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Transnational Corporations and Human Rights: An Institutional Responsibilities Framework

by

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Abstract

This thesis argues that transnational corporations (TNCs) bear primarily negative moral duties in relation to human rights, i.e. to avoid doing harm, and that they can be held responsible when they fail to discharge such duties. Thus, their duties are not primarily to protect human rights, as some commentators have argued. To defend the negative duties claim, I detail ways in which corporations inflict harm not only directly through their operations, but also by shaping and supporting a global institutional arrangement that foreseeably and avoidably produces human rights harms. Therefore, the negative duties of corporations should be understood to include refraining from engaging in harmful institutional practices, or participating overall in a harmful institutional order without providing adequate compensation to the victims of harm. If they fail to do so, TNCs can be held accountable for the negative outcomes engendered by the global order.

To my grandparents, Leonor and Enrique.

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Contents

Acronyms	i
Chapter 1 . Introduction	1
1.1. Overview.....	7
Chapter 2 . Bridging the Governance Gap	12
2.1. Introduction	12
2.2. First Wave of Global Initiatives to Regulate TNCs: The 1970s.....	15
2.2.1. The Draft UN Code of Conduct on Transnational Corporations.....	18
2.2.2. The ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy	20
2.2.3. The OECD’s Guidelines for Multinational Enterprises	21
2.2.4. Codes from Civil Society	22
2.3. The Changing International Climate: The 1980s.....	24
2.4. Second Wave of Attempts to Regulate TNCs: The 1990s	25
2.4.1. Multi-Stakeholder Initiatives.....	29
2.5. Third Wave of Attempts to Regulate TNCs: The 2000s.....	30
2.5.1. The UN Global Compact	32
2.5.2. The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights	35
2.5.3. The UN Protect, Respect and Remedy Framework for Business and Human Rights and the UN Guiding Principles	39
2.6. Holding TNCs Accountable Under National Law	44
2.6.1. US Alien Tort Statute.....	44
2.7. Conclusion	48
Chapter 3 : The Responsibilities of TNCs Under International Law	50
3.1. Introduction	50
3.2. Duties, Responsibilities and Obligations	51
3.2.1. Positive, Negative and Intermediate Duties	53
3.3. Moral and Legal Conceptions of Human Rights	56
3.3.1. Human Rights, States and Non-State Actors	58
3.4. Holding Transnational Corporations Accountable Under International Law	62
3.5. The International Legal Responsibilities of TNCs	67

3.6. The Responsibilities of TNCs Under the Protect, Respect and Remedy Framework for Business and Human Rights	71
3.7. Conclusion	74
Chapter 4 . The Moral Duties of Transnational Corporations.....	75
4.1. Introduction	75
4.2. Corporations As Moral Agents.....	77
4.3. Corporate Duties as Fiduciary Duties.....	80
4.4. Corporate Duties as Positive Duties	83
4.4.1. Conditional Positive Duties	84
4.4.2. Non-Conditional Positive Duties	86
4.4.3. Distribution of Duties.....	91
4.4.4. Scope of Duties	93
4.5. Attributing Positive Duties to TNCs and the Efficiency Problem.....	95
4.5.1. The Profit Motive.....	97
4.5.2. Possible Unprincipled Attribution of Duties	100
4.5.3. Adoption of the Approach.....	102
4.6. Corporate Duties as Moral Negative Duties.....	104
4.7. Conclusion	106
Chapter 5 . An Institutional Approach to Allocating Moral Responsibility to TNCs .	108
5.1. Introduction	108
5.2. Interactional and Institutional Moral Approaches.....	110
5.3. TNCs Responsibility Under the UN Framework: An Interactional Approach.....	114
5.3.1. Limitations of the Interactional Approach.....	117
5.4. The Spheres of Responsibility Framework.....	119
5.5. The Global Institutional Order and Its Impact on Human Rights	120
5.6. Transnational Corporations in the Political Sphere	126
5.6.1. Lobbying	127
5.6.2. The ‘Revolving Door’ Phenomenon.....	130
5.6.3. Other Practices.....	132
5.7. Transnational Corporations in the Private Sphere.....	135
5.8. Conclusion	137
Chapter 6 . Institutional Responsibilities Framework.....	138
6.1. Introduction	138
6.2. Benefiting as Additional Grounds to Allocating Moral Responsibility to Transnational Corporations.....	140

6.3. Allocation of Responsibility	148
6.4. Possible Objections to the Proposed Approach	151
6.4.1. Objection 1: Human Rights as Claims Against Those Who Share an Institutional Order	152
6.4.2. Objection 2: The Role of the Global Institutional Order.....	155
6.4.3. Objection 3: Negative Duties Are Not Necessarily More Stringent.....	156
6.4.4. Objection 4: Privileged Agents as Duty-Bearers	158
6.4.5. Objection 5: The Approach Is Very Demanding	160
6.5. Conclusion	160
Chapter 7 . Implications of the Proposed Framework.....	162
7.1. Introduction	162
7.2. Derivative Positive Duties.....	164
7.2.1. Duties of Due Diligence	164
7.2.2. Duties of Coordination.....	166
7.2.3. Duties Not to Undermine the Capabilities of the State and to Strengthen Its Capabilities to Discharge Positive Duties.....	168
7.2.4. Duties to Reforming the Global Institutional Order	172
7.2.5. Duties of Accountability.....	174
7.3. Duties of Rescue.....	175
7.4. Implications for the Protect, Respect and Remedy Framework.....	178
7.4.1. Grounds for Attributing Duties to Respect and ‘Principled Pragmatism’	179
7.4.2. TNCs Duties of Justice.....	182
7.4.3. Broadening the Conception of Impact.....	185
7.5. Implications for the Global Institutional Approach	188
7.6. Conclusion	191
Chapter 8 . Conclusions	193
8.1. Further Research	204
Appendix A: Core Documents and Initiatives	205
Appendix B: Timeline Core Documents and Initiatives	207
Appendix C: Alien Tort Statute Cases.....	208
Bibliography	213

Acronyms

ATS or ATCA	Alien Tort Statute or Alien Tort Claims Act
BHRRC	Business and Human Rights Resource Centre
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCRERI	Centre for Constitutional Rights and Earth Rights International
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CIA	Central Intelligence Agency of the United States
CRC	Convention on the Rights of the Child
CSR	Corporate social responsibility
DITE	United Nations Division of Investment Technology and Enterprises
ECOSOC	United Nations Economic and Social Council
ECHR	European Convention on Human Rights
EITI	Extractive Industries Transparency Initiative
EPZ	Export Processing Zone
ERT	European Round Table of Industrialists
EU	European Union
ETI	Ethical Trading Initiative
FLA	Fair Labour Association
G7	Group of 7
GDP	Gross domestic product
GBI	Global Business Initiative on Human Rights
IBAHRI	International Bar Association's Human Right Institute
ICC	International Chamber of Commerce
ICHRP	International Council on Human Rights Policy
IFC	International Finance Corporation
IHBR	Institute for Human Rights and Business
ILO	International Labour Organization
IMF	International Monetary Fund
IOE	International Organisation of Employers

ISO	International Organisation for Standardization
L3C	Low-Profit Limited Liability Company
MNC	Multinational corporation
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
NIEO	New International Economic Order
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PPP	Purchasing power parity
SIPRI	Stockholm International Peace Research Institute
SRSG	Special Representative of the Secretary-General
TNC	Transnational corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNGC	United Nations Global Compact
UNSC	United Nations Security Council
USEPA	United States Environmental Protection Agency
VPSHR	Voluntary Principles on Security and Human Rights
WB	World Bank
WTO	World Trade Organisation

Chapter 1. Introduction

Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters.

–Grover Cleveland, US President 1885-89, 1893-97

Transnational corporations (TNCs) have been regarded as increasingly important actors in the global arena, given their sizable economic power, cross-border organisational capacities, high mobility and capacity to have impact on virtually every aspect of societal life (Cragg, 2000, p. 209; Wettstein & Waddock, 2005, p. 306; Sethi, 2011, p. 3). In contrast, the state, which has been considered to bear the main responsibility to protect and fulfil the human rights of its population in the current human rights regime, is not always willing or able to discharge its duties. The mismatch between the capabilities and roles of states and some non-state actors has led to the question of whether some moral duties can be attributed to transnational corporations and, if so, which ones. This thesis seeks to answer this question by arguing that TNCs can be attributed primarily negative duties to avoid doing harm, both directly through their operations and activities, and indirectly by participating in an institutional order that foreseeably and avoidably generates human rights harms.

A transnational corporation can be defined as any business that owns and controls activities in more than one country. Several terms have been used to describe these companies, such as 'international trusts', 'multinational corporations', 'multinational enterprises', 'transnational firms' or simply 'international corporations'. The term 'enterprise' is considered more inclusive than 'corporation', as the latter refers only "[...] to businesses that possess a legal charter and state recognition and excludes

unincorporated entities such as partnerships and joint enterprises” (Weissbrodt & Kruger, 2003, p. 908). However, the term ‘transnational corporation’ conforms to the United Nations’ modern official usage adopted in the mid-1970s, and it reflects better the trans-border activities and operations of these firms. In contrast, the term ‘multinational corporation’ suggests a merger of capital from more than one state, but albeit with a few exceptions, most companies that operate internationally are owned and controlled by nationals of one country (O'Brien & Williams, 2007, pp. 178-179; Sagafi-Nejad & Dunning, 2008, pp. 2-3). I will thus use the term ‘transnational corporation’. Further, for the purposes of this thesis it will be understood that the main goal of corporations is maximising profits for their stockholders, and that they will consider any others as secondary goals.¹ While the conception of the TNC as essentially a profit-maximising entity has been contested (see O'Neill, 2001; Sorell, 2004; Kollman, 2008), such a conception, I contend, reflects and explains the behaviour and decisions of modern private corporations.

The aim of this thesis is to contribute to the discussion on the responsibilities of corporations by developing an alternative normative approach for the allocation of moral duties to TNCs in relation to human rights. So far, the bulk of the literature in political theory and philosophy has tended to argue that TNCs have negative duties to respect human rights as well as *prima facie* positive duties to protect and fulfil them, particularly

¹ This concept coincides with the definition of the corporation from neoclassical economics, which does not necessarily account for newer types of corporation such as the ‘benefit corporation’ and the ‘low-profit limited liability company’ (L3C). The benefit corporation is a new corporate form that allows companies to consider societal and environmental factors along with profit maximising in their decision-making processes. Laws recognising this type of company have been passed in the US states of California, Hawaii, Illinois, Louisiana, Massachusetts, Maryland, New Jersey, Pennsylvania, South Carolina, Vermont and Virginia. The main characteristics of the benefit corporation include “[...] a corporate purpose to create a material positive impact on society and the environment, an expansion of the duties of directors to require consideration of non-financial stakeholders as well as the financial interests of shareholders, and an obligation to report on its overall social and environmental performance using a comprehensive, credible, independent and transparent third-party standard” (B Lab, 2013). The L3C is a type of corporation also recognised in some states of the United States which, among other characteristics, “[...] may not have as a significant purpose the production of income or the appreciation of property [and...] shall significantly further the accomplishment of one or more charitable or educational purposes [...]” (Utah Revised Limited Liability Company Act, 2009). While it is true that these new types of companies do not have as a main goal maximising profits, they are mainly national companies operating within the United States, with limited legal recognition. This is why this thesis will not take such types of companies into consideration.

towards those directly affected by their operations. These positive duties are mainly attributed to corporations on two grounds: their capability to discharge these duties, and characteristics shared with states that allow TNCs to behave in an analogous way and to bear similar duties. This view, which I refer to as the ‘positive duties approach’, has tended to simply transpose the duties of the state to other capable actors such as TNCs in order to fill a vacancy left by governments, running the risk of “dumping” the duties of states onto other actors on the basis of their superior capabilities. While capabilities are a necessary condition, they are not sufficient to attribute positive duties; thus, even if corporations can do much to advance human rights, this does not necessarily mean that they ought to do so. Nevertheless, a significant part of the literature has tended to assume that in the case of TNCs, “can implies ought”.

