

Transnational business corporations, human rights, and global justice

by

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Declaration

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Abstract

This thesis investigates the human rights role of transnational business corporations (TNCs) in the contemporary era and how they can contribute to global justice.

In the era of globalisation, the growing reach and influence of TNCs has prompted both academic and policy discussion over big businesses' global responsibilities. In recent years the question of TNCs' human rights role has become more important, and there have been efforts at the international level to develop principles and guidelines on TNC behaviour in the human rights sphere. A key issue these efforts have had to face is how far TNCs' human rights responsibilities should go and what obligations could reasonably be placed on them, given that they are private actors with legal standing that differs from states.

Business ethics enquiries into these matters – and specifically a field known as Business and Human Rights (BHR) - have addressed the moral bases for according human rights obligations on TNCs. Yet there is lack of consensus in the scholarship on the extent of and grounds for these obligations and lack of engagement with the features of the international system, namely its inter-state nature.

The thesis critically engages with the BHR literature and develops a framework for considering TNCs' moral responsibilities for human rights by drawing on global justice scholarship. Specifically, the thesis critiques the interactional framing of human rights underpinning BHR arguments and offers an institutional understanding of human rights. This recasts the human rights claimants-respondent relationship into an institutional one and considers agent obligations in relation to the institutional order.

In terms of this, and through a critical reading of the United Nations 'Guiding Principles on Business and Human Rights' of 2011, the study argues the following: (i) that TNCs have human rights duties directed towards the institutional setting and their contribution to that setting; (ii) TNC duties are first and foremost negative: it is to refrain from participating in unjust and coercive institutional orders. (iii) TNCs also carry positive duties toward redress and to work towards the institution's just exercise of rights. (iv) TNCs exercise their obligations alongside states, who have primary obligation towards protection and remedy. Yet, depending on the context, the nature of the TNC, and their capacities, TNCs can at times be expected to secure - that is, protect and promote - human rights in settings where states fail in this primary

obligation. (v) Establishing when this positive duty on TNC applies and how it is effected, is an institutional process.

Opsomming

Die studie ondersoek wat die menseregterol van transnasionale sake-ondernemings (TSOs) is en hoe sulke ondernemings tot globale geregtigheid kan bydra.

Die era van globalisering het die toenemende invloed van TSOs teweeggebring. Hierdie verskynsel het akademiese, sowel as beleids gesprekke, oor die globale verantwoordelikhede van groot ondernemings ontlok. Algaande het hierdie gesprekke die vraag oor die menseregterol van TSOs begin aanspreek; daar is ook pogings aangewend om internasionale beginsels en riglyne daar te stel vir die optrede van TSOs. 'n Vername vraagstuk is hoeveel van TSOs verwag kan word, gegewe die feit dat hulle private entiteite is met 'n ander regsstatus as state.

Navorsing in sake-etiek, en in besonder navorsing wat fokus op 'Sake en Menseregte' verken die morele gronde vir die toedeling van menseregte verpligtinge op TSOs. Daar bestaan egter geen konsensus onder navorsers oor hoe ver TSO verpligtinge hoort te strek nie en op watter gronde toedeling hoort te geskied nie. Die literatuur toon ook gebrekkige omgang met vraagstukke wat verband hou met die samestellende eienskappe van die internasionale bestel, te wete die feit dat dit 'n inter-staat stelsel is.

Dié tesis gaan krities om met die 'Sake en Menseregte' literatuur. Dit ontwikkel 'n alternatiewe raamwerk vir die toedeling van menseregte verpligtinge aan TSOs, en dit aan die hand van globale geregtigheid literatuur. In besonder, neem die tesis kritiese standpunt in teen die interaksionele grondslag vir 'Sake en Menseregte' se argumente oor menseregte, en bied 'n institusionele siening oor menseregte. Dit lei tot 'n herkonseptualisering van die menseregte eis-responent verhouding, wat nou in institusionele verband omskryf word. Die studie bied gevolglik insig in watter verpligtinge toepaslik is op TSOs in internasionale institusionele verband.

Na aanleiding hiervan, en deur middel van die kritiese lees van die Verenigde Nasies se 'Guiding Principles on Business and Human Rights' van 2011, voer die tesis die volgende aan: (i) dat TSOs menseregte verpligtinge het wat institusioneel omskryf moet word en aan die hand van TSOs se bydraes aan institusies beoordeel moet word; (ii) dat TSOs se menseregte verpligtinge uit die staanspoor in negatiewe verband is, d.w.s dat TSOs nie aandeel moet hê aan ongeregtighede of aan dwanginstellings nie ; (iii) TSOs het ook positiewe pligte met

betrekking tot regstellende aksies en om te beywer dat instellings geregtigheid nastreef; (iv) TSOs moet hul verpligtinge naas state uitvoer. State is primêr aanspreeklik vir die beskerming van menseregte en regstellende aksie vir menseregteskending. Na gelang van die konteks, die aard van die TSO en sy kapasiteit, kan daar egter wel van TSOs verwag word om menseregte te beskerm en te bevorder. Dit sou van toepassing wees in kontekste waar state in hul pligte faal. (v) Die vraag oor wanneer en hoe hierdie positiewe verpligtinge op TSOs van krag is, word institusioneel verreken.

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List of acronyms and abbreviations

BHR	Business and Human Rights
ILO	International Labour Organization
INGO	International non-governmental organisation
MNC	Multinational corporation
MNE	Multinational enterprise
TNC	Transnational business corporation
TNE	Transnational enterprise
UDHR	Universal Declaration on Human Rights
UN	United Nations

Chapter 1

The challenges regarding transnational business and human rights

1.1 Overview and purpose of the study

What is the role that transnational business corporations (TNCs) ought to play in the human rights sphere and what does this suggest in terms of corporations' contribution to global justice? This study addresses these questions by reviewing and critiquing business ethics literature that focuses on corporate human rights obligations, and by applying global justice considerations.

The motivation for the study arises from the lack of clarity in existing scholarship about the appropriate human rights roles and responsibilities that TNCs ought to assume from an ethical point of view, and second, by the relatively little attention given by business ethicists to global justice (Arnold, 2013). A large body of scholarly work exists that focuses on the scope of obligations that individuals and nation-states have to others in the international domain, but few global justice scholars have directed their inquiry to transnational businesses. Similarly, while business ethicists have developed accounts of TNCs' obligations - and increasingly of these entities' human rights role - there has been relatively little attempt to ground these accounts in relation to the constitutive conditions of the Westphalian order, marked as it is by the legal and authority distinctions between state and non-state actors.

The study has an analytical and evaluation component. Analytically, the study seeks to establish what an appropriate framework is for determining TNCs' human rights role in the international system - one which meets moral standards and which takes account of the constitutive constraints of the Westphalian, inter-state system - and what perspective this gives regarding TNCs' global justice contribution. An analytical framework is developed by means of a critique and extension of existing business ethics scholarship (specifically the field of inquiry known as Business and Human Rights [BHR]). The framework is one which recasts the approach to human rights from an interactional to an institutional understanding. The study illustrates the implications of this recast framework by means of a critical reading of the international community's main current policy approach to TNCs, namely the United Nations 'Guiding Principles on Business and Human Rights' adopted in 2011, to draw conclusions on the human rights obligations of TNCs.

1.2 Context for the study

1.2.1 Transnational business corporations in the international sphere – key issues and challenges

While the significance, reach and impact of transnational business corporations (TNCs)¹ have been the subject of scholarly and public policy scrutiny since at least the 1970s (Segerlund, 2010; Brenkert, 2010), their growing influence in the context of a globalising and markedly more interconnected international economy has made the issue of the impacts and roles of these corporations more critical in recent years (Scherer, Palazzo and Matten, 2009). This is driven by greater concern over the ‘governance deficits’ related to these entities, that is, that transnational business corporations have increasing and significant power, but that there is a lack of effective international governance mechanisms to hold them to account (Ruggie, 2013).

The sheer size and economic penetration of TNCs – with some generating revenues far in excess of the national income of several of the world’s smaller states – have led to discussions and near-consensus internationally that corporations have *responsibilities* towards those whom they affect, but the question of how far those responsibilities should go and how extensively they should be codified, solidified and mandated as obligatory at the international level, is still unresolved. At the heart of this is a problem of authority and relatedly, power and jurisdiction as set within the parameters of the inter-state Westphalian system: transnational business corporations are private economic actors, albeit with structural political influence, over whom states hold often confined regulatory sway. As non-state entities, further, TNCs lack the legal standing of states in the Westphalian order, which makes the question of their accountability simultaneously a legal, political and a normative one (Muchlinsky, 2001, 2012).

Traditionally, scholars from the field of business ethics as well as those from international law, have tended to approach this problem as one of relativism versus universalism, and their analyses have generally been guided by questions of corporations’ reach. Thus, Windsor (2004)

¹ The thesis uses the term ‘transnational business corporation’ to refer to business enterprises that operate across national borders. Other terms used to describe transnational business organisations include ‘multinational corporations (MNCs)’, ‘transnational enterprises (TNEs)’, ‘multinational enterprises (MNEs)’ and ‘transnational firms’. In international business and management scholarship each of these terms has a specific meaning and definitions typically depend on the size, international coverage, structure and makeup of the enterprise (Bartlett and Ghoshal, 2002). In the thesis the term transnational business corporation (TNC) encompasses these and includes for-profit enterprises with decentralised and centralised governance structures with bases in their home and/or host country. While a variety of terms exist in the business ethics and policy literature which are engaged with in the thesis, the term TNC is a standard one and its use is common (e.g. Arnold, 2016, Hsieh, 2017, Ruggie, 2013). For the sake of consistency, TNCs is used here.

notes that the following positions have tended to be present in the literature on international business and the applicable norms. The first is in defence of minimum requirements for corporations on the rationalisation that market conditions and host state legislation determine a corporation's responsibilities. The second upholds universal norms and with that a set of strong, universally applicable rules for corporations, and the third, mid-way position favours 'morals by agreement' (Gauthier, 1986; Windsor, 2004: 738) to satisfy the conditions of the inter-state, pluralist international system.

International public policy aimed at circumscribing the roles and responsibilities of TNCs has followed the latter approach, being state-led attempts to develop frameworks for states' regulation of transnational business. The 1970s saw the first of these with the Organisation for Economic Cooperation and Development's 'Declaration on International Investment and Multinational Enterprises' (first adopted in 1976), and the International Labour Organisation's 1977 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.' These were followed by numerous other international codes over the years on the conduct of transnational business corporations. Such codes have remained voluntary. Various attempts to develop binding and legally enforceable rules derailed because of contestation over states' legitimate regulatory reach over business; lack of consensus across international public and private spheres over the appropriate norms for regulation; as well as enforcement constraints in the global governance domain (for an overview, see discussions in Ruggie, 2013, 2014 and Nolan, 2013).

1.2.2 The rise of the business and human rights agenda

Debate over the ethics of global capitalism gained impetus in the post-Cold War era. This was shaped by a number of events in the international business sphere that spotlighted significant governance loopholes in the era of globalisation (Segerlund, 2010). Numerous scandals exposing transnational corporations' illicit behaviour, or support for repressive regimes, or of direct or indirect involvement in human rights abuses² led to international re-evaluation of the governance of transnational business. In the words of one observer, a 'fundamental institutional misalignment' had arisen between the expansion and effects of global business and the capacities of societies to manage their periodic negative outflows, creating 'the permissive environment within which blameworthy acts by corporations may occur without adequate

² Prominent examples include the Enron environmental scandal in India in the early 1990s; Shell's alleged involvement in the extra-judicial execution of Nigerian activist Ken Saro-wiwa in the mid-1990s; and longstanding accusations of human rights abuses against local communities by private security units employed by Exxonmobil in Indonesia.

sanction or reparation' (UN Human Rights Council, 2007). Several international initiatives followed that tried to address the adverse side of global business and business' 'accountability gap.'³

The significance of these developments is that they helped cast new light on discussions regarding the business-society nexus. Of note is that the question of business' role in international human rights gained more systematic attention (Bilchitz and Deva, 2013). While human rights issues were seen to have a place in business affairs, traditionally this was in relation to employee rights and internal labour conditions. Asking questions about the broader human rights role of business, particularly over national borders, necessitated new conceptual frameworks, approaches and guidelines (Brenkert, 2016).

