can be said that truth is better served by the power of ideas to get themselves accepted in the competition of the marketplace.[2] This particular argument has garnered sceptical responses from philosophers and legal scholars, who point out that success in the market does not itself provide proof of truth, but it has had considerable sway on jurists in many liberal democratic societies (Barendt, 1994, 2005; Campbell, 1994; Schauer, 1982).

The argument from democracy views freedom of expression as necessary for the sustenance and flourishing of democracy, which is a form of government that depends upon an engaged and informed citizenry. Underpinning a democratic vision of society is the notion of the sovereign power of the democratic electorate (Meikeljohn, 1965; Schauer, 1982). The people, who in effect rule through the delegated activities of their political representatives, need access to the widest possible range of information and ideas in order to scrutinize, assess, criticize and propose reforms in matters of public policy. Restrictions on speech would impair the deliberative process, and prevent voters from knowing enough about the substance and process of the workings of government (Meikeljohn, 1965; Schauer, 1982). Unconstrained communication ensures that citizens can hold their governments to account, take steps to prevent and control potential abuses of power and safeguard and enhance democratic discourse. The argument from democracy is not invulnerable to criticism, since it is not insulated from the objection that the majority might conceivably choose to restrict expression as an exercise of popular sovereignty (Schauer, 1982).

Of the three core rationales, the third argument, with its focus on individual development, lends most support for the expansion to commercial speech. It, like the other two, is inextricably connected to the needs and interests of natural persons, with its emphasis on the contributions of expression and communication to the development of the human personality. Free expression is crucially important for the exercise of human autonomy, as well as for public validation and public recognition of diverse 'ways of life' (Raz, 1994). Freedom of commercial expression can be defended on the basis that individual development and individual autonomy can be furthered through the free flow of commercial information. The profit motive alone should not disqualify communicative acts from protection. While many, if not most, media entities active in liberal democratic societies are for-profit companies, they frequently pursue

objectives and convey communicative content that furthers the interests of individuals in seeking after truth, engaging in democratic deliberation and enhancing their autonomy.

Three distinct strands of argument in favour of commercial speech as valuable speech are the following: (1) a consumer may have an interest as keen, if not even keener, in the free flow of commercial information than in the political issues of the day; (2) society has an interest in the unimpeded flow of commercial information in order to ensure the proper working of a market economy; and (3) arguments in favour of restricting commercial speech may be tantamount to paternalism.[3] As to the latter point, specifically, it is wrong to deprive people of information simply because they might use it improperly, or, in the eyes of others, foolishly (Barendt, 2005). There are important public policy interests than can justify governmental controls on commercial expression, but the means used to do so should be properly designed to ensure optimal balancing. Regulatory measures could be seen to be best suited to protect consumers from potential harms represented by commercial speech, whereas broad and sweeping bans on commercial speech risk being viewed as more extensive than necessary.

Courts in liberal democratic societies have provided varying levels of recognition to commercial speech under the rubric of freedom of expression. Courts in the United States, for instance, have frequently granted protection to commercial speech, albeit with a lower (that is, less strict) standard of scrutiny of restrictions than that accorded to content-based restrictions of political speech (which get the strictest scrutiny) (Barendt, 1994, 2005). Canadian courts, in the application of the Charter, have determined that commercial speech conveys meaning and has expressive content, and thus deserves protection (Gold, 2003). Commentators from New Zealand and the United States contend that the existing protections for commercial speech should be deemed to cover DTCA, although the issues have not specifically been addressed by courts in either country (Lau, 2005; Shuchman, 2007). The current restrictions on DTCA in the Canadian context have not been tested in the courts, but commentators have speculated that the prohibition on DTCA may not withstand a constitutional challenge (Gold 2003).

The human rights potentially at stake in the context of DTCA are threefold. First is the right to life, which has particular salience in conjunction with the duty to avoid intentional harm (or the duty of non-maleficence). Second is the right to health, which incorporates the right of access to health-related information and which generates an obligation on government to regulate business in order to protect consumers from risks posed by the products of manufacturers of medicines. Third is the right to freedom of expression, which is conceptually and practically affiliated

with the right of companies to communicate with the public, provided that the public is properly protected from harm.

It should be noted that debates about the epistemological status of human rights, about whether preference should be given to accounts of human rights based on social contract theory, or capabilities theory, or other contenders are beyond the scope of the present discussion (Griffin, 2008; Nickel, 2007; Nussbaum, 2001; Rawls, 1999; Sen, 2004). So are the debates about whether there needs to be greater levels of government intervention to address concentrations of corporate power in the media sector (Barendt, 1994). The discussion will turn to an examination of pervasive and influential arguments in favour of, and in opposition to, DTCA after the introduction of a simple assumption about information.

10.3 A SIMPLE ASSUMPTION ABOUT INFORMATION

The application of a human rights analysis to the topic of DTCA should begin with a simple assumption. That assumption is that, other things being equal, more information is better than less information. The autonomy of patients is enhanced when they have more information about potential treatments for conditions they may have. The autonomy of consumers is enhanced when they have more information about the availability of products and their respective features, including their functionality. The analysis will begin with a few arguments in favour of DTCA, ones that rely upon the simple assumption. Next, the objections to DTCA will be examined in order to demonstrate that the simple assumption cannot be sustained. Then, an analysis of the human rights implications of banning DTCA will be provided.

10.4 ARGUMENTS IN FAVOUR OF DTCA

10.4.1 The Right to Health and Access to Health Information

Access to health information is a crucial component of the human right to health. A plausible case can be made that, on the basis of the human right of access to health information, natural persons (that is, human beings) are entitled to be informed about the availability of potential drugs, the risks and benefits and other salient details, in order to enable them to make decisions, with the input of their health care providers, about what is best for their health. Moreover, since natural persons are not able to

generate sufficient information by themselves, and due to the unparalleled knowledge and experience of their products held by pharmaceutical companies (Jones, 2003), the freedom of commercial expression for artificial persons (that is, companies and corporations) could be thought to serve the interests of natural persons.

10.4.2 Increased Awareness and Compliance Among Health Care Consumers

There have been positive assertions trumpeted in defence of DTCA, which also function as counter-arguments to redress the perception that there are insufficiently weighty or worthy moral reasons for allowing DTCA of pharmaceuticals. A familiar argument valorizes consumer autonomy and consumer empowerment, with specific variants that tailor the argument to highlight the needs of 'vulnerable' groups such as women (Shirreff, 2000). Types of patients most likely to benefit from DTCA include the following: (1) those of low socioeconomic status who are difficult to reach by other means of imparting health information; (2) those whose conditions are minor and/or temporary, and who would prefer easily accessible information, and perhaps less rather than more of it; (3) those with extensive experience managing chronic, long-term conditions or recurring illness (Hasman and Holm, 2006).

Defenders of DTCA insist that campaigns concentrate on particular therapeutic classes. These include drugs to treat conditions for which the symptoms are readily recognized by consumers (such as allergies, arthritis and obesity) or drugs for treatment of previously undiagnosed conditions (osteoporosis, cholesterol, diabetes and depression). In addition, campaigns target conditions, such as hair loss or skin conditions, that consumers perceive treatments will enhance quality of life (Holmer, 2002). Such conditions, while some might view them as part of the normal vicissitudes of life, can be genuinely health-detracting for others (Bonaccorso and Sturchio, 2002).

In general, consumers who are adults with presumed decision-making capacity are entitled to be well informed about available products, goods and services, and about their qualities, features and prices. The Pharmaceutical Research and Manufacturers of America (PhRMA), representing the brand name drug companies, insists that DTCA has as its overarching purpose informing and educating consumers about symptoms for conditions that are treatable (PhRMA website). As PhRMA states on its website: 'Studies show DTC advertising brings patients into their doctor's office and starts important doctor-patient conversations about health that might otherwise not have happened.' An executive of

PhRMA suggests that by increasing the likelihood that advertising will prompt patients to seek help, and then receive safe and effective medication, it could play a valuable role in enhancing public health (Holmer, 1999).

Surveys undertaken by the US Food and Drug Administration (FDA) (1999) and *Prevention Magazine* (1997, 1999, 2000) found that DTCA leads patients to talk to their physician, including about previously undiscussed conditions. Some commentators have noted that DTCA could potentially trigger a positive response in a person who is currently enduring a condition, but who has previously held back from telling her or his doctor. Some chronic conditions are said to especially prone to being underdiagnosed and undertreated. Examples include depression and hyperlipidaemia (Donohue and Berndt, 2004; Kravitz and Bell, 2007; Kravitz et al., 2005). One third of respondents to the *Prevention Magazine* 1999 study reported that DTCA had reminded them to fill a prescription. In *Prevention Magazine*'s 2000 study, just over a fifth of respondents said DTCA made it more likely that they would take medicine regularly, while 3 per cent said DTCA made it less likely they would do so. In the US FDA (1999) study, about half of respondents said that their doctor recommended a different medicine or even a non-drug option. One study of physician experiences recounted that 67 per cent of physicians felt DTCA helped them to have better discussions with their patients, and 46 per cent agreed that it helped to increase compliance (Weissman et al., 20004). Another study of consumers found there to be notable spillover effects to DTCA's impact, including attentiveness to side effects, and increased information seeking from other sources (Weissman et al., 2003).

Thus, far from potentially putting patients in greater jeopardy, some argue, DTCA could potentially increase opportunities for wellness and wellbeing, for those people who have heretofore abstained from seeking out medical advice and help. In particular, patient health could be enhanced through greater compliance with treatment regimens, provided that advertising is sufficiently informative in order to serve as a reminder and a prompt to compliance. It should be noted that the argumentation strategy relies upon characterizing a side effect of DTCA (that is, prompting patients to visit their physicians) as a benefit of DTCA.

10.4.3 Benefits to Health Care Systems

Industry-based defenders tend to make two claims. One is that DTCA can actually generate benefits to patients of the sorts discussed above. Another claim is presented as a counter to the charges that DTCA generates economic harms; that argument is discussed briefly below in Section

10.6. In response to that charge, defenders of DTCA insist that DTCA will not significantly increase costs overall (Holmer, 1999, 2002; Jones, 2003, Kelly, 2004). They argue that outpatient drug treatment can substitute for more costly therapies and hospitalizations. Ultimately, if properly used, prescription drugs could be less costly and more effective than other medical interventions. Thus, the argumentation strategy is to characterize the absence of additional costs as a form of benefit.

Thus far, the discussion has been very general. It is now time to make distinctions between different clusters of drugs that can be advertised directly to consumers, and evaluate the respective merits and demerits of information about those clusters. There are four distinct categories of prescription drugs relevant for the purposes of this analysis, each of which has two subcategories. The subcategories are divided on the basis of the presence or absence of DTCA for those drugs.

10.5 CATEGORIES OF DRUGS

Group A: Drugs that have proven safety and efficacy, over the longer term, which are designed to treat life-threatening and/or debilitating conditions. These drugs include antiretroviral therapies, antibiotics and numerous drugs for cancer, heart disease, stroke, diabetes and more. These drugs work to save lives, and have a risk-benefit profile that is not problematic.

Group A.1: Drugs Not-Advertised to Consumers
Group A.2: Drugs Advertised to Consumers.

Note that these drugs will be generally safe, when used as prescribed, as substantiated by the available adverse events information. There is clearly a risk if such drugs are prescribed improperly (to patients who should not be taking them), or are taken for 'off label' uses, or if overdoses occur. These drugs may still cause significant side effects.

Group B: Drugs that have proven safety and efficacy, over the longer term, which are designed to treat non-life-threatening, non-debilitating conditions. Such conditions can include post-nasal drip (caused by rhinitis or sinusitis), restless legs, baldness or skin conditions. These drugs do not pose undue risks, in terms of patient safety, although they are blamed for increasing health care costs overall, and they are part of a problem known as the 'medicalization of normal human experience' (Mintzes, 2002; Moynihan and Savage, 2002; Moynihan et al., 2002).

Group B.1: Drugs Not-Advertised to Consumers
Group B.2: Drugs Advertised to Consumers.

The same note applies as for Group A drugs.

Group C: Drugs designed to treat life-threatening and/ or potentially debilitating conditions, which receive marketing approval from the regulatory authorities, but which turn out to have a problematic risk-benefit profile. Either the drugs turn out to be not genuine medical advances (i.e., no better than existing drugs, as with pseudo innovation drugs), or the drugs turn out to be much less safe than was initially recognized by the regulatory authorities (as, for example, with rofecoxib, marketed as Vioxx, a treatment for rheumatoid arthritis, and rosiglitazone, marketed as Avandia, an anti-diabetic).

Group C.1: Drugs Not-Advertised to Consumers
Group C.2: Drugs Advertised to Consumers.

Group D: Drugs designed to treat non-life-threatening conditions (see examples above for Group B), which receive marketing approval from the regulatory authorities, but which turn out to have a problematic risk-benefit profile. Either the drugs turn out to be not genuine medical advances (i.e., no better than existing drugs, as with pseudo innovation drugs), or the drugs turn out to be much less safe than was initially recognized by the regulatory authorities (as with decongestants containing phenylpropanolamine that posed a possible risk of stroke) (Horwitz et al., 2000).

Group D.1: Drugs Not-Advertised to Consumers
Group D.2: Drugs Advertised to Consumers.

In order to apply a human rights impact analysis to the topic of DTCA, it is critical to survey the objections that have been levelled against DTCA, and situate both the defences and the objections in the context of these categories.

10.6 INTERLOCKING ARGUMENTS AGAINST DTCA

There are several strands of argument against DTCA that are typically relied upon to support prohibitions. These arguments, although distinguishable, intersect in intriguing and important ways. The strands include:

(1) concerns about patient safety and drug efficacy; (2) concerns about negative impacts on physician prescribing practices and patient-physician relationships; and (3) concerns about the detrimental effects on the fiscal viability of health care systems. At the root of the arguments are assumptions that in turn rest upon empirical evidence.

10.6.1 Background Conditions

Assumption I: Existing systems for regulating drug safety do not ensure that unsafe drugs will not reach the market. The process of clinical trials is fraught with opportunities for commercial considerations to impact negatively on the pursuit of scientific knowledge, and for conflicts of interest to jeopardize the fully accurate dissemination of research results (Angell, 2000; Bekelman et al., 2003; Bodenheimer, 2000; Curfman et al., 2008; DeAngelis, 2006; Lexchin, 2003; Melander et al., 2003; Roberts, 2007; Safer, 2002; Stelfox et al., 1998; Wynia, 2009). Government agencies such as the Food and Drug Administration (FDA) in the United States, the Therapeutic Goods Administration in Australia, Medsafe (within the Ministry of Health) in New Zealand and the Therapeutic Products Directorate (within Health Canada) in Canada lack adequate resources, necessary capacity and sufficient political will to do the job they have been tasked with properly (Abramson, 2004; Angell, 2004a, 2004b; Avorn, 2007; Bremner, 2008).

Assumption II: Pharmaceutical companies are so determined to market their products that they engage in a range of deceptive and misleading practices, with respect to the reporting of clinical trial results, including duplicate publication, selective publication and selective reporting, as well as ghostwriting (Duff, 2008; Singer, 2009). These practices tend to produce the impression that certain prescription medications are safer than they actually are (Herxheimer et al., 1993; Safer, 2002).

