

Re-thinking 'spheres of responsibility': business responsibility for indirect harm

Abstract

This paper considers two prominent, competing approaches to defining the scope of business responsibility for human rights. The first approach advocates extension of business responsibility beyond the boundaries of the enterprise to encompass broader 'spheres of influence'. The second approach advocates a business 'responsibility to respect' human rights (but not a 'positive' duty to protect, promote or fulfil rights). Building on a critical evaluation of these competing accounts of business responsibility, the paper outlines a modified account, referred to as a framework of 'spheres of responsibility'. On such an account, business responsibility for human rights outcomes is conceptualised not only in relation to direct 'harms' imposed by the business, but also in relation to corporate influence over broader relationships and institutions that shape and constrain the substantive realization of human rights.

Keywords

Business and Human Rights; Corporate responsibility; Negative versus positive duties; Responsibility to respect; Spheres of influence

Introduction

Most are now familiar with the broad charge sheet of human rights abuse that has so often been levelled against transnational businesses over the last two decades of economic 'globalisation'. The charges include: use of foreign 'sweatshop' labour in the factories from which prominent global brands source their products; use of market power to push down prices received by poor farmers in developing countries for their agricultural products; and damage inflicted on the health, livelihoods and ways of life of local communities living close to mines or pipelines operated by major global resource companies (Clapham and Jerby 2001; Koenig-Archibugi 2004; Macdonald 2009; Muchlinski 2001). Such transnational business practices are viewed by many as contributing both directly and indirectly to the violation of human rights of vulnerable individuals and communities around the world – especially in developing countries.

These kinds of persistent human rights violations have been widely represented as products of a 'governance gap', characterised by the diminishing capacity of national governments to

steer and constrain those dimensions of transnational business activity that affect the human rights of their populations. Such a gap is often claimed to be emerging as a result of the expanded power and capabilities of transnational business and weakened capabilities of states under conditions of economic globalisation (Campbell 2006; Nolan 2009; Ratner 2001; Scherer et al. 2005). The agenda of formulating a clear account of how the responsibilities of transnational business in relation to human rights can be defined and bounded has been explicitly cast as a response to governance gaps of this kind (Human Rights Council 2008a, p.3):

“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.”

In addressing human rights issues related to transnational corporate practices, multiple competing accounts of business responsibility for human rights have been elaborated and debated. In this paper, I focus my analysis on two accounts that have attracted particular attention in recent years as potential means of defining – and importantly also *bounding* – the scope of business responsibility for human rights: one advocates the extension of business responsibility beyond the boundaries of the enterprise to encompass broader ‘spheres of influence’; the other advocates a business ‘responsibility to respect’ human rights (but not a positive duty to protect, promote or fulfil rights).

The general proposition that business responsibility for human rights could be bounded in accord with the scope of business ‘spheres of influence’ was widely debated following initial reference to such a principle within the UN Global Compact and the UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (Gasser 2007). The ‘spheres of influence’ concept was perceived by some observers as offering a promising means of capturing the diverse and widely varying channels through which businesses affect human rights, both directly and indirectly. However, while this concept’s theoretical elasticity may have bolstered its virtues as a flexible guiding metaphor, its analytical bluntness has made it difficult to operationalise for use in defining operational standards to govern transnational business conduct. Such weaknesses in the framework culminated in its rejection by John Ruggie, the United Nations Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. The Special Representative has now proposed an alternative framework in which business responsibility is limited to a negative duty to ‘respect’ human rights in the conduct of business activities and relationships.

Many questions remain regarding both the normative grounding and the institutional implications of the above conceptual frameworks, and serious challenges therefore confront

both scholars and practitioners seeking to design effective and legitimate means of overcoming the identified governance gap with respect to transnational business and human rights. The central goal of this paper is to critically evaluate these competing accounts of business responsibility for human rights and on this basis to develop a modified account that I refer to as a ‘spheres of responsibility’ framework.¹

In developing this account, I draw for illustrative purposes on empirical sources derived from multi-country field research involving around 300 individuals and organisations associated with garment and coffee sector supply chains connected to production sites in Nicaragua.² I draw also on research conducted with the UK’s Corporate Responsibility (CORE) Coalition, utilising case studies of corporate human rights abuses in Nigeria and India (Macdonald 2009). These cases reflect this paper’s central interest in the responsibility of business actors that operate across transnational borders, influencing human rights outcomes among vulnerable individuals and communities in the developing world. They also constitute examples from a diverse range of business sectors and varying institutional contexts, encompassing examples of corporations in the mining sector directly impacting communities; participants in business networks of the kind that are very common in supply chains in the garment sector; and businesses operating in agricultural sectors such as coffee in which business activity is typically coordinated via more arms length forms of networked and market relations.

Business ‘responsibility to respect’ human rights: understanding its appeal

One prominent account of how business responsibilities for human rights may be defined and bounded is that developed by the United Nations Special Representative (UNSR); this focuses on the business obligation to ‘respect’ human rights, and derivative obligations of due diligence. The business ‘responsibility to respect’ is presented as part of a broader framework that also includes the principles of a state duty to protect against human rights abuses by third parties, including business, and the need for more effective access to remedies (Human Rights Council 2008a).