This thesis proposes the use of the Institutional Responsibilities Framework for the attribution of moral responsibility to TNCs. It argues that the moral duties of TNCs should be understood as essentially negative duties to refrain from violating human rights. Therefore, according to the proposed approach, responsibility is not simply determined by the capabilities of corporations to protect and fulfil human rights. Instead, responsibility is attributed on the basis of the breach of negative duties, i.e., on the contribution of corporations to specific harms. While this does not deny that TNCs may bear some positive duties, it argues that conceptualising the moral duties of corporations as negative duties is theoretically more robust, and given that negative duties are generally deemed more stringent than positive duties, all things considered, there is little reason for focusing on the latter when both sets of duties are involved. Furthermore, the proposed framework allows the circumvention of the most significant challenges of the positive duties account, and it better addresses current challenges concerning TNCs and human rights, which mainly involve the breach of TNCs’ duties to respect rights, rather than the underfulfilment of their positive duties.

The proposed framework also emphasises the participation of corporations in structural harms. Some contemporary accounts of corporate responsibility presume that TNCs can only inflict harm directly on the people and communities close to their operations, and therefore they focus on attributing responsibility when there is direct and clear relation between corporate activity and human rights outcomes. While appropriate in many cases, such agent-relative approaches fail to take into consideration the significance of institutional channels as mediators between corporate agency and the resultant human rights outcomes. This deficiency has been noted by Macdonald (2011), who has also proposed allocating moral responsibility according to the harm corporations contribute to inflicting via institutional channels such as business networks and supply chains. While the proposed addition is a welcome step towards a more precise attribution of responsibility, it still falls short of reflecting the complexity and variety of institutional channels through which TNCs operate, as it fails to consider at least one significant way in which TNCs indirectly impact human rights: namely, through the global institutional order.

The core arguments of this thesis develop from the global institutional approach extensively developed by Thomas Pogge. He argues that the current global institutional order foreseeably and avoidably engenders human rights deficits, and therefore, those who contribute to it can be attributed some responsibility for the harms that the order inflicts (2002, pp. 72-74; 2005c, pp. 36-53; 2005d, p. 76; 2007, pp. 25-53; 2010, esp. Chs. 1 & 2). While Pogge's account focuses on the participation of the citizens of affluent countries, this thesis explores the role of TNCs. It examines ways in which corporations contribute to shaping and maintaining the global institutional order through both the political and the private spheres. By 'political sphere' I refer to the dealings of TNCs with public authorities, such as governments or international organisations. Here, corporations contribute to shaping the rules of the global order, for example, through the representation of their interests by national governments or by directly participating in

international forums such as the World Trade Organisation (WTO). However, corporations can also contribute to the configuration of the global institutional order through what I refer to as the 'private sphere'. Here, they may use particular attributes such as purchasing power, reputation, established networks and size to influence common practices, conventions and industry standards in their favour. They can do this through several mechanisms, including establishing a corporate culture, launching voluntary initiatives, funding think-tanks, preventing or enabling technology transfer, etc. Recognising that TNCs can also cause harm via institutions means that they can be allocated a negative duty not to support an institutional order that foreseeably and avoidably leads to human rights deficits. In turn, this duty generates some derivative positive duties, including duties of coordination, duties to strengthen the government's capacities to discharge its positive duties, duties of accountability and duties to promote institutional change.

The approach detailed in this thesis would expand the scope of responsibility for TNCs to encompass instances in which they contribute to doing harm via institutions, in breach of their negative duties. While the approach aims to contribute to the ethical debate on the duties of TNCs in relation to human rights, it can also have significant implications for policy initiatives, such as the United Nations Protect, Respect and Remedy Framework (UN Framework) considered to be the most authoritative document on the issue of business and human rights. The Framework developed by the Special Representative of the Secretary-General on Business and Human Rights, John Ruggie, sees states as bearing duties to protect human rights and provide remedy when rights have been violated, whereas corporations are said to have a primary responsibility to respect human rights, i.e. avoid doing harm. While human rights can be described as essentially moral claims (Pogge, 2005c, p. 43; Wettstein, 2012a, p. 153), the Framework does not develop the moral dimension of corporate human rights responsibility (Arnold, 2010; Cragg, 2012; Wettstein, 2012a, pp. 739-740). Such a gap can be partly explained by

reference to the Special Representative's original mandate to identify and clarify standards of corporate responsibility for TNCs in relation to human rights. However, "[...] the failure to ground the framework on explicitly moral foundations makes the framework both pragmatically and intellectually unpersuasive [...]" (Cragg, 2012, p. 10).

The Institutional Responsibilities Framework developed in this thesis could contribute to addressing some of the deficiencies of the UN Framework and other recent accounts by emphasizing the moral duties of justice that TNCs can be allocated regardless of their recognition in instruments of law. It could also contribute to ensuring more consistency in the UN Framework, to addressing the concerns of a broader range of stakeholders, and to clarifying the discussion on the voluntary versus the mandatory nature of TNCs' duties. Contrary to a primarily positive duties approach, the proposed account is compatible with the main premise of the UN Framework, that TNCs bear negative duties to respect human rights. However, it would entail significant changes to it, such as expanding the notion of impact that the UN Framework considers as the grounds for attributing responsibility to corporations. It may also pose several pragmatic challenges such as empirically determining the contribution of corporations to engendering harm. Nonetheless, not only is the proposed account theoretically sound, but it is also consistent with recent policy developments, including the Guiding Principles for the Implementation of the UN Protect, Respect and Remedy Framework (the Guiding Principles), which move in the direction of recognising the relevance of institutional channels for determining corporate responsibility.

1.1. Methodology

The current thesis can be described as a work of non-ideal theory as it takes into consideration situations of non-compliance from both states and TNCs in the formulation of the Institutional Responsibilities Framework. The normative approach

proposed in this thesis aims not only to advance the discussion on political theory regarding the moral duties of corporations, but it also intends to inform current international policy-making in the area of business and human rights. For this reason the proposed approach incorporates abstract models of companies and states as well as empirical facts about the conduct of these actors. For example, while in the current human rights regime the state is considered as the main duty-bearer in relation to human rights given its large capabilities, this thesis also studies the cases when the state is not capable or willing to fulfil its role. Similarly, it also discusses situations in which TNCs do not comply with legal rules. It notes that while companies can be conceptualised as economic actors with multiple goals and purposes, they are often very reluctant to accept stringent legal human rights responsibilities even when they publicly commit to respect or protect them, which can be regarded as a reflection of the paramount place of the corporations' profit-maximising goal. Thus, while this thesis proposes an approach that develops from a theoretically sound discussion on the justifiability of attributing moral duties to TNCs, it also provides a framework that can overcome some of the main efficiency problems of existing ones in order to contribute to the actual realisation of human rights.

1.2. Overview

The thesis is organised as follows. Chapters 2 and 3 situate this work within the current debate on business and human rights, in particular within the discussion of the moral duties of TNCs. Chapter 2 elaborates on the governance gap, or lack of effective regulation of TNCs, and the attempts to try to bridge it since the 1970s. Special attention is given to the most recent initiative, the United Nations' Protect, Respect and Remedy Framework and the Guiding Principles for its implementation. Chapter 3 introduces the debate on the legal obligations of TNCs, which has tended to inform international policy mechanisms. Here, two positions can be distinguished: the statist and non-statist legal

approaches. The 'statist approach' holds that states are the only subjects of international law and that any mechanisms to regulate non-state actors should be of a domestic nature. In contrast, the 'non-statist approach', which has gained currency in recent years, maintains that non-state actors, including transnational corporations, have some degree of legal personality and can also be subject to obligations under international law.

While the UN Framework has focused on the legal grounds of corporate duties, political theorists and philosophers have increasingly questioned the broader moral duties of non-state actors, meaning duties that are not necessarily reflected in current international law. Chapter 4 engages with some current approaches on the moral duties of TNCs. It notes that the bulk of the literature has tended to argue that TNCs bear *prima facie* positive duties to protect, promote and fulfil human rights. This argument tends to rest either on the basis of the superior capabilities of TNCs or on the idea that TNCs share with states similar characteristics that have traditionally bestowed some positive duties upon the latter. I highlight some problems with this positive duties approach, in particular its tendency to transfer the duties of states to corporations without adequately considering the role and nature of TNCs as profit-maximising entities. I give reasons to think that the moral duties of TNCs should be understood as essentially negative duties to respect human rights. While this does not deny that corporations may bear some positive duties, it contends that focusing on the negative duty to avoid doing harm allows circumvention of the major issues of the positive duties approach and also makes the proposed approach more feasibly adopted at the policy level.

Part of the contribution of this thesis lies in re-thinking what the negative duty to respect entails. Generally, transnational corporations are considered to be able to do harm through their direct actions or operations. Therefore, the negative duty not to harm has been reduced to requiring corporations to refrain from inflicting direct, unmediated harm. Nevertheless, Chapter 5 argues that corporations can also inflict mediated harm by participating in and contributing to shaping global institutional arrangements that

foreseeably and avoidably cause human rights harms. Thus, if it is accepted that corporations may also have impact on human rights indirectly via institutional mechanisms, it is possible to attribute to corporations a negative duty to avoid participating in a global institutional order that foreseeably causes human rights harms. Participating in such a harmful order thus could engender moral responsibility to TNCs. There is nonetheless another significant ground to allocating moral responsibility to TNCs, namely, actively benefiting from harm. Given that sometimes it is not possible to avoid contributing to and benefiting from harm at a reasonable cost, corporations may be allowed to compensate some of the harms they have caused or contributed to causing. These cases, however, should be limited to those in which the injustice can be traced back to features of the global institutional order upon which companies have limited opportunity to have impact.

In recognition of the institutional channels in which corporations participate and through which they can inflict harm, the negative duties of corporations can also give rise to derivative positive duties. Chapter 6 argues that corporations bear, for example, duties of due diligence that require TNCs to map the different instances in which they may have negative impact on human rights. While often, duties of due diligence would allow corporations to identify and avert negative impacts on human rights, this might not be sufficient in cases where corporations are unable to do so without the cooperation of other business or parts of their supply chain. In these cases, in order to fully discharge their negative duties, corporations also acquire some duties of coordination, whose stringency increases according to the power or leverage that they have within a particular industry. Other duties include duties of accountability towards those who can be affected by corporate action, duties not to undermine the ability of the state to discharge its duties in order to respect an established moral division of labour and duties to reform the harmful global institutional order in order to prevent the continuance of structural harm.

Given that the proposed framework shares some significant premises and principles with the global institutional approach, it might be subject to similar objections. Chapter 6 surveys five possible objections to the approach: the conception of human rights as claims against those who share a global institutional order; the validity of the claim that the global order engenders human rights violations and that negative duties are necessarily more stringent than positive duties; the attribution of responsibility to those agents that support the global institutional order; and the significant demandingness of the approach. Even when both approaches share similar principles, the Institutional Responsibilities Framework is not susceptible to the same objections, or at least not to the same extent. This is because the framework proposed focuses on analysing defined agents with significant leverage to impact on the global institutional order, as opposed to citizens of affluent countries whose participation in the global order is complex to determine. Furthermore, unlike individuals, corporations by definition operate within a global institutional order which, in turn, contributes to clarifying the significance that the proposed framework attaches to the global institutional order.