Assumption III: DTCA lacks sufficient quality of information in terms of content; it is not balanced or accurate (Bero, 2001; Stryer and Bero, 1996). In a survey undertaken by the Henry J. Kaiser Family Foundation (2001), substantial proportions of survey respondents (70 per cent) recount that they learned little or nothing more about a health condition requiring treatment. Direct-to-consumer ads tend to be superficial in their coverage of conditions, and to rely upon emotional appeals (Frosch, 2007). Consumers may not understand efficacy claims made in DTCA. A study providing respondents with 'benefit box' information (standardized table with published data on the chances of various outcomes with and without the drug) found that respondents would pay a lot of attention to that kind of information, and that they would trust that kind of information

more than what was actually found in the ads scrutinized (Woloshin et al., 2004). Many ads neglect to inform potential patients about basic matters such as risk factors, prevalence of a condition or subpopulations at greatest risk. Ads for prescription drugs seldom educate about the mechanisms by which they work, necessary duration of use, their success rates, or alternative treatments or behavioural changes that could supplement or even supplant treatment (Bell et al., 1999a, 2000a, 2000b; Wilkes et al., 1992; Wilkes et al., 2000). Direct-to-consumer ads were found to give consumers 30 per cent less time to absorb facts about risks than about benefits, and to leave out important contextual information for risk statements that were included (Kaphingst and DeJong, 2004).

For adults with limited literacy, in particular, DTCA relies too heavily on medical terms that could be hard to decipher (Kaphingst and DeJong, 2004). The average reading difficulty scores of the text materials that are intended to fill in the gaps from broadcast ads were found to be well above the reading ability of average adult Americans (Kaphingst and DeJong, 2004). It should be noted that some critics of DTCA highlight the special vulnerability of women (Ford and Saibil, 2010). In general, consumers lack adequate knowledge of medicine or pharmacology to be able to assess for themselves the relative merits and demerits of advertised prescription medicines. There is evidence that consumers are labouring under misperceptions about the level or extent of protection provided by the regulatory system. One study found that 43 per cent of respondents believed that only completely safe drugs could be advertised directly to consumers, 22 per cent believed that advertising of drugs with serious side effects had been banned and 27 per cent believed that only extremely effective drugs could be marketed directly to consumers (Bell et al., 1999a). Consumers are at a substantial informational disadvantage vis-à-vis the marketers of prescription drugs (Brownfield et al., 2004; Day, 2008; Detmer et al., 2005; Ford and Saibil, 2010; Hoffman and Wilkes, 1999; Kaphingst and DeJong, 2004; Mansfield, 2005; Toop and Mangin, 2007; Toop and Richards, 2003).

Assumption IV: Physicians are besieged by an onslaught of promotional activities undertaken by pharmaceutical companies, including advertising in medical journals, detailing (in-person office visits by pharmaceutical sales representatives (PSRs)) and free samples of drugs, 'gifts' and continuing medical education (CME) events (Avorn et al., 1982; Moynihan, 2003a, 2003b, 2003c; Relman, 2003; Sade, 2009; Tsai, 2003; Wager, 2003; Ziegler et al., 1995). In addition to the pressures posed by those activities, patients who have their expectations raised of benefit from an advertised drug represent additional pressures on the physician to prescribe that drug. IMS Health gathered survey data indicating that two thirds of

Americans recalled being exposed to DTCA, and about one tenth asked for a prescription for the advertised drug (IMS Health, 1998). Of those asking, 73 per cent obtained a prescription for the advertised drug (IMS Health, 1998). Numerous studies have found that physicians have mixed feelings, at best, about DTCA (Aikin et al., 2004; Bell et al., 199b; Hamm et al., 1996; Keitz et al., 2007; Mintzes et al., 2002; Mintzes et al., 2003; Murray et al., 2003; Murray et al., 2004; Woloshin et al., 2001; Young, 2002; Zachry et al., 2002).

Physicians have expressed concerns about the impact of DTCA on patient satisfaction, patient trust in their doctor and also about the 'hassle' factor. Physicians stressed that exaggerated perceptions of drug benefits were the most significant problem with DTCA in one study (Aikin et al., 2004); addressing those exaggerated perceptions can potentially waste valuable time in visits (Weissman et al., 2004). In one study, 30 per cent of physician respondents reported that DTCA made patients less confident in their doctor's judgement (Weissman et al., 2004). When asked about their perceived likelihood of reacting to non-fulfilment of a prescription, 46 per cent of respondent patients forecast disappointment, one fourth anticipated that they would resort to persuasion and seeking the prescription elsewhere and 15 per cent said they would consider terminating their relationships with their physicians (Bell et al., 1999b). When asked about the efficacy of an advertised drug that had been prescribed to patients, 46 per cent of physician respondents felt it was the most effective, while 48 per cent felt it was no more effective than other drugs, and 12 per cent predicted that there would be no effect on symptoms (Weissman et al., 2004). In that same study, 20 per cent predicted there would be no effect on the patient's overall health, and 5 per cent thought other options may have been more effective than the advertised drug that was prescribed (Weissman et al., 2004).

Critics worry that the cumulative effects of the promotional activities and desires to achieve patient satisfaction can lead to improper or excessive prescribing, which has implications for patient safety (discussed below) (Mansfield, 2005; Mintzes et al., 2002; Mintzes et al., 2003; Toop and Mangin, 2007; Toop and Richards, 2003). Commentators may make the assumption that general practitioners can be deficient in their knowledge of pharmacology (as are consumers in general), and thus that some physicians will also be at an informational disadvantage vis-à-vis the marketers of prescription drugs (Hubbard, 2009).

10.6.2 Implications: Threats to Patient Safety

Several high profile and much publicized cases starkly illustrate the implications in terms of threats to patient safety. One case is that of Merck's

blockbuster drug rofecoxib (Vioxx), the use of which was found to increase the risk of serious coronary heart disease when compared with celecoxib use (Bombardier et al., 2000; Graham et al., 2005; Juni et al., 2002; Mukherjee et al., 2001). The drug was approved by the US FDA in May 1999, and epidemiological studies highlighted problems during 2002 and 2004 (Berenson, 2006). The drug was not taken off the market until September 2004. Subsequently, officials from Merck admitted to an error in interpretation in a crucial statistical test, in 2006, and ultimately agreed to one of the largest civil litigation settlements for ongoing class action lawsuits in 2007 (Berenson, 2006, 2007). Critics of the company charged that officials had been aware of the potential risks from the drug, prior to 2004, but had continued to aggressively market it (spending over US$100 million a year, and more than US $160 million in 2000 (National Institute for Health Care Management, 2000, 2002) and irresponsibly downplayed the risks (Topol, 2004a, 2004b). The drug rosiglitazone (Avandia), used to treat diabetes, has been associated with a significant increase in the risk of myocardial infarction (Nissen and Wolski, 2007). It has been the focus of controversies over internal government reports that connect the drug to increased risk of death, and the subject of a US Senate investigation (Harris, 2010a, 2010b).

A drug that is not as safe as promised that is promoted through DTCA may bring harm to greater numbers of people. A survey sponsored by the US FDA found that 22 per cent of general practitioners and 13 per cent of specialists indicated that they felt 'somewhat' or 'very' pressured to prescribe drugs to patients who had seen DTCA (Aikin et al, 2004). One study was designed to track the prescribing behaviour of doctors in geographically close cities, one American and one Canadian (to test the effects of DTCA, legal in the former but illegal in the latter) (Mintzes et al., 2002; Mintzes et al. 2003). The researchers reported that patients in the US city were more than twice as likely to request drugs advertised directly to consumers (Mintzes et al., 2002; Mintzes et al. 2003). With the Vioxx drug specifically, there are indications that Merck's very hefty advertising budget translated into greater numbers of patient requests acquiesced to by physicians (Bradford et al., 2006; Spence et al., 2005).

10.6.3 Detriment to Health Care Systems

Assumption V: Due to the impact that DTCA has on escalating demand for 'me-too' drugs (that is, pseudo innovations), and for the newest and most expensive medications that may be no more effective than older, cheaper alternatives, the overall effect of DTCA is to substantially increase costs to health care systems. In addition, critics of DTCA

object to its contributory role in the 'medicalization' of normal human experience, by 'selling sickness', 'disease mongering' and flogging a 'pill for every ill', a role that further increases costs (Hollon, 1999; Mintzes, 2002; Moynihan and Savage, 2002; Moynihan et al., 2002; Wilkes et al., 2000). Considerable evidence has been accumulated that DTCA can be associated with increased health care costs (Kaiser Family Foundation, 2001; Kessler and Levy, 2007; Lurie, n.d.; Mintzes, 2006; Morgan, 2001; Rosenthal et al., 2003; US General Accountability Office, 2002).

It should be emphasized that this is an issue over which the defenders and the detractors of DTCA are in striking disagreement. As noted above, proponents of DTCA insist, in light of proper interpretation of the relevant data, that DTCA will not prove to be inefficient from a societal perspective (Calfee, 2007; Dubois, 2003; Saunders, 2003). It has been emphasized that spending on DTCA tends to be concentrated on a relatively small number of brands, and that it amounts to a small proportion of overall spending on promotion of pharmaceuticals (Donohue et al., 2007; Rosenthal et al., 2002). The impact of DTCA on a product's market performance may be tempered or even negated by the formulary status or price or copayment of the advertised drug (Zachry et al., 2002). It has been suggested that drug spending increases attributed to the effects of DTCA should more properly be attributed to patients' insulation from paying the full costs of drugs, a problem that could be addressed through other policy options, such as consumer cost-sharing and the formulary status of drugs (Calfee, 2007; Rosenthal and Donohue, 2005).

The opponents of DTCA insist that proper interpretation of the data shows just the opposite. There is, policy analysts have argued, sufficient evidence to indicate that DTCA increases consumer demand for advertised medicines, typically newer drugs that are more costly than older treatments (and especially than non-treatment options), and that leads to expenditures that are not cost-effective overall (Mansfield, 2005; Mintzes, 2006; Toop and Mangin, 2007; Toop and Richards, 2003; Toop et al., 2003). Critics contend that the trajectory of the expected continuing increases in costs will ultimately put the viability of health care systems at risk, for no net benefit in terms of patient wellbeing, and potentially net detriment (Mansfield, 2005; Mintzes, 2006; Toop and Magin, 2007; Toop and Richards, 2003; Toop et al., 2003).

10.7 HUMAN RIGHTS ANALYSIS: UNDERINCLUSIVITY AND OVERINCLUSIVITY

The primary issue to be addressed is that of patient safety. It is without doubt that patient wellbeing counts among the desiderata of policy goals for any health care system. There are clear connections between the right to health and avoidance of morbidity and mortality due to unsafe medications, as was noted above (in Section 10.2). It should be emphasized that the charge about increased risk to safety will only hold against drugs falling within Groups C and D, but would not apply to drugs falling within Groups A and B. Recall that Groups A and B did not have a problematic risk-benefit profile, and thus those two clusters of drugs do not pose particular risks to patient safety. Of course, it bears repeating that the caveats mentioned above apply: provided the drugs are prescribed properly and not given for off-label uses, and if overdoses are avoided.

For the drugs in Categories C (C.1 and C.2) and D (D.1 and D.2), it is clear that such drugs may pose risks to consumers in ways to which they could not be presumed to consent, if fully informed about the risks. It is helpful to conceive of a right not to be harmed by unsafe consumer products through corporate malfeasance or negligence, especially the right not be killed thereby.

The challenge is that a ban on DTCA by itself, as a prophylactic for human rights abuse is underinclusive, since it would only remedy the potential harm posed to consumers of drugs in Subcategories C.2 and D.2. The consumers of drugs in those two categories are the 'additional' patients who receive those drugs due to exposure to DTCA and willingness of their physicians to prescribe in accordance with patient expectations. It is important to emphasize that improper prescribing goes well beyond advertised drugs. Research indicates that elderly patients especially are subjected to levels of improper prescribing that are alarming (Newcomer, 2000). Consumers who receive drugs in Subcategories C.1 and D.1 are still put at risk, even though DTCA is not implicated.

The fundamental issue is that unsafe drugs, that is, ones that have an inherently problematic risk-benefit profile, should not be allowed to get on the market in the first place. If they do sneak out, they need to be tracked down and dealt with promptly. There has been sustained and intense focus upon the larger topic of drug approval, ushering in many focal points for reform. Examples include the pre-registration of all clinical trials, the adoption by medical journals of a policy of only publishing articles pertaining to pre-registered clinical trials, as well as toughening up the policies and procedures concerning disclosures of potential conflicts of interest

(International Committee of Medical Journal Editors, 2010). Medical journals can adopt a policy requiring data from clinical trials written up in submissions to be subjected to independent analysis, in order to substantiate the results. Other calls for reform have focused on the need for more rigorous oversight through improvements in post-approval adverse event monitoring (Chen and Carter, 2010).

Other policy measures can address the potentially problematic influence of sales-related activities of pharmaceutical corporations upon physicians. These include legislative reform to require companies to disclose all expenditures on gifts to physicians, and medical school policies that ban or limit marketing-related interactions between physicians and industry. Still others try to reduce the risk of adverse events going undetected, through, for instance, provision of a toll free number for patients and physicians to report adverse events and other side effects of prescription medication directly to regulatory authorities. Regulatory and other reforms that directly fix the gaps in the processes for drug testing and approval will have the effect of remedying risks to consumers posed by drugs in Subcategories C.1 and D.1, drugs that are not the focus of DTCA campaigns. Reforms such as these have the merit of being sufficiently inclusive to cover all four Subcategories of C and D types of drugs.

If the focus shifts to drugs in Categories A and B, the challenge is a different one. Now, the ban on DTCA risks being overinclusive. Drugs in Subcategories A.1 and B.1 are drugs about which consumers would benefit from having access to accurate, balanced and comprehensive information. A ban on DTCA for drugs in those categories risks being a way to constrain demand and ration services, as has been suggested as a rationale for the ban in the European context (Detmer et al., 2005). Such a policy rationale (that is, cost containment) can be justified on economic grounds, but not necessarily on grounds of respecting human rights. A wholesale ban prevents information about those drugs from reaching consumers directly, and potentially jeopardizes a fuller exercise of their autonomy.

10.8 POLICY RECOMMENDATIONS

Policy recommendations following from a human rights analysis are in keeping with the differentiated approach to the human rights obligations of corporations, as articulated by the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (Ruggie, 2010). Under that framework, for-profit entities have responsibilities to respect human rights, whereas states have responsibilities for protection of human rights.

Pharmaceutical companies are morally required to avoid harming their customers through malfeasance and negligence. Governments are morally required to ensure that the human rights of their citizens are not abused or violated, and to take action to prevent abuses or violations.

The fatal flaw in the line of reasoning presented to defend DTCA is that the simple assumption cannot be sustained. The simple assumption posits that, other things being equal, more information is better than less information. The serious deficits in information quality that have been the focus of the empirical research surveyed above mean that more information is not necessarily better. If the information being provided by DTCA is significantly compromised in terms of balance, and educational value, as many studies have suggested, a permissive approach to DTCA may be an idea whose time should not come, for those jurisdictions in which a ban already exists (Garlick, 2003; Hoffman and Wiles, 1999; Mansfield, 2005; Toop and Mangin, 2007; Toop and Richards, 2003). Governments in countries that currently prohibit DTCA would be unwise and imprudent to rush to dissolve the prohibition unless and until the other policy measures outlined above are in place to ensure protection of the public.

