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## Human Rights and Assigned Duties: Implications for Corporations

Ivar Kolstad

**WP 2007:7**



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Price: NOK 50

ISSN 0804-3639

ISBN 978-82-8062-211-2

This report is also available at:

[www.cmi.no/publications](http://www.cmi.no/publications)

### **Indexing terms**

Human rights

Duties

Business ethics

Corporate social responsibility (CSR)

### **Project title**

27039

### **Project number**

Human Rights Programme

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## Introduction<sup>\*</sup>

Amartya Sen has pointed out that there is a need for a stronger conceptual grounding of human rights. Though the notion of human rights has considerable intuitive appeal, he argues, “conceptual doubts must also be satisfactorily addressed, if the idea of human rights is to command reasoned loyalty and to establish a secure intellectual standing”.<sup>1</sup> According to Sen, one of several questions a theory of human rights has to address is what duties and obligations human rights give rise to. If we accept a notion of universal human rights, on whom do the various duties of realizing these rights fall? This remains an understudied area of human rights theory, which has focused on what rights individuals should receive and why, rather than on who is obligated to provide rights realization.<sup>2</sup> Without a well-defined scheme for assigning duties correlative to human rights, however, these rights remain illusory.

One aspect of duty assignment, concerns what duties to assign to corporations. This has become a prominent issue in recent years, as the power of the corporate sector has become particularly salient. Onora O’Neill argues, for instance, that accounts of global justice has over-emphasized the role of the state, while other agents such as corporations can make substantial contributions to justice.<sup>3</sup> Beyond observing that corporations are capable of contributing to the realization of rights, however, little has been done to systematically specify the duties of corporations in this respect. For instance, though corporations are commonly thought to have negative duties to respect human rights, considerable disagreement remains on whether they also have positive duties to protect, promote or fulfil human rights.

This paper derives the duties of corporations generated by universal human rights. A basic premise of the analysis is that corporations are no different from other agents *prima facie*, in that their obligations have to be derived from a general duty assignment which applies to all agents; individuals and organizations alike.<sup>4</sup> The paper therefore develops core elements of a general scheme of duty assignment, and studies the implications for corporations. A key distinction in such an assignment, is between unconditional duties which apply to every agent regardless of the duties borne by others, and conditional duties which relate to tasks for which there can be a division of moral labour. The paper draws out the implications of each category of duties for corporations.

The analysis in this paper applies to all corporations, whether national or multinational. The implications will of course differ according to characteristics of corporations, and multinational corporations doing business in developing countries may often face more expansive duties, as a consequence of the fact that they have decided to establish themselves in a particular environment. An important difference between this paper and the bulk of the literature on corporations and human rights, is that this paper focuses on ethical rather than legal duties. This reflects the purpose of the paper, which is to address the question of what corporations ought to do, and this can only be

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<sup>\*</sup> The author thanks Bertil Tungodden, Arne Tostensen, Elin Skaar, Siri Gloppen, John McNeish, Anna Milford and other CMI colleagues for helpful comments. The usual disclaimer applies.

<sup>1</sup> Sen, A. (2004), “Elements of a theory of human rights”, *Philosophy and Public Affairs*, 32, 4, 315-356

<sup>2</sup> As argued by James W. Nickel, “advocates and theorists of human rights have spent plenty of time defending the claims-to that human rights contain, but have devoted much less effort to developing accounts of claims-against”. Nickel, J. W. (1993), “How human rights generate duties to protect and provide”, *Human Rights Quarterly*, 15, 77-86.

<sup>3</sup> Oneill, O. (2001), “Agents of justice”, *Metaphilosophy*, 32, 1/2, 180-195.

<sup>4</sup> For an argument that Milton Friedman’s idea that corporations ought only to maximize the returns to owners, places undue emphasis on owner interests and is therefore ethically untenable, see Kolstad, I. (forthcoming), “Why firms should not always maximize profits”, *Journal of Business Ethics*.

established through ethical analysis. The legal approach, on the other hand, is useful for an instrumental discussion of how to implement a given set of duties.