The proposed approach can have implications both for political theory, and for policy mechanisms, such as the UN Framework, as is explained in Chapter 7. According to the UN Framework, responsibility is attributed to corporations on the basis of their impact, which refers to direct causation and contribution to human rights harms, and this is closely tied to unmediated corporate agency. According to the proposed approach, however, institutionally mediated harms can also give rise to moral responsibility. Thus, it is argued, the UN Framework should expand the notion of impact in order to accommodate the institutional mechanisms through which corporations can exert or contribute to harm. In turn, the derivative positive duties recognised under the Framework would be considerably expanded, and the duty of due diligence would have to reflect the immediate institutional channels in which TNCs participate, and also their role in the global institutional order. While this approach is more demanding than

existing accounts of corporate responsibility, and therefore might encounter some resistance from transnational corporations and home countries, recent documents, in particular the UN Guiding Principles, have started to recognise the indirect impact that corporations may exert on human rights. Such developments suggest the possibility of incorporating some of the demands of the proposed account into current initiatives and documents on the issue of business and human rights in the near future. Finally, Chapter 8 concludes by providing a general evaluation of the proposed framework and suggesting some avenues of future research.

Chapter 2. Bridging the Governance Gap

There is an evil which ought to be guarded against in the indefinite accumulation of property from the capacity of holding it in perpetuity by... corporations. The power of all corporations ought to be limited in this respect. The growing wealth acquired by them never fails to be a source of abuses.

–James Madison, US President 1809-1817

2.1. Introduction

The discussion of the responsibilities of corporations in relation to human rights has partly developed from the perception of the existence of a “governance gap”. This concept refers to a vacuum in the effective regulation of transnational corporations’ activities. This gap has originated from a misalignment between economic forces and the governance capacities of states, and it is seen as constituting a permissive environment in which TNCs are able to perform wrongful acts without adequate sanctioning or reparation (Cragg, 2000, pp. 209-210; 2012, p. 13; Sethi, 2002, p. 90; Muchlinski, 2003, p. 33; Koenig-Archibugi, 2004, p. 235; Wettstein & Waddock, 2005, p. 305; Ruggie, 2007b, pp. 16, 23; 2008 p. 3, 5, 6; Wettstein, 2009, p. 214; Macdonald, 2011, p. 549).

On one hand, it is argued, the power of TNCs has significantly increased in recent years thanks to their possession of certain resources, including economic assets, organisational capacities, knowledge and prestige. Some of the largest TNCs report annual revenues comparable to the gross domestic product (GDP) of medium-sized

countries. For example, in 2011, the revenues of the US retailer Wal-Mart were similar to the GDP of Austria and South Africa in the same year, while the net profits of the US oil company Exxon Mobil were larger than the GDP of Latvia and more than twice the GDP of Jamaica and Iceland² (Fortune, 2011; World Bank, 2013). Besides their monetary assets, TNCs also possess intangible resources that contribute to their power or leverage in specific domains. Some specialised companies, for example, possess not only sophisticated knowledge but also the monopoly to exploit it through the acquisition of patents and copyrights on products ranging from software and books to seeds and essential drugs to combat life-threatening diseases (Drahos & Braithwaite, 2002; Tyfield, 2008; Pogge, 2010b, p. 189).

Although transnational corporations have significant impact on the lives of a large part of the global population, they are not obliged to be accountable to a similar extent within public institutions, and they are perceived as capable of evading public control thanks to their high mobility and economic power (Hsieh, 2004, p. 656; Koenig-Archibugi, 2004, p. 235). This capacity to move with relative ease across borders also allows them to decide where to locate different parts of their business according to the competitive advantage offered by each location (Cragg, 2000, p. 209; Winston, 2002, p. 73; Zerk, 2006, p. 47). Thus, it is common for corporations to locate their manufacturing operations in countries where they can offer low wages, such as China, India, Bangladesh or Mexico, while at the same time maintaining their fiscal domicile in territories that charge low corporate tax, such as Bermuda, the Bahamas, the Channel Islands, the Netherlands or Luxembourg.³

² The revenues of Wal-Mart in 2011 were \$421,849 million while the GDP of Austria was \$417,656 million and the GDP of South Africa was \$408,236 million. In the same year, Exxon Mobil reported net profits of \$30,460 million, which were larger than the GDP of Latvia (\$28,252 million), Jamaica (\$14,436 million) and Iceland (\$14,026 million) (all amounts in millions of US dollars at PPP).

³ This phenomenon is also visible within countries. For example, the US state of Delaware is home to more than 50% of all US publicly-traded companies and 64% of the Fortune 500 including American Airlines, Apple, Bank of America, Berkshire Hathaway, Cargill, Coca-Cola, Ford, General Electric, Google, JPMorgan Chase, and Wal-Mart, as it has the lowest corporate tax rate in the US and requires the

On the other hand, states face several challenges brought by globalisation. This will be understood as a set of processes involving the erosion of economic borders, extensive financial integration and hypermobility of goods, services, people, capital and information across state boundaries. At the same time these processes have been intensifying, the scope of state authority has remained largely confined to their boundaries. Thus, there is a mismatch between state capacity to regulate and the ability of transnational actors such as TNCs to have impact on those within states. In other words, the power of the state is seen as having been diminished, as it has been compelled to surrender to the interest of big capital. In their perceived need to remain competitive, states have opted to provide favourable conditions for business, engaging in “regulatory competition” in order to attract investment, thus enhancing the bargaining position of large corporations (Cragg, 2000, p. 209; Young, 2004, p. 370; Wettstein, 2009, p. 240). The on-going privatisation of public domains such as health, housing, education and security, it is argued, has also led to a transfer of control and authority from governments to corporations (Wettstein, 2009, p. 240).

Thus, the mismatch between TNCs’ operations and powers and the state’s perceived diminished capacities and limited jurisdiction, along with the absence of strong supranational regulatory bodies, combine to create a governance gap. This gap is seen as giving rise to some problems that affect with particular intensity the most vulnerable people and communities (Ruggie, 2007a, p. 23; Mayer, 2009, p. 562). With these issues in mind, social scientists, policy-makers, lawyers, international organisations and NGOs have proposed various solutions to try to narrow the gap. These range from re-thinking the current state-centric conception of human rights to proposing international legal or quasi-legal instruments to regulate the conduct of transnational corporations at the international level (De Brabandere, 2010).

disclosure of only minimal information to set up a company (Wayne, 2012; State of Delaware, 2013; State of Delaware, 2013; State of Delaware, 2013; State of Delaware, 2013).

This chapter will map some of these efforts at the global policy level, in order to provide context for a broader discussion of the possible human rights duties of TNCs. It will focus in particular on UN initiatives, because they are key referents in every stage of the discussion from the 1970s onwards. Also highlighted will be critiques of various initiatives, primarily from a failure to generate coercive mechanisms to ensure compliance. Such challenges have led to some nationally-based attempts to hold corporations to account, but as will be shown, these have been curtailed by recent legislation.

The historical development of the debate on business and human rights that will be presented in this chapter aims to illustrate the changing position of transnational corporations regarding their own responsibilities in relation to human rights, which has become increasingly progressive. Such developments will be helpful to argue in the next chapters for the viability of implementing the approach proposed in this thesis. While historically, companies have been reluctant to recognise stringent duties for themselves, they have become acceptant of the idea that they have at least a moral duty not to harm, which is the basis of the proposed Institutional Responsibilities Framework.

2.2. First Wave of Global Initiatives to Regulate TNCs: The 1970s

The last day of the year 1600 marked the birth of the first transnational corporation, when Queen Elizabeth I of England granted a charter of incorporation to the East India Company. During the period of European colonialism, the domestic law of the home country regulated corporations and generally gave them access to the colonies' wealth on extremely favourable terms. European companies became the main agents for the economic exploitation of their colonies and some of them even acted as *de facto* administrators of the overseas territories. In contrast, the people from the

colonies received few economic benefits and had hardly any resources to complain about these conditions (Ratner, 2001, p. 453). However, with the fall of the European empires after the Second World War and the start of a decolonisation period, the relationships between states and TNCs changed significantly.

The emergence of new sovereign nations, the so-called Third World, was accompanied by a wariness of TNCs, which were denounced by many as economic and political agents of a neo-colonialist project (Koenig-Archibugi, 2004, p. 234; Zerk, 2006, p. 9). Many developing countries saw TNCs as posing a threat, since their resources and influence allowed them to evade national regulation and taxation, to abuse their competitive power, distorting market relations, and to oppose the technological transfer necessary for the development of their economies (Muchlinski, 2007, p. 120). These concerns were fuelled by the involvement of TNCs in high-profile cases of human rights violations and interference in national political affairs. Two notorious examples were the participation of the US company, United Fruit Corporation, in the coup d'état against Guatemalan president Jacobo Árbenz in 1954⁴ and the involvement of the US company, International Telephone and Telegraph, Inc. (ITT) in a campaign against Chilean president Salvador Allende in the 1970s.⁵

Most developing-country hosts of TNCs believed that economic development could be best promoted in a regulated rather than in a completely open environment (Jenkins, 2001, p. 3). Consequently, they implemented cautionary measures aimed at ensuring that TNCs would become instruments of development. National and regional

⁴ In the early 1950s, the United Fruit Company started a public relations campaign to warn the US public against the “communist threat” posed by Árbenz, as the company was concerned that the land reforms he proposed would threaten their interests as one of the largest property owners in Guatemala (Litvin, 2003, pp. 117-119). It has also been claimed that the company provided substantial aid in the coup d'état orchestrated by the US Central Intelligence Agency (CIA), which ranged from shipping weapons in the company's boats to providing food and housing to the coup's leaders (Dunning & Lundan, 2008, p. 167; Litvin, 2003, p. 119).

⁵ It has been claimed that in the 1970s, the International Telephone and Telegraph, Inc. (ITT) conspired with the CIA to prevent Salvador Allende's election (Meyer, 1998, p. 181), as it was feared that he would nationalise some industries, including telecommunications, upon becoming president of Chile. After Allende's electoral victory in 1970, the ITT and the government of the United States continued their efforts by funnelling money to support the anti-Allende media campaign in Chile and Europe (Church, 1975, p. 13; Litvin, 2003, p. 150; Meyer, 1998, pp. 181-183; Sagafi-Nejad & Dunning, 2008, p. 43).

laws were passed imposing a range of restrictions, including requirements on foreign investment regarding profit repatriation, promotion of local development through joint ventures, local purchasing, technology transfer, exports, domestic participation, local content of products and indigenisation policies (Jenkins, 2001, p. 3; Koenig-Archibugi, 2004, p. 241; Sagafi-Nejad & Dunning, 2008, p. 28). They also wrote domestic agreements detailing the rights and duties of states and investors, and many developing countries engaged in the expropriation of resources or whole firms, particularly in extractive industries (Kobrin, 1984, p. 329; Jenkins, 1999 in Jenkins, 2001, p. 3; Ratner, 2001, pp. 455-457). Some examples are the nationalisation of copper in Chile in 1971, petroleum in Venezuela in 1975, the expropriation of British Petroleum in Nigeria in 1979, and the nationalisation of the US oil company, Texaco, in Libya in 1973.

The first attempts to set international standards for corporate behaviour can be found in the early 1970s. In 1972, the International Chamber of Commerce (ICC) issued its Guidelines for International Investment. Contrary to the policies of developing host countries, the document was focused on promoting the liberalisation of international trade and investment, and on protecting the interests of corporations from unilateral national measures. Also, in 1977 the US Foreign Corrupt Practices Act prohibited American corporations from performing abroad certain acts that would be illegal in the United States, including bribing foreign government officials and providing false information in the company's books (Stohl, Stohl, & Popova, 2009, p. 611). The Act fostered the creation of corporate codes of conduct, as US corporations were required to write a code delineating expected behaviours and rules. While these initiatives came from the government and corporate sectors, most efforts in the following years would originate within intergovernmental organisations, particularly the United Nations, as a response to the increasing establishment of TNCs in developing countries and the economic and social concerns this engendered.