The account of responsibility presented in this and similar frameworks (e.g. (Ratner 2001), (Jungk 1999)) – can be understood as what is commonly termed a ‘liability’, ‘blame’ or ‘agent-relative’ account of responsibility (Goodin 1987). Although such conceptions of responsibility actually reflect a loose grouping or family of theoretical accounts, they concur on the central proposition that attributions of responsibility rest solely or at least primarily on facts about agents and their relations to certain harmful or favourable events or states.³

¹ This phrase has been variously employed by a number of other authors and commentators, including (Lehr and Jenkins 2007) and (European Coalition for Corporate Justice 2008).

² Interviews were conducted with key stakeholders and decision makers within garment and coffee supply chains that reached from factories in Nicaragua, to both consumer markets in the US and locations of investors and civil society activists spanning the US, Europe and East Asia. For further detail, see (Macdonald 2007a, b).

³ The agent can be a collective entity, such as a corporation. However when it is, that entity can be treated as a single agent for the purposes of assigning responsibility (Marion Young 2004; Pettit 2007).

Attribution of responsibility is therefore tightly linked to the consequences of an agent's actions and choices (Haydar 2005; Kutz 2002):

“Agency conceptions suppose that the way in which a deed or consequence is attributed to the agency of its author, that is responsibility as attributability, provides the basis for the moral interest we take in the responsibility of others” (Ripstein 2004).

On this account, simply the existence of acknowledged needs or entitlements does not necessarily imply responsibilities for all those with capabilities to assist. Rather, responsibilities of a more stringent kind are allocated to those actors who have in some way contributed to bringing about the outcomes in question.

For this reason, agent-relative accounts of responsibility are usually associated with a distinction between what are commonly referred to as ‘negative’ as opposed to ‘positive’ duties. As (Scheffler 2001) describes, this distinction implies that:

“individuals have a special responsibility for what they themselves do, as opposed to what they merely fail to prevent. This doctrine is sometimes expressed in the principle that negative duties are stricter than positive duties, where this means, roughly, that it is more important to avoid doing certain sorts of things to people than it is to prevent unwelcome occurrences from befalling them or to provide them with positive benefits”.⁴

Deployment of such a positive/negative distinction by the UN Special Representative's ‘responsibility to respect’ framework is explicit (Human Rights Council 2008a, p.9): “To respect rights essentially means not to infringe on the rights of others – put simply, to do no harm”.⁵

The appeal of this framework can be understood in part as resulting from its normative grounding in a set of individualist normative assumptions that command a reasonably broad-based consensus across a range of political and ideological positions, particularly within a liberal moral universe. The normative grounding of such a view rests importantly on a particular conception of responsibility as moral agency: the idea that “responsibility is a moral property of agents that consists in or supervenes upon underlying facts of agency and

⁴ (Shue 1988, p.689-90) characterises the negative/positive distinction in the following way: “Being negative in the case of duties means, roughly, involving nothing more than not depriving other people of what they have rights to – a negative duty requires simply not interfering with others. All that I give up in performing a negative duty are opportunities to do or to take what I have duties not to do or take. A duty's being positive, on the other hand, means that fulfilling it will require the expenditure of some resource I control, like time, money, energy, or emotional involvement.” See also (Patten 2005).

⁵ As I discuss in more detail below, the framework does incorporate an important role for some positive duties, in so far as they are “clearly necessary to effect” the negative duties (Ratner 2001, p.516). An important example of this is the framework's inclusion of positive obligations of business to engage in processes of due diligence as a means of managing risks associated with potential harm.

upon agents' connections to the world" (Kutz 2002, p.550). Such an account is linked importantly to the liberal view of individuals as primary bearers of rights and responsibilities. Moreover, the negative duty to avoid actively harming others tends to be experienced as constituting less of a constraint on the pursuit of one's own goals than does the more stringent positive duty to aid others (Scheffler 2003; Shue 1988). The negative/positive distinction therefore plays an important role in bounding the scope of business responsibility within an agent-relative view, giving rise to an account of responsibility that is relatively minimalist and non-demanding.

The appeal of such a minimalist normative view is further reinforced by the apparent 'naturalness' of an agent-relative view of responsibility, which (Scheffler 2003, p.39) suggests may be attributed to certain features of the 'phenomenology of agency' – the way we tend to experience and imagine the impacts of our own agency – wherein greater weight is placed on individual versus group actions, and on near as opposed to remote effects. Such a phenomenology of agency therefore lends some support to the familiar distinction between acts and omissions, which in turn importantly underpins the distinction between 'negative' versus 'positive' obligations.

Not only is this simple, minimalist account of business responsibility normatively and phenomenologically appealing, it is also practically useful for a number of important applications. The landscape of transnational business activity is replete with cases in which business impacts on human rights involve the direct imposition of harms of the kind apparently contemplated by an agent-relative account of business responsibility. Some of the clearest examples of violations of this kind come from the mining and resources sectors, in which there are a number of prominent cases of direct human rights violations resulting from transnational business activity. One clear example is the practice of flaring gas in Nigeria. This is a practice undertaken by oil companies when oil deposits are mixed with gas and it is judged more profitable simply to burn off the gas rather than capturing it for utilisation or re-injection. Gas flaring is carried out in Nigeria by five multinational oil companies, of which Shell is the greatest contributor to the total flaring.⁶ As detailed elsewhere (Macdonald 2009), these flaring activities have resulted in alleged harms to the health of communities living near the flaring sites, including respiratory problems and other serious health issues. Further, local communities have suffered damage to their environment and livelihoods, with loss of food security due to destruction of their crops.