The discussion, according to Wettstein (2012) yielded three pathways. The first considers how existing international human rights law could be extended and reinterpreted to include, alongside traditional state duties, human rights responsibilities for business corporations. This could entail, inter alia, utilising existing human rights frameworks, such as the United Nations Declaration of Human Rights, that make provision for a supportive role by non-state actors in human rights protection.

The second pathway focuses on how national jurisdiction could be extended over national borders in instances where there is evidence of wrongdoing by a corporation in a second country. This is typically in the context of universal jurisdiction or extraterritoriality, where a state's jurisdiction is stretched to prosecute acts of wrongdoing by one of its citizens or organisations in another country.

Alongside the reinterpretation of international and national legislation, the third pathway has focused on the design of a new international normative regime and corresponding rules or guidelines centred directly on corporation's human rights roles. The most important efforts have been in the realm of the United Nations, seeing in 2011 the UN's adoption of the 'Guiding Principles on Business and Human Rights (UN, 2011). The Guiding Principles are the intellectual output of United States academic, John G. Ruggie, who was appointed as Special

³ These included the Caux Roundtable for Business of 1994; the 1995 Interfaith Declaration of International Business Ethics; and soft law frameworks such as the 1997 Global Reporting Initiative and the United Nations Global Compact of 2000. Many major business corporations incorporated human rights policies into their corporate governance codes (Segerlund, 2010).

Representative to the UN Secretary-General in 2005 to devise an approach for the international regulation of big business, as well as clear, generally accepted human rights guidelines for transnational corporations. His work followed an earlier, abortive UN attempt to develop international norms on these issues (the ‘UN Norms’) which were heavily contested and never adopted.⁴

The Ruggie-devised UN Guiding Principles sets a triad approach to human rights in the international sphere, namely: (i) that states have the duty to protect against human rights abuses by third parties (Protect pillar); (ii) that business corporations have a responsibility to respect human rights (Respect pillar); and (iii) that there should be mechanisms to address the grievances of human rights abuse victims (Remedy pillar) (Ruggie, 2013). The so-called Protect, Respect and Remedy Framework is the centrepiece of the UN’s attempt towards establishing a human rights role for big business and has become the international community’s lodestar towards the regulation of transnational business activities based on a set of commonly agreed principles.

1.3 Rationale and problem formulation

Against this contextual background, there are three interlocking rationales to the investigation in the thesis. The first concerns the normative significance of the recent international policy turns culminating in the formulation and adoption of the UN Guiding Principles. There had been a lengthy build up to the Guiding Principles within a multilateral context, spanning nearly five decades of initiatives, advocacy campaigns and previous, mostly abortive policy attempts. At root was normative divergence, with different values – state, political, cultural and moral – competing in the international policy deliberations (Ruggie, 2017). The adoption of the Guiding Principles marked the first time that, in the words of its architect, a widely accepted conceptual

⁴ Starting in 1998, a sub-commission resorting under the then UN Human Rights Commission, decided to call a ‘Working Group on the Working Methods and Activities of Transnational Corporations’ into life. The Working Group’s mandate was to ‘contribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights’ (UN Sub-Commission on the Promotion and Protection of Human Rights, 2001). In 2003 the Working Group presented a text to the sub-commission entitled ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (‘UN Norms’). Treaty-like in nature, the ‘UN Norms’ outlined strong human rights duties for business corporations in their spheres of influence, by which corporations would commit themselves ‘to promote, secure the fulfilment of, respect, ensure respect of and protect human rights’ (UN Sub-Commission on the Promotion and Protection of Human Rights, 2003). The UN sub-commission approved the UN Norms, prompting contesting among supporters and critics. Supporters of the UN Norms principally came from the ranks of the international non-governmental (INGO) community who favoured the strong approach embodied in the Norms and the Norms’ proposal to make corporations’ human rights obligations binding under international law. Critics hailed from the business world. For them the UN Norms represented ‘the privatisation of human rights’ (Ruggie, 2013: xvii) and imposed on them obligations they saw properly falling under the remit of states. The UN Norms were ultimately abandoned.

and normative basis came about that allows the international community to deliberate over and ultimately establish rules that govern business corporations' human rights roles (Ruggie, 2014, 2017).

The UN Guiding Principles both resulted from and introduced a common normative space for international discussion towards the regulation of transnational business corporations. The impetus for the emergence of this normative space, importantly, was empirical in nature – increased realisation of weakening state capacity to deal with real-life global challenges in the context of globalisation, and attempts to address the growing governance and regulation deficits that this yielded.

While the Guiding Principles are a global governance response to these empirical challenges, they can also be conceptualised as an international normative (or more precisely, norm-change) enterprise. For the first time there seems to be common, principled basis for deliberation not only by states, but also other constituencies, stakeholders and involved publics in the international community about transnational business corporations and their role in international society.

It is important however to place this basis under scrutiny. This entails examining whether the Guiding Principles go far enough in addressing the primary normative issues in relation to business and human rights; and whether the substantive (or foundational) norm that governs the Principles are morally adequate. This in turn requires a moral-philosophical framework for the discernment of such a substantive norm and evaluation of the Guiding Principles' alignment.

The second rationale for the study flows from this and relates to existing scholarship's lack of a satisfactory framework of analysis for such an exercise. In business ethics, the UN Guiding Principles have been heavily debated. Scholars weigh up not only the merits of the Guiding Principles and the international regime these principles are establishing, but particularly the degree to which the emerging regime satisfies human rights requirements from a moral point of view. The following critiques are prominent. The major criticism, firstly, is against the triad framework underpinning the Guiding Principles and the distinction drawn between state duties and corporate responsibilities towards human rights. For many scholars this places a too soft set of obligations on transnational business corporations and creates additional loopholes (Blitt, 2012). It is argued, among others that the separation of state and corporate duty could weaken the safeguarding of human rights (Bilchitz and Deva, 2013).

Further, it is argued that the Guiding Principles lack ‘moral normativity’, in that their foundations are strategic rather than value-based (Cragg, 2012). For Bilchilz (2013: 109) there is a distinct lack of ‘oughtness’ in the UN Guiding Principles, that is, that the Principles focus too much on detailing corporate human rights responsibilities based on corporations’ capacities rather than ‘what ought to be the case’. In addition, it is charged that the Guiding Principles are substantively inadequate. For some scholars, the Principles’ working conception of human rights – with human rights approached in political and legal terms rather than as moral rights – is wrong (Wettstein, 2012; Campbell, 2010, Cragg, 2010). Relatedly, the Principles’ justificatory basis is critiqued. Nolan (2013) for instance notes that in order to satisfy diverse constituencies, the Principles justify the protection of human rights on the basis of perceived common ‘social expectations’ rather than deeper-lying moral principles.

These are powerful critiques. Yet there is lack of clarity in existing business ethics scholarship on the substantive content of, justification for, and even the moral principles informing, transnational business corporations’ human rights role. In what may be termed the Business and Human Rights (BHR) field in business ethics,⁵ two opposing viewpoints exist. The first argues for a strong set of corporate duties to protect and promote human rights in the international sphere based on a claim of the moral and universal nature of human rights. These scholars, following Brenkert (2016) may be termed universalists or restrictivists.⁶ The second, identified by Brenkert (2016) as expansivists, while not denying that human rights are moral rights that ought to be safeguarded, argue for a more limited human rights role for TNCs, seeing corporate duty lying only in refraining from harming human rights.

The restrictivist/expansivist debate in Business and Human Rights scholarship is underpinned by key conceptual and justificatory distinctions between the two camps that result in their opposing viewpoints. The distinctions relate to the two camps’ differing conceptions of human rights, justifications for the source and scope of human rights, and the ensuing obligations each

⁵ The Business and Human Rights (BHR) field reflects multiple origins and relatedly diverse contributions from the ranks of academia, the international policy arena as well as the transnational advocacy domain. According to Santoro (2015), BHR is simultaneously an academic field and a social movement made up of various interest and policy groups that collectively try to address the adverse human rights impacts of business in society. While the social movement component is a broad church of social justice groups, intergovernmental and non-governmental organisations and sometimes broad civil society, the academic component has been shaped by insights from business ethics, philosophy, social sciences and law. BHR academic scholarship seeks to provide conceptual and theoretical guidance to policy deliberations on the human rights role of business and the nature and extent of business corporations’ obligations (see Bragues, 2018; Deva et al, 2016; Wettstein, 2012).

⁶ The term ‘restrictivists’ is used in the thesis.

camp proposes legitimately pertain to human rights respondents. The result is competing claims regarding transnational business corporations' role in the international human rights regime, with the restrictivist position advancing positive obligations, and the expansivist position, negative obligations – or even only a weak set of responsibilities - for TNCs.

Importantly, the restrictivist/expansivist debate presents a theoretical impasse that gives few guideposts on the morally appropriate human rights role of TNCs, nor clear answers on the substantive norm – or set of norms – that should govern the international regime for TNCs as human rights actors. This impasse makes effective evaluation of an international framework like the UN Guiding Principles difficult.

Furthermore, while BHR scholarship offers some insights into the types of questions that ought to bear on discussions regarding TNCs' role within the constraints of the Westphalian order, there are outstanding matters related to the constitutive nature of the international system and the resultant standing of TNCs vis-à-vis other stakeholders, particularly human rights claimants (see discussion in Chapter 2). There are also related matters on the nature, reach, purpose and consequent legitimate role of the corporation in the international sphere that the BHR field does not adequately address (Enderle, 2016). In brief, context and (international) structure questions seem to be important in thinking through the morally appropriate human rights role of transnational business corporations (also see discussion in Ruggie, 2013), but so far the scholarship addressing the issue of business and international human rights has given few clear guidelines (Arnold, 2013).

It is the proposition of this thesis that a more satisfactory framework of analysis is one that enables reflection on corporate human rights roles and obligations against given constitutive and structural conditions as they exist in the international system.. This is a type of reflection that involves, on one hand, establishing the relationship between human rights claimants and respondents – and on why that relationship exists – and on the other, appraising the structural arrangements within which human rights claims and responsibilities are determined.

Importantly, this reflection requires dealing with broader questions of justice, and specifically, global justice, since it invokes consideration of the responsibilities of agents vis-à-vis others within these structures. Global justice concerns centre on the fairness of the 'organized public sphere whose structures support and enforce a degree of order' (O'Neill, 2018: 641) and on individuals' (and corporations') actions and obligations in this order.

The third rationale for the study is therefore to bring the human rights role of TNCs into conversation with global justice considerations. The aim is to establish what substantive (or foundational) norm is appropriate for TNCs as human rights actors, taking into consideration the constitutive conditions of the international environment and on what that establishes in terms of TNCs' human rights role. Here, the study accepts Pogge's (1999) proposition that an acceptable substantive norm (what Pogge, [1999: 358] terms a 'core criterion of justice') is possible when framed within human rights considerations. Pogge's proposition is for a thin conception of human flourishing on the basis of which human rights roles and obligations are determined.

Global justice has received little systematic attention in Business and Human Rights scholarship (Arnold, 2013). Here the intention is not to establish a comprehensive theory on global justice and international business. It is to use global justice points of departure in order to close the theoretical gaps in the BHR field and to advance a proposition on the relevant moral standards that might apply to TNCs in the international human rights regime.

1.4 Objectives of the study

With these underpinning rationales, the study has the following specific objectives:

- (i) To address the theoretical and analytical gaps in the Business and Human Rights scholarship;
- (ii) To propose an analytical framework for the discussion of transnational business corporations' human rights role that allows consideration of the constitutive conditions of the international environment, as well as of TNCs' global justice contribution within this setting;
- (iii) To advance a proposition on the substantive norm that guides transnational business corporations' human rights role within this analytical framework; and
- (iv) To establish what corporate duties legitimately apply to TNCs as derived from this norm.