2.2.1. The Draft UN Code of Conduct on Transnational Corporations

The UN first attempted to create binding rules to regulate the conduct of TNCs in the 1970s. As part of the discussion of the New International Economic Order⁶ the United Nations established the Commission on Transnational Corporations (the Commission) and the Centre on Transnational Corporations (UNCTC), which started operating in 1974. The main functions of the Commission were to serve as a central forum within the UN for the consideration of issues related to TNCs, promoting the exchange of views among governments, conducting inquiries, undertaking studies and preparing reports on TNCs. It also was to provide guidance and advisory services to the UNCTC, assist the Economic and Social Council (ECOSOC) regarding intergovernmental arrangements, and provide it with a set of recommendations that would serve as the basis for a code of conduct to deal with TNCs (Sagafi-Nejad & Dunning, 2008, pp. 90-91). The main objectives of the Centre on Transnational Corporations included furthering the understanding of the effects of TNC activities in developing countries, strengthening the negotiating capacities of developing host countries in their dealing with TNCs, and securing international arrangements that promoted the positive contributions of TNCs towards economic growth while mitigating the negative effects (UNCTAD, 2002). During its 17 years of existence, the Centre performed a range of tasks, including collecting, analysing and disseminating information on foreign direct investment, undertaking research to better understand the impact of TNCs in developing countries, advising governments of

⁶ In the 1970s, the Group of 77, a coalition of seventy-seven developing countries in the United Nations, called for a New International Economic Order (NIEO) “[...] based on equity, sovereign equality, interdependence, common interest and cooperation among all States [...]” (United Nations, 1974). This set of proposals aimed at ensuring economic development and eliminating the widening gap between developed and developing countries. The main propositions of the NIEO included respect for sovereignty, sharing equitably technological advancements between developed and developing countries, cooperation among countries, providing assistance and preferential treatment to developing countries, ending the waste of natural resources, and improving the terms of trade of raw materials (United Nations, 1974).

developing countries in their negotiations with TNCs and formulating an international code of conduct to regulate TNCs activities (UNCTAD, 2002).

In 1976, the Commission started to write a document that would later be known as the draft UN Code of Conduct on Transnational Corporations (the draft UN Code). Its aims were to establish common standards for the conduct of TNCs, enhance the negotiating capacities of states vis-à-vis TNCs, and to set rules for the treatment of foreign investment. It touched upon political, economic, financial and social issues associated with the operation of TNCs, disclosure of information, treatment of transnational corporations by host countries and intergovernmental cooperation. However, human rights did not feature in this initiative, because most of the developed countries opposed their inclusion (Ruggie, 2007b, p. 819). In fact, the only mention of human rights is in Article 13, which states that TNCs should respect human rights and fundamental freedoms in the countries where they operate (United Nations, 1983). The final version of the draft UN Code was submitted to Economic and Social Council in May 1990. During the negotiations, developed countries urged discussion of the standards of treatment of TNCs and foreign investment, whereas developing countries stressed the importance of the political, economic and social aspects of the Code (Madley, 2008, p. 174). At the same time, the United Nations Conference on Trade and Development (UNCTAD) was developing a draft Code on the Transfer of Technology (1979). That code, however, was never finalised due to disagreement between developing and developed countries on models of technology transfer regulations (UNCTAD, 2001, p. 22).

The harsh economic conditions of the 1980s (see Section 2.3) were particularly unfavourable for the draft UN Code, and developing countries lost interest in formalising it. In July 1992, all negotiations were abandoned, and the UN Centre on Transnational Corporations was downgraded and renamed the Transnational Corporations Management Division, one of eight divisions of the UN Department of

Economic and Social Development. One year later, in 1993, it was moved from New York to Geneva and reformed as the Division of Investment, Technology and Enterprises (DITE) of UNCTAD. Unlike the UNCTC and the Commission, which were able to negotiate international rules, the DITE is a more limited think tank, focused on research and policy analysis, intergovernmental consensus-building and technical assistance to developing countries (Muchlinski, 2007, p. 121).

2.2.2. The ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

In 1977, the International Labour Organization⁷ (ILO), the specialised UN agency concerned with labour issues and the promotion of internationally recognised human and labour rights, formulated the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the Tripartite Declaration) (revised in 2001). As with the draft UN Code, it was created in order to respond to the concerns of developing countries, which had urged the creation of international instruments to regulate the conduct of TNCs and define the terms of the relations between them. The Tripartite Declaration aimed to ensure that corporations positively contributed to the economic development of host countries while minimising potential abuses of power or clashes with national laws. Their principles offered guidelines to TNCs, governments, employers' associations and workers' organisations on labour-related and social policy issues such as employment, training, conditions of work and industrial relations. Unlike the draft UN Code, the Tripartite Declaration explicitly exhorts the parties to respect the Universal Declaration of Human Rights (UDHR) (International Labour Organization, 2006, p. 3).

⁷ Given its purpose of promoting social justice and internationally recognised human and labour rights, as well as its unique tripartite structure of governments, workers, and employers, the ILO has been closely involved in issues regarding industrial relations, corporations and human rights. Between 1969 and 1974, the ILO conducted studies, established working groups, held meetings with experts on TNCs and published policy papers on the topic, such as the 1973 *Multinational Enterprise and Social Policy*, which would later contribute to the creation of the Tripartite Declaration (Sagafi-Nejad & Dunning, 2008, p. 177).

According to some critics, the impact of the Tripartite Declaration on human rights is limited, as it is not legally binding and does not oblige companies to engage in social responsible activities beyond the legal requirements of the host country (Jenkins, 2001, p. 4). It has also been coldly received by corporations; for instance, only 3% of corporate codes of conduct make reference to the ILO's core labour conventions (Clapham, 2006, p. 215). Yet, it has been seen as significant in that it constitutes a set of principles upon which further standards can be elaborated, provides a framework for activists and NGOs to formulate their own appeals, and is considered an authoritative interpretation of other binding international conventions such as the Universal Declaration of Human Rights (Clapham, 2006, pp. 212-213).

2.2.3. The OECD's Guidelines for Multinational Enterprises

As a response to growing criticisms from the developing countries and in order to prevent further control of TNC activities, the Organisation for Economic Co-operation and Development adopted in 1976 the Guidelines for Multinational Enterprises (updated in 2011), which formed part of its Declaration on International Investment and Multinational Enterprises⁸ (Jenkins, 2001, p. 2; Clapham, 2006, p. 201). The Guidelines are non-legally binding recommendations addressed to TNCs operating from or in adherent countries (plus Argentina and Brazil) on a range of issues such as employment and industrial relations, taxation, science and technology, environment, information disclosure, competition and consumer interests (OECD Observer, 2001, pp. 1-2). According to the OECD, the Guidelines' purpose is to encourage positive contributions from TNCs to the economic, environmental and social progress of host countries as well as promoting investment among OECD

⁸ The aim of this declaration is ensuring that foreign TNCs are treated as favourably as domestic corporations, promoting cooperation among governments on international investment and minimising the imposition of conflicting requirements on TNCs by different governments.

countries through the harmonisation of TNCs' operations and government policies (2011b, pp. 7, 13). When they were updated in 2011, a new human rights chapter was added to make the Guidelines more consistent with recent developments such as the UN Framework and the Guiding Principles, which will be described in Section 2.5.3. The OECD Guidelines have enjoyed widespread acceptance among TNCs, which can be partly explained by their voluntary nature, moderate approach and lack of effective enforcement mechanisms (Jenkins, 2001, p. 4).

2.2.4. Codes from Civil Society

Civil society actors also contributed to the creation of codes of conduct that tackled specific problems regarding corporate operations. One of the most representative of such efforts was the Sullivan Principles, a voluntary code of conduct, adopted in 1977, which aimed at regulating the operations specifically of US corporations⁹ in South Africa, particularly in their relations with black workers¹⁰ (Sethi & Williams, 2000, p. 169).

The Sullivan Principles represented one of the early attempts to introduce the concept of corporate responsibility and some related ideas, including the role of corporations as agents of change, and well as their responsibilities to follow minimum standards of behaviour and to treat stakeholders in an equitable manner (Sethi &

⁹ The original corporations that committed to the Principles were American Cyanamid, Burroughs Corporation, Caltex Petroleum Corporations, Citicorp, Ford Motor Company, General Motors Company, IBM Corporation, International Harvester Corporation, Minnesota Mining & Manufacturing Company, Mobil Corporation, Otis Elevator and Union Carbide Corporation. By 1994, there were more than 150 companies that had pledged to abide to the Principles (Sethi & Williams, 2000, pp. 170-171).

¹⁰ These principles were named after their creator Rev. Leon H. Sullivan, who at the time was a board member of General Motors. The principles were: 1) non-segregation of the races in all eating, comfort and work facilities; 2) equal and fair employment practices for all employees; 3) equal pay for all employees doing equal or comparable work for the same period of time; 4) initiation of and development of training programs that will prepare, in substantial numbers, blacks and other non-whites for supervisory, administrative, clerical and technical jobs; 5) increasing the number of blacks and other non-whites in management and supervisory positions; and 6) improving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation and health facilities (Sethi & Williams, 2000, p. 170).

Williams, 2000, p. 171). In enacting the principles, Rev. Sullivan expected corporations to help address segregation, and in the long run to contribute to the abolition of apartheid (Sethi & Williams, 2000, pp. 176-177). However, at the time, US and European business leaders did not embrace the concept of corporate responsibility and treated it with suspicion, as they were antagonistic to the idea of imposing non-market constraints on managers (Sethi & Williams, 2000, pp. 172, 177). Instead, they perceived the Principles as a means to limit the pressure from social groups that advocated the withdrawal of US companies from South Africa and as a protective umbrella to implement changes in the workplace without retaliation from the South African government (Sethi & Williams, 2000, pp. 172, 177).

The results of the Principles were mixed. Critics point out that the Principles stalled rather than accelerated the end of apartheid, as they legitimised the operations of signatory companies (Mangaliso, 1997, p. 228). Some have also asserted that that the Principles did not help the black majority, as they only focused on the employees of US corporations and did not tackle other serious issues such as the ban on black persons voting and owning land in South Africa (Mangaliso, 1997, p. 229; McCrudden, 1999, p. 177). However, they did contribute to mainstreaming the idea that corporations are expected to fulfil certain expectations from society. Instead of discussing whether corporations should be held responsible for their impacts on society, the debate moved towards discussing how they could discharge such responsibilities and to what extent they should be held accountable (Sethi & Williams, 2000, p. 172). The Principles also inspired other governments to produce similar codes of employment practice for firms operating in their countries with subsidiaries in South Africa. In 1977, for example, the European Community adopted the Community Code of Conduct for Enterprises Having Affiliates, Subsidiaries or Agencies in South Africa, and in 1985 Canada adopted its own such code. The Principles were abandoned in

1994, after the United States passed the Comprehensive Anti-Apartheid Act,¹¹ and Rev. Sullivan disassociated from the Principles and instead advocated disinvestment measures (McCrudden, 1999, p. 178).

2.3. The Changing International Climate: The 1980s

While the 1970s had been an active period on terms of the introduction of initiatives to regulate the behaviour of TNCs, the onset of the international debt crisis late in the decade, and especially in the early 1980s, changed the landscape. Many developing countries experienced a shortfall of investment in comparison to the early 1970s, when several international banks decided to stop much of their lending after Mexico announced in 1982 that it could no longer service its debts. This served to expose the weak financial condition of other developing countries (O'Brien & Williams, 2007, p. 224). The main concern of these countries was not anymore the potentially negative impacts of TNCs, but ensuring continued inflows of investment. Therefore, their policies shifted from controlling foreign investment to promoting it, facilitating access to markets and attracting capital, technology and skills. Developing countries relaxed or abandoned restrictions on foreign ownership, profit repatriation terms, technology transfer agreements and requirements for local content and exports (Jenkins, 2001, p. 3).