The paper is structured as follows: The next section analyzes how universal human rights generate correlative duties, and by which principles these can be assigned to specific agents. The following two sections then discuss the unconditional and conditional duties of corporations, respectively. A final section concludes.

## Assigning duties correlative to human rights

The human rights perspective is a universal deontological ethical theory. It is universal (or cosmopolitan) in the sense that human rights are afforded to all human beings. And it is deontological because it deems actions right or wrong based on characteristics of the actions themselves, rather than their consequences. What is ethically wrong in a human rights perspective, is for agents to act in such a way that human beings do not have secure access to the substance of their rights. In other words, these rights imply that human individuals have claims against other agents, or that there are correlative duties that other agents should assume. Conversely, if the necessary duties are not assumed by other agents, the rights of individuals are not secured, and hence rights are illusory. For instance, a person's right not to be tortured is only realized if others refrain from torturing her and protect her from torture at the hand of third persons.

So rights for someone, imply duties for others. The question then is what kind of duties and for whom. A useful starting point in assigning duties, is the observation that for rights to be secured, some duties must be borne by all agents, whereas other duties can be asymmetrically assigned to different agents. For instance, the right not to be tortured implies that everyone has an obligation not to torture others. But it need not imply that everyone equally has an obligation to protect others from torture, as this task can be adequately (and more effectively) discharged by specific agents. As Henry Shue has pointed out, for certain duties there can be a division of moral labour, where different agents fulfil different duties whose sum total is full coverage in terms of rights realization.<sup>5</sup> A standard distinction in the literature has therefore been between universal duties, i.e. duties that must be borne by everyone, and non-universal duties, which can be assigned to specific agents.

This standard distinction is, however, problematic for reasons of connotation and substance. The term non-universal duties signals that these are duties from which some agents are excused, that they need under no circumstances be concerned with, as they are assigned to others. To see why this is problematic, we need to consider more closely the idea of duty assignment through a division of moral labour. The duty-bearers under the optimal division of moral labour are standardly called the primary duty-bearers. As long as these primary duty-bearers discharge their assigned duties, there is no reason for other agents to assume the same duties.

However, what happens if the primary duty-bearers default on their obligations, failing to address the tasks assigned to them? For instance, if the state is the primary duty-bearer in providing human rights protection, what happens if the state does not fulfil this obligation, due to a lack of resources or inclination? If other agents than the primary duty-bearer fail to assume or address these obligations, rights are in effect null and void. So a scheme of duty assignment based on a division of moral labour, has to include an assignment of secondary or back-up duties, which specify duties in the event the primary duty-bearer defaults, in order to fully secure human rights.<sup>6</sup> In other words, an

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<sup>5</sup> Shue, H. (1988), "Mediating duties", *Ethics*, 98, 687-704

<sup>6</sup> A corresponding notion of secondary, or back-up, responsibilities within a consequentialist framework, is suggested by Goodin, R. E. (1985), *Protecting the vulnerable. A reanalysis of our social responsibilities*, Chicago: The University of



ordinal arrangement of successive duty-bearers, designating secondary, tertiary duty-bearers and so on, is required for rights to be guaranteed.

What the term non-universal duties does is to let other agents than the primary duty-bearers too easily off the hook, by offering no indication that they need step in where the primary agent defaults. The types of duties for which there can be a division of moral labour should therefore be denoted as conditional duties, i.e. duties to be assumed depending on the actions of other agents in a more closely specified succession of duty-bearers (more on this below). The distinction used in the following is hence between unconditional duties, which are duties every agent has regardless of what duties others observe, and conditional duties.