In another case of direct human rights violations resulting from the activities of transnational mining companies, the UK listed company Vedanta has allegedly committed a broad range of human rights violations as part of its bauxite mining activities in the Indian state of Orissa. Concerns have focused in particular on damage to local livelihoods, health, environment and ways of life among tribal people living in affected areas. To make way for the construction of the Lanjigarh refinery, villages have been razed and over 100 tribal families moved from

⁶ All companies operate in joint ventures with the Nigerian National Petroleum Corporation, which is a statutorily established, state owned corporation.

their land, in many cases to a crowded cement-house “rehabilitation colony” with inadequate land for farming and grazing. Particular concerns have focused on Vedanta’s toxic waste management at the Lanjigarh refinery, which produces up to three million tons of caustic soda waste each year. People have complained of breathing difficulties and skin problems, as well as damage to crop yields and livestock (Macdonald 2009).

In cases such as these, the relationship between businesses and the populations they affect are proximate in time and space, and attributable in very direct ways to the agency of the transnational mining companies involved. If ascribing responsibility is essentially a matter of pointing fingers, as (Goodin 1987) suggests, then on an agent account of responsibility in such cases the finger of blame points very clearly towards these corporations that have directly inflicted the harms in question when clearly they could reasonably have acted otherwise. In such cases, the characterisation of human rights violations as resulting from the direct ‘abuse’ of human rights appears highly appropriate.

Contemplating cases such as these, it makes sense to regard the business and human rights governance challenge as essentially one requiring containment of abuses committed by “powerful global actors that some states lack the resources or will to control” (Ratner 2001, p.461). Reflecting such a view, the ‘governance gap’ has been widely characterised as a regulatory environment that permits wrongful or negligent acts to occur and that fails to provide appropriate remedies to victims of abuse (Human Rights Council 2008a). In response to governance gaps of this kind, the ‘respect’ framework of business responsibility offers an important basis on which to establish strengthened systems of enforcement and remedy in such cases.

Institutionally mediated action: the limits of ‘responsibility to respect’

Although appropriate in many cases, an agent-relative account of corporate responsibility such as that described above has a significant deficiency. This is that it is based on a conception of corporate agency that does not take sufficiently seriously the significance of social institutions as mediating channels between the exercise of corporate agency and resultant human rights outcomes. To elaborate this point, I first examine some of the most common dynamics of institutionally mediated action through which business agency is extended and/or constrained. I then consider the implications of these dynamics for the limits of the ‘responsibility to respect’ framework.

The dynamics of institutionally mediated action

Social institutions mediate between individual actors and social outcomes at a number of different levels. Institutions constitute social actors in various ways, defining and instilling core norms, identities, capabilities, purposes and relationships. Institutions can also act as constraints on the exercise of agency, in part as a result of their actions combining with the actions of others in typically unintended and uncoordinated ways, and also as a result of the dynamics of institutional mediation through which actions are separated in time from their

effects. Further, dynamics of institutional interaction operate to distribute agency across different actors. In cases where institutional structures cause agency to be widely diffused, as within market-based systems of social coordination, the diffusion of costs, benefits and information associated with such structures may give rise to widely recognised barriers to both individual and collective action.

Such dynamics of institutional mediation have important potential implications for the plausibility of competing accounts of business responsibility. First, recognition of these dynamics provides a basis for holding businesses responsible for their indirect impacts on human rights, on the grounds that institutionally mediated causal processes enable businesses to ‘do harm at a distance’. This account of responsibility for indirect impacts acknowledges that when individual agents act within institutions, it is often the confluence of their unintended and/or uncoordinated actions that results in harms giving rise to human rights claims (Gosselin 2006). Second, recognising dynamics of institutional mediation may support the placement of limits on the scope of business responsibility, on the grounds that the need to act within institutions places constraints on the extent to which individual decision makers can control outcomes. Although ‘can’ does not necessarily imply ‘ought’ (Human Rights Council 2008a), the reverse is true, in the sense that capacity enters as a precondition for the meaningful attribution of responsibility (Kutz 2002).

Clearly, businesses of all kinds are deeply enmeshed in institutional relationships of an enormous variety. To illustrate how dynamics of institutional mediation operate in practice to both extend and constrain business influence over human rights outcomes, I briefly consider some of the most common types of institutional channels through which businesses influence human rights outcomes.

First, one very widely analysed category of institutional relationships through which business enterprises sometimes influence human rights indirectly consists of the legal, financial and managerial links between businesses that are organised within *decentralised structures of enterprise association*, typically in the form of a corporate group or joint venture. Such relationships may facilitate and constrain indirect control in differing ways. Institutional relationships of this kind have raised particular concern due to their tendency to impede the *legal* liability of individual business actors in many jurisdictions (Human Rights Council 2008a).

Second, attention is increasingly being attracted by the ways in which many business enterprises are able to exercise institutionally mediated influence over human rights outcomes via their participation in *business networks and supply chains*. In some cases, these networks are structured around long term contractual relationships; in others, the economic relationships may be constituted and coordinated via more arms length market relationships, in which dynamics of control are substantially influenced by the economic importance of each business enterprise in relation to its suppliers or purchasers (Ratner 2001).

One very common form of network organisation within a wide range of manufacturing, horticultural and agricultural industries takes the form of *buyer-driven* supply chains, in which transnational systems of production are coordinated and controlled primarily by large retailers and branded merchandisers based in industrialised countries; for example, these are ‘brands’ and retailers in garment and footwear sectors and roasting companies in the coffee industry.⁷ Acting via these networked chains of relationships, leading firms within such buyer-driven supply chains are able to influence a wide range of human rights outcomes among workers, producers and communities connected to these chains.