In the 1980s, developing and developed countries signed numerous bilateral investment treaties to remove barriers to trade and protect foreign direct investment. Investors were allowed to hire their own senior personnel, and host countries committed to paying the full value of the investment in the event of expropriation. Many also guaranteed free repatriation of profits and liquidated proceeds (Ratner, 2001,

¹¹ The Act adopted in 1986 imposed sanctions against South Africa, banned new trade, investments and some imports from this country. It also demanded the elimination of apartheid laws and the release of the political prisoner Nelson Mandela.

p. 458; Madley, 2008, p. 178). Sectors that had traditionally been closed to foreign direct investment, such as manufacturing and natural resources, started to be deregulated and privatised in line with nascent neoliberal policy emphases (Jenkins, 2001, p. 3; Bruno & Karliner, 2002, p. 26). This resulted in increasing inflows of foreign direct investment and a favourable climate for corporations that would persist into the future.

Unsurprisingly, during this time the efforts to create an international regulatory framework for corporations and the pressure for adopting codes of conduct subsided (Jenkins, 2001, p. 5). Most of the corporate codes enacted at the time were a response to specific issues. Two examples are the Valdez Principles,¹² launched in 1989 after the Exxon-Valdez oil spill¹³ to guide corporations in establishing environmentally sound policies; and the MacBride Principles, issued in 1984 with the aim of eliminating discriminatory practices of the Protestant majority against the Catholic minority in Ireland via US-owned companies (Perez-Lopez, 1993, p. 9; Compa & Darricarrère, 1996, p. 185).

2.4. Second Wave of Attempts to Regulate TNCs: The 1990s

The negative impacts of the governance gap became more apparent in the 1990s as a result of the emergence of TNCs in larger numbers than ever before and the increasing influence of economic neoliberalism from the mid-1980s (Zerk, 2006, p. 13; Ruggie, 2013, p. xv). During this decade, a series of corporate scandals emerged involving some of the largest retailers, including Adidas, Disney, Gap, Nike, Reebok, and Victoria's Secret which revolved around their use of child labour and sweatshops.

¹² They are now called CERES Principles, after the Coalition for Environmentally Responsible Economies, the organisation that proposed them.

¹³ On March 1989, the oil tanker Exxon Valdez struck Prince William Sound's Bligh Reef in Alaska, spilling 11 million gallons of crude oil and greatly affecting the environment of the region (USEPA, 2013).

Scandals also involved companies in the extractive industry, including Shell,¹⁴ for their role in environmental disasters and violations of human rights in host countries (Koenig-Archibugi, 2004, p. 235; Shamir, 2004, p. 638; Young, 2004, p. 367; McBarnet, 2005, pp. 68-69; Ruggie, 2013, p. xv). These cases raised fresh concerns regarding the lack of accountability of TNCs and its implications for social and environmental standards, and they sparked waves of anti-corporate activism (Zerk, 2006, p. 21).

As a consequence, the corporate social responsibility (CSR) movement, characterised by the recognition of stakeholders' interests in the companies' policies gained prominence (Zerk, 2006, pp. 30-32). Here, term 'stakeholder' refers to groups and individuals who have a stake or interest in the corporation. In the narrow sense, it includes those on which the corporation depends for its survival; such as employees, customer segments, suppliers, shareowners, key government agencies and certain financial institutions (Freeman & Reed, 1983, p. 91). In the wider sense, it also encompasses those who potentially can affect or be affected by corporate conduct such as public interest groups, protest groups, government agencies, trade associations, competitors and unions (Freeman & Reed, 1983, p. 91)

While CSR-related themes had featured in corporate public relations for some time, it was only in this period that these became associated with a recognisable social movement (Zerk, 2006, p. 17). Within this framework, large TNCs and industrial organisations started to produce voluntary codes of conduct, informed by the experiences of the extractive sector and the outcry surrounding the labour practices of some of the global retail chains (OECD, 2001, p. 8; Ruggie, 2013, p. 14). Initially, NGOs supported the creation of voluntary codes and other similar initiatives as a

¹⁴ During this decade, Shell's image was one of the most affected, as it was involved in a series of scandals, ranging from environmental damage to human rights violations. In 1995, Shell was targeted for its plans to dispose of the Brent Spar oil storage tanker in the North Sea with uncertain ecological consequences. At the same time, Shell was also accused of complicity in the execution of Ken Saro-Wiwa and other campaigners who demonstrated against the Nigerian government's oppression and the exploitation of oil by TNCs. Human rights attorneys sued Shell under the US Alien Tort Act (see Section 2.6.1) for human rights violations in Nigeria (CCRERI, 2009; McBarnet, 2005, p. 68; Shamir, 2004, p. 638).

response to inadequate governmental solutions (Clapham, 2006, p. 195). However, NGO critics later observed that the content of the codes was not translated into social change and that, instead of advancing human rights, they were actually hindering them, as they provided a false sense that corporations were addressing human rights concerns (Ethical Trading Initiative, 2013).

Several NGOs suggested that, contrary to their stated purpose, many of the codes were created to enhance companies' public image, respond to public pressure, improve their financial results,¹⁵ attract investors and potential employees, and obtain permissions to operate and enable further deregulation by showing that they could rule themselves (Christian Aid, 2004, pp. 9-15; Clapham, 2006, p. 197). Some of the criticisms voiced against codes of conduct included their lacking any independent accountability system, being ambiguous and fragmented, being unilaterally developed, and in general, lacking a true commitment to improve human rights (ICHRP, 2002, p. 10; Amnesty International, 2004, p. 5; Ethical Trading Initiative, 2013; Ruggie, 2013, p. 34). NGOs and civil society actors, in particular the union movement, soon began to fear that codes of conduct would be seen as appropriate substitutes for actionable legal obligations (Clapham, 2006, p. 197). This was particularly worrying for them given that most codes did not include the protection of certain rights and labour standards developed by the ILO, predominantly those regarding unionising and collective bargaining (Jenkins, 2001, p. 22). In fact, according to the OECD, in a study of 246 voluntary codes of conduct, the only consistent issue across all of them was a ban on child labour (ICHRP, 2002, p. 16). While some initiatives were created, corporations still continued enjoying handsome advantages in binding agreements; for instance “[...] some 94 per cent of all national regulations related to foreign direct investment

¹⁵ There are mixed results on the link between corporate social responsibility and financial performance. Some studies report no relation between these variables (see Aupperle, Carroll, & Hatfield, 1985; Nelling & Webb, 2009; Surroca, Tribó, & Waddock, 2010) and a few argue that this relation is negative (see McPeak, Devirian, & Seaman, 2010). However, a significant portion of the literature argues that these two factors are positive albeit weakly related (see Chochram & Wood, 1984; Orlitzky, Schmidt & Rynes, 2003; Sánchez & Sotorrió, 2007; Waddock & Graves, 1997).

that were modified in the decade from 1991 to 2001 were intended to further facilitate it” (Ruggie, 2013, p. xxv).

For those reasons, most NGOs shifted their efforts from advocating corporate ‘responsibility’ to corporate ‘accountability’. That is, instead of demanding that corporations sign voluntary agreements, NGOs pressed corporations to behave according to established social norms and to face consequences if they failed to do so (Clapham, 2006, p. 195). The common pledge across NGOs was (and still is) that it is necessary to give “teeth” to the commitments of companies (ICHRP, 2002, p. 7; Amnesty International, 2004, p. 12; Christian Aid, 2004, p. 56). They argue that binding codes of conduct and more legislation could even be beneficial for companies that are genuinely committed to respecting human rights, because they would provide a level playing field, protecting them from competitors that do not adopt human rights norms (ICHRP, 2002, p. 18).

In the UN context, a significant event in this period was the discussion of the social clause on labour standards and trade at the launch of the World Trade Organisation in 1994 (International Labour Organization, 2012). This opened a window for the ILO to press for recognition of workers’ rights in the context of trade. In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work, which constituted an expression of the commitment of governments, employers and workers’ organisations to uphold basic rights already stated in other ILO conventions (International Labour Organization, 2010). The rights and commitments include freedom of association and collective bargaining, the elimination of all forms of forced or compulsory labour, abolition of child labour and elimination of discrimination in the workplace.

2.4.1. Multi-Stakeholder Initiatives

At the end of the 1990s and the beginning of the 2000s, companies began to develop more systematic mechanisms to engage with external stakeholders. New initiatives emerged with the purpose of enhancing the accountability of corporations through standardised procedures, regulatory actions and transparency mechanisms (Ruggie, 2007b, p. 835). Some of the most prominent initiatives included:

- Social Accountability International (SAI) (1997): A New York-based organisation that convenes meetings worldwide involving companies, trade unions and NGOs to conduct research, training and capacity-building programmes. It has the mission of advancing the human rights of workers, eliminating sweatshops and promoting ethical working conditions, labour rights and corporate social responsibility globally. It created the SA8000 Standard, an auditable social certification for decent workplaces, whose normative elements are based on international human rights norms and ILO conventions (Social Accountability International, 2012).
- Ethical Trading Initiative (ETI) (1998): An initiative originated by a group of UK companies, NGOs and trade unions with the purpose of deciding the best ways for companies to implement their codes of labour practices. Currently there are 70 member companies and it covers around 10 million workers worldwide (Ethical Trading Initiative, 2013).
- Fair Labour Association (FLA) (1999): A multi-stakeholder initiative based in Washington DC that has as affiliates companies across the world, (mostly from the United States), universities and colleges and civil society organisations. It was created following a meeting between TNCs and NGOs in 1996 convened by US President Bill Clinton, in which he asked them to work together to improve working conditions in the apparel and footwear industries (Fair Labor

Association, 2012). The goal of the FLA is protecting workers' rights globally and ensuring that goods are manufactured under fair and ethical conditions. Its main areas of activity are setting standards for affiliated companies, conducting external assessments, monitoring and publicly reporting on the activities of companies, and providing training and resources to companies to ensure that they comply with the standards (Fair Labor Association, 2011).

- The Voluntary Principles on Security and Human Rights (2000): A set of commitments launched following a discussion on security and human rights by the governments of the United States, the United Kingdom, the Netherlands, Norway, companies in the extractive and energy sectors and NGOs (VPSHR, 2013). The Principles were designed to help companies in the extractive industries to operate within a framework that respects human rights and international humanitarian law, particularly in areas of conflict and weak governance. Although they are voluntary, several companies have incorporated them into their management systems and agreements with contractors (BHRRC, 2010).
- The Kimberley Process (2002): A certification scheme for rough diamonds that guarantees that certified diamonds are conflict-free and are not financing violence in producer countries. The Kimberly Process Certification Scheme currently has 76 member countries and is open to all states that agree to abide by its requirements (The Kimberley Process, 2012).

2.5. Third Wave of Attempts to Regulate TNCs: The 2000s

This period has been characterised by the explicit introduction of the concept of human rights in the discussion regarding the responsibilities of TNCs. As described in previous sections, the negative effects of some TNC activities have been a concern

for decades. However, from the late 1990s, NGOs and UN bodies started to see human rights as a political concept and political project suitable for addressing the main problems associated with TNC operations (Karp, 2009, p. 88). The four initiatives developed within the UN during this period –the Global Compact, the UN Norms, the UN Framework and the Guiding Principles– explicitly referred to human rights as enumerated in the International Bill of Human Rights (the Bill). It consists of the Universal Declaration of Human Rights¹⁶ (UDHR), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The UN Norms are most direct about their grounding in the Bill, stating in Article 23 that their usage of human rights includes civil, cultural, economic, political and social rights as set forth in the Bill (United Nations, 2003). Meanwhile the Global Compact, the UN Framework and the Guiding Principles state that to establish the content of human rights, at minimum, companies should look to the Bill and the core conventions of the ILO (Ruggie, 2008, p. 17; 2011, p. 13; UNGC, 2013b).