It is instructive to consider how the distinction between conditional and unconditional duties intersects with other duty typologies. Negative duties are duties to refrain from acting in a way that deprives people of their rights, i.e. duties to respect the rights of others. For example, a negative duty not to torture others corresponds to their right not to be tortured. Positive duties are duties to perform certain actions to secure the rights of others. A number of sub-categories of positive duties have been suggested.<sup>7</sup> Henry Shue includes duties to protect the rights of others, i.e. to create or contribute to schemes of protection of human rights, and duties to aid those deprived of their rights, i.e. to directly provide the substance of a right to someone.<sup>8</sup> So constructing an adequate judicial system would be an example of the former, and providing subsistence food to the poor may be an example of the latter. Another common distinction is between positive duties to protect, promote and fulfil.<sup>9</sup>

Negative duties are unconditional duties.<sup>10</sup> Shue points out that negative duties “are, and must be, universal”, i.e. they apply to everyone.<sup>11</sup> If someone did not have a negative duty not to deprive someone of a human right, that right would not be secured. In other words, not to directly violate the human rights of someone, is a duty that everyone has to observe. Moreover, negative duties are duties not dependent on the duties observed by others. This follows from the fact that the human rights perspective is a deontological ethical theory, according to which agents must respect certain absolute standards. The conduct of others is not a valid excuse for not respecting the rights of others, so even if others violate someone’s rights, you have a duty not to. For instance, even if there are other agents torturing an individual, this does not make it permissible for you to do so. A direct violation of the human rights of others is wrong in and of itself, even if others are doing the same thing.

Positive duties correspond in a more complex way to the other classifications. Shue argues that “the positive duties need to be divided up and assigned among bearers in some reasonable way”.<sup>12</sup> In other words, duties to protect, promote and fulfil rights can be more effectively pursued if assigned to specific agents. Taken alone, this statement suggests that positive duties are non-universal. However, as argued above, a scheme of duty assignment that fully protects rights, has to include back-up duties for cases where the primary duty-bearers default. So this would suggest that positive

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Chicago Press. This notion of secondary duties should not be confused with that applied by O’Neill, *Agents of Justice*, who defines secondary duties as duties of compliance with terms set by primary duty-bearers.

<sup>7</sup> For an overview of different typologies of duties, see Koch, I. E. (2005), “Dichotomies, trichotomies or waves of duties”, *Human Rights Law Review*, 5, 1, 81-103.

<sup>8</sup> Shue, H. (1980), *Basic rights – Subsistence, affluence, and U.S. foreign policy*, Second edition, Princeton: Princeton University Press

<sup>9</sup> While these distinctions may have subtle implications for the division of moral labour, they are not discussed further here, as the negative – positive distinction is sufficient for the points made.

<sup>10</sup> More precisely, negative duties are a subset of the unconditional duties, as will become apparent in the subsequent discussion of positive duties.

<sup>11</sup> Shue, “Mediating duties”, p. 690.

<sup>12</sup> *Ibid.*

duties are conditional. This cannot be the full story, however, as any division of moral labour depends critically on the actions of agents other than the duty-bearers. A division of labour can be effectively undermined by a lack of compliance or outright subversion by other agents. For instance, there are numerous cases in which foreign governments or corporations have undermined the ability of a domestic government to address its functions. The point is that for any division of moral labour to be effective, it must be respected by other agents. And the division of moral labour is effective only if every agent respects it, and regardless of what other agents do. There are thus unconditional duties to comply with (for instance in terms of paying the taxes required) and not undermine (for instance through bribery) the division of moral labour. Positive duties hence entail both conditional duties of implementation and unconditional duties of compliance.

To more closely specify the conditional duties of any given agent, four questions must be considered. What is the optimal division of moral labour? Who are the corresponding primary duty-bearers? What is the ordinal arrangement of duty-bearers in stepping in where more highly ranked duty-bearers default on their obligations? And to what extent do the more highly ranked duty-bearers actually discharge their assigned duties? The first three questions bear on the assignment of primary duties, secondary duties, tertiary duties and so on, for any particular task, and should be decided on the basis of reasonable principles consistent with the human rights perspective. The fourth question is an empirical one, and addresses the practical duty of performing a task, given the ordinal arrangement of duty-bearers.