The scope and limits of this form of influence vary significantly within and between industries. For example, in the garment industry, the line of control from retailers to production sites is generally quite direct. Direct sourcing relationships are also common in specialty coffee chains, accounting for around 10% of global coffee trade. In contrast, distributions of control within those supply chains sourcing commodity grade coffee are much more diffuse; while trade remains dominated by roasters, these are separated from producers via often lengthy, intermediate trading chains through which producers sell to exporters – either directly via extensive networks of collection centres in coffee producing regions, or indirectly via additional intermediaries. The market oriented coordination mechanisms dominating such conventional chains play an important role in diffusing control over resultant outcomes.

While such institutional relationships facilitate important forms of indirect control, they also give rise to important forms of constraint on the influence of lead firms within such supply chain systems. For example, while large retailers are able to exercise significant influence over factory conditions via the terms of the contracts they set with suppliers, they lack control over day to day management practices that also contribute to determining workplace conditions. On large-scale Nicaraguan coffee plantations, for instance, permanent workers generally live on farm property and provision for their housing, food, health care and other forms of social infrastructure is at the discretion of farm owners and managers, as are most other working conditions. In the garment industry, while variables influencing wages and conditions such as overtime (such as price, quality and delivery schedules) are controlled more directly by actors higher up the supply chain, many other working conditions remain controlled by decision makers at the factory level.

In those sectors in which coordination is dominated by arms length market relations, dynamics of institutional mediation often place particularly strong constraints on the capacity of business to influence human rights outcomes, as a result of the diffusion of control among a long chain of supply chain intermediaries. For example, those companies purchasing conventional green coffee beans via the major market exchanges typically exercise only very limited short term control over production processes. In purchasing coffee, buyers choose its basic characteristics, differentiated on the exchange on the basis of origin and quality class;

⁷ Within these ‘buyer-driven’ chains, northern brands and retailers are able to control marketing and design activities, which in turn enables them to wield extensive power over decision making throughout the global chain (Gereffi 1999).

and second, they negotiate details of price and delivery (Fitter and Kaplinsky 2001, p.16; Gibbon 2001). However, such buyers have limited ability to control broader social and environmental features of the production process within their supply chains. Buyers also have limited control over farm-gate prices; the lack of both traceability and price transparency within intermediated supply chains means that it is generally only when roasters purchase coffee directly from farmers that they have the ability to ensure that any payment of higher prices by roasters will end up being passed on to farmers.

A third important form of institutional interaction through which companies exercise indirect influence over human rights outcomes is via the relationships that transnational businesses form with governments and other social actors within host countries. Most obviously, such relationships often take the form of both direct and indirect forms of political engagement with host country governments. In some cases, influence may also be exercised via engagement with non-state organisations and networks through which formal or informal rules governing business activity in a particular sector or location are shaped.

Social and governmental institutions within host countries also operate sometimes as important *constraints* on the capacity of transnational business enterprises to control human rights outcomes among those with whom these enterprises engage in institutional relationships. The institutional environments in which businesses operate are shaped by a variety of local actors, norms and historically entrenched patterns of social privilege. Practices such as the denial of social and economic rights to landless agricultural workers, and the persistence of child labour in many agricultural and manufacturing sectors, are often entrenched via social institutions of these kinds. In other cases, business influence is importantly constrained by the practices of host country governments, such as the barriers to freedom of association created by government policy and practice (together with wider social influences) in countries such as China or Vietnam.

The limits of 'responsibility to respect'

The exercise of business agency over human rights outcomes in these institutionally mediated ways presents a significant challenge to the 'responsibility to respect' framework, making it very difficult – both conceptually and empirically – to distinguish meaningfully between human rights non-fulfilment resulting from the 'negative' engagement of business in *damaging* forms of institutional engagement, versus the failure of business to 'positively' engage in *more favourable* forms of institutional action. That is, the complex institutional processes mediating the actions of individual businesses lead to a break-down of the distinction between what individual businesses themselves *do*, as opposed to what they merely *fail to prevent*. This ambiguity reflects the way in which the seemingly natural understanding of agency on which the negative/positive distinction is based (placing greater weight on individual versus group actions, and on near as opposed to remote effects) can be compromised when action is mediated through institutions.

Because the framework of a business ‘responsibility to respect’ human rights relies so heavily on the negative/positive distinction (and the agent-relative assumptions and intuitions that underpin it), the practical importance of such complex institutional dynamics presents serious challenges to this framework.

Two challenges are of particular importance. The first is a problem of *indeterminacy*: in those cases where human rights outcomes are influenced significantly by institutionally mediated dynamics, the negative/positive distinction – and thus also the ‘respect’ framework – ceases to offer a clear practical basis for defining and bounding business responsibility. The blurred boundaries of the business ‘responsibility to respect’ then tend in practice to translate into a further problem of *excessively restrictive scope*: to the extent that the influence of institutionally mediated action cannot straightforwardly be understood as ‘negative’ in a given context, the tendency is for such forms of influence simply to be excluded from the scope of a business’s ‘responsibility to respect’. Therefore, this second problem substantially limits the capacity of this framework to address those elements of the prevailing governance gap that result from institutionally mediated action, as opposed to directly wrongful or negligent acts on the part of individual businesses.