Some commentators have called for a ban even in the circumstances where DTCA is legally allowed, at present, on the grounds that respect for autonomy demands it (Arnold, 2009; Hubbard, 2009). Or a ban has been seen as a last resort, out of despair that the current system of company self-monitoring and regulatory oversight is not working, and fear that commercial considerations have come to compromise the quality of health care (Stange, 2007a, 2007b).

Numerous commentators take a considerably more optimistic stance on the potential for significant improvements in the regulatory regime. What is needed, they argue, are regulatory measures to ensure that advertising contains specific content, with details about who may be at risk for the condition, what non-pharmacological treatment options are available, when behaviour modification is likely to be effective, as well as the likely efficacy of alternative treatments (Bell et al., 2000a; Frosch et al., 2007; Kaphingst and DeJong, 2004). It is most likely that some kind of 'pre-review' or 'prior approval' of DTCA would be necessary to achieve those policy goals. It is telling that a substantial proportion of survey respondents in the United States incorrectly believed that regulatory authorities were already exercising that kind of proactive and precautionary oversight (Bell et al, 1999a).

With the shift to autonomy, health care is a partnership between patients and health care providers, albeit a partnership in which physicians, serving as learned intermediaries, perform a gatekeeping role (Coulter, 1999; Drazen, 2002). Physicians can take the initiative to remind

their patients that DTCA is simply 'advertising', and as such reflects 'unabashed attempts' to get them to buy something (in the words of a former editor of the *New England Journal of Medicine*) (Ingelfinger, 1972). Physicians should advocate for better quality information to be generated, so that they will have at their disposal ready sources of 'counter-detailing' in order to stimulate more balanced conversations with their patients (Bell et al., 1999a; Wolfe, 2002). Health care professionals and members of the general public alike should advocate for improved sources of health information of all kinds from many different sources (Coulter et al., 1999; Detmer et al., 2005).

Pharmaceutical companies should embrace the myriad possibilities for optimizing their efforts towards corporate social responsibility, particularly in relation to the UN Global Compact Principles, the first principle of which reads as follows: 'businesses should support and respect the protection of internationally proclaimed human rights' (UN Global Compact website, n.d.). The drug industry has a tremendous opportunity to address the concerns of its critics, and to redeem its credibility and its public reputation.

10.9 CONCLUSION

If there can be sufficient assurance in the quality of data obtained from clinical trials, and if quality assurance can be effected in the production of promotional materials, then it could be said that allowing DTCA, with proper oversight by regulatory authorities, could be the most autonomy preserving policy option. It could potentially be the policy option least fraught with the afflictions of paternalism. However, the 'ifs' relating to quality assurance are very substantial ifs, and we seem to be rather a long way from those concerns being adequately addressed.

Human rights are not the only measure of the desirability of policy options, and HRIA will provide only a partial picture of the policy landscape. Other treatments of the broader economic context within which DTCA is situated have great value (Calfee, 2002, 2003; Health Canada, 2003; Kaiser Family Foundation, 2001; Mintzes, 2006; New Zealand Ministry of Health, 2000; Toop et al., 2003; US General Accountability Office, 2002, 2006). Yet, human rights are in many ways a common currency of value in our contemporary globalized world, and an evaluation of policy options would be remiss without taking the measure of their respective implications for human rights.

The merits of the approach taken here include the differentiation of types of drugs into categories based on features of the targeted conditions,

and respective risk-benefit profiles, in addition to whether the drugs are or are not advertised directly to consumers. That differentiation makes clear that not all drugs are equal with respect to the impact of DTCA upon patient wellbeing.

The core argument is that banning DTCA risks being both overinclusive and underinclusive as a policy option. A wholesale ban risks being overinclusive in that it could deprive consumers of information about medications with a positive benefit-risk profile (that is, those in Subcategories A.1 and B.1), ones that could enhance their quality of health and wellbeing. Thus, it risks being overly paternalistic and could potentially infringe the human right of access to reliable and beneficial information through the avenues of commercial speech among others. Banning DTCA, by itself, is underinclusive in that it is insufficient to address the ways that unadvertised drugs (that is, those in Subcategories C.1 and D.1) can pose significant risks to consumers. Other policy measures would be most optimal to deal with the very serious deficits in the processes by which prescription drugs undergo clinical trials, and garner regulatory approval prior to their promotion in the marketplace. A more fine-tuned approach to regulatory oversight is endorsed here, one involving a proactive and precautionary approach reliant upon prior approval, and working in tandem with the generation of alternative and high quality sources of information. Such an approach could help to address the very serious concerns about potential infringements of the human right not to be harmed by unsafe consumer products through corporate malfeasance or negligence.

NOTES

* Reprinted by permission of the *Australasian Medical Journal*, A. Wellington (2010), 'To ban or not to ban: direct-to-consumer advertising and human rights analysis', *Australiasian Medical Journal*, **3**, 749–66, doi: 10.4066/AMJ.2010.500.

1. Preamble to the Constitution of the WHO as adopted by the International Health Conference, New York, 19–22 June 1946; signed on 22 July 1946 by the representatives of 61 states (Official Records of the World Health Organization, No. 2, p. 100) and entered into force on 7 April 1948.
2. Justice Holmes in *U.S. v. Abrams* 250 US 616, 630–1.
3. Justice Blackmun, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 US 748, 763, 764–765, 769–70.

REFERENCES

Abramson, J. (2004). *Overdosed America: The Broken Promise of American Medicine: How Pharmaceutical Companies Distort Medical Knowledge, Mislead Doctors, and Compromise Your Health*, New York: Harper Collins.

Aikin, K, J. Swasy and A. Braman (2004). 'Patient and physician attitudes and behaviors associated with promotion of prescription drugs. Summary of FDA survey research results, executive summary', 19 November, available at http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/ucm109877.pdf (accessed 10 October 2010).

Aim for Human Rights (2009). 'Guide to corporate human rights impact assessment tools', Aim for Human Rights, Utrecht, the Netherlands, January, available at http://www.humanrightsimpact.org/fileadmin/hria_resources/Business_centre/HRB_Booklet_2009.pdf (accessed 10 October 2010).

Angell, M. (2000). 'Editorial: is academic medicine for sale?', *New England Journal of Medicine*, **342**(20), May, 1516–18, doi: 10.1056/NEJM200005183422009.

Angell, M. (2004a). 'Excess in the pharmaceutical industry', *Canadian Medical Association Journal*, **171**(12), December, 1451–3, doi:10.1503/cmaj.1041594.

Angell, M. (2004b). *The Truth About Drug Companies: How They Deceive Us and What to Do About It*, New York: Random House.

Archard, D. (2004). 'Welfare rights as human rights', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations*, Dordrecht: Kluwer Academic Publishers, pp. 45–62.

Arnold, D. (2009). 'The ethics of direct-to-consumer pharmaceutical advertising', in D. Arnold (ed.), *Ethics and the Business of Biomedicine*, Cambridge: Cambridge University Press, pp. 131–49.

Australian Government Department of Health and Ageing (2004). 'Direct to consumer advertising (DTCA) of prescription medicines and the Quality Use of Medicines (QUM)', Pharmaceutical Health and Rational use of Medicines (PHARM) Committee, April, available at http://www.health.gov.au/internet/main/publishing.nsf/Content/6D64F5D246ED8FDBCA256F9A00146902/$File/dtca.pdf (accessed 10 October 2010).

Australian Medical Association (2007). 'AMA Position Statement on Direct-To-Consumer Advertising – 2007', Canberra, available at http://ama.com/au/node/2931 (accessed 10 October 2010).

Avorn, J. (2007). *Powerful Medicines: The Benefits, Risks and Costs of Prescription Drugs*, New York: Vintage/Random House.

Avorn, J., C. Milton and R. Hartley (1982). 'Scientific versus commercial sources of influence on the prescribing behavior of physicians', *American Journal of Medicine*, **73**(1), July, 4–8.

Barendt, E. (1994). 'Importing United States free speech jurisprudence?', in T. Campbell and W. Sadurski (eds), *Freedom of Communication*, Aldershot: Dartmouth, pp. 57–75.

Barendt, E. (2005). *Freedom of Speech*, 2nd edn, Oxford: Oxford University Press.

Beauchamp, T. and J. Childress (2008). *Principles of Biomedical Ethics*, 6th edn, Oxford: Oxford University Press.

Beetham, D. (1999). *Democracy and Human Rights*, Cambridge: Polity Press.

Bekelman, J.E., Y. Li and C.P. Gross (2003). Scope and impact of financial conflicts of interest in biomedical research: a systematic review', *Journal of the American Medical Association*, **289**(4), 454–65, doi:10.1001/jama.289.4.454.

Bell, R.A., R.L. Kravitz and M.S. Wilkes (1999a). 'Direct-to-consumer prescription drug advertising and the public', *Journal of General Internal Medicine*, **14**, 651–7.

Bell, R.A., M.S. Wilkes and R.L. Kravitz (1999b). 'Advertisement-induced

prescription drug requests: patients' anticipated reactions to a physician who refuses', *Journal of Family Practice*, **48**(6), June, 446–52.
Bell, R.A., R.L. Kravitz and M.S. Wilkes (2000a). 'Direct-to-consumer prescription drug advertising, 1989–1998: a content analysis of conditions, targets, inducements and appeals', *Journal of Family Practice*, **49**(4), April, 329–35.
Bell, R.A., M.S. Wilkes and R.L. Kravitz (2000b). 'The educational value of consumer-targeted prescription drug print advertising', *Journal of Family Practice*, **49**(12), December, 1092–8.
Berenson, A. (2006). 'Merck admits a data error on Vioxx', *New York Times*, 31 May, available at http://www.nytimes.com/2006/05/31/business/31drug.html (accessed 10 October 2010).
Berenson, A. (2007). 'Merck agrees to settle Vioxx suits for $4.85 billion', *New York Times*, 9 November, available at http://www.nytimes.com/2007/11/09/business/09merck.html (accessed 10 October 2010).
Bero, L.A. (2001). '"Educational" advertisements – I haven't seen one yet!', *West Journal of Medicine*, **174**(6), June, 395.
Bodenheimer, T. (2000). 'Uneasy alliance: clinical investigators and the pharmaceutical industry', *New England Journal of Medicine*, **342**, 1539–44, doi:10.1056/NEJM200005183422024.
Bok, S. (2004). 'Rethinking the WHO definition of health', Working Paper Series, Vol. 14, No. 7, October.
Bombardier, C., L. Laine, A. Reicin et.al. (2000). 'Comparison of upper gastrointestinal toxicity of rofecoxib and naproxen in patients with rheumatoid arthritis', VIGOR Study Group, *New England Journal of Medicine*, **343**, 1520–8.
Bonaccorso, S. and J.L. Sturchio (2002). 'Direct to consumer advertising is medicalising normal human experience (for and against)', *British Medical Journal*, **324**, 13 April, 908, doi: 10.1136/bmj.324.7342.908.
Bradford, W.D., A.N. Kleit, P.J. Nietert, T. Steyer, T. McIlwain and S. Ornstein (2006). 'How direct-to-consumer television advertising for osteoarthritis drugs affects physicians' prescribing behavior', *Health Affairs (Millwood)*, **25**(5), September–October, 1371–7, doi: 10.1377/hlthaff.25.5.1371.
Bremner, J.D. (2008). *Before You Take That Pill: Why the Drug Industry may be Bad for Your Health*, New York: Avery/Penguin.
Brownfield, E.D., J.M. Bernhardt, J.L. Phan, M.V. Williams and R.M.Parker (2004). 'Direct-to-consumer drug advertisements on network television: an exploration of quantity, frequency, and placement', *Journal of Health Communication*, **9**(6), 491–7, doi:10.1080/10810730490523115.
Business leaders' initiative on human rights, UN Global Compact and UN High Commissioner for Human Rights (2006). 'A guide to integrating human rights into business management', 4 November, available at http://www.humanrightsimpact.org/fileadmin/hria_resources/Business_centre/HRB_Booklet_2009.pdf (accessed 10 October 2010).
Calfee, J. (2002). 'Public policy issues in direct to consumer advertising of prescription drugs', 8 July, available at http://www.ftc.gov/ogc/healthcare/calfeedtcjppm.pdf (accessed 10 October 2010).
Calfee, J.E. (2003). 'What do we know about direct-to-consumer advertising of prescription drugs?', *Health Affairs (Millwood)*, **W3**, 26 February, 116–19, available at http://content.healthaffairs.org/cgi/reprint/hlthaff.w3.116v1 (accessed 10 October 2010).

Calfee, J.E. (2007). 'An assessment of direct-to-consumer advertising of prescription drugs', Clinical Pharmacolology and Therapeutics, **82**(4), October, 357–60.
Callahan, D. (1973). 'The WHO definition of "health"', *Hastings Center Studies*, **1**(3), 77–87.
Campbell, T. (1994). 'Rationales for freedom of communication', in T. Campbell and W. Sadurski (eds), *Freedom of Communication*, Aldershot: Dartmouth, pp.17–44.
Campbell, T. (2004). 'Moral dimensions of human rights', in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations*, Dordrecht: Kluwer Academic Publishers, pp. 11–30.
Canadian Charter of Rights and Freedoms (1982). Section 1, Section 2(b), Part I of the Constitution Act, being Schedule B to the Canada Act 1982 (UK), *c.*11, available at http://www.canlii.org/en/ca/const/const1982.html (accessed 10 October 2010).
Chapman, A. (ed.) (1994). *Health Care Reform: A Human Rights Approach*, Georgetown, Washington, DC: Georgetown University Press.
Chen, J.Y. and M. Carter (2010). 'Bioethics and post-approval research in translational science', *American Journal of Bioethics*, **10**(8), August, 35–6, doi:10.1080/15265161.2010.494220.
Coulter, A. (1999). 'Paternalism or partnership?', *British Medical Journal*, **319**(7212), 18 September, 719–20.
Coulter, A., V. Entwistle and D. Gilbert (1999). 'sharing decisions with patients: is the information good enough?', *British Medical Journal*, **318**, 30 January, 318–22.
Curfman, G.D., S. Morrissey, G.J. Annas and J.M. Drazen (2008). 'Peer review in the balance', *New England Journal of Medicine*, **358**(21), 22 May, 2276–7, doi: 10.1056/NEJMe0803516.
Day, R. (2008). 'Direct-to-consumer drug ads: what do people understand and remember?', Testimony to the US Congress House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, 8 May, available at http://energycommerce.house.gov/cmte_mtgs/110-oi-hrg.050808.Day-testimony.pdf (accessed 10 October 2010).
DeAngelis, C.D. (2006). 'The influence of money on medical science', *Journal of the American Medical Association*, **30**(296), 23 August, 996–8, doi:10.1001/jama.296.8.jed60051.
Detmer, D.E., P. Singleton and S.C. Ratzan (2005). 'The need for better health information: advancing the informed patient in Europe', in M. Santoro and T. Gorrie (eds), *Ethics and the Pharmaceutical Industry*, Cambridge: Cambridge University Press, pp. 196–205.
Donnelly, J. (1982). 'Human rights as natural rights', *Human Rights Quarterly*, **4**(3), Autumn, 391–405.
Donnelly, J. (2003). *Universal Human Rights in Theory and Practice*, 2nd edn, Ithaca, NY: Cornell University Press.
Donohue, J.M. and E. Berndt (2004). 'Effects of direct to consumer advertising on medication choice: the case of antidepressants', *Journal of Public Policy and Marketing*, **23**(2),Fall, 115–27.
Donohue, J.M., M. Cevasco and M. Rosenthal (2007). 'A decade of direct-to-consumer advertising of prescription drugs', *New England Journal of Medicine*, **357**(7), 16 August, 673–81, doi: 10.1056/NEJMsa070502.