1.5 Delimitations and limitations

The study has analytical objectives that ultimately bring two disparate scholarly corpuses – that on Business and Human Rights, a sub-branch of business ethics, and that on global justice – together. A note on the scope of engagement with these two corpuses, is in order.

First, the study engages deeply with Business and Human Rights scholarship, since this scholarship has dealt most extensively with questions concerning transnational business' human rights role. Chapter 2 offers a review of the BHR field and the key discussions in this field.

On the other hand, the study's engagement with global justice scholarship is more selective. The field of global justice is expansive and diverse. It has been marked by various waves (concerns and focuses) and debates, with the most formative probably being the statism/cosmopolitan debate (represented, respectively, in the work of Michael Walzer (1977) and Thomas Nagel (2005) on one hand, and writers like Peter Singer (1972), Shue (1980) and Pogge (1989, 1995), among others, on the other) (see Beitz, 2019 for a useful overview). Other important philosophical discussions in global justice pertain to the cosmopolitan-communitarian debate, on distributive economic justice (see Pogge, 2001) and on the responsibilities and morality of global institutions (e.g. Erskine, 2003).

John Rawls' substantive theory of social 'justice as fairness' (Rawls, 1971) and his later work on *The Law of Peoples* (Rawls, 1999) are undoubtedly major reference works in justice scholarship. *The Law of Peoples* is the work that has been of greatest concern for global justice writers. In there, Rawls offers an account of international justice based on two principles, first, a requirement that states respect human rights and second, a principle that places on better-off societies a 'duty to assist' those societies that are materially less well-off. Rawls' account has been roundly critiqued by global justice cosmopolitans for its state-centrism (Pogge, 1989) and for not detailing distributive principles for the international sphere (see discussions in Beitz, 1979; Wenar, 2001). Rawls' *The Law of Peoples* also does not offer a substantive account of human rights (although of course, this was not its objective). In the years following Rawls' 1999 book, global justice literature has diversified and grown substantially.

The study does not give an extensive overview, nor critique of the global justice field, nor does it engage with major areas of global justice discussion, such as the cosmopolitan-Rawlsian debate or the cosmopolitan-communitarian debate. It also does not engage with the extensive scholarship on global economic distributive justice. The aim is modest. It is to use global justice considerations – specifically in relation to the 'fairness of global rules and arrangements' (Barry, 2001: 223) and the obligations of agents that flow from this - to help bridge the gaps in BHR scholarship. From this, a framework is proposed to evaluate the human rights role of transnational business corporations within the Westphalian order.

The study's engagement with global justice issues thus resembles what Beitz (2019: 188) has identified as 'global political justice', that is, the principles and norms that apply to 'global governance institutions' and that involves consideration of 'how these norms might feasibly be embedded in global governance processes that are accessible from where we stand today.'⁷ As discussed in Chapter 3, an account of global justice as framed within human rights objectives, provides a useful theoretical bridge.

1.6 Thesis outline

Chapter 2's objective is to develop a framework for the human rights role of transnational business that both meets moral standards and addresses the constitutive and structural conditions of the international system. This framework builds on a review and critique of Business and Human Rights scholarship, which is bridged by recasting the terms of the BHR debate. The framework developed in the chapter offers a reframed conception of human rights which sets human right relationships (between claimants and respondents) in relation to the global institutional order.

Chapter 3 expands on the content and implications of the recast framework. It discusses the nature and substance of institutional human rights, the scope of duties that are derived and the significance for corporate duties. The chapter puts forward a framework that it tests through a reading of the UN 'Guiding Principles on Business and Human Rights.' From there conclusions are drawn on the scope of TNC duties in the international institutional context. The chapter's main argument is that TNCs have institutionally directed duties that, in the first instance, place negative human rights obligations on them. States have the primary role to protect and promote human rights. Depending on the specific institutional context, however, TNCs can also be expected to fulfil positive duties alongside or in place of states. Through this, TNCs can contribute to global justice.

Chapter 4 gives a brief conclusion.

⁷ This approach is to be contrasted with work on global democracy (e.g. McGrew and Held, 2002) which argues for cosmopolitanism applied to global and regional organisations.

Chapter 2

Business and Human Rights – A reframing

2.1 Introduction

The objective of this study is to develop a framework for the discussion of transnational business corporations' human rights role that meets moral, as well as empirical considerations that pertain to the international system. The aim is to establish what an adequate normative framework is that helps address key moral concerns regarding TNCs' role in human rights and that allows consideration of their contribution to global justice.

With this in view, this chapter applies a series of steps. It starts off with a discussion that contrasts two prominent schools of thought in the Business and Human Rights (BHR) literature on the moral foundations and related dimensions of transnational business corporations' human rights role. These two schools are, following Brenkert (2016), restrictivist (also known as universalists) who argue that business corporations have discrete and direct human rights obligations, and expansivists,⁸ who have a more contingent view of human rights and the accordant responsibilities of transnational business.

While restrictivists in the main hold that corporations have clearly delineated, positive human rights obligations (i.e. the duty to protect and promote human rights) (e.g. Arnold, 2010; 2016; Wettstein, 2012), the expansivist position contests this. Typically expansivists, while not denying that transnational business corporations have a role to play in the international human rights regime, hold that this role is different from that of states; at best corporations have negative duties to refrain from harming human rights. Some expansivists (e.g. Bishop, 2012; Hsieh, 2017) contest the idea that TNCs have human rights obligations, merely that they have a set of circumscribed responsibilities.

Apart from major conceptual and justificatory distinctions, the two schools have contrasting viewpoints on the types of human rights to be protected; the relation between rights-holders and duty-bearers (or in the language of Gewirth, 1983, the claimants and respondents to rights); and on corporations' role vis-à-vis other international actors. The chapter reviews and evaluates the

⁸ Brenkert (2016) identifies a third approach – relativism – which is not utilised in the present study.

position of each school, identifies analytical gaps in each and outlines the implications of the theoretical impasse in the BHR debate.

Following this, the chapter develops an analytical bridge by recasting the terms of the BHR debate. Specifically, drawing on Pogge's (1995, 1999) and Barry's (2003) formulation, it is shown that both restrictivist and expansivist conceptions of human rights entail an interactional understanding of human rights. It is possible to transcend the theoretical impasse through an institutional framing of human rights. The chapter outlines what such a framing entails and what its implications are for the bases on which human rights duty expectations are set. The chapter highlights further questions that arise from this, which are discussed in Chapter 3.

2.2 Business and Human Rights – two schools of thought

Business and Human Rights scholarship is a branch within business ethics that seeks to answer the question of whether transnational business corporations have human rights duties and if so, what the scope of those duties is. BHR scholarship has sought to move beyond legal-political concerns in other areas of business ethics that have addressed aspects related to the loopholes in the current international human rights regime and on improving human rights regulation. BHR philosophers have deeper-lying concerns. Scholars have set themselves the task of deliberating the moral bases of transnational business corporations' human rights role (Wettstein, 2012).

Philosophical inquiry has addressed four questions: (i) What human rights are and the justificatory grounds for their protection? (ii) Who carries human rights responsibilities? (iii) Whether corporations have human rights obligations?; and (iv) What the human rights role of corporations ought to be? (Brenkert, 2016; Bilchitz and Deva, 2013; Enderle, 2016, Sison, 2018). These are questions that extend beyond deliberation over aspects related to public policy and law in international human rights protection (see e.g. Santoro, 2015), but that seek to uncover the basic moral grounds for corporations' human rights roles.

At the outset, it is useful to outline areas of major conceptual division in the BHR scholarship. These relate to the scope of human rights; distinctions that are made in terms of human rights responsibilities and duties; and overarching these, conceptions of agency and conceptions of rights. BHR scholars offer varying conceptions of the type of agents that business corporations are. For some, corporations are social institutions that have social duties as a result of this ontological status (Donaldson, 1989). Others see corporations as exclusively either economic

or legal entities (e.g. Ratner, 2001), while others see them as morally culpable entities (Cragg, 2010).⁹ These differing conceptions, along with differing accounts of rights, lie at the root of different positions regarding the scope of corporations' human rights roles. Moreover, it leads to divergence in the BHR field about other ancillary matters, such as the moral origins of rights, the boundaries that such rights imply, and the precise nature of the duties rights evoke.

Brenkert (2016) helpfully identifies three schools of thought (or 'species' in his words) – the relativists, for whom human rights are culturally based; the restrictivists who take a strict view on the universality of human rights (therefore they are also known as universalists); and those who adopt an expansive approach, viewing human rights as ideals or aspirations to strive towards, linked to the context within which entitlement is sought.

Of these, the claims and positions of the restrictivist and expansivist schools will be further discussed. Relativism has a number of prominent proponents, including Donnelly (2007) and Walzer (1994). Donnelly's statement is representative of the main stance of relativism, which is that the idea of (universal) human rights 'misunderstands and misrepresents the foundations and functioning of (non-Western) societies ... by anachronistically imposing an alien analytical framework' (Donnelly, 2007: 285). By its nature, relativism would deny that business corporations have an a priori human rights role in the international domain, principally because the very idea of a set of values, generally accepted across the world's cultures, is questioned. For relativists, the issue would be that there is not a common basis for the international protection of human rights (or even the claim to international human rights), which makes the matter of business' role in this regard a moot one.

Relativism has been much critiqued in business ethics. Donaldson's (1989) critique of relativism, for example, is standard. This includes relativism's failure to account for the existence of a shared - albeit not an absolute - moral framework, or space of moral discourse in the world; and methodologically, relativism's inability to defend many of the implications of its own argument. Others have noted problems in establishing the parameters of different cultures (Brandt, 1983), and that the existence of certain particularistic viewpoints – which

⁹ The question of whether business corporations have moral agency stands central in the BHR debate. Arnold (2016) for instance holds that corporations are moral agents that are responsible for their activities and policies (also see Kolstad, 2010). For scholars like Bishop (2012) and Hsieh (2017), while corporations have uncontested responsibilities, not all of those responsibilities are moral in nature, nor do corporations have moral agency. BHR scholarship has not resolved the debate on whether corporations are moral agents. A review of this discussion is beyond the scope of the thesis.

might arise as result of differences in societal conditions, economies or history – does not mean that there are not underlying general moral principles (Donaldson and Dunfee, 1994: 264). In agreement with Donaldson (1989: 19), the position here is that cultural relativism offers ‘no persuasive reason for seeing the international realm as a moral free-for-all in which anything goes.’ Nor does relativism help explain existing efforts at the international level to create a common approach towards the worldwide protection and promotion of human rights (also see discussion by O’Neill, 2018).

The other two schools of thought identified by Brenkert (2016) offer conceptual frameworks that can be weighted up. Their accounts differ in terms of basic conceptual matters, as well as their general claims regarding business corporations’ role, as discussed below.

2.2.1 What are human rights?

Probably the most fundamental yet one of the most deliberated among BHR philosophers is the question of the nature of human rights. Points of agreement, in line with the least contested parts of international human rights discourse, are that human rights are ‘rights’, enjoyed by individual persons; that these rights are of greatest social importance and thus enjoy priority or status over all other things; and that they are inalienable (Wettstein, 2013). BHR philosophers generally accept (albeit sometimes tacitly) the argument put forth by Feinberg (1966: 142) that a right is ‘a justified entitlement *to* something *from* someone.’