As discussed briefly above, the ‘governance gap’ that is widely believed to exist in the domain of transnational business and human rights has often been characterised as essentially involving shortfalls of regulative capacity to sanction individual companies for such wrongful or negligent acts. It is certainly true that functions of enforcement and remedy oriented towards individual acts of transgressive corporate conduct play an important role in any system of business regulation; however, it is widely recognised that regulatory systems also perform broader coordinating functions. Governments deploy a broad range of regulatory instruments intended to overcome problems of collective action and coordination, by seeking to structure actors’ capacities and incentives and coordinate their interactions in ways that support and promote specified public values and goals.⁸ From this viewpoint, regulation can be recognised not only as a means of addressing individual violations one by one, but also as a powerful tool with broader policy and coordination functions. In other words, business regulation within well functioning systems of national governance serves also to steer the ways in which individual businesses interact within overlapping systems of social institutions.

To the extent that transnational business is able to operate beyond the reach of national systems of regulation, we must therefore recognise the resulting ‘governance gap’ as encompassing more than a weakness in the regulative capacity to sanction individual businesses whose wrongful or negligent conduct directly violates human rights. Rather, this gap also reflects a deficit in the capacity of public institutions to structure and coordinate processes of interaction between businesses so as to govern more complex, institutionally

⁸ These include constitutive policy tools at the enterprise level (such as company law), constitutive and regulatory tools at the level of markets (such as competition policy or policies of registration, certification or standard setting) and facilitation or administration of collective institutions at the sectoral or policy levels (Ahdieh 2009 unpublished; Scherer et al. 2005).

mediated processes and human rights outcomes. For this reason, an account of business responsibility that fails to incorporate some account of business responsibility for institutionally mediated impacts on human rights will be unable effectively to plug this important dimension of the governance gap.

‘Spheres of influence’ as an account of institutionally mediated harms

An alternative account of business responsibility that has also attracted widespread attention and debate in recent years is what I refer to as the ‘spheres of influence’ framework, which was outlined briefly in both the Global Compact and the UN Norms. The framework’s central proposition is that businesses should be obliged to both ‘support and respect’ human rights within their ‘spheres of influence’.

While the ‘responsibility to respect’ framework rests importantly on an appeal to the ‘negative/positive’ distinction, the ‘spheres of influence’ approach appeals instead to an image of multiple spheres of indirect as well as direct influence over human rights. Because this approach emphasises indirect as well as direct channels of influence, it seems to provide a strong foundation for an account of the responsibility of business for institutionally mediated contributions to human rights violations. However, two aspects of the ‘spheres of influence’ framework have been widely criticised, each of which is discussed below.

The first aspect of the ‘spheres of influence’ metaphor that has been subject to widespread criticism is its simplistic empirical assumptions, which are based on the image of concentric circles of stakeholders radiating out from each company. As initially envisaged in the Global Compact and UN Norms (Human Rights Council 2008a, p.19), the concept of spheres of influence

“was intended as a spatial metaphor: the sphere was expressed in concentric circles with company operations at the core, moving outward to suppliers, the community and beyond with the assumption that the influence and thus presumably the responsibility of the company declines from one circle to the next.”⁹

Such a tidy and symmetrical image stands in stark contrast to the configurations of institutional agency that we observe within the ‘partially joined up world’ of the contemporary global political economy. These configurations are much more heterogeneous, overlapping and complex in form than suggested by the imagery of neatly nested concentric circles. As several commentators have observed, the metaphor of ‘webs’ of relationships

⁹ (Shue 1988, p.691) makes a very similar point in more general terms: “An almost irresistibly natural-seeming image dominates much thinking about duties. We often see our duties from the point of view of a pebble dropped into a pond: I am the pebble and the world is the pond I have been dropped into. I am at the centre of a system of concentric circles that become fainter as they spread. The first circle immediately around me is strong, and each successive circle is weaker. My duties are exactly like the concentric ripples around the pebble: strongest at the centre and rapidly diminishing toward the periphery. My primary duties are to those immediately around me, my secondary duties are to those next nearest, and so on.”

seems to capture the messy empirical reality more accurately than that of circles radiating out from a central point (Human Rights Council 2008b, p.6; Shue 1988, p.693).

Another important criticism that has been levelled at the ‘spheres of influence’ framework as it was represented in the UN Global Compact and in the UN Norms is that of normative ambiguity or incoherence: the charge that it “lumped together too many disparate dimensions related to the notion of influence”, including leverage, impact on others, capacity and benefit (Lehr and Jenkins 2007) (Human Rights Council 2008a, p.19). It is certainly possible to imagine an account of ‘spheres of influence’ that could justify consideration of a broad range of criteria associated with ‘influence’, encompassing benefit and capacity as well as impact on others. For example, the ‘spheres of influence’ framework could be interpreted as an element of a broader account of what some political theorists have referred to as ‘interaction-dependent’ or ‘relational’ accounts of global distributive justice (Pogge and Bleisch 2002), according to which the scope and content of social obligations and entitlements are linked importantly to empirical features of the social interactions in which individuals and groups participate (Armstrong 2009; Maffettone 2009; Sangiovanni 2008). Given that such an account has been neither articulated nor defended, however, it seems clear that the ‘spheres of influence’ approach as invoked in these contexts is at least guilty of being underspecified.