Drazen, J.M. (2002). 'The consumer and the learned intermediary in health care', *New England Journal of Medicine*, **346**(7), 14 February, 523–4.
Dubois. R. (2003). 'Pharmaceutical promotion: don't throw the baby out with the bathwater', *Health Affairs (Millwood)*, **W3**, 26 February, 96–103.
Dworkin, G. (1972). 'Paternalism', *The Monist*, **56**(1), 64–84.
Dworkin, R. (1977). *Taking Rights Seriously*, Cambridge, MA: Harvard University Press.
Emberland, M. (2006). *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford: Oxford University Press.
Faden, R and T. Beauchamp (1995). *A History and Theory of Informed Consent*, Oxford: Oxford University Press.
Feinberg, J. (1970). 'The nature and value of rights', *Journal of Value Inquiry*, **4**(4), 243–57, doi: 10.1007/BF00137935.
Ford, A.R. and D. Saibil (eds) (2010). *The Push to Prescribe: Women and Canadian Drug Policy*, Toronto: Women's Press.
Frosch, D.L. P.M., Krueger, R.C. Hornik, P.F. Cronholm and F.K. Barg (2007). 'Creating demand for prescription drugs: a content analysis of television direct-to-consumer advertising', *Annals of Family Medicine*, **5**(1), January–February, 6–13, doi: 10.1370/afm.611.
Gardner, J. (2008). '"Simply in virtue of being human": the whos and whys of human rights', *Journal of Ethics and Social Philosophy*, **2**(2), February, 1–22.
Garlick, W. (2003). 'Should drug companies be allowed to talk directly to consumers? No', *British Medical Journal*, **326**(7402), 14 June, 1302, doi: 10.1136/bmj.326.7402.1302-a.
Gold, J.L. (2003). 'Paternalistic or protective? Freedom of expression and direct-to-consumer advertising policy in Canada, *Health Law Review*, **11**(2), 30–6, available at http://www.law.ualberta.ca/centres/hli/userfiles/goldjfrm.pdf (accessed 10 October 2010).
Graham, D.J., D. Campen, R. Hui et al. (2005). 'Risk of acute myocardial infarction and sudden cardiac death in patients treated with cyclo-oxygenase 2 selective and non-selective non-steroidal anti-inflammatory drugs: bested case-control study', *Lancet*, **365**(9458), 5 February, 475–81, doi:10.1016/S0140-6736(05)17864-7.
Griffin, J. (2008). *On Human Rights*, Oxford: Oxford University Press.
Hamm, R.M., R.J. Hicks and D.A. Bemben (1996). 'Antibiotics and respiratory infections: are patients more satisfied when expectations are met?', *Journal of Family Practice*, **43**(1), July, 56–62.
Harris, G. (2010a). 'FDA to restrict Avandia citing heart risk', *New York Times*, 23 September, available at http://www.nytimes.com/2010/09/24/health/policy/24avandia.html (accessed 10 October 2010).
Harris, G. (2010b). 'Research ties diabetes drug to heart woes', *New York Times*, 20 February, available at http://www.nytimes.com/2010/02/20/health/policy/20avandia.html (accessed 10 October 2010).
Hasman, A. and S. Holm (2006). 'Direct-to-consumer advertising: should there be a free market in healthcare information?', *Cambridge Quarterly of Healthcare Ethics*, **5**(1), Winter, 42–9.
Health Canada (2003). 'Legislative renewal – Issue Paper: direct to consumer advertising (DTCA) of prescription drugs', Ottawa, 11 August.
Henry J. Kaiser Family Foundation (2001). 'Understanding the effects of direct-to-consumer prescription drug advertising', Menlo Park, California, November.

Herxheimer, A., C.S. Lundorg and B. Westerholm (1993). 'Advertisements for medicines in leading medical journals in 18 countries: a 12-month survey of information content and standards', *International Journal of Health Services*, **23**, 161–72.

Hoffman, J.R. and M. Wilkes (1999). 'Direct to consumer advertising of prescription drugs: an idea whose time should not come', *British Medical Journal*, **318**, 15 May, 1301–2.

Hollon, M. (1999). 'Direct-to-consumer marketing of prescription drugs: creating consumer demand', *Journal of the American Medical Association*, **281**(4), 27 January, 382–4.

Holmer, A.F. (1999). 'Direct-to-consumer prescription drug advertising builds bridges between patients and physicians', *Journal of the American Medical Association*, **281**(4), 27 January, 380–2.

Holmer, A.F. (2002). 'Direct-to-consumer advertising – strengthening our health care system', *New England Journal of Medicine*, **346**(7), 14 February, 526–8.

Horwitz, R.I., L.M. Brass, W.N.Kernan and C.M. Viscoli CM. (2000). 'Phenylpropanolamine and risk of hemorrhagic stroke: final report of the Hemorrhagic Stroke Project', 10 May, available at http://www.fda.gov/ohrms/dockets/ac/00/backgrd/3647b1_tab19.doc (accessed 10 October 2010).

Hubbard, J.E. (2009). 'The dangers of detailing: how pharmaceutical marketing threatens health care', in D. Arnold (ed.), *Ethics and the Business of Biomedicine*, New York: Cambridge University Press, pp. 103–30.

ICCPR (International Covenant on Civil and Political Rights) (1966). G.A. Res. 2200A (XXI), 21 UN GAOR Suppl. (No. 16) at 52, UN Doc. A/6316, 999 U.N.T.S. 171.

ICESCR (International Covenant on Economic, Social and Cultural Rights) (1966). G.A. Res. 2200A (XXI), 21 UN GAOR Suppl. (No. 16) at 49, UN Doc. A/6316, 993 U.N.T.S. 3.

IMS Health (1998). IMS Health reports direct to consumer advertising increases prescription pharmaceutical brand requests and awareness: majority of physicians have negative view toward DTC advertising. September 15, 1998. <http://www.imshealth.com/html/news_arc/09_15_1998_104.htm> (accessed 10 October 2010).

Ingelfinger, F.J. (1972). 'Advertising: informational but not educational', *New England Journal of Medicine*, **286**(24), 15 June, 1318–19.

International Committee of Medical Journal Editors (2010). 'Uniform requirements for manuscripts submitted to biomedical journals: writing and editing for biomedical publication', available at http://www.icmje.org/urm_full.pdf (accessed 10 October 2010).

Jones. T. (2003). 'Should drug companies be allowed to talk directly to patients? Yes', *British Medical Journal*, **326**, 14 June, 1302, doi: 10.1136/bmj.326.7402.1302.

Juni, P., A.W. Rutjes and P.A. Dieppe (2002). 'Are selective COX 2 inhibitors superior to traditional non-steroidal anti-inflammatory drugs?', *British Medical Journal*, **324**, 1287–8.

Justice Blackmun (1976). *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 US 748, 763, 764-765, 769–70.

Justice Holmes (1919). *US v. Abrams* 250 US 616, 630–1.

Kaiser Family Foundation (2001). 'Understanding the effects of direct-to-consumer prescription drug advertising', November, available at http://www.

kff.org/rxdrugs/upload/Understanding-the-Effects-of-Direct-to-Consumer-Prescription-Drug-Advertising-Report.pdf (accessed 10 October 2010).
Kaphingst, K.A. and W. DeJong (2004). 'The educational potential of direct-to-consumer prescription drug advertising', *Health Affairs (Millwood)*, **23**(4), July/August, 143–50, available at http://content.healthaffairs.org/cgi/reprint/23/4/143 (accessed 10 October 2010).
Keitz, S., K. Stchuchak, S. Grambow, C. Koropchak and C. Tulsky (2007). 'Behind closed doors: management of patient expectations in primary care practices', *Archives of Internal Medicine*, **167**, 12 March, 445–52.
Kelly, P. (2004). 'DTC advertising's benefits far outweigh imperfections', *Health Affairs (Millwood)*, **W4**, 246–8, doi: 10.1377/hlthaff.W4.246.
Kessler, D.A. and D.A. Levy (2007). 'Direct-to-consumer advertising: is it too late to manage the risks?', *Annals of Family Medicine*, **5**(1), January/February, 4–5.
Kravitz, R.L and R.A. Bell (2007). 'Direct-to-consumer advertising of prescription drugs: balancing benefits and risks, and a way forward', *Clinical Pharmacology and Therapeutics*, **82**(4), October, 360–2, doi:10.1038/sj.clpt.6100348.
Kravitz, R.L., R.M. Epstein, M.D. Feldman et al (2005). 'Influence of patients' requests for direct-to-consumer advertised antidepressants: a randomized controlled trial', *Journal of the American Medical Association*, **293**(16), 27 April, 1995–2002.
Lau, Y. (2005). 'Is banning direct to consumer advertising of prescription medicine justified paternalism?', *Journal of Bioethical Inquiry*, **2**(2), 69–74.
Lexchin, J, L.A. Bero, B. Djulbegovic and O. Clark (2003). 'Pharmaceutical industry sponsorship and research outcome and quality: systematic review', *British Medical Journal*, **326**, 29 May, 1167–70, doi:10.1136/bmj.326.7400.1167.
Lurie, P. (n.d.) 'Testimony before the Senate Special Committee on Aging on the impact of direct-to-consumer drug advertising on seniors' health and health care costs', HRG Publication No.1751, available at http://www.citizen.org/publications/print_release.cfm?ID=7402 (accessed 10 October 2010).
Mansfield, P. (2005). 'Banning all drug promotion is the best option pending major reforms', *Journal of Bioethical Inquiry*, **2**(2), 75–81.
Meiklejohn, A. (1965). *Free Speech and its Relation to Self-government, in Political Freedom: The Constitutional Powers of the People*, New York: Oxford University Press.
Melander, H., J. Ahlqvist-Rastad, G. Meijer and B. Beermann (2003). 'Evidence b(i)ased medicine – selective reporting of studies sponsored by pharmaceutical industry: review of studies in new drug applications', *British Medical Journal*, **326**, 29 May, 1171–3, doi:10.1136/bmj.326.7400.1171.
Mill, J.S. (1859). *On Liberty*, Penguin.
Mintzes, B. (2002). 'For and against: direct to consumer advertising is medicalising normal human experience (for)', *British Medical Journal*, **324**, 13 April, 908–11, doi:10.1136/bmj.324.7342.908.
Mintzes, B. (2006). 'Direct-to-consumer advertising of prescription drugs in Canada: what are the public health implications?', Health Council of Canada, January, available at http://healthcouncilcanada.ca/docs/papers/2006/hcc_dtc-advertising_200601_e_v6.pdf (accessed 10 October 2010).
Mintzes, B, M.L. Barer, R.L. Kravitz et al. (2002). 'Influence of direct to consumer pharmaceutical advertising and patients' requests on prescribing decisions: two site cross-sectional survey', *British Medical Journal*, **324**, 2 February, 278–9, doi:10.1136/bmj.324.7332.278.

Mintzes, B, M.L.Barer, R.L. Kravitz et al. (2003). 'How does direct-to-consumer advertising (DTCA) affect prescribing? A survey in primary care environments with and without legal DTCA', *Canadian Medical Association Journal*, **169**(5), 2 September, 405–12.

Morgan, S. (2001). 'An assessment of the health system impacts of direct-to-consumer advertising of prescription medicines (DTCA)', Health Policy Unit Research Reports, University of British Columbia, Vancouver, HPRU 02:5D, August, available at http://www2.itssti.hc-sc.gc.ca/hpb/hcpd/pchcd/projectc.nsf/ExecSum/NA250/$File/execsum-eng.pdf (accessed 10 October 2010).

Moynihan, R. (2003a). 'Who pays for the pizza? Redefining the relationships between doctors and drug companies: Part 1 – Entanglement', *British Medical Journal*, **326**, 29 May, 1189–92, doi:10.1136/bmj.326.7400.1189.

Moynihan, R. (2003b). 'Who pays for the pizza? Redefining the relationships between doctors and drug companies: Part 2 – Disentanglement', *British Medical Journal*, **326**, 29 May, 1193–6, doi:10.1136/bmj.326.7400.1193.

Moynihan, R. (2003c). 'Drug company sponsorship of education could be replaced at a fraction of its cost', *British Medical Journal*, **326**, 1163, doi:10.1136/bmj.326.7400.1163.

Moynihan, R. and R. Savage (2002). 'Too much medicine? Almost certainly', *British Medical Journal*, **324**, 13 April, 859–60, doi:10.1136/bmj.324.7342.859.

Moynihan, R., I. Heath and D. Henry D. (2002). 'Selling sickness: the pharmaceutical industry and disease mongering', *British Medical Journal*, **324**, 13 April, 886–91, doi:10.1136/bmj.324.7342.886.

Mukherjee, D, S.E. Nissen and E.J. Topol (2001). 'Risk of cardiovascular events associated with selective COX-2 inhibitors', *Journal of the American Medical Association*, **286**(8), 22 August, 954–9.

Murray, E, B. Lo, L. Pollack, K. Donelan and K. Lee (2003). 'Direct-to-consumer advertising: physicians' views of its effects on health behaviors, health care, and the doctor-patient relationship', *Journal of the American Board of Family Practice*, **16**(6), November–December, 513–24.

Murray, E., B. Lo, L. Pollack, K. Donelan and K. Lee K. (2004). 'Direct-to-consumer advertising: public perceptions of its effects on health behaviors, health care, and the doctor-patient relationship', *Journal of the American Board of Family Practice*, **17**(1), January–February, 6–18.

National Institute for Health Care Management Research and Educational Foundation (2000). 'Prescription drugs and mass media advertising', September, available at http://www.nihcm.org/~nihcmor/pdf/DTCbrief.pdf (accessed 10 October 2010).

National Institute for Health Care Management (2002). 'Prescription drug expenditures in 2001: another year of escalating costs', 6 May, available at http://www.nihcm.org/pdf/spending2001.pdf (accessed 10 October 2010).

New Zealand Bill of Rights Act (1990). Public Act No. 109, available at http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html (accessed 10 October 2010).

New Zealand Ministry of Health (2000). 'Direct-to-consumer advertising of prescription medicines in New Zealand: a discussion paper', New Zealand: Ministry of Health, Wellington.

Newcomer, L.N. (2000). 'Medicare pharmacy coverage: ensuring safety before funding', *Health Affairs (Millwood)*, March/April, 59–62, available at http://content.healthaffairs.org/cgi/reprint/19/2/59.pdf (accessed 10 October 2010).

Nickel, J.W. (2007). *Making Sense of Human Rights*, 2nd edn, Malden, MA: Blackwell Publishing.

Nissen, S.E. and K. Wolski (2007). 'Effect of Rosiglitazone on the risk of myocardial infarction and death from cardiovascular causes', *New England Journal of Medicine*, **356**, 14 June,2457–71, doi: 10.1056/NEJMoa072761.

Nussbaum, M. (2001). 'Capabilities and human rights', in P. Hayden (ed.), *The Philosophy of Human Rights*, St Paul: Paragon House, pp. 212–40.

Office of the High Commissioner for Human Rights and WHO (n.d.). 'The right to health', Fact sheet No. 31, available at http://www.ohchr.org/Documents/Publications/Factsheet31.pdf (accessed 10 October 2010).