The introduction of the concept of human rights marked a shift in the debate regarding TNCs from corporate social responsibility to the issue of ‘business and human rights’. The latter can be described as a recent cross-disciplinary debate whose unified aim is discussing and determining the responsibilities of corporations and other business enterprises in relation to human rights, and answering several questions that unfold from this main concern. These include, for example, rethinking the moral and legal duties of states vis-à-vis non-state actors, how to attribute and distribute duties across agents, and how to measure compliance. In contrast with the corporate social responsibility approach, which emphasises the voluntary and discretionary nature of

¹⁶ Some of the most important rights included in the Declaration are: the rights to life, liberty and security; physical freedom; freedom from torture and cruel, inhuman or degrading treatment or punishment; right to be recognised as a person before the law; right to equal protection of the law; right to an effective remedy from national tribunals for violations of their rights; freedom from arbitrary arrest, detention or exile; right to a fair and public hearing by an independent and impartial tribunal; right to be presumed innocent until proved guilty if charged with a penal offence; right to privacy; right to freedom of movement; right to seek asylum; right to a nationality; right to property; freedom of religion; freedom of speech; freedom of peaceful association; right to work, rest and leisure and right to education (United Nations, 1948).

corporate obligations, “[...] the ‘business and human rights’ discourse is presenting a very different picture: a picture according to which corporate social obligations are non-discretionary at least some of the time” (Karp, 2009, p. 106). Specifically, during this decade, the initiatives within the United Nations largely focused on discussing and clarifying some of these obligations in order to produce an account that would be politically authoritative.

2.5.1. The UN Global Compact

In 1999, then-UN Secretary-General Kofi Annan announced at the World Economic Forum in Geneva, Switzerland, the creation of a voluntary corporate accountability initiative, the Global Compact. This was designed as a learning forum to promote socially responsible practices in the areas of human rights, labour, the environment and anti-corruption.¹⁷ Currently, the Global Compact is the largest corporate social responsibility initiative with around 7,000 company participants and national networks in more than 50 countries (Ruggie, 2013, p. xxvii). While the Global Compact has gained ample support from the business community, it has also been widely criticised by NGOs for what they see as its business-friendly attitude, its voluntary nature and its association with some of the companies that had been implicated in human rights harms, such as Nike and Nestlé (see EarthRights International, 2004). The voluntary and business-friendly attitude of the Global Compact is apparent from its light-touch affiliation process, which involves submitting a letter in which the business or non-business organisation commits to supporting the

¹⁷ The UNGC principles are: 1) businesses should support and respect the protection of internationally proclaimed human rights; and 2) make sure that they are not complicit in human rights abuses; 3) businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; 4) the elimination of all forms of forced and compulsory labour; 5) the effective abolition of child labour; and 6) the elimination of discrimination in respect of employment and occupation. 7) Businesses should support a precautionary approach to environmental challenges; 8) undertake initiatives to promote greater environmental responsibility; and 9) encourage the development and diffusion of environmentally friendly technologies; and 10) businesses should work against corruption in all its forms, including extortion and bribery. Originally, there were only 9 principles and the last one was added in 2004.

UNGC 10 principles,¹⁸ and to issuing an annual document called ‘Communication on Progress’, in which the company publicly discloses the steps it took to implementing and advancing such principles during the year.

The Global Compact does not have any system to monitor or enforce compliance; instead it relies on self-assessment, as it “[...] is more like a guide dog than a watch dog [...] focused on learning, dialogue and partnerships [...]” (UNGC, 2013b). Despite its stated purpose, corporations have tended to treat the Global Compact and its endorsement as seal of approval to raise their profile –for example, by using the Global Compact logo on the company’s official websites and documents. Such handling of a company’s affiliation to the UNGC can be misleading, as some members of the UNGC have been implicated in systematic violations of human rights. An example is the British mining company, Anglo American, which has been allegedly involved in several cases of human rights harms against their employees and the communities of their operations across the countries where it and its subsidiaries operate, including Colombia and South Africa (ActionAid, 2008; BHRRC, 2013a). Another example is the Canadian mining company, Barrick Gold Corporation, whose security personnel have been allegedly involved in cases of gang rape and extrajudicial killings (Human Rights Watch, 2010). Both companies are full members of the Global

¹⁸ The process of admitting new members into the UNGC is mostly conducted by interns at the Global Compact Office in New York, United States. To become a member of the UNGC, the CEO of the business or the highest executive of the non-business organisation commits to supporting the 10 Principles of the Global Compact by sending a letter using a template provided. After the letter is received, the intern in charge of the process searches on the Internet for information on the company and checks the identity of the person who signed the letter (sometimes this is not possible given that some potential members do not have an electronic presence). The next step is checking on an electronic database of politically exposed persons if the company or the person signing the letter is associated with any scandal or felony (sometimes it is difficult to determine this, as there are numerous homonyms, especially in the case of Chinese business). The profile of the company is also checked against a confidential document that lists companies subject to sanctions from the United Nations or that have been blacklisted by UN Procurement. While the reasons for banning these corporations are said to be “moral reasons” (UNGC, 2013b), companies can eventually have their status reinstated. If there are no major concerns, the profile of the company is sent to the local network to be reviewed and the membership is automatically approved in seven working days. In case of concerns, the local network is contacted and more information can be required from the company. If there is no local network, the application is automatically approved in seven working days. (Author observations as intern at the Global Compact office in New York, United States, April-June 2011).

Compact and explicitly endorse the UN Framework and the Guiding Principles (see Anglo American, 2013; Barrick Gold Corporation, 2013).

Furthermore, critics have identified some inconsistencies, or at least clear tensions, in the Global Compact's policies and joining process. For example, companies engaged in the manufacture and sales of anti-personnel landmines or cluster bombs are banned from joining¹⁹ (UNGC, 2013b); nonetheless, companies involved in manufacturing arms, ammunition, missiles and the provision of defence services (armed personnels) can become members. Examples are Mitsubishi and EADS (Netherlands), which produce missiles; Thales (France) and Kongsberg Gruppen SA (Norway), which produce arms, ammunition and missiles (SIPRI, 2011), as well as the private military company, AEGIS (UK). A similar inconsistency is highlighted in the Global Compact policy on tobacco companies. While they are discouraged from becoming members, they can join –albeit with several restrictions²⁰– under the rationale that tobacco is “[...] a legal product whose use United Nations Member States have not yet outlawed [...]” (UNGC, 2013g). This inconsistency between the Global Compact's purported support of human rights and the admission of “bad” companies, has led critics to claim that the initiative is no more than an attempt to “bluewash” the image of corporations, i.e. associating them with the UN and the values the institution embodies in order to clean their image or be perceived as part of the global humanitarian community (Bruno & Karliner, 2002, pp. 78-79).

While a range of actors was consulted prior to the creation of the Global Compact, particular attention was paid to corporations in order to make the initiative more attractive to them. From 1998, Secretary-General Annan held meetings and

¹⁹ It should be noted that the use of anti-personnel landmines is banned by the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, which aims at eliminating personal landmines around the world. To date 161 states are party to the Convention.

²⁰ This is because the UNGC supports the World Health Organisation's efforts to raise awareness of the health effects of tobacco use. It thus actively discourages tobacco companies from participating in the initiative, does not accept funding from them and does not allow tobacco companies to make presentations at any of the Global Compact's events (UNGC, 2013g).

issued joint statements with the International Chamber of Commerce and representatives of corporations such as Coca-Cola, Unilever, McDonalds and Goldman Sachs (Bruno & Karliner, 2002, p. 43; Kell, 2005, p. 71). While other stakeholders, including NGOs and labour organisations, have become involved, companies have exercised significant influence on the way in which the Global Compact principles are interpreted and applied, through their participation in forums, policy dialogues, networks and the advisory board of the Global Compact Office (Bruno & Karliner, 2002, p. 41; Seppala, 2009, pp. 408-409). For instance, of the 34 members of the board, 20 are businesses and two are business organisations, the International Chamber of Commerce and the International Organisation of Employers (UNGC, 2013a).

The response of NGOs to the Global Compact has been mixed. Some, including Amnesty International, Human Rights Watch and the Lawyers Committee for Human Rights, welcomed the initiative but have not formally endorsed it because of its lack of independent verification and enforcement mechanisms (Winston, 2002, p. 78). Upon the Compact's launch, another group of NGOs, including Corporate Watch and Greenpeace International, issued a press release criticising the initiative as threatening the mission of the UN, and because they feared that it would prevent progress on binding and legally enforceable documents or initiatives (Bruno & Karliner, 2002, pp. 78-79; Winston, 2002, p. 78; EarthRights International, 2004).

2.5.2. The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

In August 1998, the UN Sub-Commission on the Promotion and Protection of Human Rights, in its Resolution 1998/8, decided to establish a sessional working group. This group was tasked with identifying and examining the working methods

and activities of TNCs, and analysing the compatibility of the various international human rights instruments with regional and international investment agreements. It also was to help ensure that TNC methods and activities kept in line with the economic and social objectives of host countries, and to examine the scope of the obligation of the state to regulate the activities of TNCs where their activities have or are likely to have a significant impact on the enjoyment of the human rights of all persons within their jurisdiction (UNHCHR, 1998). For five years, the working group developed a document that would become known as the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the UN Norms). The Norms established standards for regulating the activities of TNCs and preventing human rights violations and other corporate misconduct in the areas of sovereignty, corruption, environmental protection, child labour, development, working environment, adequate wages, workers' rights and the right of security of the person (Sorell, 2006, p. 284). Contrary to other initiatives, the UN Norms were not limited to transnational corporations, but also included *other business enterprises*. This move was aimed at preventing corporations from using legal or financial devices to conceal their transnational nature in order to avoid responsibility under the UN Norms (Weissbrodt & Kruger, 2003, p. 909).

The Norms considered states to be the primary duty-bearers in relation to human rights, but they were notable for ascribing to corporations the same range of duties that states have under international law, namely “[...] to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law [...]” (United Nations, 2003). The only difference between states and corporations was that the latter were considered secondary duty-bearers, and their responsibilities were confined to their “spheres of activity and influence”. The UN Norms echoed some of the responsibilities already outlined in other documents, and they required corporations to pay particular attention to those

areas that historically have been the most affected by corporate activity, such as labour standards and corruption. For instance, the Norms required corporations to refrain from using forced labour and exploiting children, ensuring equality of opportunity and treatment, providing a safe and healthy working environment, providing workers a living wage, ensuring freedom of association and collective bargaining, and abstaining from condoning, benefiting from or demanding bribes or incurring in other acts of corruption. However, they also included further demands regarding consumer protection and the environment that not even states have accepted for themselves (Arnold, 2010, p. 379; Ruggie, 2013, pp. 48-49). For example, the UN Norms required corporations avoid producing, distributing, marketing or advertising harmful products, and acting in accordance with fair business practices in order to guarantee the safety and good quality of their products.

The UN Norms triggered a division between advocacy groups and businesses. Prominent NGOs, including Amnesty International, Christian Aid, Oxfam and Human Rights Watch, supported the Norms, as they proposed making corporate obligations binding under international law (Ruggie, 2013, p. xix). On the other hand, leading business-sector representatives, including the International Chamber of Commerce and the International Organisation of Employers (IOE), fiercely opposed them. They argued that the UN Norms were effectively transferring to corporations the obligations of states, a move they described as “the privatisation of human rights”, and they feared that new guidelines were mapping the road towards binding regulations (Kinley & Chambers, 2006, pp. 457-458; Ruggie, 2007a, p. 821; 2013, p. xvii; Sorell, 2006, p. 287). It was also feared that advocacy groups would use the Norms to declare corporate acts illegal, as opposed to merely being able to claim corporate wrongdoing, and that, in the end, the constraints that the UN Norms imposed would undermine corporations’ autonomy, risk-taking and entrepreneurship (Ruggie, 2007b, p. 822; 2013, p. 51).