To characterize the optimal division of moral labour and arrive at an ordinal arrangement of duty-bearers, one can distinguish between two different cases. The first case is a situation in which resources are insufficient to secure full human rights for everyone. The second case is one in which resources are sufficiently abundant for universal and comprehensive rights to be attained. In the first case, the only assignment of duties which is consistent with the human rights perspective is one which secures as full human rights for as many individuals as possible, given the resource constraint.<sup>13</sup> The principle by which to specify the optimal division of moral labour and the ordinal arrangement of duty-bearers is therefore efficiency. The optimal division of moral labour is one which would realize as full rights for as many as possible, and the primary duty-bearers are therefore the agents who can most efficiently perform the various specific tasks. If a primary duty-bearer defaults on its obligations, the duty must be addressed by the secondary duty-bearer who is the second most efficient in performing the task in question, and so on. So for any given task, the ordinal arrangement of duty-bearers in addressing that task reflects the relative efficiency of agents in performing it.

In the second case where resources are abundant, it is less obvious what the principle for assigning duties should be. If universal and comprehensive rights can be secured in several ways, the human rights perspective does not in itself offer any guidance on which particular assignment to choose. In an ethical perspective that consists only of rights, then, it might be a matter of convention who the primary duty-bearers are, as long as the assignment of primary duties secures full rights. The same might be true of at least the top positions in the ordinal arrangement of duty-bearers, while further down efficiency may have to be decisive if full coverage cannot then be secured. If, in addition to rights, our ethical perspective includes other concepts, the principle for assigning duties must take these into account, which again suggests that some type of efficiency consideration is in order to realize rights and other ethical concepts as fully as possible.

Now, from the above arguments it is clear that a positive capability must be a prerequisite for including any agent in the ordinal arrangement of duty-bearers.<sup>14</sup> Only agents that are capable of

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<sup>13</sup> This of course raises difficult questions of how to weight different rights of different individuals.

<sup>14</sup> Obligations are also related to capability in O'Neill "Agents of Justice".

carrying out the task in question, should (in a given setting) be called upon to do so.<sup>15</sup> If an ethical perspective consists only of rights, or rights are given lexical priority over other ethical concepts, any agent with even a marginal ability to contribute to fulfilling a particular task, should be included in the ordinal arrangement. If rights do not have lexical priority, the question is more complex, and involves considering trade-offs with other ethical concepts.

To sum up, human rights imply correlative duties that are unconditional or conditional. Agents face unconditional duties to respect the rights of others, i.e. not to directly violate their rights. Moreover, agents face unconditional duties to comply with and not undermine the assignment of duties as reflected in the division of moral labour. Agents also have conditional duties, which they have to practically address depending on their position in the ordinal arrangement of duty-bearers and the conduct of the agents more highly ranked than themselves. With this elaboration of duties in mind, we can discuss the duties of corporations that follow from the human rights perspective.

## Unconditional duties of corporations

Human rights imply two types of unconditional duties for corporations. Firstly, corporations have a duty to respect the rights of all human beings. And secondly, corporations have a duty to comply with and not undermine the division of moral labour.

The first type of unconditional duties derives from the argument made earlier that if every agent does not have a duty not to directly violate the rights of others, those rights are not secure. This applies to corporations as it does to other agents. Hence, for rights to be secure, they must be respected by corporations. A corporation thus cannot kill or inflict physical harm on its workers, nor can it use slave labour, or significantly curtail the freedom of speech of its employees.