However, the ‘spheres of influence’ framework can be reinterpreted more narrowly, as an account of business responsibility for institutionally mediated harm. Such an account would continue to build on a restrictive *normative* view of the grounds of responsibility – linking responsibility closely to the exercise of moral agency, and thereby restricting responsibility to those cases of human rights non-fulfilment to which individual companies have actively contributed. Such an account could thereby avoid the charge of normative under-specification or incoherence. This more restrictive normative interpretation of spheres of influence could then be combined with a more complex and multi-dimensional *empirical* account of the kinds of actually existing institutional relations that activate narrowly construed agent-relative responsibilities.

An account of spheres of influence understood in this way would serve to complement rather than to challenge the narrower account of corporate responsibility to ‘respect’ human rights related to direct impacts. The established responsibility to respect framework already offers a useful basis for holding businesses responsible for their direct impacts on human rights. A modified account of spheres of influence – understood as business responsibility for institutionally mediated harm – could operate alongside this to provide a means of also allocating responsibility for harms resulting from the coordinated or uncoordinated actions of multiple businesses (often interacting also with state and non-state actors of other kinds).

By integrating key insights from the responsibility to respect framework with a modified version of the ‘spheres of influence’ approach, it is therefore possible to build a framework that encompasses business responsibility for both direct and institutionally mediated impacts on human rights. I refer to such a framework as a ‘spheres of responsibility’ approach. This framework is complementary to the responsibility to respect framework, retaining its clear

and widely accepted minimalist normative foundations. However, it can accommodate more complex, decentralised divisions of responsibility between multiple businesses and other social actors. Such an account is more appropriate to situations in which human rights are undermined by complex social processes involving a range of poorly coordinated decision makers – both public and private.

Operationalising ‘spheres of responsibility’: from simple to complex negative duties

What then might such a framework of business ‘spheres of responsibility’ look like in practice? I suggest the concept of ‘complex negative duties’ as a way of conceptualising decentralised allocations of responsibility for indirect sources of human rights harm.

‘Complex negative duties’ encompass what I refer to as both *distributed negative duties* and *derivative positive duties*.

Distributed negative duties imply the distribution of responsibility between multiple actors contributing to complex processes of human rights harm. If decentralised responsibilities held by multiple firms are to ‘add up’ to sector wide realisation of human rights, it is usually also necessary for some complementary positive duties to be accepted. Such positive duties require firms to take reasonable measures to identify and avoid potential contributions to indirect harm, where necessary coordinating their actions with other decision makers to this end. In this sense, derivative positive duties constitute “those positive measures clearly necessary to effect” recognised negative duties (Ratner 2001, p.516). That is, the positive duties are derivative from the underlying negative duties not to harm. I discuss each of these two categories of complex negative duties in turn.

Distributed negative duties

Distributed negative duties provide a basis for disaggregating responsibilities between businesses in cases where a number of individual business enterprises contribute to human rights violations—in the sense of initiating, facilitating or sustaining a causal sequence leading to the problem (Barry 2005)—without any one exercising full control over outcomes.

As described earlier in this paper, diffusion of influence over human rights outcomes is particularly notable within transnational production systems organised around decentralised network and market structures. When control over human rights outcomes is distributed between multiple decision-makers in such contexts, the concept of distributed negative duties can help us understand how corresponding liabilities can be allocated between individual firms. It also provides a means of placing reasonable limits on the responsibility of any one firm, so that responsibilities correspond with available capacities and resources, and are not excessively morally demanding.

Existing corporate social responsibility practices are already incorporating some implicit recognition of distributed negative duties. For example, a number of private corporate responsibility standards differentiate between the obligations of different categories of supply

chain players, such as factories, trading companies or retailers. This reflects recognition of the distinct role each category of business enterprise plays in contributing to – and/or guarding against – human rights violations. At present, however, such differentiated attributions of responsibility remain highly ad hoc. If responsibilities of this kind are to be more consistently interpreted, applied and enforced, it will be necessary to ground them in more explicitly articulated principles concerning the basis on which shares of influence might be more rigorously disaggregated between multiple actors.

In deriving such principles, useful lessons may be learned from existing practices in liability law, where there is often a focus on managerial and financial indicators of control.¹⁰ In cases where influence is distributed via systems of contractual and market relations, it may be important also to consider additional indicators related to market and bargaining power of various kinds. For example, relevant considerations may include criteria concerning the relative percentages of outputs and/or purchases represented by a given transaction from the perspectives of both buyers and sellers;¹¹ the extent to which contracting or sourcing relations involve the provision of finance; control over strategic material, organisational or financial resources;¹² differentials in risk preferences or holding or delay capacity; and asymmetric distributions of information regarding supply and demand ‘schedules’ of other buyers and sellers.

If developed with sufficient clarity, the concept of distributed negative duties may provide an appropriate basis for a legal concept of distributed liability, applicable in contexts where multiple businesses contribute to harms resulting from the operation of a broader supply chain system. For example, (Teubner 2000) suggests that a new regime of ‘network share liability’ (analogous to market share liability) could govern situations where causation of damage is clearly attributable to the network itself but cannot be traced back to individual network participants. He suggests that this could involve a pro-rata-liability of participants according to their share in the network as a whole. Such an approach could provide a means of legally regulating those decentralised markets and networks in which control and responsibility are distributed between multiple actors.

Derivative positive duties

¹⁰ For example, (Gasser 2007) derives from case law relating to corporate liability for acts and omissions of subsidiaries criteria such as: profit sharing; contributions towards financing the subsidiary; degrees of oversight and/or joint control; masterminding the venture. He further draws on case law on third party liability in the context of joint ventures to suggest additional criteria such as: shared common interest in the subject matter of the venture; shared profits and losses; and joint control or the joint right of control over the venture. See also (European Coalition for Corporate Justice 2008).