Deliberation over what human rights are typically starts with reflection on the nature of rights. There are varying conceptions of rights (cf. Cranston, 1973; Dworkin, 1977; Feinberg, 1970; McCloskey, 1976; Nickel, 1987), with differences in emphasis among BHR scholars generally reflecting whether they take a restrictive or expansive position. At minimum, however, is a general understanding that a right protects something of ‘paramount importance’ (Cranston, 1973: 67), and that it sets boundaries for the individual against the collective good (Dworkin, 1977). Henry Shue’s definition of basic rights has received much attention. Basic rights, according to Shue (1980: 18), ‘are the morality of the depths. They specify the line beneath which no one is to be allowed to sink.’ Further, basic rights ‘are everyone’s minimum reasonable demands upon the rest of humanity.’ (Shue, 1980: 19). They are basic since ‘the enjoyment of them is essential to the enjoyment of all other rights.’ (Ibid.)

While Shue’s conception of basic rights has been used widely by others, his list of such rights, and specifically his inclusion of subsistence (or welfare) rights, has been contested (e.g.

Donaldson, 1989). From the restrictivist viewpoint, particularly, recognising things such as economic rights as fundamental moral rights leads to ‘no fixed limits to the rights that people claim(ed) or (were said to) possess’ (Cranston, 1983: 12). Restrictivists therefore set robust limitations to what counts as fundamental rights, precisely because such rights need to apply universally. The benchmark for restrictivists is that human rights are basic moral rights enjoyed by all individuals, which are inalienable and not dependent on the prior recognition of governments (e.g. Wettstein, 2012).

Expansivist viewpoints on what human rights are can vary. Some expansivists treat them in the sense of entitlements (which would mean a circumscribed set of rights, in the Feinberg sense), while others regard human rights more broadly, as ‘desirable ends or ideals’, or also as interests (Brenkert, 2016: 281). Expansivists would typically also derive these rights from different societal sources, so that they become ‘aspirational rights’ rather than strictly defined basic rights (Arnold, 2016).

2.2.2 Justificatory grounds for human rights

Restrictivists derive their claims for the moral nature and universality of human rights from the features of human beings, principally that humans have agency, including moral agency, because of their capacity to reason. This justificatory basis for human rights follows a lengthy genealogy, arising first in the religious thinking of the 12th and 13th Centuries and being secularised in the Enlightenment era through the thinking of Rousseau and Kant (see overviews by Bragues, 2018; Sison, 2018). In outline, human beings are seen as moral agents that all equally share the right to freely exercise moral reasoning. The fact that human beings have this feature, means that all humans are born free and equal, with equal claim. From these conditions of freedom and equality, the idea of human dignity is derived, which accords intrinsic value to all humans in equal measure (c.f. Kant, 1955).

Restrictivist conceptions of human rights are operationalised on these bases: human rights give *gestalt* to human freedom, equality and dignity - three core values of ‘foundational moral significance’ (Cragg, 2010: 271). Human rights are hence rationalised by the necessity to give credence to each individual’s inalienable freedom to exercise their moral agency and enjoy their moral autonomy. This also justifies the universality of human rights, since to enable only some their moral autonomy or freedom is to discriminate against others (c.f. Gewirth, 1983).

The respect for human rights has therefore both intrinsic value, because it confirms the dignity and freedom of all individuals, and it does so on equal basis. Restrictivists emphasise that human rights are inherently ethical and that they are overriding since they trump all other moral and non-moral values and take precedence over all other rights (Wettstein, 2012). For restrictivists, lastly, human rights are moral goods that need to be protected since they assure, in a Kantian frame, human beings their status of ends in themselves (Arnold, 2010).

The expansivist justification for human rights is varied (Brenkert, 2016). Some appeal to the Kantian notion of human dignity but link it to broader applications such as contained in the United Nations Universal Declaration of Human Rights (e.g. Campbell, 2006). Others adopt an instrumental approach by holding that respecting and promoting human rights have societal benefit (Bishop, 2012); while those working in the contract tradition derive justification for human rights from social contracts – whether they be actual ones institutionalised through international agreements and covenants, or idealised or hypothetical contracts (such as pertain in the work of Donaldson and Dunfee (1994)). In this frame social contracts generate certain rights of moral standing. The specific content of those rights is determined by the contractors and the conditions under which the rights are agreed to. Human rights, in this sense, are contingent upon what contractors consent to under the set of norms that govern relations between contracting parties.

2.2.3 Do transnational business corporations carry human rights responsibilities and/or duties?

An issue which has proved highly divisive in BHR scholarship, is the question of whether transnational business corporations have human rights obligations or not, and if so, what the scope of those obligations should be. This is a matter of basic conceptual divergence regarding the nature of obligation versus responsibility, that result in different justificatory positions. It is thus useful to first outline why the idea of corporate human rights obligations is contested and the various ways in which ‘responsibility’ and ‘obligation’ are used in BHR scholarship.

2.2.3.1 Why the distinction between responsibility and obligation?

The claim that corporations have human rights responsibilities is uncontroversial when seen in the light of corporations’ obligation to respect national legislation, and to some extent, international law. Since human rights protection is incorporated in one form or another in the domestic law of most sovereign states, and has been codified through various international agreements, business corporations find themselves subject to human rights provisions which

they have to abide by in the course of their normal operations. Growing concerns about corporate governance and corporate social responsibility around the world also mean that corporations would want to be seen as good citizens that obey the laws of the countries that they are active in (Wettstein, 2015).

In this sense the claim on corporations' human rights responsibility – defined in terms of respecting national and international law - is uncontentious. On the other hand, the question whether corporations are active *duty-bearers* or carry *direct* human rights obligations is subject to intense debate in the BHR field (Cragg, 2010). Conceptually, the debate orients around two differing framings of human rights obligations. A negative framing sees corporations' obligations in a passive light by which they respect legislation and refrain from harming groups' human rights. A positive framing poses obligations on business corporations to actively promote or advance human rights claims and to enter into direct moral contractual relationships with human rights claimants, without the intermediating role of the state, international law, or international institutions. Generally, restrictivists advocate for a fixed set of human rights obligations for corporations, derived from a 'general duty assignment' (Kolstad, 2009: 570) and frame these obligations in a positive way (Arnold, 2010, 2016; Bilchitz, 2013 and Kolstadt, 2009 are examples). Expansivists see negative obligations pertaining to corporations in that corporations are expected to respect domestic and international law (e.g. Hsieh, 2017).

There are other reasons for the contention among BHR scholars. One issue is the degree of manoeuvrability that business corporations have in the Westphalian, state-centric order, and their corresponding lack of international legal personality. Unlike states, business corporations cannot make or enforce international rules. This constraint leads some scholars to ask whether the same obligations that pertain to states can legitimately apply to non-state actors like business corporations (Hsieh, 2010).

A related matter is the type of corporate duties that are at stake given the current human rights regime. Restrictivist human rights discourse sets standards for the observance of human rights, holding that it must be possible to enforce and monitor them. This practicality requirement of human rights (c.f. Campbell, 1998) stems from the Kantian principle underpinning universalist discourse that 'ought implies can.' The standards required from this are that a given human right cannot generate duties that are unrealisable, or be so broad that the correlative duties are vague or unspecified. If the benchmark of the current institutional regime is taken to be frameworks such as the UN's Universal Declaration of Human Rights, the regime offers few

guidelines on non-state actors' human rights obligations (Kobrin, 2009). Furthermore, for a restrictivist like Arnold (2016), expansivists' notion of human rights as aspirational rights can lead to imperfect (non-valid or untenable) duties on the duty-bearer. In relation to business corporations this could see human rights expectations placed on them that fall outside the remit or control of the corporation.¹⁰ Political and legal conceptions of human rights could lead to the same challenges (Wettstein, 2012).

2.2.3.2 Restrictivist positions

The restrictivist camp in the BHR field has yielded the most forceful proponents of the argument that business corporations have direct, positive human rights duties. The logical extension of the restrictivist position demands that human rights are to be recognised, respected and advanced without exception by all entities in the social world. This includes, clearly, business corporations. Restrictivists provide various justifications for their position.

For example, Arnold (2010) proposes a conception of human rights as moral rights that comply with the following conditions: they are claim-rights that generate corresponding duties; they are 'agentically-grounded'; and they are basic, not aspirational rights. His notion of claim-rights (or rights as claims) draws from Feinberg's (1966) argument that rights are things that entitle individuals to receive assistance, protection, or some other legally pre-determined goods from others. The parties that have the responsibilities to satisfy the claim-rights can be seen as duty-bearers vis-à-vis the rights-bearers (also see Wenar, 2005). The idea of agentically-grounded rights provides further justificatory ground for the ties between rights-and duty-bearers. In the specific context of business corporations, because they are intentional entities, they have ontological status as moral agents and hence as moral duty-bearers (Arnold (2010, 2016).

In sum, according to Arnold (2010), business corporations operate within a moral space (i.e. a space of human rights demands) that sets constraints on the legitimate pursuit of their economic activities. They therefore have human rights obligations. These include ensuring employees are not subject to forced labour, trafficking, corporal punishment, imprisonment or other forms of grievous bodily harm; that employees are not prevented their right to organise; and that the physical and social surrounds in which the business corporation is active is not negatively impacted (e.g. through permanent natural resource depletion or pollution).¹¹

¹⁰ One example would be obligating a corporation to prevent the use of torture by governments.

¹¹ Arnold's (2016) argument about corporation's obligations hinges on his understanding of the nature of the corporation. For him corporations are more than fictional entities to whom moral concerns do not apply. Corporations in his view are intentional organisations because they have internal decision-making architectures,

Wettstein (2009) argues that corporations have human rights duties and that these are on par with states. This stems, in his view, from corporations' authoritative basis. Major transnational corporations operate within a space of de facto political authority. This authority is different from that of states since it is usually tacit and not based on an explicit normative agreement with society (when understood within the social contract tradition). Yet corporations hold sway over society. To make this explicit and hence legitimate, corporations' social role needs to be codified. From this vantage point, it is logical to conclude that corporations have human rights duties.

Donaldson (1989) also develops an argument for the role of transnational business corporations as active duty-bearers. According to Donaldson (1989), by virtue of business corporations' nature – that they are productive organisations – they have societal agency. This agency is moral in the sense that society recognises business corporations as discrete entities (thus giving them identity), and society likewise can expect specific normative goods and behaviour from them, such as contributing to the general public good and to the interests of consumers and employees. By applying the social contract thesis, Donaldson (1989: 62) asserts that business corporations have moral duties. He distinguishes between corporations' 'minimal' duties, those that the breach of or continual failure to follow, would strip the corporation of its moral right to exist, and 'maximal' duties, those that fulfilling 'would be praiseworthy but not absolutely mandatory' (Donaldson, 1989: 62).

To establish what minimal duties apply to business in the international domain, Donaldson draws on international human rights theory to propose a list of ten fundamental international rights: (i) the right to freedom of physical movement; (ii) the right to ownership of property; (iii) the right to freedom from torture; (iv) the right to a fair trial; (v) the right to non-discriminatory treatment on the basis of physical or other characteristics; (vi) the right to physical security; (vii) the right to freedom of speech and association; (viii) the right to minimal education; (ix) the right to political participation; and (x) the right to subsistence (Donaldson, 1989: 81).

ethical infrastructure such as corporate conduct codes, and the capacity to assess, reflect on and change corporate plans and practices. This intentionality bestows on corporations moral agency where they can be held to moral account for their actions. More than this, corporations are moral duty-bearers with direct human rights obligations.

Drawing on Shue's (1980) and Nickel's (1987) arguments, Donaldson concludes that transnational business corporations have duties to avoid depriving people of all ten fundamental rights; and duties to help protect people from the deprivation of some of the fundamental rights. The rights that international business corporations are exempt from actively protecting from deprivation include: freedom of physical movement; ownership of property; freedom from torture; and the right to a fair trial (see Donaldson, 1989: 86).¹²

2.2.3.3 Expansivists' positions against business corporations as human rights duty-bearers

Expansivists offer contrasting arguments that deny that business corporations should be seen as direct human rights duty-bearers. The qualification for this generally relates to the nature of business corporations, their goals, and their relationship to states.

For example, for Bishop (2012), if corporations are said to hold obligations in relation to human rights, the question is what corresponding rights they hold that capacitate them to exercise those obligations? Because corporations have entirely private goals, according them the right to organise social systems in the pursuit of their obligations carries risks and could lead to misuses. Therefore corporations hold different obligations to states.