The fact that these are unconditional duties, to be observed regardless of the conduct of others, also implies that some common arguments regarding limits to corporate duties, are invalid. Consider, in particular, the following claim made by a corporate executive:

“We know that if our presence in Myanmar were ended, we would immediately be replaced by other operators who might not apply the same social or ethical standards.” *Jean-François Lassalle, E&P Vice President Public Affairs, Total Oil*<sup>16</sup>

This is a particular version of a more general argument that competition can limit the duties of a corporation, since if a corporation ends a particular practice or quits a particular market, it would be replaced or outperformed by other corporations that are equally or more unscrupulous. From a human rights perspective, however, the duty not to directly violate human rights is not dependent on the behaviour of others. On the contrary, it is an unconditional duty that must be observed no matter what other corporations or agents do or would do in your place. A direct violation of the human rights of others is wrong in and of itself, even if others are doing the same thing. Nor is being better than your competitors in ethical terms always sufficient or a relevant benchmark. For example, it is wrong to employ slave labour even if at slightly better terms than your competitor would provide. The argument that someone else and less responsible would enter a market if you withdrew, is therefore not in general valid in the context of human rights. For multinational corporations such as Total, the implication is that if you cannot operate in a country such as Burma (Myanmar) without violating human rights, you should not be there.

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<sup>15</sup> This relates to the “social influenceability” of rights, see Sen “Elements of a theory of human rights”.

<sup>16</sup> [http://burma.total.com/en/publications/burma\\_campaign.pdf](http://burma.total.com/en/publications/burma_campaign.pdf), last accessed 12 September 2007.

The analysis of the unconditional duties of corporations in authoritarian countries, is complicated by the fact that the government, rather than corporations, is usually the one violating the human rights of its citizens. Corporations are, however, often argued to be complicit in human rights violations of governments, by participating in or facilitating government action or increasing the resources available to the regime in question. The question of exactly when a corporation is complicit in human rights violations to an extent that is unethical, is difficult to settle. We can, however, address some extreme cases, and discuss how complicity varies with the nature of a corporation's actions. Clearly, most would agree that being a regime's henchman, to whom human rights violations are subcontracted, would entail complicity to an unacceptable extent. At the other extreme, we have small firms in businesses unrelated to government repression, which contribute very little by way of taxes or other resources to the regime.

The degree of complicity clearly varies in terms of the type of association a firm chooses to have with the repressive regime. In the case of Burma (Myanmar), some companies such as Suzuki and Daewoo reportedly have entered into joint ventures with companies owned and controlled by the military regime,<sup>17</sup> while other companies have a far more remote role as subcontractors to larger corporations operating in the country. It would seem obvious that the degree of complicity would be higher in the former case than in the latter, *ceteris paribus*.

These nuances notwithstanding, it is difficult to draw the line that delimits the degree of complicity that is unacceptable from an ethical point of view. Even the case where a company contributes negligible tax revenues to a regime is not completely clear, as any easing of the resource constraint of a regime with preferences for human rights violations, could in one sense constitute complicity.<sup>18</sup> If we were able to draw a line, however, what would be clear is that a corporation could not justify operating in an authoritarian country simply by claiming a lesser degree of complicity than its competitors. A corporation has the duty to avoid unacceptable complicity, no matter what others choose to do.

In addition to the unconditional duty to respect rights, corporations also face an unconditional duty to comply with and not undermine the division of moral labour. This follows from the above argument that some duties can be more effectively addressed by assigning them to specific agents, and that this division of moral labour can only be effective if it is respected by other agents. Corporations therefore should not unduly interfere in the performance of duties by other agents.

If for instance the state is awarded the primary duty of introducing and operating systems for the protection of human rights, such as a judicial system, this means that corporations should respect the state's practice of that duty.<sup>19</sup> This entails paying the taxes required of corporations towards financing the protection of human rights.<sup>20</sup> In a human rights perspective, tax evasion is illegitimate due to its detrimental effect on the ability of the state to perform its positive duties of implementation.

Conversely, directly undermining the ability of the state to see to its duties, through such practices as bribery, lobbying or the subversion of democracy, would be unacceptable from a human rights

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<sup>17</sup> [http://www.burmacampaign.org.uk/dirty\\_list/dirty\\_list.html](http://www.burmacampaign.org.uk/dirty_list/dirty_list.html), last accessed 13 September 2007.