Critics of the UN Norms also highlighted what they saw as some deficiencies internal to them. The first was their unclear identity. While the authors of the Norms asserted that they were simply expressing existing international legal principles that applied to companies, critics targeted the similarities between the ascribed duties of states and corporations, and they saw the UN Norms as introducing new standards with unclear international legal standing, such as the right to a living wage, consumer protection and environmental precautionary principles (Arnold, 2010, pp. 374, 379; Ruggie, 2013, pp. 48-49). Second, the Norms were seen by critics as not providing a clear basis for determining which rights had to be included and which did not, beyond the rationale that some were more at risk than others of being abused by corporations. The UN Norms' approach thus seemed to disregard the fact that corporations can have an impact on virtually any human right, ranging from labour and health to civil rights (Ruggie, 2013, pp. 20-23).

The third issue related to the attribution of duties to corporations on the grounds of influence, which in practice means that "can implies ought". This was seen as problematic because corporations may be attributed some responsibilities in cases where they have some influence over the sources of harm, even if they are unrelated to it. Similarly, in cases where corporations have some relation to the harm but can demonstrate that they did not have any influence over the source of harm, they could be absolved (Ruggie, 2013, p. 50). Another consideration refers to some alleged contradictions of the UN Norms, which imposed on corporations a range of duties recognised under international law and also required them to follow national laws and to apply the most protective standards wherever they might be found. However, the Norms did not offer clear guidance on what standards corporations must follow in case of contradiction. Furthermore, the term 'sphere of influence', which was conceived as a metaphor to illustrate the reach of the impact of TNCs' behaviour, was been regarded

as “misleading”, as it may ignore the fact that corporations can exert significant impact on distant communities (Ruggie, 2013, pp. 49-50).

In 2004 the Sub-Commission presented the Norms to its intergovernmental parent body, the Commission on Human Rights (now the Human Rights Council) for their approval. On receipt, however, the Council noted that it had never requested such a document (Council Decision 2004/116). It said further that the Norms had no legal standing, and it demanded that the Sub-Commission refrain from performing any monitoring function in relation to the proposed guidelines (OHCHR, 2004, p. 1). This was not a surprising outcome, given the perceived flaws of the UN Norms and the fact that home states and business had little incentive to adopt such an ambitious document, not only because it was against their perceived interests, but also because of the existence of an organisation more sympathetic to their interests, namely, the Global Compact.

2.5.3. The UN Protect, Respect and Remedy Framework for Business and Human Rights and the UN Guiding Principles

The dismissal of the UN Norms did not mean that the discussion around the issue of business and greater human rights accountability was abandoned. Some governments and advocacy groups perceived a necessity to continue the dialogue, and businesses demanded more clarity regarding their human rights responsibilities from an authoritative source (Ruggie, 2013, pp. xvii-xviii). In 2005, led by the United Kingdom, the UN Commission on Human Rights created a mandate for an individual to look into the issue of business and human rights. Annan then appointed Harvard Professor of International Affairs John Ruggie as Special Representative on Business and Human Rights (SRSG). Ruggie had served as Annan’s Assistant Secretary-General for Strategic Planning from 1997 to 2001, and he had also been involved in the

development of the Global Compact (Whelan, Moon, & Orlitzky, 2009, p. 369; Ruggie, 2013, p. xviii).

Ruggie's original two-year mandate²¹ was largely descriptive and required the Special Representative, among other things, to identify existing standards of corporate conduct and accountability and to clarify the terms 'complicity' and 'sphere of influence' introduced by the UN Norms. Ruggie began his work in a polarised environment. On one hand, businesses insisted that he should recognise that there was no need for a new international regulatory framework, and instead urged him to identify and disseminate good practices and tools to enable them to cope with human rights challenges. On the other hand, NGOs supported the UN Norms and expected him to build upon them and work toward their implementation (Ruggie, 2013, pp. xix-xx). In order to advance the discussion, Ruggie notes that he tried to move beyond the binding/voluntary dichotomy, and instead decided to follow what he calls "principled pragmatism", "[...] an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of peoples" (Ruggie, 2006, p. 18).

Ruggie rejected the self-regulatory mechanism that the business community wanted, as he felt it would lack credibility and alienate NGOs. However, a treaty-like document was not an option either, as he considered that there was no foundation to negotiate such a document, and that it would entail a very lengthy process that would not provide the immediate solutions needed (Ruggie, 2013, p. 57). He also rejected the

²¹The mandate asked the Special Representative: 1) to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights; 2) to elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation; 3) to research and clarify the implications for transnational corporations and other business enterprises of concepts such as 'complicity' and 'sphere of influence'; 4) to develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises; and 5) to compile a compendium of best practices of States and transnational corporations and other business enterprises (OHCHR, 2013).

idea of simultaneously writing a treaty and taking short-term practical steps, as he identified some major challenges to that path. First, there was little consensus on the desirable responses that the issue of business and human rights required, as it was a relatively new topic on the international agenda. Second, some policy incoherence existed within governments, as entities in charge of human rights were isolated from those that protect business, which were generally larger and more powerful; thus it was feared that a treaty would lock in commercial interests at the expense of human rights. Third, he noted, treaty negotiations are sometimes used as an excuse by governments to avoid taking concrete steps to protect human rights (Ruggie, 2013, pp. 58-60).

Additionally, given the sensitivity of the issues, there was the latent risk that the only standards reached would be very low or would not be ratified. Finally, some countries also expressed their concern that imposing on corporations the same range of duties as states would ultimately diminish the state's roles and responsibilities (Ruggie, 2013, pp. 58-60, 64). The Special Representative also cast some doubts on the effectiveness of a treaty-like document, as it would create yet another set of laws that could potentially collide with existent national or international norms, doing little to solve the real problem. Even if a document like that was eventually created, there would be still many issues to resolve regarding enforcement, as, specifically, the most affected countries are those which lack sufficient organisational resources to monitor compliance (Ruggie, 2013, pp. 60-68).

As noted, part of Ruggie's mandate was to clarify the term 'sphere of influence' introduced by the UN Norms; however, he soon made it clear that he could not endorse or build upon the Norms, as he found them deeply flawed. He accused the Norms' effort of becoming "[...] engulfed by its own doctrinal excesses [and on creating confusion due to] its exaggerated legal claims and conceptual ambiguities [...]" (Ruggie, 2006). He also rejected continued development of the term 'sphere of

influence’, as he considered that even when it had some practical applicability, it lacked any “legal pedigree” (Ruggie, 2007a, p. 24).

After the first mandate period ended, the Human Rights Council invited Ruggie to take another year to develop what would become the Protect, Respect and Remedy Framework for Business and Human Rights. The Framework puts forward the idea that corporations’ primary responsibility²² is to *respect* human rights as recognised under various international instruments of soft law, i.e. that are not legally binding, whereas states bear the duties to *protect* the rights of their population and *seek remedy* for the victims of abuses committed by third parties, including business (Ruggie, 2008, p. 8). According to the Framework, the distribution of duties between corporations and states conforms to both existing state-centric legal and political mechanisms that consider governments to be the “[...] appropriate entities to make the difficult balancing decisions to reconcile different societal needs” (Ruggie, 2008, p. 28). In contrast, corporations’ responsibility to respect human rights means that they should act with due diligence to identify, prevent, mitigate and account for how they address their adverse impacts on human rights and enable remediation when harm has been done. Corporations are allocated a set of duties distinct from those of states because, it is argued, corporations are “[...] specialized economic organs, not democratic public interest institutions” (Ruggie, 2008, p. 17).

When the Framework was presented in 2008, the Human Rights Council unanimously welcomed it and extended Ruggie’s mandate, asking him to create guidelines for operationalisation.²³ These guidelines would become the Guiding

²² In the reports the word ‘responsibility’ is used to indicate the fact that respecting human rights is currently not an obligation for corporations under international human rights law.

²³ The 2008-2011 mandate required the Special Representative 1) to provide views and recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from abuses by transnational corporations and other business enterprises, including through international cooperation; 2) to elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders; 3) to explore options and make recommendations, at the national, regional and international levels, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities; 4) to integrate a

Principles on Business and Human Rights for Implementing the UN Protect, Respect and Remedy Framework, which the Council then unanimously endorsed. The document comprises 31 principles that correspond to the three pillars –protect, respect, remedy– of the UN Framework, each with a commentary elaborating its meaning and implications. The Guiding Principles combine public corporate and civil governance mechanisms. For states, the focus is on the obligations that they have under international law, and for companies, the emphasis is on complying with legal obligations and managing the risks of being involved in human rights harms. The UN Guiding Principles are also intended to serve as a tool for empowering victims of human rights violations. At the conclusion of the Special Representative’s mandate in 2011, the Council established a working group in charge of disseminating and implementing the Guiding Principles. Its main tasks are to promote the implementation and dissemination of the UN Guiding Principles, to identify good practices, to help to build institutional capacity in developing countries and to provide further recommendations to the Council. At the present time, several standard-setting bodies such as the International Organisation for Standardisation, the European Union and the OECD have started to incorporate the UN Guiding Principles into their own regulations (Ruggie, 2013, pp. 120, 160).

Such developments help to illustrate the changing ideas regarding TNCs and their responsibilities towards human rights. While in the 1970s companies were reluctant to recognise stringent duties for themselves, it has become widely accepted that companies have at least some moral duties to respect human rights and that they

gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children; 5) to liaise closely with the efforts of the human rights working group of the Global Compact in order to identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises; 6) to work in close coordination with United Nations and other relevant international bodies, offices, departments and specialized agencies, and in particular with other special procedures of the Council; 7) to continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including States, national human rights institutions, international and regional organisations, transnational corporations and other business enterprises, and civil society, including academics, employers’ organisations, workers’ organisations, indigenous and other affected communities and non-governmental organisations, including through joint meetings; and 8) to report annually to the Council and the General Assembly (OHCHR, 2013).

can be held accountable for their indirect contribution to human rights deficits. For instance the UN Guiding Principles explicitly allocate to companies a responsibility to “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts” (Ruggie, 2011, p. 14). Such evolution, I will contend in the next chapters, offers some reasons to think that it is possible to expand the responsibilities of companies to encompass their contributions to harmful social structures, as long as they are rooted in their primary negative duty not to harm.

2.6. Holding TNCs Accountable Under National Law

As is suggested by the above discussion, efforts to address the governance gap have focused mainly on developing international standards and rules in order to match the transnational activity of corporations and avoid competing regulations among states. Nevertheless, in some countries, grave cases of human rights violations have been heard in the courts of home countries or third parties. This section will present the cases of legal provisions under US legislation to prosecute TNCs for complicity in human rights violations abroad, which usage nonetheless has become limited by recent legislative decisions.

2.6.1. US Alien Tort Statute

The Alien Tort Statute (ATS), also known as the Alien Tort Claims Act (ATCA), was enacted in the United States as part of the Judicial Act of 1789. The Act allows aliens, i.e. any person who is not a citizen or a national of the United States, to bring claims in US federal courts for a tort, i.e. an offence in violation of the law of nations (Ramasastry, 2002, p. 120). It operates under the universality principle, which maintains that violations may trigger legal responsibilities regardless of where the

offence occurred and the nationality of the defendant (Reinisch, 2005, p. 56; Ramasastry, 2002, p. 153). The Alien Tort Statute has been invoked in cases against foreign companies, financial institutions and political groups for violations of international law and human rights abuses in foreign territories. Up until 2013, around 180 alien tort cases had been filed against business entities; two resulted in default judgments and 13 in settlements (Goldhaber, 2013, p. 128) (see Appendix C).