Hsieh (2015, 2017) aligns with the latter view, arguing that if there is proper understanding of the status of corporations, they cannot be said to hold human rights duties on equal footing to states. Adopting Buchanan's (2013) notion of 'status egalitarianism', Hsieh's (2015) basic proposition is that corporations are private entities that have specific social standing, tasked with profit generation. According them human rights duties does not correspond with this social status. Instead, corporations enjoy equal moral status with other social entities. It is the duty of

¹² Donaldson (1989) applies a technique known as the compatibility proviso to synthesise the list of ten fundamental international rights from existing international frameworks, including the United Nations Declaration of Human Rights of 1948. The compatibility proviso holds that as long as a right satisfies pre-set conditions, observing the right satisfies all other fundamental international rights, meaning that no single right is more important than the other and avoiding the need for executing trade-offs between various rights. The pre-set conditions that Donaldson applies, draws on the work of Nickel (1987), who outlines criteria that an international right, at basis should satisfy. Donaldson's (1989: 73) list of three conditions entail: that the right should protect something very important; that the right must be 'subject to substantial and recurrent threats'; and that the obligations or burdens created by the right must be affordable in terms of the resources and other obligations required to observe it, and fair in the distribution of resources. The latter condition leads to the fairness-affordability criterion, applied by Donaldson (1989: 85-86) to establish the minimum correlative duties to be accorded international business corporations. Using Shue's (1980) account of basic rights – which holds that there are three types of correlative duties for any type of right, namely, (i) to avoid depriving; (ii) to help protect from deprivation; and (iii) to aid the deprived – Donaldson sifts his list of ten international rights according to those he believes meet all conditions applicable to international business corporations.

the state to act as arbiter in the protection of all entities' statuses and corresponding rights, including that of corporations. Giving additional duties to corporations misrecognises their status and negates their rights. From the vantage point of status egalitarianism, the human rights system entails more than the protection of basic interests or normative agency, but it also accords equal basic moral status to all social entities (Buchanan, 2013). For Hsieh (2015), corporations have the right towards this equality of moral status in society. Therefore they cannot have the same duties as states.

Bishop (2012) and Hsieh (2017) make strong cases against attributing to business corporations the full set of human rights obligations usually accorded states. Hsieh (2017) contends that it is generally accepted that corporations and their managers have distinct moral duties vis-à-vis society, and that looking at these basic duties, rather than framing them in human rights terms, offers more fruitful avenues for delineating business corporations' responsibilities. There is a further implication arising from Bishop's (2012) and Hsieh (2017)'s argument, namely that corporations are rights-bearers, and that any attribution of duty upon them has to be moderated in relation to their rights. More generally, expansivists have advocated for the recognition of corporations' minimal role in respecting human rights (i.e. corporations' role in negative rights).

2.3 Synthesis and analytical gaps

The restrictivist/expansivist division is not a cast iron one. It models broad areas of difference in debates in the Business and Human Rights field, and individual scholars might by occasion straddle both.¹³ But the distinction provides a useful way of organising the major arguments, as well as points of contention in the BHR field. Similarly, it helps give theoretical and conceptual guidance to discussions around businesses' human rights role.

In this regard, it is significant that the restrictivist and expansivist positions offer two competing, evaluative frames for viewing transnational corporations in the human rights regime and the corresponding conditions and sets of standards that are relevant. This is detailed in Table 2.1.

¹³ An example is Donaldson's (1989) earlier work which reflected a restrictivist position, and his later work with Thomas Dunfee (Donaldson and Dunfee, 1994) which is expansivist in nature.

Table 2.1
Contrasting restrictivist and expansivist claims

	Restrictivist view	Expansivist view
Conception of human rights	Basic moral rights	Moral rights as determined within the context they are exercised / Moral interests
Justification/source of human rights	Human moral autonomy, freedom and human dignity (Kantian principle)	Human dignity
Scope of rights	Intrinsic value Fixed and limited	Instrumental value (ensures equal protection of social interests) Aspirational
Corresponding duties	As determined by rights-claims; fixed and limited	Contingent
Corporations as duty-bearers and rights-bearers	Corporations are direct duty-bearers Positive framing of duty – duty <i>to</i> Inconclusive on corporations as rights-bearers	Corporations have duties but contingent on context and social role Limited positive framing of duty Generally negative framing of duty – duty <i>to refrain from</i> Corporations are rights-bearers; their duties have to be determined in relation to their rights
Framing of the corporation (and justificatory grounds)	Normative and instrumental	Instrumental
Major exemplary works	Arnold (2010; 2016); Bilchiltz and Deva (2013); Donaldson (1989); Werhane (2016); Wettstein (2012; 2015)	Bishop (2012); Donaldson and Dunfee (1994); Hsieh (2015, 2017); Ruggie (2008); Ruggie (2013)

2.3.1 Opposing views

Each of these positions has different implications for the exercise of human rights. At root are foundational conceptual divisions that derive from differing conceptions of human rights. These conceptual divisions have substantive implications for the scope of corporations' human rights obligations, on which the BHR scholarship offers two opposing viewpoints.

The restrictivist position sets rigorous standards for business corporations' human rights role in the international sphere and the obligations legitimately placed on corporations. This follows from restrictivists' rejection of human rights being anything but basic moral rights. Expansivists' view of human rights is much broader, seeing human rights claimants and corresponding respondents in contingent light, shaped by the context for entitlement. The restrictivist framing hence provides for the active advancement of human rights. By contrast, expansivists adopt a negative framing; for expansivists the legitimate scope of corporations' duties is merely to refrain from harming human rights.

The debate in the BHR literature seems to offer few clear guideposts regarding the actual exercise of these duties in the business ethics context. In this regard one can legitimately ask whether the restrictivist position sets principles and standards that are too strict, and whether that of the expansivists is too unspecified? For example, the risk of the expansivist view of human rights is that no one party can be identified as a duty-bearer for a specific right or set of rights, nor can any one party necessarily be sanctioned or punished if they fail to deliver human rights entitlements. The expansivist approach can become so broad that human rights in the business ethics context become 'a catchall phrase for anything a person wishes to defend' Brenkert (2016: 285).

On the other hand, restrictivists' principled position can place expectations on duty-bearers that are so rigorous that, in attempting to fulfil these expectations, duty-bearers can legitimately only pursue a limited number of rights. In the case of businesses' human rights role, it has been noted that the restrictivist position implies a business ethics that does not cover the full scope of businesses' operations (Sorrell, 2004). The restrictivist approach therefore can satisfy certain human rights conditions, but within a delimited area of the business domain. This leaves the question of which part of the business domain, unanswered.

2.3.2 Analytical gaps

There are also other implications that the BHR debate is not clear on. These relate to a number of analytical issues.

First, the debate reflects differing conceptions of the transnational corporation. Different philosophers have different answers to the question of what type of entity the corporation is. For a writer like Donaldson (1989), corporations are economic organisations and they are productive organisations who correspondingly carry duties towards human rights protection.

Many other scholars also derive business corporations' obligations from their role in society. Yet the precise nature of this role is largely unspecified and the character of the business-society nexus (in terms of its dynamics) undescribed.

Second, relatedly, concerns the international context in which transnational business corporations' human rights role are determined. BHR literature does not deal with this matter in a systematic way even though strong claims are made regarding corporations' obligations and even rights in the international system. From a restrictivist viewpoint there is justification for this, since deliberation on moral issues should transcend questions of type, form and function. But the issue extends beyond this. As Enderle (2016) points out, in posing and answering questions about corporations' human rights roles, it is important how the business organisation is conceptualised, how such organisations' purposes are defined, what the larger systemic context is, and what economies are held in mind. Thus, considerations of the moral context of the political economy that today prevails and the justified moral roles that can be accorded different role players, are important. This is in line with Boatright's (1993) argument for the significance of 'the moral market,' in business ethics, which shifts the focus away from individual corporations to the larger social environment in which they operate and that factors in wider economic, political, social and institutional setups.

There are sound moral reasons for this. It meets a base – albeit very important - standard of morality in that moral relationships (in terms of rights, claimants and respondents) are specified within the context within which these relationships operate. Further, it helps deal with the 'plurality of values' (Gomez, 2018) that businesses are confronted with and that are amplified within the international environment. Rather than an appeal to relativism, this recognises the empirical condition of plurality while still offering a common moral framework. In addition, it allows for the factoring in of practical considerations that are important to realise moral objectives. Thus, considering the features of the larger moral political economy and transnational business corporations' role in it, necessitates dealing with questions concerning the mandate and functions of corporations and their capabilities – as non-state actors - within the Westphalian order.

A third issue is conceptual in nature and relates to the fact that the restrictivist and expansivist positions reflect both general (universalist or Kantian) and instrumental rationalisations to transnational business corporations. In this regard Hsieh's (2015) problem formulation is worth referring to. He notes that the general rationalisation for the acknowledgment of moral

autonomy (and by extension, human rights) is based on the intrinsic value of individuals as human beings. For corporations, while ostensibly this rationalisation is applied, what scholars rather seem to have in mind when they seek to justify corporations' moral nature, is an instrumental claim: respecting and promoting human rights is instrumentally valuable and part of the realisation of the objectives tied to business entities. The BHR debate is not clear on the implications of these rationalisations within a business ethics domain. Even the restrictivist position seems to conflate both Kantian and instrumental rationalisations, from which strong claims for the moral nature of transnational business corporations are derived, while their societal (and human rights) role is instrumentally justified. In all, a moral view of the corporation, one appropriate for the international system, is not offered.

2.4 The theoretical impasse in the BHR debate and transcending it

In sum, while BHR scholarship has some important arguments, it also has analytical gaps. Of particular significance is that deliberation over transnational corporations' morally appropriate human rights role ends in an impasse which BHR scholarship has not adequately resolved.

Two ontological issues can be identified that contribute to the theoretical impasse. The first concerns BHR scholarships' framing of the rights-duties relationship and what this implies. Specifically, the two accounts, while leading to different conclusions, are ensconced within the same – namely interactional – framing, by which 'each rights (has to be matched) with certain directly corresponding duties' (Pogge, 2008: 70). The restrictivist discussion advances a maximalist account of human rights, according to which human rights provoke both negative duties ('to avoid depriving') and positive duties ('to protect and to help'). The expansivist camp gives a minimalist account of human rights. Minimalist accounts require only negative duties (to refrain from violating a given human right)

The implications of maximalist versus minimalist accounts of human rights are clear. For the first, human rights are moral rights of universal scope and effect that therefore generate binding and direct obligations on duty-bearers to ensure the fulfilment of those rights. For the second, human rights, while moral rights, do not generate these positive duties.

The interactional basis underpinning the restrictivist/expansivist accounts frames the rights-duties relationship on a one-to-one basis. It is about the appropriate alignment between human rights and their corresponding duties.

The second ontological issue is related to this. The interactional understanding frames ‘the (human rights) responsibilities that individuals hold directly to others’ (Barry, 2003: 219). Here, an important aspect of the two BHR camps is that they both treat the corporation as an individual agent with obligations to other individuals. This is evident in the justificatory grounds for the corporation’s role which both provide. Whether this is in a universalist/Kantian or instrumental frame - or a conflation - as outlined above, the view of the corporation is that of an individual agent that enters into a claimant-respondent relationship with other individuals.

The transactional basis implied in the restrictivist/expansivist debate is one-to-one, with individuals the unit of concern.

These ontological aspects make for a framing of human rights in BHR accounts that requires careful matching of duties with rights. It also explains why an impasse arises between the restrictivists and expansivists. Further, the interactional framing carries with it stalemates over the claimability and enforceability of rights and the moral relationship between rights claimants and respondents (Raz, 1984; Arras and Fenton, 2009), in part because of the difficulty in identifying the proper respondents to rights claims.