¹¹ The extent of power may be related in complicated ways to the relative size of the buyers and sellers involved: a buyer or seller may be able to exercise market power as a result of their share of sales, or buying power, of value added, of profits or of relative rate of profit (Gibbon 2003; Kaplinsky and Morris 2000).

¹² These may involve possession of scarce inputs or strategic assets and resources, a dominant identity or brand, scarce finance capital, or specialised competencies, knowledge or technology that increase capacity for productive efficiency and/or innovation (Gibbon 2003).

While clear specification of distributed negative duties is often a *necessary* condition for attributing responsibility for indirect human rights harms, it is rarely a *sufficient* condition. It is usually necessary for those decision makers participating in complex social processes to also undertake some positive duties, requiring reasonable efforts to avoid participation in wider collective practices from which human rights harms foreseeably result. I refer to these as ‘derivative positive duties’. These can take at least three forms, which I examine in turn.

Duties of due diligence

First, firms need to be capable of identifying their individual contributions to wider social processes resulting in human rights harms, and take reasonable measures to avoid such sources of harm.

The UNSR’s ‘responsibility to respect’ framework already incorporates recognition of derivative positive duties of this kind. The ‘responsibility to respect’ framework defines business responsibility to engage in processes of due diligence as requiring: “a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it.” Such responsibilities are explicitly presented as involving a positive dimension: “‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps – for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes” (Human Rights Council 2008a, p.17).

There are a number of examples of existing CSR practice that illustrate how such responsibilities may be operationalised. Requirements for human rights risk assessments already exist within many private standards schemes such as the IFC Performance Standards or the OECD Guidelines on Multinational Enterprises. In some cases non-employee stakeholder consultations can also play a role in helping companies understand the nature of their indirect impacts on individuals and communities. And of course legal obligations of due diligence already exist within the scope of existing civil liability regimes.

A more consistent application of this principle would however extend such obligations significantly beyond the scope of existing legal obligations. The UNSR clearly states that in addition to responsibilities concerning direct impacts of corporate activities, responsibilities to respect also extend to cases in which businesses “might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, state agencies and other non state actors” (Human Rights Council 2008a).¹³ To address the kinds of indirect harms identified earlier in this paper, such a broader application of due diligence

¹³ Such acknowledgement of the importance of indirect channels of business influence appears to be reflected also in the UNSR’s expressed concern that “If the scope of due diligence were defined by control and causation this could imply, for example, that companies were not required to consider the human rights impacts of suppliers they do not legally control or situations where their own actions might not directly cause harm but indirectly contribute to abuse” (Human Rights Council 2008b, p.6).

obligations to encompass looser contractual and networked relationships within supply chains would be essential.

Duties of coordination

Duties of due diligence may offer sufficient means of guarding against implication in indirect harms in cases where businesses are able to manage human rights risks by implementing appropriate policies and management systems at the firm level. However, due diligence processes alone may not be sufficient in cases where businesses are unable effectively to avoid identified risks of human rights harms without the active cooperation of other businesses. In such cases, a derivative positive duty of coordination may also apply, providing a means of coordinating those inter-organisational decision-making processes that impact interdependently upon relevant human rights outcomes. Obligations to engage in collective actions of various kinds are likely to be particularly important as a basis for regulating the aggregate effects of interactions between large numbers of individual businesses.

In some cases, such responsibilities for engaging in coordinated activity may be discharged by the voluntary formation of inter-organisational networks as means of both negotiating shares of responsibility, and coordinating contributions. There are a few examples of multi-stakeholder CSR programs requiring that participating businesses engage in modest forms of policy coordination with other firms. For example, the Voluntary Principles for Security and Human Rights require that all members must respond to queries and requests for dialogue from other members. Likewise, sectoral or industry schemes such as the Fair Labor Association or Ethical Trading Initiative provide forums for coordinating cooperative activities to build sector-wide capacity in relation to persistent areas of human rights non-compliance. Individual companies such as Starbucks and large exporting firms with which it works have sometimes formed strategic alliances with development NGOs to support wider education or health programs in local communities.

However, while there are some such limited examples of businesses engaging in such collaborative activities on a voluntary basis, the incentives for businesses to do so are typically very weak. Instituting responsibilities of this kind on a broader basis would almost certainly require some means of developing and deploying innovative legal instruments in order to strengthen corporate incentives to comply with responsibilities of this kind. One possible suggestion regarding how such innovation might proceed is outlined by (Teubner 2000), who advances a notion of ‘interface liability’ as a potential means of compelling businesses to take responsibility for those forms of external risk or damage created by inadequate coordination among network participants, by imposing duties of coordination *directly* on each network participant. By way of illustration, (Teubner 2000) refers to a decentralised solution to such coordination problems, in which under some special circumstances in the health and social security sector, French law now imposes a duty of coordination on each network node involved, and sanctions a breach of these duties with *responsabilite solidaire*. He points also to a directive of the European Union which requires

network participants to install a central coordinator with contractually defined responsibilities and to establish a coordinating body with employee participation.

Duties to support institutional change

Even acting together, firms may find that their efforts to avoid participation in harmful social practices continue to be undermined by regulatory, market or wider social constraints. Such constraints might result from government policy, such as constraints on union rights and freedoms; from market competition—a constraint that many businesses claim to make payment of living wages impractical; or from pervasive social norms, such as entrenched patterns of employment discrimination against minority groups. In such cases, a derivative positive duty to support processes of institutional change may also apply, implying responsibility for (contributing to) transforming institutions that constrain the realisation of human rights.