<sup>18</sup> In fact, corporate operations in repressive countries turn the question of transfer pricing on its head. While in other developing countries it might be unacceptable to shift profits to divisions abroad in order to ease the company's total tax burden, in repressive countries it might actually be morally mandatory to do so in order to reduce the resources available to the regime.

<sup>19</sup> It may not be obvious that the state is the primary duty-bearer in this case. This would depend on the principles of efficiency or convention, as set forth in the previous section.

<sup>20</sup> For the argument that rights require taxes, see Holmes, S. and Sunstein, C. R. (1999), *The cost of rights – Why liberty depends on taxes*, New York: W. W. Norton & Company.

perspective. One definition of corruption is “the abuse of public office for private gain”.<sup>21</sup> Abuse in the current perspective reflects the deviation from duties assigned to public officials, and can happen with and without corporate involvement. However, where corporations promote the deviation from duties by public officials, for instance through bribery, this would constitute subversion of the division of moral labour. In a human rights perspective, then, corruption is ethically untenable because it causes behaviour inconsistent with the assignment of duties. A similar point can be made for lobbying, though there might be nuances here, since some forms of lobbying may legitimately express the interests of corporations, allowing public officials to more effectively pursue their duties. In any case, political intervention to capture the state in order to further corporate interests, such as has been observed of powerful corporations in a number of developing countries, would be inconsistent with the duties imposed by the human rights perspective.

Corporate duties to comply with and not undermine the division of moral labour, do not depend on the conduct of others. This implies that tax evasion or corruption are no more acceptable in countries where these practices are common, nor can the misconduct of competitors be used to justify these types of acts. Of course, one cannot always assume that the state dutifully fulfils its assigned obligations, but this may activate conditional duties of corporations, rather than diminish their unconditional ones, as explained in the next section.

## Conditional duties of corporations

The assignment of conditional duties correlative to human rights, entails an ordinal arrangement where agents are designated as primary, secondary, tertiary and so on, duty-bearers for different tasks. The population of agents included in the ordinal arrangement can be individuals, states, corporations and other organisations or collectives with the capability to perform a particular task. As argued above, the ordinal arrangement should reflect basic principles of efficiency, or convention, depending on the abundance of resources. It is beyond the scope of this paper to argue for particular ordinal arrangements for particular tasks, based on comparisons of the efficiency of various agents. Instead, this section outlines some general implications for corporate conditional duties that follow from the above perspective.

For the sake of argument, let us assume that we are looking at a set of tasks to protect, promote or fulfil human rights, which the state has been assigned the primary duty to implement. Moreover, assume that foreign states or the international community has the secondary duty to address these tasks. Then follows a further succession of duty-bearers in which corporations are included. In a situation where the state is willing and able to assume its obligations of providing, protecting or fulfilling human rights, corporations would not have a duty to practically address these tasks, perhaps beyond monitoring that the state is actually doing its part. In many democratic and developed countries this is a fairly accurate description of how society works, which means that corporations may have limited duties in practice.

However, in many developing and/or authoritarian countries, the state may be unable or unwilling to perform the duties assigned to it. In this case, for rights to be secured, this requires that back-up duties come into force, that some other agent addresses the relevant duties. Given the assumptions above, state default would imply that other states or the international community should address the tasks of protecting, promoting, or fulfilling human rights. As long as this secondary duty-bearer performs its duties satisfactorily, the practical duties of corporations would still be limited.

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<sup>21</sup> This is a widely used definition of corruption, endorsed and applied by among others the World Bank.