A different framing is possible that overcomes the BHR impasse and that factors in the constitutive and empirical aspects related to the international system as outlined above. This is achieved by recasting the terms of the BHR debate, specifically, by reconceiving the nature of human rights.

In contrast to the interactional framing of human rights, Pogge (1994, 1995) and others offer an institutional understanding of human rights, by which human rights are conceived ‘primarily as claims on coercive social institutions and secondarily as claims against those who uphold such institutions’ (Pogge, 1999: 356).

Specifically, as argued by Pogge (1995), by formulating a human right, the assertion is that a given society or social system is organised in such a way that the claimant’s access to that right is satisfied. If not, the society or social system ought to be reorganised to ensure such access. This shifts the transactional focus, in terms of the delivery of rights, from the individual to the collective agent (Barry, 2003: 220), and in particular, the institutional context.

It furthermore shifts the debate from the ‘agents question’ on ‘who ought to do what for whom’ (O’Neill, 1984, 2001)), and the recipient’s question, which is centred on the rights dimension of human rights, to what O’Neill (2018) identifies as a ‘perspective-neutral’ view centred on the standards that institutions should meet.

Such an account of human rights reconceptualises human rights as moral rights that are determined institutionally. The obligations of respondents, furthermore, is established institutionally. This conception poses demands on procedure and setting, rather than on the fulfilment of a strict set of universally applied rights, without foregoing moral standards. Institutional rights entail merely the right to the right kind of institutions (Arras and Fenton, 2009).

A conception of human rights in this way helps meet criteria related to the effectiveness, reach and practicality of the human rights regime, while ensuring strict moral standards. This framing places demands on the creation and adequateness of the specific institutions to realise these moral rights (Arras and Fenton, 2009).

In all, in the recast frame, human rights are institutionally generated and institutionally delivered. The claimant-respondent relationship is also an institutional one, and specific to that institution.

The implications that this reframing brings in terms of corporations’ obligations, are important. First, the reframing is ontological, and it entails a shift in level and unit of analysis, from a conception of corporations as individual agents, and of corporate duties framed in individual-to-individual terms, to one where the corporation is one respondent among others within a collective context. Second, corporate duties are framed in relation to the institutional setting.

Third, such a shift addresses the difficulty of carefully aligning rights with duties. The requirement is rather to align duties with the institutional context. Fourth, viewing the corporation within a collective context, invokes questions about corporations’ positioning vis-à-vis other respondent, specifically states. This introduces issues that BHR scholars have largely neglected, that is, questions about the make-up of the international system and TNCs’ place in that system.

2.5 Conclusion

In sum, an institutional conception of human rights addresses conceptual and analytical matters that BHR scholars have not adequately addressed. This chapter has argued that a recasting of the terms of the BHR debate leads to a framework for assessing the human rights role of TNCs that allows the factoring in of important constitutive and empirical aspects related to the international system. This framework draws focus to TNCs' positioning and role within the larger institutional order within which human rights relationships are established. Human rights are reconceived as moral rights within the constraints of the institution. TNCs, in this frame, have human rights obligations justified in terms of the institutional context.

With this, the emphasis as far as human rights deliberation is concerned, falls on the institutional context, and a further set of issues have to be considered. These relate to the nature of the institutional setting and the rules within that setting. What should these look like to meet moral standards? And what are the substantive bases on which obligations towards that setting are established? It is to these, and subsidiary questions regarding the scope of institutional human rights and duties, that the study now turns. The next chapter discusses these.

Chapter 3

Institutional human rights and criteria of global justice

3.1 Introduction

The institutional conception of human rights helps to address the underlying theoretical problems in the restrictivist/expansivist debate. By reformulating human rights within an institutional frame, rather than in interactional terms, it is possible to bridge the impasse in BHR scholarship. This brings a re-emphasis in the discussion about human rights obligations, which in the institutional conception, centres not on individuals, but on the institutional context and the deliberative processes within this context.

There are important questions that flow from this re-conception. What are the morally appropriate standards that should prevail in the institutional context? How do human rights claimant-respondent relationships get established, and what substantive norm is appropriate in this regard? Furthermore, what is the scope of institutional human rights, and what is the scope of institutionally conceived duties? Finally, what does this lead to in relation to appropriate duty expectation for human rights respondents in the international sphere?

The task of this chapter is discuss these aspects in greater detail. The chapter starts off with an outline of the institutional conception of human rights and elaborates, through the use of global justice considerations, what its substantive contents are. Thereafter, the nature and substance of institutional human rights and duties are discussed. The discussion leads to an outline of duty expectations that is tested through a reading of the United Nations Guiding Principles on Business and Human Rights of 2011. The chapter draws conclusions on the nature and extent of TNC duties within the institutional order as these duties are geared towards justice goals.

3.2 An institutional conception of human rights – the scope of rights and duties

As discussed, the institutional conception departs from the restrictivist/expansivist framing of human rights in a key way: it sees the rights-claimants-respondents relationship as an institutional one. This account of human rights reconceptualises human rights as moral rights that are determined on collective basis within institutional contexts. Institutions are thus not only the vehicles for securing – and in some instances enforcing - human rights. They also constitute the space within which the content of those rights and the nature of the relationship between claimants and respondents are concluded. Determining who owes what to whom is the

outcome of deliberation. It follows that corporate/TNC duties are established not in relation to individuals, but to the institutional context.

But what should that institutional context look like in order to meet moral standards? What do institutionally conceived rights and duties entail and how do they get established in morally accountable ways? What demands, accordingly, are posed on TNCs and what is the appropriate substantive norm for allocating corporate duties?

To answer this, it is useful to call on accounts from the global justice domain, which centre on the international framework or structure of rules within which agents – individual and collective – relate to each other, and which derive agent responsibilities in terms of this framework. Global justice concerns speak to the ‘fairness of global rules and arrangements’ (Barry, 2003: 223) and the institutions that are part of these arrangements. Global justice considerations make possible normative appraisal of the global institutional environment. It enables elaboration of the scope of human rights and duties within the institutional setting towards the objective of, in the words of Pogge (1995: 114), fairness in ‘the organization of one’s society’.

Following Barry (2003: 223-224) such an appraisal requires clarity on the ‘appropriate *aims*’ that a given institutional order, as part of the social system ‘should be designed to realize’; the *subjects*, that is, the ‘entities deemed relevant to (an) assessment of social arrangements’; the *goods* (or benefits) that are involved; and the principles by which *responsibilities* for social arrangements are allocated. These include responsibilities, variously, to adhere to arrangements when they are in place, work towards their improvement where they lack, or to bring remedy for the adverse effects of unfair arrangements.

In accordance with this, if the aims are articulated as the arrangement of institutions to ensure the fair distribution of the benefits and burdens of social life (Beitz, 2001), and the subjects involved are understood to be individuals and collective agents within the institutional setting, a number of principles apply. These help to specify (i) the scope of institutional human rights; (ii) the scope of duties within the institutional setting; and (iii) the required or appropriate institutional arrangements.

First, concerning the scope of rights, human rights claims – the goods that are at stake – are framed in relation to the institutional order. Institutional human rights are ‘moral claims’ on the structures of society ‘.... that make demands on citizens... (and governments) to work for an

institutional order and public culture that ensure that all members of society have access to the objects of their human rights' (Pogge, 1995: 115). Institutional rights entail the right 'to institutions that will provide procedures for determining who should get what' (Arras and Fenton, 2009: 35). It can also be specified as the right to just institutions.

Second, human rights duty is framed in terms of what 'institutions "owe" to others' (Arras and Fenton, 2009: 33). Should a given order be the source of injustices or deprivation, the responsibility for this is borne by all those who participate in it. Duties are towards ensuring a just institutional order.

Third, the emphasis is on social rules and their fairness. Agents are called upon to address human wrongs and deprivations, by 'restructuring social arrangements' (Barry, 2003: 221). There is not an interactionist duty to compensate individuals directly, but a duty to work towards better institutions that help guarantee protection or compensation.

This, fourthly, sets a foundational norm centred on the just nature of the given institution's ground rules. The ground rules, in turn, are to be established within the specific institutional setting and the relevant issue area. Within this, both the content of rights and the appropriate duties are established in relation to the institutional setting's official purpose and its domain of competence (or in the terminology of Beeson, 2015, 'jurisdiction'). The emphasis is on the deliberative processes within that setting. This means agents also have the responsibility to ensure just deliberation (see Pogge, 1995).

This offers a framework of human rights specified in relation to the required normative goals of the international institutional order and the principles for institutional arrangements that can be set out as follows:

Institutions should strive towards the delivery of justice. They mediate human rights claims and responses in terms of this. The requirement to systematically correlate rights with duties - as underlies the discussion in the restrictivist/expansivist camps - is sidestepped. Rather, the institutional account acknowledges that this relationship varies across contexts and that other factors ought to bear on determining the duties owed to claimants. Practicality and feasibility conditions, as well as institutional deliberation, affect the scope of institutionally articulated rights and duties. The human rights that can be justifiably claimed are specific to the institutional setting, dependent on what is practical within that setting.

This is summarised in Table 3.1

Table 3.1
The scope of institutional human rights and duties

Conception of human rights	Moral rights that find expression through political processes and specific to the institutional context
Human rights subjects	Individuals and collective agents with a claimant-respondent relationship mediated by the institutional order
Justification/source of human rights	Legitimated in terms of deliberative institutional processes, claimability and achievability (capacity)
Scope of rights	Institutionally articulated rights
Human rights goods/claims	Right to just institutions
Scope of duties	‘What institutions “owe” to others’

3.3 What is the substance of institutional duties?

The framework outlined in Table 3.1 specifies means towards, rather than components of human flourishing, setting a minimum standard for human rights (c.f. Pogge, 1999). But it provides a morally robust standard, as it conceives of human rights as moral rights. The framework furthermore sets out the scope of institutional human rights and demarcates principles for the allocation of duty.

In terms of the nature of duties, there are further aspects to consider. What does it mean to say respondents’ duties are towards institutions, and what are the substantive grounds for the exercise of those duties? Further, how can corporate duties be specified in relation to other respondents within the institutional setting?

Starting with the latter question, one route is to follow O’Neill’s (2001) distinction between the primary agents of justice ‘with capacities to determine how principles of justice are to be institutionalised within a certain domain,’ and other, secondary agents of justice that ‘contribute to justice mainly by meeting the demands of primary agents’ (O’Neill, 2001: 181). Taking the conditions of the Westphalian system into account – namely, that states have law-making and law enforcement capacities, while TNCs, as private, non-state actors, do not; and that TNCs have to abide by state law – states can be considered to hold primary responsibility while TNCs are secondary moral agents. (Erskine, 2003; Pogge, 1999; O’Neill, 2001).

This establishes grounds for a distinction between state duty and corporate duty. The question that follows is what the substance of that duty is in the context of the institutional order? Specifically, does the distinction between primary and secondary respondents determine the type and content of duty they hold to the institutional order?

For a thinker such as Pogge (1995, 1999), the institutional context indeed establishes the substance of duties that pertain, but with equal significance for primary and secondary respondents. For Pogge (1995: 118), institutionally agreed upon rights generate only negative duties throughout: all respondents should refrain from upholding or participating in a ‘coercive institutional order that avoidably restricts the freedom of some so as to render their access to basic necessities insecure without compensating for their collaboration by protecting its victims or by working for its reform.’

According to Pogge, respondents – both state and non-state – have the duties only to refrain from violating a given human right and to not support coercive institutional orders. He justifies his argument by the fact that the relationship between human rights claimants and respondents is institutionally mediated. In particular, Pogge (1995: 117) states that ‘the institutional understanding ... occupies an appealing middle ground: it goes beyond (minimalist interactional) libertarianism, which disconnects us from any deprivations we do not directly bring about, without falling into a (maximalist interactional) utilitarianism of rights, which holds each of us responsible for all deprivations whatever, regardless of the nature of our causal relations to them... (this institutional understanding) can go well beyond minimalist libertarianism without denying its central tenet: that human rights entail only negative duties.’