Some large or otherwise influential businesses may be able to support institutional change simply via changes in the way they conduct their individual relationships: for example, by modifying their bargaining strategies with suppliers, their strategic engagement with competitors or their political engagement with governmental and relevant non-state actors. More commonly, bringing about meaningful change also requires at least some degree of coordinated action together with other business, state and/or non-state actors (thereby also invoking responsibilities for performance of coordination functions, as discussed above).

In practice, it is often extremely challenging to specify the reasonable limits of business responsibility for institutional change. It is frequently unclear under what conditions existing constraints should count as ‘indemnities’ from responsibility (on the grounds that ‘ought implies can’), or under what conditions businesses can instead reasonably be understood to hold responsibilities for engaging in processes of capacity building and institutional change. One way in which existing CSR practice appears to be tackling this challenge is via the development of process and progress standards that seek to define the reasonable limits of business responsibility for ongoing processes of change. It is becoming increasingly common for private standard-setting schemes such as Fairtrade or Rainforest Alliance to develop separate minimum and ‘progress’ standards, laying out defined timelines over which processes of capacity building and organisational change can be undertaken to help overcome both internal and external constraints.

In most cases, however, such processes of capacity building have focused primarily on institutional change *within* individual companies or business networks. It is much harder to find examples of responsibilities for institutional change being operationalised in relation to wider social norms or government policies. In rare cases businesses have committed to transparent disclosure of lobbying positions as part of their corporate social responsibility programs, but even such limited obligations of transparent disclosure have usually been avoided. Under some circumstances, business obligations to support the strengthening of worker and producer organisations could indirectly support challenges to prevailing

institutional rules and practices that impede the realisation of human rights. In practice however very few corporate responsibility programs (with the possible exception of Fairtrade) support organisational strengthening of a sufficiently political kind to contribute meaningfully to such broader processes of social transformation.

The difficulty of articulating business responsibilities for supporting institutional changes of these kinds is doubtless complicated by the highly political content of such institutions, and therefore the salience of difficult questions about the limits of legitimate corporate influence over political choices. At some point, debates about the responsibilities of transnational businesses for human rights start to blur into debates about the legitimate place of transnational business enterprises within democratic decision making processes across multiple jurisdictions. Conceptualising where and how this line can be drawn is a challenge that that any comprehensive account of business responsibility must address.

Clearly, much work remains to be done in developing such an account of the boundaries of these outer spheres of legitimate business responsibility. Nevertheless, by beginning to articulate the conceptual and practical underpinnings of ‘complex’ as well as ‘simple’ negative duties, we may move closer to establishing a clear and practicable basis on which business responsibility for indirect as well as direct forms of influence over human rights outcomes can be assigned and enforced. In this way, we may also be better equipped to confront the governance gap that currently afflicts the regulation of transnational business activity and its impact on the human rights of vulnerable individuals and communities around the world.

Conclusion

The influential framework articulating a business ‘responsibility to respect’ human rights has important potential for creating new international mechanisms to enforce the simple yet immensely important negative duty of business to refrain from inflicting direct harm on human rights outcomes. However, the challenge of defining and bounding business responsibility for human rights has been shown to be much more complicated as it applies to the enmeshment of multiple business activities within complex institutional processes for which individual businesses are partially but not wholly responsible.

This paper has suggested that the complex and highly decentralised governance challenges we now confront demand an account of business responsibility for human rights that goes beyond simply ‘respecting’ rights. I have outlined in this paper a framework of business responsibility which provides a broader account of how we might conceptualise multiple ‘spheres’ of business responsibility for human rights. By illustrating some of the ways in which simple negative duties may be extended to encompass an additional range of complex negative duties, I have sought to demonstrate that this expanded ‘spheres of responsibility’ framework offers a firmer basis than either the spheres of influence or the responsibility to respect frameworks, taken alone. This is because it assigns responsibility not only for the direct impact of business activity on human rights, but also for the important range of

indirect, institutionally mediated channels through which transnational business activity influences human rights outcomes around the world.

Despite the strengths of an extended 'spheres of responsibility' framework, there remain important domains of business influence over human rights for which the boundaries of business responsibility remain unclear. Although the framework outlined above helps us to understand how minimalist, 'negative' responsibilities not to harm can be extended to cases of indirect harm, it doesn't resolve cases of alleged human rights violations for which resolution of claims would involve significant degrees of normative contestation (for example, conflicting rights claims) and/or strategic uncertainty (as in the case of complex and long term processes of institutional change). To clarify business responsibilities for more overtly political problems of this kind, we would need to develop an account of business responsibility as part of a broader account of transnational political constituencies and democratic decision making processes. This is a major theoretical project which is well beyond the scope of this paper, but which remains a pressing issue for ongoing work.

Both normatively and institutionally, the challenge of defining and instituting a clearer account of business 'spheres of responsibility' in our unevenly and yet increasingly globalised world remains daunting. Establishing effective means of distributing and coordinating business responsibility in the presence of significant dynamics of institutionally mediated business action will require significant degrees of theoretical and institutional innovation. Yet if we are to have any hope of avoiding the continuing prospect of widespread violations of the human rights of some of the most vulnerable individuals and communities within a globalising economy, such challenges must be seriously and urgently confronted.

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