PhRMA website (n.d.). 'Direct to consumer advertising', available at http://www.phrma.org/taxonomy/term/97 (accessed 10 October 2010).

Prevention Magazine (1999). *Year Two: A National Survey of Consumer Reactions to Direct-to-consumer Advertising*, Emmaus, PA: Rodale Press.

Prevention Magazine (2000). *International Survey on Wellness and Consumer Reactions to DTCAadvertising of RX Drugs*, Emmaus, PA: Rodale Press.

Prevention Magazine and the American Pharmaceutical Association (1997). *Navigating the Medication Marketplace: How Consumers Choose*, Washington, DC: Joint Survey.

Rawls, J. (1999). *The Law of Peoples*, Cambridge, MA: Harvard University Press.

Raz, J. (1994). 'Free expression and personal identification', in J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Revised edn, Oxford: Clarendon Press, pp.146–69.

Relman, A. (2003). 'Defending professional independence: ACCME's proposed new guidelines for commercial support of CME', *Journal of the American Medical Association*, **289**(18), 14 May, 2418–20.

Rights and Democracy (2008). 'Getting it right: a step by step guide to assess the impact of foreign investments on human rights', available at http://www.dd-rd.ca/site/_PDF/publications/Getting-it-right_HRIA.pdf (accessed 10 October 2010).

Roberts, W. (2007). 'The tangled web of medical and commercial interests', *Health Expectations*, **10**, 27 February, 1–3, doi: 10.1111/j.1369-7625.2007.00432.x.

Rosenthal, M. and J. Donohue (2005). 'Direct-to-consumer advertising of prescription drugs: a policy dilemma', in M.Santoro and T. Gorrie (eds), *Ethics and the Pharmaceutical Industry*, Cambridge: Cambridge University Press, pp.169–83.

Rosenthal, M.B., E.R. Berndt, J.M. Donohue, R.G. Frank and A.M. Epstein (2002). 'Promotion of prescription drugs to consumers', *New England Journal of Medicine*, **346**(7), 14 February, 498–505.

Rosenthal, M., E. Berndt, J. Donohue, A. Epstein and R. Frank (2003). 'Demand effects of recent changes in prescription drug promotion', The Henry J. Kaiser Family Foundation, June, available at http://www.kff.org/rxdrugs/upload/Demand-Effects-of-Recent-Changes-in-Prescription-Drug-Promotion-Report.pdf (accessed 10 October 2010).

Ruggie, J. (2007). *Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Human Rights Impact Assessments – Resolving Key Methodological Questions*, A/HRC/4/74, 5 February, available at http://www2.ohchr.org/english/issues/globalization/business/reports.htm (accessed 10 October 2010).

Ruggie, J. (2010). *Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, A/HRC/14/27, 9 April, available at http://198.170.85.29/Ruggie-report-2010.pdf (accessed 10 October 2010).

Sade, R. (2009). 'Introduction: dangerous liasons? Industry relations with health professionals', *Journal of Law, Medicine and Ethics*, **37**(3), Fall, 398–400, doi: 10.1111/j.1748-720X.2009.00400.x.

Safer, D. (2002). 'Design and reporting modifications in industry-sponsored comparative psychopharmacology trials', *Journal of Nervous Mental Disorders*, **90**(9), 583–92, doi: 10.1097/01.NMD.0000030522.74800.0D.

Saunders, B. (2003). 'Direct-to-consumer advertising – where does the public interest lie?', *New Zealand Medical Journal*, **116**(1180), 22 August, U557.

Schauer, F. (1982). *Free Speech: A Philosophical Enquiry*, Cambridge: Cambridge University Press.

Sen, A. *(2004). 'Elements of a theory of human rights', Philosophy and Public Affairs*, **32**(4), October, 315–56.

Shiner, R.A. (2003). *Freedom of Commercial Expression*, Oxford: Oxford University Press.

Shirreff, R. (2000). 'For them to know and you to find out: challenging restrictions on direct-to-consumer advertising of contraceptive drugs and devices', *University of Toronto Faculty of Law Review*, **58**, Spring, 121–55.

Shuchman, M. (2007). 'Drug risks and free speech – can Congress ban consumer drug ads?', *New England Journal of Medicine*, **356**(22), 31 May, 2236–9.

Singer, N. (2009). 'Medical papers pushed by ghostwriters pushed therapy', *New York Times*, 5 August, available at http://www.nytimes.com/2009/08/05/health/research/05ghost.html (accessed 10 October 2010).

Spence, M.M., S. Teleki, T.C. Cheetham, S.O. Schweitzer and M. Millares (2005). 'Direct to consumer advertising of cox-2 inhibitors: effect on appropriateness of prescribing', *Medical Care Research and Review*, **62**(5), 5 October, 544–59, doi: 10.1177/1077558705279314 9.

Stange, K.C. (2007a). 'In this issue: doctor-patient and drug company-patient communication: drug-to-consumer advertising', *Annals of Family Medicine*, **5**(1), January/February, 2–3, doi: 10.1370/afm.670.

Stange, K.C. (2007b). 'Time to ban direct-to-consumer prescription drug marketing', *Annals of Family Medicine*, **5**(2), March/April, 101–4, doi: 10.1370/afm.693.

Stelfox, H.T., G. Chua, K. O'Rourke and A.S. Detsky (1998). 'Conflict of interest in the debate over calcium-channel antagonists', *New England Journal of Medicine*, **338**, 8 January, 101–6, doi: 10.1056/NEJM199801083380206.

Stryer, D. and L.A. Bero (1996). 'Characteristics of materials distributed by drug companies: an evaluation of appropriateness', *Journal of General Internal Medicine*, **11**(10), October, 575–83.

Toop, L. and D. Mangin (2007). 'Industry funded patient information and the slippery slope to New Zealand', *British Medical Journal*, **335**, October, 694, doi: 10.1136/bmj.39346.525764.AD.

Toop, L. and D. Richards (2003). 'New Zealand deserves better. Direct-to-consumer advertising (DTCA) of prescription medicines in New Zealand: for health or for profit?', *New Zealand Medical Journal*, **116**(1180), 22 August, U556.

Toop, L., D. Richards, T. Dowell, M. Tilyard, T. Fraser and B. Arroll (2003). *Direct-to-consumer-advertising of Prescription Drugs in New Zealand: For Health or For Profit*? Report to the Minister of Health supporting the case for a ban on DTCA, Christchurch, Dunedin: New Zealand Departments of General Practice, Wellington and Auckland Schools of Medicine.

Topol, E.J. (2004a). 'Failing the public health – rofecoxib, Merck and the FDA', *New England Journal of Medicine*, **351**(17), 21 October, 1707–9, doi: 10.1056/NEJMp048286.

Topol, E.J. (2004b). 'Good riddance to a bad drug', *New York Times*, 2 October, available at http://www.nytimes.com/2004/10/02/opinion/02topol.html (accessed 10 October 2010).

Tsai, A. (2003). 'Policies to regulate gifts to physicians from industry', *Journal of the American Medical Association*, **290**(13), 1 October, 1776, doi:10.1001/jama.290.13.1776.

UDHR (Universal Declaration of Human Rights) (1948). G.A. Res. 217A (III), UN Doc. A/810 at 71.

UN CESCR (Committee on Economic, Social and Cultural Rights) (2000). 'The right to the highest attainable standard of health', General comment No. 14 (2000), E/C.12/2000/4, 11 August, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument (accessed 10 October 2010).

UN Global Compact Website (n.d.). http://www.unglobalcompact.org/Issues/human_rights/ (accessed 10 October 2010).

US Constitution. Amendment 1, http://www.usconstitution.net/xconst_Am1.html (accessed 10 October 2010).

US FDA (Food and Drug Administration) (1999). 'Attitudes and behaviors associated with direct-to-consumer (DTC) promotion of prescription drugs: main survey results', Rockville, MD, available at http://www.fda.gov/downloads/Drugs/ScienceResearch/ResearchAreas/DrugMarketingAdvertisingandCommunicationsResearch/UCM152860.pdf (accessed 10 October 2010).

US General Accountability Office (2002). *FDA Oversight of Direct-to-consumer Advertising has Limitations*, Report to Congressional Requesters, Washington, DC: GAO, October, Report GAO-03-177.

US General Accountability Office (2006). *Prescription Drugs: Improvements Needed in FDA's Oversight of Direct-to-consumer Advertising*, Washington, DC: General Accountability Office, November, Report: GAO-07-54.

Vasak, K. (1977). 'Human rights: a thirty-year struggle: the sustained efforts to give force of law to the Universal Declaration of Human Rights', *UNESCO Courier*, **30**(11), UNESCO, Paris, November.

Wager, E. (2003). 'How to dance with porcupines: rules and guidelines on doctors' relations with drug companies', *British Medical Journal*, **326**, 31 May, 1196–8, doi: 10.1136/bmj.326.7400.1196.

Weissman, J.S., D. Blumenthal, A.J. Silk, K. Zapert, M. Newman and R. Leitman (2003). 'Consumers' reports on the health effects of direct-to-consumer drug advertising', Datawatch: Drug Ads, Web Exclusive, 26 February, doi: 10.1377/hlthaff.w3.82.

Weissman, J.S., D. Blumenthal, A.J. Silk et al. (2004). 'Physicians' reports on patient encounters involving direct-to-consumer advertising', *Health Affairs (Millwood)*, 28 April, doi: 10.1377/hlthaff.w4.219.

Wilkes, M.S., B.H. Doblin and M.F. Shapiro (1992). 'Pharmaceutical advertise-

ments in leading medical journals: experts' assessments', *Annals of Internal Medicine*, **116**, 1 June, 912–19.
Wilkes, S., R.A. Bell and R.L. Kravitz (2000). 'Direct-to-consumer prescription drug advertising: trends, impact, and implications', *Health Affairs (Millwood)*, **19**(2), 19 April, 110–28, available at http://content.healthaffairs.org/cgi/reprint/19/2/110 (accessed 10 october 2010).
Wilson, D. (2008). 'Drug maker said to pay ghostwriters for journal articles', *New York Times*, 12 December, available at http://www.nytimes.com/2008/12/12/business/13wyeth.html (accessed 10 October 2010).
Wolfe, S.M. (2002). 'Direct-to-consumer advertising – education or emotion promotion?', *New England Journal of Medicine*, **346**(7), 14 February, 524–6.
Woloshin, S., L.M. Schwartz, J. Tremmel and H.G. Welch (2001). 'Direct to consumer advertisements for prescription drugs: what are Americans being sold?', *Lancet*, **358**(9288), 6 October, 1141–6.
Woloshin, S., L.M. Schwartz and H.G. Welch (2004). 'The value of benefit data in direct to consumer drug ads', *Health Affairs (Millwood)*, Web Exclusive, **W4**, 234–45, doi: 10.1377/hlthaff.w4.234.
Wynia, M. and D. Boren (2009). 'Better regulation of industry-sponsored clinical trials is long overdue', *Journal of Law and Medical Ethics*, **37**(3), Fall, 410–19, doi: 10.1111/j.1748-720X.2009.00402.x.
Young, D. (2002). 'Studies show drug ads influence prescription decisions, drug costs', *American Journal of Health System Pharmacy*, **59**(1), 1 January, 14,16, available at http://www.ncbi.nlm.nih.gov/pubmed/11813459 (accessed 10 October 2010).
Zachry, W.M. III and D.B. Ginsburg (2001). 'Patient autonomy and the regulation of direct-to-consumer advertising', *Clinical Therapy*, **23**(12), December, 2024–37, doi: 10.1016/S0149-2918(01)80155-7.
Zachry, W.M. III, M.D. Shepherd M.J. Hinich, J.P. Wilson, C.M. Brown and K.A. Lawson (2002). 'Relationship between direct-to-consumer advertising and physician diagnosing and prescribing', *American Journal of Health System Pharmacy*, **59**(1), 1 January, 42–9.
Ziegler, M., P. Lew and B.C. Singer (1995).'The accuracy of drug information from pharmaceutical sales representatives', *Journal of the American Medical Association*, **273**(16), 26 April, 1296–8.

PART III

Postscript

11. Business and human rights: reflections and observations

Charles Sampford

11.1 INTRODUCTION

Joint stock companies are very recent institutional inventions – barely 150 years old in their prevalent form as limited liability entities with separate legal personality established under general laws of incorporation rather than by specific government order.[1] They emerged 200 years after the sovereign state, 600 years after parliaments, 800 years after western universities and 1800 years after the Catholic Church. Like other, older institutions of largely western origin, joint stock companies have proved highly adaptable as they have grown in number, reach, wealth and power while retaining self-images drawn from their more vulnerable pasts. Corporations emerged when sovereign states appeared all powerful. They frequently grew out of businesses established by individuals and partnerships of individuals who bore the full risk of those businesses. Law imagined them as non-natural legal persons. Indeed, when I was an undergraduate law student in the late 1970s, they were studied in an elective subject called 'Legal Persons'. It was easy to portray these legal persons with human antecedents as potential victims of abuse by all powerful governments – and sometimes unions. When the Canadian Charter of Rights and Freedoms was enacted and adjudicated in the 1980s, it was interpreted by Canadian courts to confer those rights on natural persons and corporations alike – something I suggested in 1984 to be a serious mistake (Sampford, 1986). The Australian High Court was not so generous with the much more limited rights accorded by Australian law. When that court decided by a 6:1 majority that corporations did not have the right to silence, the one dissenting judge seemed perplexed at an Australian Bar Association conference where we both spoke in 1993. I tried to summarize the essence of the argument as follows: 'The right to silence is a very important human right. Corporations are not humans. Ergo, corporations do not have human rights – including the right to silence.' The rights and responsibilities of corporations should not be seen as based on any innate

or natural (let alone 'human') right but on how they can serve the communities in which they operate. Corporations do not have human rights but their shareholders, employees, customers and members of communities in which they operate do. As corporations have grown in power, and sovereign states (never as powerful as imagined) are frequently weaker, I argue that we should recognize that corporations can be a great threat to human rights but can also be critical institutions in the development and delivery of human rights. This is particularly the case with what some call 'positive' or 'second generation' human rights but which I have preferred to call the 'positive' dimension of human rights.

To make this case, I will be drawing on a number of arguments I have made about the needed globalization of values debates, the nature of human rights and the means for their realization and the ethical duties of business. In this chapter, I briefly rehearse those arguments, emphasising the way that business can be part of the problem or part of the solution. I argue that human rights are best delivered by 'rights regimes' rather than US-style constitutionally entrenched charters and constitutionally entrenched courts. Business needs to play a vital role in rights regimes of modern market economies.

11.2 GLOBALIZATION OF GOVERNANCE VALUES

The basis for this argument is a narrative that has much influenced my thinking over the last ten years. Good governance requires the articulation of governance values (for example, liberty, equality, citizenship, community, democracy, human rights, the rule of law and environmental sustainability)[2] and a range of institutions that can realize those values. Since the seventeenth century, governance debates have centred on sovereign states rather than relations between them. Late seventeenth-century states were generally highly authoritarian and justified as such. Indeed, I have dubbed the Treaty of Westphalia 'a tyrant's charter' – written of the tyrants, by the tyrants, for the tyrants (Sampford, 2011).[3] Hobbes, whom I have called the 'philosopher of record' for the new sovereign states, argued that rational people would mutually agree to subject themselves to an all-powerful sovereign to avoid a 'state of nature' in which the life of man would be 'poor, nasty, brutish and short' (Hobbes, 1991, p. 89).