Pogge (1995) presents a case for a minimalist conception of duty. In accordance with this, the fulfilment of negative duties is sufficient to ensure the standards of justice, provided the appropriate institutional procedures are in place.

But does an institutional framing of human rights only lead to negative duties, or are there grounds for both minimalist and maximalist expectations, in accordance with which respondents hold negative (to avoid depriving) *and* positive duties (‘to protect and help’)? And if differentiation is made between primary and secondary duty holders within this institutional framing, what grounds would be sufficient, and what does this lead to?

To elaborate on these aspects, the next section uses the example of the UN Guiding Principles on Business and Human Rights of 2011 which, as discussed below, makes provision for a minimalist and maximalist framework and distinguishes between state and corporate obligations. The Guiding Principles thus offer a basis for assessing the merits and demerits of minimalist and maximalist pathways. The reading of the Guiding Principles aims to unpack the grounds by which different duty expectations might be placed on respondents and what the implications are in terms of human rights and global justice standards. Below, a description of the Guiding Principles is first given, followed by discussion of the allocation of responsibilities in the Principles, the justificatory grounds, and the implications.

3.4 Minimalist and maximalist pathways for institutional human rights duties: An illustration through the UN Guiding Principles

3.4.1 A brief description of the UN Guiding Principles

As noted in chapter 1, a lengthy institutional process unfolded over a six-year period before the United Nations Human Rights Council adopted the final recommendations made by Special Representative of the Secretary-General, John G. Ruggie, in June 2011. The process saw two major documents being produced. The first, the 2008 ‘Protect, Respect and Remedy Framework’ defined the UN’s approach to business and human rights, specifying principles by which international actors should seek to advance human rights. The second document, the ‘Guiding Principles’ of 2011 sets out the steps to be followed towards implementing the Framework. The ‘Guiding Principles’ is a detailed document specifying foundational and operational principles for each of the three pillars of the Framework. In total 31 such principles are stipulated (also see Figure 3.1).

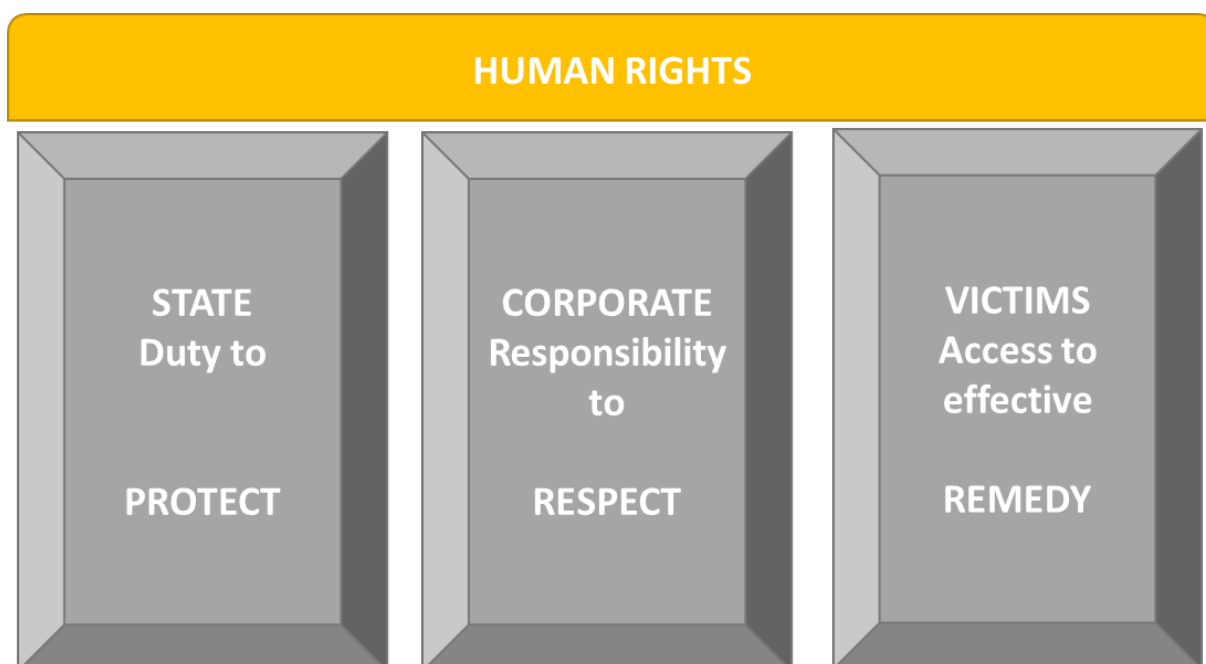


Figure 3.1 Schematic outline of the UN Guiding Principles

As shown in Figure 3.1, in design, the Guiding Principles has a number of foundational features. These are, first, the Framework's three-pillared approach to human rights protection and promotion in the international sphere. Second, is the distinction it makes between protecting and respecting human rights, which is each set out as a separate pillar. Third, is that it distinguishes between human rights duties and responsibilities; and lastly that it allocates such duties to states, while separate responsibilities are allocated to business enterprises.

The Guiding Principles does not define (human) rights. It holds merely that rights are to be protected and respected. Its reference is to 'internationally recognized human rights' with the International Bill of Rights as point of departure (UN Guiding Principles, 2011: 13).¹⁴ The scope of rights is broad, including political and civil rights, economic rights and labour rights. As such, the Guiding Principles conceives of human rights in aspirational terms and as ideals

¹⁴ From these it can be derived that the Guiding Principles endorse the 'universal respect for and observance of human rights and freedoms... as a common standard of achievement' (Universal Declaration of Human Rights [UDHR], 1948). Rights arise from humans' inherent dignity, are equal and inalienable (UDHR, 1948). The types of rights to be respected include basic, political and socioeconomic rights. The first two types derive from the 1948 UDHR and the 1966 International Covenant on Civil and Political Rights and include the basic right to life, equality before the law, freedom of movement, thought, and conscience, the right to property, nationality, and the right to peaceful assembly, family and privacy, among others. Socioeconomic rights derive the International Covenant on Economic, Social and Cultural Rights of 1966, and include the right to work, social security, education, rest and leisure, among others. The labour-specific rights to be respected by business enterprises come from the ILO's Declaration. They cover: freedom of association and the right to collective bargaining; elimination of forced or compulsory as well as child labour; and the elimination of 'discrimination in respect of employment and occupation' (ILO, 1998).

to pursue. Rights are political, legal, and institutional (see discussion in Ruggie, 2007, 2013: xlvi).

3.4.2 Allocation of duty – distinction between state and corporate obligations

3.4.2.1 State duty to protect

Pillar I of the Guiding Principles contains two foundational principles for state's human right duty. The principles hold that:

- (i) States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.
- (ii) States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights through their operations (Human Rights Council, 2011: 3).

Following these foundational principles, eight operational principles are detailed under Pillar I that elaborate on the procedural aspects of the state duty to protect. The operational principles address, inter alia, state regulatory and policy mechanisms towards human rights protection; the role of state-owned enterprises; and guidelines for exercising the state duty in conflict situations (see Human Rights Council, 2011: 4-12). The state duty to protect 'is a standard', not an outcome, 'of conduct,' (Ruggie, 2013: 84; Human Rights Council, 2011: 3.). By this, states are not intrinsically responsible for private actors' human rights abuses, including those perpetrated by business, although they are bound by their duty to seek to protect as far as they are capable.

3.4.2.2 Corporate responsibility to respect

Pillar II of the Guiding Principles address business' human rights role. The first foundational principle under this Pillar states that

- (i) Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved (Human Rights Council, 2011: 13).

This responsibility 'is a global standard of expected conduct' (Human Rights Council, 2011: 13) for all enterprises irrespective of where they are active, and is independent of the state duty to protect human rights. The corporate responsibility, furthermore, involves more than

complying with national human rights legislation; it exists ‘over and above’ this legal requirement (Human Rights Council, 2011: 13).

A further four foundational principles detail the substantive content of corporate responsibility. They hold:

- (i) The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.
- (ii) The responsibility to respect human rights requires that business enterprises:
 - a. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
 - b. 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.
- (iii) The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.
- (iv) In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including
 - a. A policy commitment to meet their responsibility to respect human rights;
 - b. A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
 - c. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute (Human Rights Council, 2011: 14-16).¹⁵

¹⁵ Nine operational principles under Pillar II that specify operational aspects linked to the corporate responsibility to protect. These cover themes relating to context, policy commitment; human rights due diligence; monitoring and evaluation; external communication; and remediation (Human Rights Council, 2011: 16-26).

The geographical scope of corporate responsibility is set in relation to business enterprises' context and the immediate environment they are active in. Businesses carry responsibilities with respect to the 'actual or potential adverse human rights impacts by an enterprise's own activities or through the business relationships connected to those activities' (Ruggie, 2013: 100) which include supply and value chains. This should ensure that corporate complicity in human rights abuses - also those of an indirect nature - is addressed. Furthermore, to ensure enterprises meet their human rights responsibilities, they should exercise 'human rights due diligence' as a standard part of their operations (Human Rights Council, 2008). This involves business' responsibility to identify, and avoid or otherwise mitigate negative human rights impacts.

3.4.2.3 Access to remedy

The third pillar (Remedy) outlines what recourse human rights abuse victims could have. Both states and business have a role in this regard so as to give effect to their respective human rights duties and responsibilities. Substantively, remedy is understood as counter actions or steps that are intended to redress 'any human rights harms that have occurred' (Human Rights Council, 2011: 27) and could take forms such as apologies, restitution, financial or other compensation, as well as different types of criminal or non-criminal punishment. Remedy is also understood in a preventative sense where guarantee is given that harms will not be repeated. The pillar identifies three grievance mechanisms in lieu of victims' access to remedy: state-based judicial, state-based non-judicial, and non-state-based (Human Rights Council, 2008).¹⁶

3.4.3 Discussion

In sum, the Guiding Principles establishes a wide-ranging set of human rights to which varying obligations are linked. States and TNCs are allocated separate roles but are expected to complement (or support) each other in the exercise of their respective roles. TNCs have direct responsibilities in their immediate sphere of operation and impact, and by practising due diligence they should see to their impacts on non-immediate environments (that is, supply and value chains). TNC's human rights responsibility is to be exercised within the bounds of law. This places TNCs' responsibility subject to that of states.

¹⁶ The latter two include: the use by business of national or regional human rights institutions; enterprises' use of their own operational-level grievance and remedy systems; the use of industry regulatory bodies; and utilising channels provided by multi-stakeholder collaborative initiatives. To ensure effective remedy, grievance mechanisms should be 'legitimate; accessible; predictable; equitable; transparent; rights-compatible; based on engagement and dialogue (in the case of operational-level mechanisms); and a source of continuous learning' (Human Rights Council, 2011: 33-34).

The Guiding Principles thus stipulates different duty expectations, drawing distinction between state and corporate obligations. State obligation is specified in terms of duty, while TNC obligations are set out in terms of responsibility. Further, within this, both states and TNCs carry differentially circumscribed positive and negative obligations. Both should avoid infringing human rights and actions that cause deprivation. States have the duty to protect against human rights abuses and to provide mechanisms towards redress. TNCs have the responsibility to refrain from engaging in harmful activities and to ensure mitigation or remedy when their operations cause infringement.

The grounds for the different duty expectations in the Guiding Principles stem from established international human rights law and social norms (Ruggie, 2013). The state duty to protect against human rights abuses by third parties is derived from treaty and customary law that over time has proscribed principles and rules for states' conduct with respect to human rights protection.¹⁷ The body of international human rights law contains at least two state obligations common to most treaties and conventions: that states should not violate the agreed rights of persons in their jurisdictions (in other words, that states commit themselves to respect persons' rights); and that states should ensure (or promote) rights-holders' enjoyment of their rights. In this regard the state duty to protect is established as formative in the Guiding Principles (Ruggie, 2013: 85).