When the state defaults on its human rights obligations, however, it is not always the case that an agent such as the international community assumes secondary duties of this kind. The international affairs of states are governed by a number of interests besides protecting human rights. Economic or political self-interest is behind many foreign policy decisions, even where foreign aid is concerned. It is often observed that media attention is skewed towards certain photogenic issues, leaving other and more pressing problems unaddressed by policy makers. Moreover, in certain cases the ability of the international community to effect change in authoritarian countries can be limited. If the secondary duty-bearer also defaults on its obligations, the next agent in the ordinal arrangement must address the tasks in question, and so on.

At some point, after the default of a succession of duty-bearers, corporations may be next in line, and should hence address the task of protecting, promoting or fulfilling human rights. In other words, though corporations may not always in principle be in the best position to address these types of tasks, they may nevertheless have a duty to do so, given the inaction of better positioned agents. The implication is that corporations that operate in places where human rights are poorly protected as a result of the default of other duty-bearers, face a duty to act where others do not. In countries like Burma, where human rights are not effectively secured by the government, by other states, by international organisations, by civil society efforts, or by anyone else, corporations choosing to stay and do business in the country arguably have substantial duties to act.

As argued above, being included in the ordinal arrangement of duty-bearers requires some capability to address the tasks in question. Though corporations often protest that they are incapable of addressing the types of duties discussed here, there can be little doubt that many corporations are in fact capable of doing so. It should be noted that addressing these duties may require action of different forms, one approach is to perform the required tasks directly, another is to apply pressure to the more highly ranked duty-bearers to meet their obligations. Many corporations have the financial muscle and capacity to at least perform some of the tasks conventionally attributed to governments. Moreover, corporations are often highly powerful players in an economy, and large multinational corporations in poor countries are particularly influential. Many corporations are able to bargain for highly favourable terms in developing countries, and some have certainly proved able to do a lot of harm to the institutional environment in host countries, so corporations should also be capable of using their influence in more benign ways. Moreover, the collective influence of corporations can be huge, so a highly effective way of putting pressure on unwilling governments, would be to act in concert with other corporations. The point is that in many cases corporations can do a lot to protect, promote or fulfil human rights, or to use the words of Henry Shue “if their gargantuan force cannot be at least in part harnessed for the solution of some of our species’ worst problems – that is, made to implement some positive duties – the lost opportunity will be spectacular”.<sup>22</sup>

The capability and efficiency of corporations in different areas vary, of course, according to their characteristics. Large multinational corporations usually have more resources and power to address human rights issues than smaller domestic companies. And corporations that possess traits or technologies that a government is reliant on, i.e. that present a government with more limited outside opportunities, are able to address human rights issues more forcefully. So size and bargaining power are certainly two of several factors that would influence the position and inclusion of a corporation in the ordinal arrangement of duty-bearers.

As noted, there may be various reasons why duty-bearers default on their obligations, broadly characterized as inability or unwillingness. Robert Goodin argues that back-up responsibilities arise

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<sup>22</sup> Shue, “Mediating duties”, p. 697.

in the former instance and at least in some cases of the latter instance.<sup>23</sup> The point to make here, I would argue, is that back-up duties are equally compelling in both cases, but that the form the duties take may differ. In the case where a duty-bearer defaults due to inability, such as a state that has insufficient resources to implement and maintain a system of rights protection, back-up duties to substitute government action may be required. So for corporations, the direct implementation of duties normally shouldered by the state, could be called for in this case. Where a duty-bearer is unwilling to discharge its duties, the appropriate back-up duty consists rather of applying pressure on the duty-bearer, in order to avoid strategic inaction by more highly ranked duty-bearers.

This is related also to a common counter-argument against assigning human rights duties to non-state agents. It is sometimes claimed that if duties are assigned to other agents, this trivializes rights by shifting attention away from government abuse and permits governments to tactically point to the abuse of other agents to escape attention.<sup>24</sup> By virtue of the above arguments, however, the opposite can be shown to hold. What would trivialize rights would be not to assign duties beyond the state, as this would entail insufficiently extensive obligations to secure rights effectively. If the duties of other agents are discharged according to the above principles, there would be less room for governments to shirk their duties. The fact of the matter is that assigning duties to agents such as corporations is essential to fully secure human rights.