Once internal order had been restored, this social contract did not seem such a good bargain. The eighteenth-century Enlightenment sought to civilize these authoritarian states by holding them to a set of more refined and ambitious values – notably liberty, equality, citizenship, human rights, democracy and the rule of law. Some of these values were adapta-

tions of classical city state ideals to the much larger polities of the time. Nineteenth-century thinkers extended the range of rights championed and added concern for environment and for practical and social equality.

Most importantly, the key to the Enlightenment governance project was a 'Feurbachian' reversal of the way rulers and ruled related to each other. Before the Enlightenment, 'subjects' had to demonstrate their allegiance and loyalty to their 'sovereign'. The Enlightenment proclaimed that 'governments' had to justify their existence to 'citizens' who chose them. Once the reversal of the relationship was suggested, it was very hard to go back.

Values are rarely self-implementing: they require institutions to realize them. Institutional innovations included an independent judiciary exercising judicial review of the executive, representative institutions, bicameral parliaments, federal division of functions, government and civil society watchdogs, universal education, questioning media and 'responsible' (or 'parliamentary') government.[4] This development of governance values and the institutions to realize them can be seen as an 'enlightenment project'.

Debates have rightly continued over the precise meaning and relative importance of these governance values and the best institutional means of achieving them (and we shall return to the debates over human rights presently). However, the centre of gravity in governance debates has remained the sovereign state with the 'enlightenment project' becoming a 'United Nations (UN) project' in which all the peoples of the world might become members of strong sovereign states securing their citizen's universal human rights.

This 'UN project' has been shaken by the 'globalizing' flow of ideas, people, goods and services flooding over international borders and weakening many sovereign states. Liberal democratic values were formed in and for strong states. Citizenship, democracy, welfare and community have clear meaning within sovereign states but lack apparent application in a broader, more diffuse, globalized world. The institutions that sustain, promote and realize those values are very much state-based. The rights, duties and 'sense of belonging' that citizenship carries have generally been attached to state institutions. Democracy is realized through citizen participation in national and subnational legislatures – and loses mileage if the real power and range of choice open to those legislatures are restricted. Welfare rights like education and healthcare are only implemented through the institutions of strong, sovereign (and wealthy) states – and even their capacity to do so is increasingly questioned.

Two common responses are to abandon inconvenient governance values such as democracy and welfare or to resist globalization and strengthen the state. I have long argued for a third approach because globalization

exposes a flaw in the 'enlightenment project' and later the 'UN project' (Sampford, 2001). How can universal rights be secured by geographically limited entities? Why should the welfare rights of the citizens of some states be a tiny fraction of the welfare rights of others? This approach suggests a fundamental rethink of our governance values and the mix of institutions that can achieve them – a 'global enlightenment' in which, as in the eighteenth century, the ideals will come first and the practical institutional solutions will come later.[5] As in the eighteenth century, when city-state values and institutions were reworked and recombined for nation states, sovereign state values and institutions may need reworking and recombining.

I have argued that the institutional arrangements that are most likely to emerge and that are most likely to secure such values will not resemble 'sovereign states writ large'. They are more likely to resemble pre-Westphalian Europe. States and multi-lateral institutions will be important but other institutions – professions (Sampford, 2012), corporations, superannuation funds,[6] unions, churches and non-governmental organizations (NGOs) will play a vital role.

11.3 THE FOUR DIMENSIONS OF RIGHTS AND THE MEANS OF THEIR PROTECTION

Human rights were an important governance value in the 'enlightenment project' and have taken an even more prominent role in the 'UN project'. However, the range of rights proposed by the gentlemen of the Enlightenment who drafted the declarations and bills of rights were more limited than those found in the UN covenants. The state was seen as a tyrannical imposition on the free exchange of goods and ideas and, in general, on the pursuit of human aims by individuals. Their notion of rights was of the opportunity to pursue their aims free from state interference.

Over the past two centuries, political experience has pointed to the different threats contributing to the ability of men and women to fulfil their goals. Such threats could come from other individuals and especially combinations of individuals in corporations, trusts and unions. The greatest threat lay in an insufficiency of resources to pursue those goals. Such threats were not felt by the gentlemen who drafted the original declarations, bills and charters. They already had the material resources to pursue their life goals and had little experience of large-scale, non-state organizations. Their experience of small-scale organizations was generally congenial to them, if not to their wives, servants, daughters and some sons. However, appreciation of these threats led men to claim rights to be free from them. These actions led to new claims for rights. Traditional

human rights are seen as a subset of rights: 'negative rights', 'civil and political rights' or 'first generation rights'. New rights claims have variously been termed 'positive rights', 'social, economic, cultural rights' or, more recently 'second generation rights'. These asserted human rights to property, social security, adequate standard of living, work, health, food, equal pay, equal opportunity, education, language rights and rights of indigenous peoples. To these were added 'third generation rights' claims to peace, development, control over resources, solidarity and the rights of future generations to a decent environment.

I have long been attracted, however, to a different way of conceiving rights (Sampford, 1986). Rather than adding new generations of rights to meet the perceived inadequacies of first generation rights, it is argued that we should reconceive traditional rights as 'multi-dimensional'. The inadequacy of traditional rights claims lay in the perception of only one dimension of the claims they were making for freedom to pursue their goals.

11.3.1 The First Three Dimensions

The meaning, content, terminology and formulation of these further rights differ and many of them may be quite unsatisfactory. However, the substance and point of them is covered by what shall be referred to as protective rights and positive rights.

These rights have been variously defined. For the purpose of this chapter, the following is a set of definitions that typify existing rights discourse and attempt to cover most, if not all, current rights claims.

- 'Negative rights' state the actions that people ought to be able to perform without interference by the state within whose territory the action is intended to be performed.
- 'Protective rights' are rights to non-interference from other citizens and to protection from any such interference. From the point of view of the citizen, they largely take the same form as negative rights and are frequently subsumed within them. But from the point of view of the state, they are quite different because they provide the basis for a positive duty on the state to prevent interference rather than a negative duty not to interfere.[7]
- 'Positive rights' are rights to resources necessary to act upon our choices.

These kinds of objections and the remedy of suggesting different kinds of rights are fairly commonplace. However, most writers merely see the latter kind of rights as additions to the shopping list, often with a different

priority or requiring a lower standard of fulfilment. Where I differ is in denying that they have independent worth.

Why do we value human rights at all? Behind most, and probably all, conceptions of human rights there lies a moral view (or value, form of human good, desideratum, concept, point, idea) that it is good for citizens to be able to make choices and act upon them. This value may have many justifications: respect for persons as autonomous moral agents and hence their aims, a concern for their happiness, or their interests, an intuitive or emotive outrage at certain kinds of human suffering and deprivation, a belief in the goal-seeking nature of human beings or in the idea that making life plans and following them is a rewarding exercise of practical reason. Negative, protective and positive rights do not, by themselves, allow people to choose and act upon their choices. They can be viewed as 'dimensions' of full rights. If we are to respect the value placed on citizens making and acting upon choices (which is the whole point of rights talk), we must, at the very least, accord them 'three-dimensional rights', encompassing negative, positive and protective aspects. To respect a person's choices requires the acknowledgement of a bundle of claims that could be characterized as negative, protective and positive rights but, in total, amounts to a civil or human right to the pursuit of that aim. Each component is pointless without the others. Admittedly each has value but that value is only realized when combined with the others.

On the one hand, the positive aspect of such rights is wider than the mere 'right to subsistence' of other welfare rights because they involve the resources to do specific acts rather than merely subsist or be capable of action. On the other hand, the negative aspects of such rights are likely to be narrower than the traditional negative rights because of the necessity for the associated resources to be made available.

Where the pursuit of human aims requires the negative right of government non-interference and the positive right to the resources that enable their pursuit, government non-interference alone does not secure a 'civil' or 'human' right for all the citizens in the community. It merely secures the right for all those who already possess the resources from some other source. This is not realistically a 'right' of all the citizens. Such a provision might be called a right of a class, group or individual. But if we consider the 'justice constituency' that the government is intended to serve, it is more appropriately called a 'privilege' of the few than a 'right' of all the citizens. The right to stand for public office becomes the privilege of those who can fund a campaign; freedom of the press becomes the privilege of the press controllers. Freedom of movement, especially across international boundaries, becomes a privilege for those who can afford the fare. And where a negative right is more extensive than its associated positive

right, the difference constitutes a privilege for those who can afford it. For example, the right to counsel is usually wider than the right to legal aid.

This is not to say that privileges cannot be justified (for example, 'parliamentary privilege'). And it is not to say that their protection or even extension[8] are worthless activities. But what is justified and protected is not a civil right of the citizenry. Thus, its justification must be different, perhaps, as in Rawls's 'maximin principle', that those who do not have the privilege are nonetheless better off because others possess it. This could be argued quite forcefully in relation to freedom of the press (an essentially negative and sometimes protective right). Its protection can be justified by the greater flow of information and arguments to ordinary citizens. However, the protection may only be justified against those with even greater privileges, for example, wielders of state and monopoly power. Its protection may not be justifiable against those with fewer privileges who are trying to gain access to the media. But, however well it can be justified, a privilege should not be advertised as if it is something available to all. A privilege has to be justified on the basis that it is right for this person or that group or that official to be able to do 'X', in spite of the fact that others cannot. The justification may be in terms of the benefits, even rights that others gain, but that does not make the privilege itself a right of all.

Three-dimensional rights protect the citizen's ability to make choices and act upon them in the face of three kinds of threats. But there is another threat, one which is so fundamental that it is sometimes not seen as a threat to the ideals of rights and liberties but as a problem with the ideal itself. This is the threat posed by the ability or even the inevitability that others will influence our choices. The problem appears in its extreme form in brain-washing and manipulation of media and education. As such, it can clearly be seen as a threat, pointing to a fourth, psychologica*l*, dimension of rights such that exercising the right involves a real choice by the right holder – though three-dimensional rights do have an important place in the moral lexicon.

The moral ideal of human rights is the maximization of three- and four-dimensional rights for all: the maximization of the number of actions that citizens have the resources to perform without fear of interference by either the state or other citizens and that those citizens choose from realistic alternatives. In a very real sense, it can be seen as the maximization of the number and extensiveness of 'life plans' open to each citizen.

11.3.2 Rights and Correlative Duties

Many objections and queries may be and have been raised about this fourth, psychological dimension of rights and are discussed elsewhere

(Sampford, 1986). However, one issue is particularly relevant for the purposes of this chapter: if all human beings have such extensive rights, who bears the correlative duty to fulfil them? This resolution was easy with regards to negative rights – the correlative duty was borne by the state. But who has the duty to provide the resources to effectively exercise those rights?

My answer starts by reiterating McCloskey's point. Rights should be seen as attributes of persons and centred on right holders rather than duty bearers (McCloskey, 1986). Rights are logically prior to duties and cannot be redescribed in terms of duties without loss of meaning. If someone possesses a right, other moral propositions follow, often including those involving claims, goals, duties and so on. But the claims may not just be on specific persons or institutions. The right may involve a claim for a scheme of social arrangements that will provide the various dimensions of rights for those who are a part of and subject to those arrangements. It is a right that, within the scheme, each citizen will enjoy such four-dimensional rights.[9] The arrangements may differ from society to society. In some societies, the freedom from interference by the state may be provided by enforced legal prohibitions (for example, a ban on police phone tapping), or because the police lack the technological or financial resources to interfere, or they are limited by a strong and effective institutional morality, or they are simply incompetent. In some societies, the psychological dimensions of freedom to choose may be provided by the formal education system, in others by a free and diverse media. In some, the resources for positive rights may be provided by the market, in others by a minimum wage or by some specific institution that provides the resources needed for particular rights. The arrangements may also vary from person to person; for example, some may gain the resources that constitute their positive rights from the market, and others may be given them by the state.

The scheme of social arrangements may include legal rights and legal duties. But if so, the duties do not arise directly from the basic moral right human beings have to do the relevant action. These duties only arise because the provision of that legal right is part of the scheme of social arrangements by which that society secures that moral right. In other societies, in other times or even for other persons, that same dimension of the relevant right may be secured by some other mechanism. This means that a legal right that is limited in dimensions and beneficiaries may nonetheless play a part in securing a human right for the citizens, provided that other institutions secure the other dimensions and the rights of other citizens. For example, legal rights to income support or media access may be limited to those who do not receive those benefits from corporations.

Corporations have a critical role in the scheme of social arrangements for securing the human rights of the inhabitants of most modern societies.

Of course, some schemes of social arrangement can secure more such three- and four-dimensional rights than others and some schemes are not possible until a society has reached a certain level of development.[10] However, this means that the correlative to human rights is the best scheme of social arrangements for delivering human rights possible in that time and place – and a right to improvements in that scheme as such improvements become possible. In this sense, human rights contain within them a very important 'right to development'.

11.3.3 Collective Rights

Collective or group rights, such as the right of self-determination, of education in minority languages and the right to practice religion and to preserve minority cultures, would at first sight seem to be completely different from the three- and four-dimensional rights described above. Certainly, this is so for some conceptions of collective rights, which see the right as somehow claimed and enjoyed by the 'collectivity' itself.

But there is another, and to this writer, more attractive conception, which fully accords with and is usefully elaborated by three- and four-dimensional rights. That conception sees collective rights as individual rights to the benefits of group life. Humans are social beings who congregate in groups and live much of their lives within those groups. For example, the right of groups to the preservation of their culture is derived from the right of all human beings to belong to a culture and to be able to engage in cultural activity to which they feel a personal affinity. Although the rights are described as 'collective', they are located in the individual rather than the collectivity itself – and it is important that members may choose whether to be part of the collectivity lest the claim that they are members is thought to entail the power of the group over the member.

On this analysis, collective rights are not some new or different kind of right to be added to the rest. They are better seen as offering a new insight into already asserted rights, just as the second-generation economic rights showed us a new dimension to traditional rights. Indeed, in a very fundamental way, human rights amount to a right to the benefits of communal life because, as has often been pointed out, such rights are only realizable in and by communal organizations.[11] Human rights are not things that people possess outside society and which they retain after they enter society, limiting the latter's encroachment on them. Human rights are rights to some of the most fundamental benefits that a community can provide and they are the rights to the establishment of and participation in such a community.

On the other hand, the obscenity of breaches of human rights is largely derived from the unfairness that those benefits are denied to members of that group. Torture is obscene because it denies to men and women the physical security that should be a concomitant of group life (removing the threat of personal insecurity that is part of human conditions of life but that can be virtually abolished by the creation of society). Hunger is the denial of the protection from want that collective food gathering, production and distribution should provide. Finally, denial of free speech is a denial of the ability to communicate, which social life brings with it (an ability that increases with the technological sophistication of society).

11.3.4 The Right of Association and Institutional Governance – Particularly Corporate Governance

This is illustrated by the right to association. It is a right of individuals to associate, not of the association itself. This is true of the forms of association that are central to the right of association that are formed so that individuals may pursue other human rights – political organizations, citizens groups, churches and unions. Corporations are not formed for the pursuit of such obvious human rights. However, I would not exclude corporations as they are seen as an effective way in which individuals may seek the resources that constitute the positive dimension of the four-dimensional rights. However, there are three provisos.