The Guiding Principles hold that TNCs have a responsibility to respect human rights. This is derived from social norms and societal expectations in relation to business conduct.¹⁸ In terms of this, while business enterprises operate under agreed legal norms (that is, to respect home and host state laws, as well as to some extent international law), they also operate under social norms. These social norms lead societies to extend or revoke social licences to business enterprises. The norm of 'corporate responsibility' underpins the Guiding Principles' responsibility allocation to TNCs.¹⁹ The responsibility to respect is set in relation to the norm

¹⁷ This includes UN treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. It also includes international labour conventions by the International Labour Organization); and the output of permanent and ad hoc tribunals such as the UN's International Court of Justice and the International Criminal Court.

¹⁸ Examples of such societal expectation includes high-profile cases of litigation against big corporations; social censure of business practices; and the voluntary corporate codes of conduct adopted by business enterprises themselves.

¹⁹ As noted by Ruggie (2013: 94), the corporate responsibility norm is a 'widely recognized and ... well-institutionalized' social norm.

of ‘non-infringement’ of the rights of persons. ‘Non-infringement’ is the ‘baseline norm with the widest global recognition’ for human rights protection (Ruggie, 2013: 95).

The Guiding Principles shows how there are grounds for the distinction between state and corporate human rights obligations in the international sphere. The legal standing of states, as well as international jurisprudence and practice, establish bases for the allocation of a strong set of obligations on states to protect human rights. The absence of such a legal basis for TNCs justifies a different duty expectation. Social norms, and in particular institutionalised social norms, provide a framework for obligations that can be assigned to TNCs. In this way states and TNCs both carry moral obligations that are differentially circumscribed.

The Guiding Principles is also an illustration of how both minimal and maximal obligations can be allocated to states and TNCs within the institutional setting. Along with the negative obligation of ‘non-infringement’, TNCs hold positive obligations towards redress or mitigation which they can implement with states, or in their own capacity. The Guiding Principles stops short of specifying how these positive and negative obligations are to be exercised, nor what the content of state duties is.

Two problematic aspects relate to the Guiding Principles’ wide scope of rights, and its denoting of corporate obligations as ‘responsibility’. Concerning the first, rights are treated in aspirational terms. They are considered as standards or human interests to strive for; however there are no benchmarks by which their realisation can be assessed. This conception of rights can, as discussed in Chapter 2, lead to challenges with the specification and proper allocation of duty.

Second, by denoting corporate obligation as ‘responsibility’ (to respect), the Guiding Principles sets a weak human rights duty expectation on TNCs. The content of that responsibility is also unspecified. With this, the Guiding Principles’ demarcation of TNC obligations is not sufficiently robust as it provides a ‘minimal-expectation bar’ for business (Blitt, 2012: 35).

A more demanding corporate duty expectation can be however be posed. This is achieved by considering duties that are *unconditional*, ‘which apply to every agent regardless of the conduct of others’ (Kolstad, 2009: 569), and those that are *conditional*, which reflect a moral division of labour ‘where duties are assigned to specific agents, whose default activates back-up duties of other agents.’ In accordance with this, TNCs have unconditional, negative duties, on par with

states, not to violate human rights. States have the primary duty to protect human rights. Beyond this, TNCs hold conditional duties ‘to protect, promote or fulfil rights’ when the state (and other duty-bearers) fail in their task.

This places a set of negative, as well as positive duties on TNCs. To establish which apply and how, Miller’s (2001) principles for the allocation of obligation are useful. These are: the contribution principle, according to which an agent carries obligation for harm or deprivation if they contributed to bringing it about; the beneficiary principle, by which obligations for injustice arises from an agent’s benefit of it; the connectedness principle, which holds that obligation should be accorded on the basis of connectedness; and the capacity principle, by which the capacity to protect or to remedy harm brings the obligation to do so (Barry, 2003; Miller, 2001).

Such an approach sets a strong corporate duty expectation that can be justified in terms of the role and function of the TNC, depending on the given context within which the TNC is active. It also provides a framework by which the obligations that apply to all the legitimate respondents within the institutional setting can be established.

3.5 TNC duties within an institutional conception of human rights

In all, the following conclusions emerge for the human rights role of TNCs within an institutional framing. TNCs are entities with human rights duties. Their duties are directed towards the institutional setting and their contribution to that setting. Duties are defined, firstly, as refraining from participating in unjust coercive and institutional orders; second, to work towards the institution’s just exercise of rights; third, to refrain from harming claimants’ access to those rights, and fourthly, to support institutional efforts and activities towards remedy.

In line with O’Neill (2018), TNCs exercise their obligations alongside states, who have primary obligation towards protection and remedy. Yet, depending on the context, the nature of the TNC, and their capacities, TNCs can at times be expected to secure - that is, protect and promote - human rights in settings where states fail in this primary obligation (Kolstad, 2009). Importantly, however, far from placing TNCs in a direct relationship with legitimate human rights claimants, establishing when this positive duty on TNC applies and how it is effected, is an institutional process. It places demands on the procedures of institutions to ensure the judicious allocation – and fulfilment - of corporate duty.

The framework for TNC duties developed in this chapter differs from that in the restrictivist/expansivist discussion in key ways. First, it departs from the interactionalist grounding for the allocation of corporate duties, by which TNCs are respondents to human rights claims on an individual basis. The framework allows for the elaboration of and exercise of TNC duties through institutional mediation. Second, the framework sidesteps the problem of the restrictivist approach where only a confined set of human rights can be entertained. The institutional conception allows for a broad, though not unspecified, range of the human rights to which TNCs can legitimately be held to account, all established within the scope of the institutional environment and the capacities and function of the TNC in that environment.

At the same time, thirdly, the framework overcomes the loose approach of the expansivists in that the institutional context determines the substantive basis by which rights and correlative duties are established. The scope of rights can be quite specific and rigorous in this frame, because the scope is institutionally set. Thus, the rights at stake can be political, institutional or legal in nature, but that depends on the particular institutional setting. By the same logic, duties are established in relation to what is required in the institutional context. Far from the wide-ranging and possibly vague aspirations that human rights respondents are expected to fulfil in the expansivist approach, the institutional framing enables the delimiting of rights and their corresponding duty expectations as they are appropriate to the institutional setting.

3.6 Conclusion

This chapter has followed a pathway of reflection that sought to flesh out what the institutional conception of human rights substantively entails; what the nature and scope of institutional human rights are; and lastly, what the scope of duties within the institutional setting are as they apply to both states and non-state actors such as TNCs. The UN Guiding Principles were used to think through the grounds by which institutional human rights could be allocated, and to illustrate the various advantages and disadvantages that different duty expectations bring. From this, the chapter derived a set of TNC duties.

The chapter has shown how corporate duties can be specified that place demands - both positive and negative - on TNCs, subject to the institutional context within which TNCs find themselves and the role of TNCs relative to states. In all, the institutional conception of human rights and the TNC duties that are derived from it respond to both the position of TNCs in the international system, as well as the limits within which they operate, while also enabling a specification of

TNC obligations that are morally robust and that help to meet the goal of a just institutional order.

Chapter 4

Concluding remarks

4.1 An appropriate human rights role for TNCs in the Westphalian system

The study took as point of departure the problematique that exists in relation to the business-society nexus across national borders and, specifically, the moral expectations that could justifiably be placed on transnational business corporations. TNCs have started to assume ever larger influence in the world and their operations affect societies in ever more direct ways. Yet, as private, non-state actors, TNCs do not have the same legal capacity as states. Is it legitimate to expect the same from TNCs as states in terms of their human rights role?

Prevailing approaches provide answers to this question in varying ways. The model of state-centrism holds that there is no human rights role for TNCs beyond respecting national legislation. The model of corporate voluntary self-regulation or soft law leaves it to corporations to establish an own regime of practice based on norms deemed appropriate within the corporate setting. In general, as is evident in the UN Guiding Principles process, international efforts to develop a normative framework for TNC human rights obligations have remained caught in the obstacles presented by the differential legal status of states and non-states in the Westphalian order.

Business and Human Rights scholarship offers an entry point for discussion beyond the legal question in relation to TNCs' human rights role. This scholarship provides insight on the reasonable moral expectations that could bear on TNCs. Yet this scholarship offers contradictory conclusions, with one camp (the restrictivists) advocating for rigorously delimited TNC duties on the basis of a strict understanding of human rights, and the other (the expansivists), claiming a more contingent role. Restrictivists confine the scope of human rights to those that give force to humans' intrinsic worth (along the Kantian principle), which places robust demands on TNCs; while expansivists' explicit instrumental interpretation of human rights leads to a duty expectation that calls on TNCs only to refrain from infringing human rights. BHR scholarship also does not adequately address how structural and constitutive aspects – those that define the Westphalian system – matter.

The path of reflection in the thesis is one that considered the analytical and conceptual gaps in the restrictivist/expansivist discussion and that bridged their impasse by departing from their

interactionalist approach to systematically aligning human rights and duties. It led to an institutional conception, by which human rights and correlative duty assignment are institutionally framed.

4.2 What does an institutional approach to human rights advance?

A number of substantive things, with analytical and evaluative implications, pertain to the institutional conception.

First, human rights claims are not determined in relation to other individuals, but in relation to the institutional order and the appropriate respondent in that order.

Second, human rights duty is primarily defined as ensuring a just institutional order.

Third, human rights and the corresponding duties are institutionally articulated. The human rights calculus is one of ‘matching duties with institutions’ (Arras and Fenton, 2009: 34).

This, fourthly, satisfies the practicality condition to the extent that the human rights that can be justifiably claimed are specific to the institutional setting. It helps to address the challenges regarding scarcity in human rights claims and the allocation of corresponding duties.

Fifth, this allows for both minimalist and maximalist claims as regards human rights duty, without imposing arduous or unfeasible obligations on respondents, since these duties are institutionally mediated. Further, sixthly, it addresses questions regarding the plurality of values within the human rights order.

Lastly, the institutional conception of human rights strongly invokes questions of justice. The emphasis is on social rules and the fairness of the institutional order. Human rights obligations are conceived in terms of how they help meet institutional obligations, specified in terms of what ‘institutions “owe” to others, based on an adequate understanding of the capabilities of these institutions’ (Barry, 2003: 219).

With this, TNCs can be said to have distinct human rights duties. These duties are best understood in relation to the institutional order, and TNCs’ position within that order. TNC duties are directed at the justness of the institutional order and those who participate in it. TNC

duties, furthermore, are contextually set. These duties are negative duties at the minimum, but can also, depending on context, involve a set of positive obligations.

The institutional conception offers advantages in considering TNCs as one set of human rights respondent in the Westphalian system, giving due attention to the constraints that system poses. It provides a framework by which TNCs can be evaluated as moral actors, while factoring in the conditions of the international system. This is an analytical contribution that addresses the shortcomings of the restrictivist/expansivist discussion.

In addition, while the study did not have the purpose to evaluate the UN Guiding Principles, it showed that there are substantive and moral grounds for a distinction between state and corporate duty, as underpins the Guiding Principles. Thus, in contrast to the restrictivist argument that the Guiding Principles' division and allocation of duty is incorrect, as it denies a moral responsibility for TNCs, this study suggests that a strong duty expectation for TNCs is possible, even in a scheme where TNCs are secondary human rights respondents. Furthermore, TNC duties can be conceived in both minimalist and maximalist terms.

4.3 Further philosophical work

The study presents an argument for corporations' human rights obligations as they arise within the international institutional order. The study thus relates to 'the institutional turn' in human rights scholarship which takes the existence of social institutions as foundational in deliberation over human rights (see e.g. discussions by Hsieh, 2017; Pogge, 2008; Erskine, 2003). It should be pointed out that just institutions, which is the ultimate focus of the institutional conception, requires intent, and robust procedures. There are subsidiary questions regarding the substance of institutions, as well as institutional design, which this thesis does not address. Yet these aspects are important to answer – they necessitate 'further philosophical work' (O'Neill, 2018: 658) – if the aspiration towards justice in the international system is to be realised.

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