## Concluding remarks

Human rights imply duties. If these duties are not assigned to and borne by specific agents, rights are in effect not guaranteed and are hence illusory. The human rights perspective implies that agents face two types of duties, unconditional and conditional. Corporations are one type of agent to which duties can be assigned. For corporations, human rights imply unconditional duties to respect, i.e. not directly violate, the rights of others. Moreover, corporations face unconditional duties to comply with and not undermine the division of moral labour, for instance through tax evasion or corruption. The unconditional nature of these duties means that they cannot be deviated from by reference to the misconduct of others. So even if competitors violate rights or undermine the division of moral labour, a corporation is not justified in doing the same thing.

In addition, corporations face conditional duties to protect, promote and fulfil human rights. These tasks are more effectively performed if subdivided among agents, i.e. through a division of moral labour. Where designated duty-bearers default on their obligations, however, back-up duties are activated for successive duty-bearers. The conditional duties of corporations therefore depend on their position in an ordinal arrangement of duty-bearers and the conduct of more highly ranked duty-bearers. This implies that even though the state may have been assigned the primary duty for a task, it may still fall on corporations if the state and other more highly ranked duty-bearers do not discharge their duties. Corporations may thus have positive duties of implementation in a given set of circumstances.

Corporate duties to secure human rights, can therefore be quite extensive and demanding in certain situations. Multinational corporations operating in poor and/or undemocratic countries may face particularly extensive obligations. The financially stronger and politically more influential a company, the more demanding positive duties are placed on it, *ceteris paribus*. So for certain large multinationals operating in for instance Burma, the duties thereby incurred can be very demanding

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<sup>23</sup> Goodin, *Protecting the vulnerable*. Note that Goodin uses the word responsibility in a consequentialist context, which corresponds to duties in a deontological context.

<sup>24</sup> For a discussion of counter-arguments, see Clapham, A. (ed.) (2006), *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press.

indeed. A company that is serious about respecting human rights thus faces great and potentially costly ethical duties when operating in authoritarian countries. These duties can be rejected only by rejecting the human rights perspective.

Many companies do in fact use consequentialist, rather than deontological, arguments to justify their presence in authoritarian countries, or their conduct more generally. One common argument is that corporations provide employment, income, taxes, investment, currency, technology and more, that increase the welfare of the host country as a whole. Though these may certainly be valid considerations within a consequentialist perspective, it is not entirely clear that the responsibilities for corporations implied by a consequentialist perspective are much less demanding than the duties implied by human rights. Deprivations of rights may also have very large consequences in terms of welfare. One example would be a right to subsistence food, another would be the right not to be physically abused. Alleviating these extremely negative consequences of rights violations may actually take precedence over attaining other types of positive effects of a corporate presence. We also need to keep in mind that consequentialist perspectives demand that we pursue the best possible state of affairs, rather than just something better than the current situation. This may imply that these matters need to be addressed in addition to realizing other positive consequences of corporate activities in authoritarian countries.



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## SUMMARY

Human rights imply duties. The question is, duties for whom? Without a well-defined scheme for assigning duties correlative to human rights, these rights remain illusory. This paper develops core elements of a general scheme of duty assignment, and studies the implications for corporations. A key distinction in such an assignment is between unconditional and conditional duties. Unconditional duties apply to every agent regardless of the conduct of others. Conditional duties reflect a division of moral labour where different tasks are assigned to specific agents, whose default activates back-up duties of other agents. Corporations face unconditional duties to not directly violate the rights of others, and not undermine the division of moral labour through practices such as tax evasion or corruption. Being unconditional, these duties cannot be deviated from by reference to the misconduct of competitors. In addition, corporate conditional duties to protect, promote or fulfil rights can be activated if the state and other designated duty-bearers fail to discharge their duties.

ISSN 0804-3639  
ISBN 978-82-8062-211-2

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