First, there is no right to a particular form of incorporation – let alone a right to limited liability. Ready incorporation and limited liability were accorded, after much debate, on the basis that the community as a whole was supposed to benefit from giving these advantages to corporations. The argument takes different forms and has developed over the last 150 years. However, the gist of most arguments is that the mobilization and concentration of capital allows for larger investments generating greater output and greater efficiency that increases national prosperity at acceptable levels of social difference and a greater freedom of choice for individual workers in generally better remunerated work.

The second proviso is that there can be many legitimate limits on the operation of corporations and other associations. In the case of corporations, this includes the outlawing of corruption, price-fixing, collusive tendering and various sharp practices against consumers and competitors as well as shareholders – as well as penalties for environmental damage, unsafe work practices and so on.

Finally, the reason for many associations is that they will bring together a concentration of power, people and resources in the belief that more can be achieved collectively than individually. However, such power may be

abused and the risk of abuse is a reason for requiring governance arrangements that make it far more likely than not that corporations benefit the communities in which they are embedded in the ways that they claim. The eighteenth-century reformers were acutely aware of this. The American revolutionaries claimed that governments are instituted to support the 'inalienable rights to life, liberty and the pursuit of happiness', but they could turn against the people they were supposed to benefit, justifying their overthrow. But they were not anarchists. They did not decide to abandon the idea of government because government power had been abused. However, they wanted to reduce the risk of future abuse by creating a system of 'checks and balances' that provided a form of 'risk management'. The founder of economics was also very much aware of the dangers of corporations. While Adam Smith saw the value of markets, he certainly recognized the dangers of the abuse of economic power in his warnings about combinations of merchants as well as large mercantilist corporations. While some of those who claim to follow Adam Smith completely ignore his warnings, those who have recognized the risk have sought to manage the risk of the abuse of corporate power by legal regulation, explicit ethical standard setting and institutional reform. I have long argued (Sampford, 1992; Sampford and Preston, 2002) that the three are relatively ineffective if tried on their own, but can be highly effective if used in combination and directed towards making it more likely that institutions will live up to the public justifications for the powers and privileges they exercise. I have argued that ethics can, and should, take a leading and integrative role because it asks the fundamental questions of why an organization should exist: 'what is it good for?', 'what benefits does it provide the communities in which it operates that provide good reason for the concentration of people power and resources – and justifies the risks that such concentrations could be abused and used against that community?' This does not mean that joint stock corporations must see themselves as charities. The means by which they enhance prosperity and happiness are through actions that provide profits for their shareholders and remuneration for those who work in them from directors to cleaners. But the justification does not lie in the profit but the good that such profits are supposed to do. In particular, the justification should look at the extent to which they support and enhance human rights including the positive dimensions of those rights for shareholders, employees and customers as well as rights to a sustainable environment. For me, corporate governance involves, at its heart, asking hard questions about the values of the corporation, giving honest and public answers about the ways in which the corporation justifies itself to the communities in which it operates on the basis of the ways in which its existence benefits those

communities and then developing internal rules, structures, incentives and practices that make it likely that the corporation will live up to those values and deliver those benefits. This justification, for me, is the core of good governance and is equally valid for governments, professions, NGOs and international organizations.

11.3.5 Institutionalizing Three- and Four-dimensional Rights

Thus far, this chapter has outlined a concept of multi-dimensional rights that attempts to meet many of the traditional criticisms of rights and incorporates much of the thrust of second- and third-generational rights claims.

Having enunciated a broader concept of rights to replace the traditional 'negative' conception of human rights, by what institutional means are they most likely to be enjoyed by the citizens? What scheme of social arrangements is best designed to deliver them? The scheme of social arrangements that were thought to deliver the negative dimension of human rights was to have a constitutionally entrenched bill and a constitutionally entrenched court. However, the court is not well suited to ensuring the protective, positive or psychological dimensions of rights. The court can issue injunctions against third parties infringing the rights of citizens. However, it is too expensive, too episodic and too reactive to provide the bulk of the protective dimension. That must be provided by police forces, departments of corrections or even watchful neighbours (something of a mixed blessing in general and for the enjoyment of rights in particular). It is generally conceded that courts are not structured to administer resources, even if the constitutional power to appropriate money did not properly lie elsewhere.

The moral sway of the court could give it some role in furthering the psychological dimension of rights. Rights that have been successfully asserted in court will generally attract significant legitimacy on that account. However, there will be exceptions where those asserting the right suffer social disapproval. Furthermore, the court's influence pales into insignificance in comparison to that of the media, educational institutions and the family. To those who reject the second, fourth and, especially, third dimensions of rights, this might be seen as an advantage.

To those who accept the importance of other rights (or, as I put it, other dimensions of rights), this indicates that a Bill of Rights and a court that interprets it can, at best, play a part. A 'rights regime' will have to include other institutions capable of supporting the other dimensions. Some of those that are used in Australian jurisdictions include:

- ombudsmen
- a Human Rights Commission
- committees to scrutinize legislation[12]
- pre-legislative procedures to ensure the maintenance of high legislative standards[13]
- judicial recognition of internationally adopted human rights norms
- government agencies/commissions to promote and conciliate on human rights issues
- welfare agencies
- public interest advocacy groups
- administrative appeals tribunals and specific tribunals (for example, Social Welfare Appeals Tribunal)
- welfare agencies
- minimum wage laws
- full employment policies
- compulsory superannuation
- effective philanthropic agencies
- effective economic institutions and, especially in the third and fourth dimensions, corporations.

This does not necessarily mean that there is no role for a Bill of Rights. Indeed, I would argue that there is a very strong case for a statutory Bill of Rights that can play four roles:

- to state the human right that the scheme of social arrangements is intended to secure as a 'guide' to the officials and citizens alike
- to play a part in those arrangements by securing or implementing those rights by some form of enforceable provision
- to require legislation that derogates from human rights to do so in explicit words
- to provide a guide:
    - to decision makers
    - to civil servants and judges in the interpretation of legislation
    - to legislators, either by appealing to their consciences or to their unwillingness to be seen as overriding
    - to a Human Rights and Equal Opportunity Commission charged with the functions of developing and disseminating thinking on rights set out in the bill, reporting on conflicts between the bill and existing legislation and practices. At a minister's request, it could also look at proposed legislation (a kind of non-compulsory 'human rights impact statement'), and investigate some complaints from citizens.

Such a Bill of Rights is weaker in itself than an entrenched bill or charter. However, such entrenched bills can only go so far and may lead to complacency about the extent to which we respect human rights and a misdirection of effort and resources into court cases. An exhortatory bill will encourage us to look to build, re-enforce and use the other elements of the rights regime and provide guidance to all officials in the system.

11.3.6 The Role of Corporations in National Rights Regimes

The shift from sole reliance on entrenched Bills of Rights to a range of institutions makes particular sense in jurisdictions that have seen a significant shift in power from the sovereign state to corporations and in which the range of activities they engage in has increased (with privatization and outsourcing). Such is the case as with the power of unions, regulatory authorities and other bodies that used to provide checks and balances. These powers have been deliberately reduced, generally at the urging of corporations and the think tanks they fund.

One never could, and never should, have relied on the state to deliver all human rights – especially in the broad, four-dimensional sense. It would be even more foolish to expect the diminished, 'hollowed out' (Rhodes, 1994) state to do it. Corporations and business organizations need to see themselves as an increasingly important part of national rights regimes. Such entities need to build the making of a positive contribution to the fulfilment of human rights as a part of their core values and their justification and structure themselves to do so. While the responsibility for living up to those values must lie with the corporation and the governance arrangements it adopts, other elements of national rights regimes must also be involved in keeping it on that path – collaborating when they are fulfilling the role they claim and noticing and responding when they do not.

11.3.7 The Role of Corporations in Global Rights Regimes

The above narrative could be applied within sovereign states and it was first formulated for such national rights regimes. However, as argued in the first section, globalization has washed over the boundaries between sovereign states – posing challenges for enlightenment values and the state-based institutional means of realizing them.

We need to rethink human rights and other values as global values, taking into account the inputs from a wide range of long-standing civilizations, all with their own versions of good governance values (and their own versions of bad governance values – the west managing to produce both bolshevism and national socialism in less than a century). This is

as true in human rights as in other governance values. While the long-standing acceptance of the covenants and the work of UN and NGO bodies has developed consensus in many areas, it is important to engage in 'norm localisation' in which the local versions of human rights ideals are emphasized to demonstrate to spoilers and supporters alike that western originated human rights norms are not alien western inventions but merely the western version of ideals that are found in all cultures.

We also need to think through the institutions that will deliver those global values. If we have reason to question that the US model of an entrenched Bill of Rights and an entrenched constitutional court is the best way to deliver rights, there is simply no chance of such a solution globally. There is even more need of a 'rights regime' at the international level. Sovereign states play a role. International courts play a role: especially the International Criminal Court (ICC) in the most serious breaches and regional courts a narrower but deeper role. The UN Commission for Human Rights (UNCHR) plays a role similar to national human rights commissions and there is a wide range of NGOs. But the counterparts of some of the key elements of national rights regimes are almost always weaker and sometimes non-existent in the international arena. The one set of participants that are at least as strong in the international arena are corporations. If international rights regimes are going to be effective, corporations will have to play a significant role – hopefully a positive one.

The role of corporations in furthering human rights does not stop at the borders between the communities where they operate. Corporations could, of course, adopt the views on rights held on both sides of such borders, being a part of a number of rights regimes. Respect for the communities in which they operate requires their participation. However, this leads to the kinds of dilemmas that ethical corporations constantly confront. It can lead to normative schizophrenia, moral relativism or the abandonment of such values altogether. It may appear to be in their short-term interests to perform value-adding functions in the countries where they do not have to worry about the human rights of their workers or those who live downwind or downstream from their mines, factories and processing plants – either because the local laws accord such citizens no rights or because those laws can be circumvented or ignored. However, the inefficiencies of having different norms, procedures and processes are a significant burden. The hypocrisy of differential treatment eventually exacts a toll in terms of lost internal and external integrity.

This is not to say that corporations should dominate or drive either the global debate on values or the global rights regimes that institutionalize them. However, they should encourage, support and take part in those debates. When they take part in such debates, corporations should

declare their interests. But the arguments made should avoid 'narrow' self-interest where norms are adopted that benefit them at the expense of the community in which they operate. They should see themselves as profit-making organizations that will be sustained and thrive because they can justify themselves to the communities in which they operate – not least by furthering human rights. They should advocate norms that benefit the community and themselves at the same time. This approach is more convincing and good practice for the kinds of long-term justifications for their presence that they need to address.

Global corporations should accept priority of rights of persons and never assert rights over those of persons. They should provide an example in eschewing behaviour that advances their interests at a cost to those of the host community and their rights – such as tax avoidance, transfer pricing, corruption or keeping compliant dictators in power. They might also advise local communities of the ways that others might avoid such norms: there is nothing wrong with avoiding the disadvantage of competition from those who are not playing by the rules. Global corporations should look to ways in which the rights of community members are advanced at the same time as their rights.

An example of how this would work is demonstrated by a counterfactual approach taken by industry to the Multi-lateral Agreement on Investment (MAI) pursued by the Organization for Economic Cooperation and Development (OECD) in 1995–99. They were seeking to protect their property rights in investments made by being given the right to seek compensation from governments where their profits were adversely affected by unfair, discriminatory conditions in contravention of the MAI. Industry wanted to reduce the sovereign risk of foreign investment. The public outcry against aspects of the MAI (especially the way it favoured a one-sided liberalization that reduced labour and environmental standards) meant that it failed. For me, the most outrageous element was that they were seeking the enforcement of new property rights for investments made in third world regimes while political prisoners rotted in the gaols of those countries despite the passage of the Universal Declaration of Human Rights some 50 years before. For me, the priority was to allow such victims redress against gross violations of that Declaration and the covenants that followed. However, in the midst of what I considered my justified anger it occurred to me that a deal was to be had. Corporations could not justly prioritize their new and less pressing claims against those suffering human rights abuses. However, if corporations sought to pursue both arguments simultaneously, they might secure support for reasonable claims from those who so vigorously opposed them.

The rights of persons trump the interests of business. If businesses want

international agreements that bind states parties to protect their interests, they should also demand that states parties protect the rights of those who live there.

The fact that this is a counter-factual response reminds us that this kind of thinking is nowhere near the norm. However, the fact that corporations did not secure effective rights against host countries is a reminder that such self-serving behaviour may deny them the benefits they seek.

11.4 CONCLUSION

Corporations are often part of the problem for human rights but they could be a part of the solution. They are part of the problem if the great power they have accrued is used to the detriment of the rights of the citizens in the communities in which they operate. Corporations frequently do demand that host governments limit the human rights of the employees and citizens in order to make their investments more profitable. They may undermine the negative, protective and positive dimensions of human rights. However, corporations can, and sometimes do, have a positive contribution to human rights. Most of those in the west derive the positive dimensions of their rights from employment by, and investment of, their superannuation in corporations. They can make positive contributions to national rights regimes and to emerging international rights regimes. Such corporations can help individuals enjoy the enormous benefits of group life possible in the modern world. If they do so, they too might become as durable, adaptive and as long-lasting an institution as universities are today.

NOTES

1. Joint Stock Companies Act 1844 (7 and 8 Vict. *c.*110) and *Limited Liability Act* 1855 (18 and 19 Vict. *C.* 133).
2. Though, not as recently as might be imagined, nineteenth-century environmentalists sought to clean up the Thames and protect the countryside via the National Trust.
3. With apologies to the United Dutch Provinces, the only signatory clearly not a tyranny and to Abraham Lincoln and his Gettysburg address.
4. A feature shared by all long-standing democracies other than the United States.
5. While deferring the institutional issues, I would emphasize that this does not amount to an argument for global government – the sovereign state 'writ large'. A more likely result is a mix of institutions reflecting both pre-Westphalian Europe and the modern ideal of an integrity system made up of public, corporate and NGO bodies (Sampford, 2001).
6. Especially if driven to engage in sustainable investment that meets the values and interests of their unit holders who have longer-term interests than the investment managers.

7. This distinction becomes very important, given that many bills of rights restrict only the state and hence include only negative liberty in the narrow sense used here.
8. Much anti-discrimination legislation is directed towards making certain privileges, for example, access to professions, open to more people.
9. This right is a right to a scheme of social arrangements that provides rights for all citizens rather than privileges for a few.
10. Although human rights are possessed by all human beings and amount to a right to social arrangements that will allow for the enjoyment of those rights, the setting up of social arrangements at anything less than a global level immediately sets up distinctions between those subject to the different sets of social arrangements.
11. Even if, in some theories, the organization is merely that of the market.
12. This has been a popular development in Australia where parliamentary committees have been established in most jurisdictions to monitor the effect of new legislation on human rights.
13. As were put in place in Queensland under the Legislative Standards Act 1992 (Qld).

REFERENCES

Hobbes, T. (1991). *Leviathan*, Cambridge: Cambridge University Press.

McCloskey, H.J. (1986). 'The moralism and paternalism inherent in enforcing respect for human rights', in C. Sampford and B. Galligan (eds), *Law, Rights and the Welfare* State, London: Croom-Helm, chapter 9.

Rhodes, R.A.W. (1994). 'The hollowing out of the state: the changing nature of the public service in Britain', *Political Quarterly*, **65**, 138–51.

Sampford, C. (1986). 'The dimensions of rights and their protection by statute', in C. Sampford and B. Galligan (eds), *Law, Rights and the Welfare State*, London: Croom-Helm, pp. 170–98.

Sampford, C. (1992). 'Law, institutions and the public private divide', *Federal Law Review*, **20**, 185.

Sampford, C. (2001). 'Challenges to the concepts of "sovereignty" and "intervention"', in T. Campbell and B.M. Leiser (eds), *Human Rights in Philosophy and Practice*, Aldershot: Ashgate, pp. 335–91.

Sampford, C. (2011). 'Failed states and the rule of law', *Jindal Journal of International Affairs*, 1.

Sampford, C. (2012). 'Professions without borders', in V. Popovski and C. Sampford (eds), *Ethical Supports for the International Rule of Law*, Tokyo: United Nations University Press, in press.

Sampford, C. and N. Preston (2002). *Encouraging Ethics and Challenging Corruption: Public Sector Ethics in Theory and* Practice, Sydney: Federation Press.

Index

Abacha, Sani 92, 119, 121
AccountAbility 33
advertising 276–300
All China Federation of Trade Unions (ACFTU) 207
American Bill of Rights 77
American Declaration of Independence (1776) 12
Amnesty International 4, 250
Anderson, Brian 123
Archard, D. 80, 154
Arnold, Denis 63, 78, 82–5, 87, 89, 137, 161, 167
Arrow, Kenneth and Arrow's impossibility theorem 82
aspirational rights 83–5, 87, 96–8
Australia, direct-to-consumer advertising (of pharmaceuticals) in 276–7
Australian Bar Association 315
Australian Medical Association 276

Banerjee, S. 148
Barrientos, Stephanie 220–1, 223–4, 228–32, 234–5, 238
basic rights 63, 83–4, 87–90, 98, 100
Beckmann, M. 148
Bentham, Jeremy 63
Bishop, John Douglas 74–101
Bomann-Larsen, L. 109, 147
bribery 21, 35, 59
Business Corporations Act (Canada) 260
Business Leaders Initiative on Human Rights (BLIHR) 235
Business Social Compliance Initiative (BSCI) 228
Byrce, Eduardo 257–8

Campbell, Tom 8–9, 30, 47–71, 111, 151, 162
Canada, direct-to-consumer advertising (of pharmaceuticals) in 276–7
Canadian Charter of Rights and Freedoms 5, 283, 315
Cassel, D. 257
Chandler, Geoffrey 125
Chevron Corporation 115
child labor 59–60, 144, 191, 226–7, 229
China, People's Republic of 201–2
  child labor and 226
  corporate governance in 202–6, 211–13
  corporate social responsibility in 206–7, 211–13
  environmental protection in 210–11
  healthcare provision 208–9
  labor relations in 207–8
China Securities Regulatory Commission (CSRC) 205–6
Clapham, Andrew 109
codes of conduct 206, 220–2, 227, 229–30, 234
collective rights 323
Communist Party of China 208
Copp, D. 90
corporate business responsibility (CBR) 47, 49–52, 55–61, 66, 70
corporate governance 198–9, 201–2, 246
  China and 202–6, 211–13
  globalization and 316–18
corporate human rights responsibilities (CHRR) 48, 56, 59, 61–2, 64–9, 71
corporate philanthropy (CP) 47, 49–52, 54, 57–8, 66, 70
corporate responsibility (CR) 47, 49, 56–8, 281

corporate rights 85–7, 99–100
corporate social responsibility (CSR) 47, 49–71, 198–9, 202, 244, 246–7
  China and 206–7, 211–13
  instrumental forms of 49, 58–60
  intrinsic forms of 47–9, 52–60, 63–4, 70
  Li & Fung (company) 234
  limitations of 261–2
  mining industry and 247–8
corporations, human rights obligations of 4–5, 38–40, 56, 99–100
  duties to prevent human rights abuses 94–6, 110–15
  complicity in human rights violation 90–4, 100–101, 105–9
  draft norms model of 23–7
  hybrid model of 34–6
  impact-based responsibility 136–7, 145, 147–8, 150, 165, 170
  legal model of 15–24, 27, 35–7, 39
  leverage-based responsibility 135–8, 142, 145–8, 150–3, 156–9, 161–2, 164–71
  limits of 79–85
  nature and scope of 28–32
  rationale for 76–9
  self-regulatory model of 22–3
  spending resources on 96–7, 163–4
  spheres of influence and 136, 138–43, 152, 169–70
corruption 21, 35, 49, 59, 76, 80, 92, 249, 324, 330
Coumans, Catherine 243–67
Cragg, Wesley 3–40, 76, 81, 88, 151, 167
Cutler, A. Claire 118

Derber, Charles 118
direct-to-consumer advertising 276–300
distributive justice 181, 183, 189, 192–4
'do no harm' principle 67, 106, 110, 112–14, 137, 167, 265
Donaldson, T. 91
draft norms model of human rights obligations 23–7
Drohan, Madelaine 87
Drucker, Peter 117–18
due diligence 137, 141, 155–6, 220, 248–9, 281
Dunfee, T.W. 91
Dworkin, R. 81

East India Company 87
Economic Freedom Index 186, 194
education provision 96–8
environmental protection 29
  China and 210–11
Equator Principles 35
Ethical Trading Initiative (ETI) 224, 231–2
European Commission 52
European Court of Human rights 283
export processing zones (EPZ) 226, 228
Extractive Industries Transparency Initiative 35

Fair Labor Association 236
Food and Drug Administration (FDA, US) 288, 291, 294
four dimensions of human rights 318–31
freedom of association 31–2, 59, 67, 185, 187, 221, 224, 226–8, 238
freedom of expression 31, 185, 187, 279, 281–5
freedom of speech 67, 75, 80, 91–3, 101, 187, 283
French, P.A. 78
French Declaration of the Rights of Man and of the Citizen (1798) 12, 77
Friedman, Milton 15–16, 96

Gap Inc. 235–6
General Agreement on Tariffs and Trade (GATT) 179, 199, 223
Gereffi, G. 231–2, 238
Gewirth, Alan 6–7
Glamis Gold 249–51, 254
Global Reporting Initiative 33
globalization 3, 17–22, 39–40, 76, 105, 180, 186, 195, 199, 231
  corporate governance and 316–18
  textile and clothing industry 221–2, 231
Goldcorp Inc. 243, 247–8, 265

Goodpaster, K.E. 164
Griffin, James 6, 152, 154, 158, 162–3
Guatemala 243, 248–65

Hale, A. 225, 231
Hamm, Brigitte 220–38
healthcare provision 29, 96–8
  China and 208–9
  see also right to health
Henry J. Kaiser Family Foundation 291
Hillemanns, C.F. 77
Hobbes, Thomas 94, 316
Hsieh, N. 80–1, 89, 124, 167
human agency 63
human dignity 6–7, 10–11, 13, 62–3, 279
human equality 6–7, 10–11, 34, 199
human freedom 6–7, 10–11, 31, 38
human rights
  characteristics of 7–10
  definition of 4
  doctrine of 181–5
  four dimensions of 318–31
  harmonization of 192
  the law and 10–13
  market freedoms and 185–9
  moral foundations of 5-7
Human Rights Assessment 234
human rights assessment impact (HRIA) 243–5, 248, 255, 257, 266–7, 281, 299
human rights obligations 9
  see also corporations, human rights obligations of
human rights violations 12, 90, 93, 100
  corporate complicity in 90, 100–1, 105–9
  duties to prevent 110–15
  Nigeria and 92–3
Human Rights Watch 126
Huntington, S. 32
hybrid model of human rights obligations 34–6

impact-based responsibility 136–7, 145, 147–8, 150, 165, 170
indivisibility principle 26–28
institutionalization of human rights 11–12
instrumental corporate social responsibility 49, 58–60
Inter-American Commission on Human Rights (IACHR) 252–3, 259–61
International Bill of Rights 20, 29, 65, 280
International Covenant on Civil and Political Rights (ICCPR) 199, 280–2
International Covenant on Economic, Social and Cultural Rights (ICESCR) 199, 282
International Finance Corporation (IFC) 249–50
International Labour Organization (ILO) 19, 65, 68, 179–80, 221, 228, 250–1, 259
International Monetary Fund (IMF) 179–80
International Organization for Standardization 136, 142–5, 160, 170
international trade 179–80, 189–95, 199–201
internationalization of human rights 13–14, 32–4
intrinsic corporate social responsibility 47–9, 52–60, 63–4, 70
investment industry 243–67
ISO 26000 guide on social responsibility 136, 142–6, 160, 167–8

Jantzi Research 255, 258–9
Jerbi, Scott 109
joint stock companies 202, 315, 325

Kant, Immanuel and Kantianism 9, 63, 113, 167
Kimberly Process Certification Scheme 35
Klein, Naomi 117, 225
Kline, John M. 108–10
Kobrin, Stephen 105, 118–19
Kutz, C. 105

labor standards 180, 191–2, 200, 220
  textile and clothing industry 221–38
Lane, M. 80–1

Law, Bill 243
legal model of human rights obligations 15–23, 27, 35–7, 39
'legitimization requirement' concept 107, 109, 116–17, 121
leveraged-based responsibility 135–8, 142, 145–8, 150–3, 156–9, 161–2, 164–71
Li & Fung (company) 234, 238
limited liability 50, 202–3, 315, 324

Macaulay, Thomas Babington 160
Macleod, Alistair M. 179–95
McCloskey, H.J. 322
McMullen, Anna 224
Maher, Sara 224
market freedoms 185–9
Mayer, D. 91–2
Medsafe (New Zealand) 291
Merck & Co. 293–4
Merck, J. 228
Micklethwait, John 117
Microsoft Corporation 115
mining industry 20, 81, 86, 88, 138, 243–66
MiningWatch Canada 250, 256
Montana Exploradora de Guatemala 248–9, 259
Moore, M.S. 158, 162, 165
moral agency 5–6, 49, 62, 78–9
moral autonomy 6–7, 63
moral obligations 8–10, 25, 15, 32, 38–9, 113, 157
Movement for the Survival of the Ogoni People (MOSOP) 120, 126
Muchlinski, Peter 4, 65
Multifibre Arrangement (MFA) 223, 225
Multi-lateral Agreement on Investment (MAI) 330
multinational corporations *see* transnational corporations

negative duties 69, 78, 106, 110–14, 319
negative rights 67, 137, 319–20, 322
New Zealand
  Bill of Rights Act (1990) 283
Newcomer, L.N.
Nigeria
  human rights violations in 92, 107, 115, 124, 126
  Ogoni people of 119–24, 126
Nike Inc. 91, 236
Northwest and Ethical (NEI) Investments 259–63, 265, 267
Nozick, Robert 193–4

Ogoni people (Nigeria) 119–24, 126
'omission requirement' concept 107, 109–12, 121
O'Neill, O. 161
Organization for Economic Cooperation and Development (OECD) 23, 227, 253, 330
Ostas, D.T. 92–4
'ought implies can' principle 9, 116, 148, 149, 152, 165

Palazzo, G. 92, 119
passive duties 110, 112
patient autonomy 277–8
Patterson, Kelly 250–1
Pharmaceutical Health and Rational Use of Medicines (PHARM, Australia) 278
Pharmaceutical research and manufacturers of America (PhRMA) 287–8
pharmaceuticals, direct-to-consumer advertising of 276–300
Pico della Mirandola, Giovanni 6
Pies, I. 148
political lobbying 19, 90–4
political rights 24, 69, 87, 90, 92, 101, 185, 199, 207, 221, 238, 280, 319
positive duties 50, 69, 106, 109–10, 112, 116, 121, 319
positive rights 137, 279, 319–20, 322
Potter, Pitman B. 198–213
profitability 50, 53, 55
protective rights 319, 321
Public Service Alliance Canada 243–4

Radon, Jenik 124
Ramazzini, Alvaro 250
Ratner, Steven 62
Rawls, J. 110, 321
Raz, Joseph 62

right to health 252, 278-9, 281–2, 285–7, 296
rights bearers 9
Robinson, Mary 21, 111
Rowell, Andrew 122
Ruggie, John 74, 82, 97–8, 111, 117, 135, 220,
  corporate human rights 74, 82, 98, 100–1, 135, 139, 246–8
  corporate social responsibility 59–60, 62, 66–7
  human rights duties 111, 117
  human rights responsibilities 14, 18–19
Russia, human rights violations in 115

Sampford, Charles 315–31
Sanchez, Alvoro Benigno 251
Saro-Wiwa, Ken 92, 119–23, 126
Savage, R.
Scherer, A.G. 92, 119
self-regulatory model of human rights obligations 22–3
shareholder interests 27, 49–50, 54, 98, 202, 213, 265
Shell Oil Company 92, 107, 119–24, 126–7
Shue, Henry 63, 80, 83, 90, 110
silent complicity concept 105–9, 157
Smith, Adam 325
Smith, Sally 220–1, 228–32
Social Accountability International (SAI) 33, 231
social contract 54, 77, 86, 118, 286, 316
social participation 63, 83–4
socially responsible investment (SRI) groups 243–4, 248, 254–5, 261, 263–7
Sorell, T. 151–5
Soule, E. 163
Soyinka, Wole 126
spheres of influence (SOI) 135, 138–43, 152, 169–70
Standards Australia 52
State Environmental Protection Agency (SEPA, China) 210
state human rights responsibilities (SHRR) 48, 60, 65, 67–9
state sovereignty 107, 124–5
strategic lawsuits against public participation (SLAPP) 91
'subcontracted capitalism' concept 231
Sykes, Alan 189–90, 192

textile and clothing industry 220–38
Therapeutic Goods Administration (Australia) 291
trade liberalization 179, 200–1
transnational corporations (TNCs) 3–4, 18–21, 24–6, 66–7, 76, 80, 83–4, 100, 111, 119, 231
Transparency International 21
Traub-Merz, R. 222

UN Universal Declaration of Human Rights (UNDHR, 1948) 5, 13–14, 65, 77–8, 82, 195, 199, 228, 280–1, 330
Unidad Revolucionaria Nacional Guatemalteca (URNG) 249
United Nations Commission on Human Rights (UNCHR)
  Draft Norms on the Responsibilities of Transnational Corporations (2003) 4, 24–6, 59–60, 62, 139–42, 152, 169
United Nations Convention on the Rights of the Child 228
United Nations Global Compact (UNGC) 3, 59–60, 62, 64, 109, 111, 138–40, 142, 167–8, 234, 299
United Nations Human Rights Council (UNHRC) 14, 145–6, 249, 329
  Guiding Principles for Business and Human Rights 136–7, 145–6, 157, 160–1, 165–6, 168–9, 171, 220
United States
  Bill of Rights 77
  Constitution of 283
  Declaration of Independence (1776) 12
  direct-to-consumer advertising (of pharmaceuticals) 277–8
universal obligations 8–9
universal rights 12
universalization of human rights 23

Voluntary Principles on Security and Human Rights 35
voluntary standards 221–2, 227–38, 258
voluntary transactions principle 181, 185, 187–9, 192–5

Wellington, Alex 276–300
Wen Jiabao 209–10
Wettstein, Florian 90–1, 105–27, 157, 167
Wiggen, O. 109, 147
Wills, J. 225, 231
Wiwa, Owens 122–3
Wood, Stepan 135–71
Wooldridge, Adrian 117
World Bank 179–80, 249–50, 253
World Health Organization (WHO) 19, 282
World Trade Organization (WTO) 20, 179–80, 199
  TRIPS Agreement 180

Young, Iris Marion 113, 119, 161
Yperen, M. van 225

Zeldenrust, L. 228