Until very recently, in all cases brought under the Alien Tort Statute there was a tacit understanding that corporations, as legal persons, were capable of violating the law of nations and therefore could be sued (Murray, Kinley, & Pitts, 2011, p. 59; Ramasastry, 2002, p. 121; Ratner, 2001, p. 88).²⁴ However, on 17 September 2010, in two cases involving transnational corporations: *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (Talisman)²⁵ and *Kiobel v. Royal Dutch Petroleum* (Kiobel),²⁶ the US Court of Appeals for the Second Circuit decided that corporations could not be held liable under the Alien Tort Statute because there was no customary norm that recognised corporate liability for violations of international law²⁷ (Murray, Kinley, & Pitts, 2011, p. 59). The US District Court for the District of Columbia contested this claim during the hearing

²⁴ This idea was in line with the recognition of the corporate personhood under United States federal law, (see Korten, 2001). Unlike suits against natural persons for direct violation of international law, most suits against corporations have been brought for their complicity or secondary liability, usually with the government of the host country (Murray, Kinley, & Pitts, 2011, p. 66). In the case of *Khulumani v. Barclay National Bank Ltd.* (Khulumani) where the plaintiffs sued around 50 corporations for their complicity with the government of South Africa in maintaining apartheid, the judges differed on their understanding of 'complicity'. One judge argued that international law requires demonstrating that the corporation acted with the purpose of facilitating the commission of the crime, while the other judge, based on federal law, held that the corporation must knowingly assist in the principal violation (Murray, Kinley, & Pitts, 2011, pp. 67-68). As the international meaning prevailed, it was determined that for the TNCs to be judged under international law, they had to be recognised as subject to international law in the first place (Murray, Kinley, & Pitts, 2011, p. 70).

²⁵ In 2001, the Presbyterian Church of Sudan accused Talisman Energy, a Canadian oil company, of being complicit with the Sudanese government in ethnic cleansing against the non-Muslim population living in the area of the company's oil concession.

²⁶ In 2002, Esther Kiobel, the wife of an Ogoni activist executed by the Nigerian government, filed a suit against Shell Petroleum Development Company of Nigeria on the charges of complicity with the Nigerian government in the commission of torture, extrajudicial killing and other human rights violations.

²⁷ According to Murray, Kinley and Pitts this decision was based on 1) the fact that the Charter of the International Military Tribunal at Nuremberg granted it jurisdiction over natural persons only; 2) the fact that during the Nuremberg Trials, in the case of IG Farben only the executives and not the corporation were prosecuted; 3) the statutes of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and International Criminal Court give them jurisdiction over natural persons only; 4) the proposal to extend the Court's jurisdiction to include corporations was rejected; and 5) the few treaties that do provide for corporate liability are not widely ratified (2011, pp. 72-73).

of the case of *Doe v. Exxon Mobil Corporation* (Exxon).²⁸ On 8 July 2011, the DC Circuit ruled that “ [...] neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations” (2011, p. 4). Meanwhile, the Seventh Circuit Court, in *Flomo v. Firestone*²⁹, added: “the factual premise of the majority opinion in the Kiobel case is incorrect [...] suppose no corporation had ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be” (2011, pp. 6-7).

The Supreme Court heard two rounds of oral arguments, and on 17 April 2013 it affirmed the lower court’s dismissal of the case on the premise that the Statute does not explicitly indicate extraterritorial application. This decision effectively limits the application of the Alien Tort Statute, which now can only be invoked when the defendant is a US national or when the “[...] defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind” (*Kiobel v. Royal Dutch Petroleum*, 2013).

Besides the Alien Tort Statute, there are a few comparable legal mechanisms in other countries. In the UK’s legal system, it has been possible to pursue similar cases under the “foreign direct liability theory”, which refers to the notion that

[...] when a parent company is directly involved in its subsidiary’s operations or exercises de facto control, then it owes a duty of care to its employees or anyone affected by its operations. Accordingly, it may be held liable for harm flowing from its failure to competently

²⁸ In this case, the plaintiffs accused the Indonesian military forces whom the oil company Exxon had hired to perform security services. They claimed that the company was complicit in serious human rights abuses including genocide, murder, torture, crimes against humanity, sexual violence and kidnapping.

²⁹ In November 2005, a group of people who lived and worked on the Firestone rubber plantation in Liberia filed a class action lawsuit against the company in US federal court in California. They alleged that the working conditions at the rubber plantation amount to forced labour and that supervisors at the Firestone plantation required workers to put their children to work to meet the company’s production quotas (BHRRC, 2013b).

perform the functions it controls, or to give foreign subsidiaries sound advice on environmental, worker safety, and human rights policies (Goldhaber, 2013, p. 132).

This legal resource has been used several times against British mining³⁰ and oil companies.³¹ However, a proposed reform to the Legal Aid, Sentencing and Punishment of Offenders bill to limit legal expenses in the United Kingdom may jeopardise the continuity of those cases (Goldhaber, 2013, pp. 133-134; Mathiason, 2011). This is because under the new provisions, in some cases the plaintiffs instead of the defendant found guilty will have to cover the legal fees. In addition, the amount of money that can be claimed may be limited, which means that in some cases the costs incurred on bringing a case may not be covered even if the case is won (Mathiason, 2011). This is an important development, as many of the largest TNCs in the world have their headquarters in the United Kingdom.³² These include some companies in extractive industries, which conduct a large part of their operations in vulnerable communities in developing countries. Similar cases have been filed, albeit in much small numbers, in other countries, including the Netherlands, Australia and Canada (Goldhaber, 2013, pp. 134-136).

³⁰ One example is the suit that several farmers in Peru filed in 2007 against UK-based Monterrico Metals for its alleged involvement in abuses committed by police forces during a protest against the operations of the mining company. Another example is the suit against UK's Anglo American South Africa Ltd. filed by over 450 individuals in 2011 in the London High Court. The claimants alleged that they were suffering from silicosis and silico-tuberculosis as a result of the company's failure to control the levels of dust on its South African gold mines (see Leight Day & Co. Solicitors, 2011a). The settlements reached are calculated to be worth around £10.5 million excluding legal fees (Goldhaber, 2013, p. 130).

³¹ Two recent cases include lawsuits against BPXC and Shell Petroleum Development Company. In 2011, a group of Colombian farmers filed a claim against BPXC (a BP subsidiary) because, allegedly, the company failed to observe proper environmental procedures while constructing an oil pipeline in Colombia. Also, in 2011 Shell admitted liability in *Bodo Community v. Shell Petroleum Development Co. of Nigeria*, for an oil spill that caused contamination in creeks, mangroves, rivers and waterways in the Bodo area in Nigeria (see Leight Day & Co. Solicitors, 2011b). The settlements reached are calculated to be worth around £3.3 million excluding legal fees (Goldhaber, 2013, p. 130).

³² By 2013, 95 out of the 2,000 TNCs with the largest assets has their headquarters in the United Kingdom (Forbes, 2013).

2.7. Conclusion

This chapter has presented some of the efforts at the international level to bridge the existing gap in the governance of transnational corporations. It has shown how the focus of United Nations initiatives has reflected the changing global environment and concerns regarding TNCs at each stage, as well as the increasingly progressive view of companies regarding their own responsibilities. The idea that TNCs have at least negative duties to respect human rights as well as the increasingly accepted principle that they can be held responsible for their indirect participation in human rights matters starkly contrast with the prevailing views of the 1970s.

During these years, efforts were directed towards ensuring the fair treatment of developing countries, which enjoyed significant leverage at the global level until many were dramatically affected by the international debt crisis of the early 1980s. The Global Compact, announced in 1999, was an effort to perpetuate economic liberalisation (Kell & Levin, 2002, p. 7) and preserve the global economy, which was thought to be “fragile and vulnerable” (Annan, 1999), particularly in the sight of the anti-globalisation movement, of which the protests in Seattle during the WTO ministerial conference later that year became one of its symbols. The development of non-binding documents and partnerships with corporations became the preferred approach of the United Nations. This was crystallised in the Global Compact and the UN Framework, which had as its stated purpose the creation of “[...] a formula that was politically authoritative, not a legally binding instrument” (Ruggie, 2013, p. xlvi).

Before the 1990s, companies were reluctant to recognise many stringent duties for themselves; however partly as a result of demands from NGOs and civil society at large, companies became significantly more progressive. The policy developments of the 2000s –the UN Norms, the UN Framework and the UN Guiding Principles– captured and contributed to conceptualising the responsibilities of corporations in

Chapter 2: Bridging the Governance Gap

terms of human rights. Increasingly NGOs, UN bodies and policy think tanks have argued that TNCs ought to have duties that are similar in some respects to states'. In other words, they have been arguing that the human rights regime developed in the aftermath of the Second World War, which ascribes primary human rights duties to states, ought to be extended to also include non-state actors, in particular TNCs (Karp, 2009, p. 88). This raises a series of ethical, political and legal questions regarding the justifiability of allocating responsibilities to corporations, the content of such responsibilities and how they can be politically and legally codified and enforced. The next chapter will present an overview of some of the proposed answers to these questions.

Chapter 3: The Responsibilities of TNCs Under International Law

The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give to the sovereign –that is, to the Government, which represents the people as a whole– some effective power of supervision over their corporate use. In order to insure a healthy social and industrial life, every big corporation should be held responsible by, and be accountable to, some sovereign strong enough to control its conduct.

–Theodore Roosevelt, US President 1901 -1909

3.1. Introduction

The use of human rights as a framework in which to place demands upon corporations has had important implications for the debate on the responsibilities they can be allocated. While states are at the centre of the current human rights regime, over the last decade, non-governmental organisations, UN bodies, and policy think-tanks have argued for extending it to include transnational corporations (Karp, 2009, p. 88). While they do not contend that corporations should bear the same range of responsibilities as states, they argue that TNCs should be seen as duty-bearers in relation to human rights, given their growing capabilities and their involvement in several cases of human rights violations around the world. Furthermore, the view of the state as the main party responsible for preventing violations of human rights within its jurisdiction can be hard to reconcile with the fact that states are not always willing to play, or capable of playing, that role.

The problem is that international law does not easily accommodate non-state actors. This is because its foundations were developed upon the image of the state as the main player in the international arena and the main threat to human rights. Nonetheless, these elements have significantly changed over the last 60 years; it has become accepted that while the state has a privileged position, non-state actors also possess some status under international law and therefore are susceptible to rights but also to responsibilities. The challenge remains to develop the content of such responsibilities. While some argue that corporations should bear responsibilities similar in some respects to states' duties, legal scholars have argued that the duties allocated to corporations must reflect their distinct capacities, roles and purposes as profit-maximising entities (Ratner, 2001, p. 493; Kinley & Tadaki, 2004, p. 961; Zerk, 2006, pp. 79, 83). In order to begin moving toward a coherent and fully defensible set of moral principles applicable to determining TNC duties, I will in this chapter consider and contextualise the predominant positions on TNC responsibilities under international law.

3.2. Duties, Responsibilities and Obligations

It will be useful to begin with a clarification of some key terms. First, the terms 'responsibilities', 'obligations' and 'duties' refer to varying actions or constraints that an agent is bound to observe (Erskine, 2003b, p. 11). While there are several distinctions drawn between these terms by various authors, the present work will follow Pogge's usage. He would not draw a firm distinction between 'duties' and 'responsibilities'.³³ For

³³ Other authors, however, have offered different typologies. For example, Goodin (1995) differentiates between 'duties' and 'responsibilities'. For deontological ethics, duties dictate an agent's actions or inactions and ascribe to agents moral credit or blame for what they have done or contributed to an outcome. For a duty to be discharged one must do or refrain from doing something, thus discharging a duty is binary as there is no substitute for doing what one is required to do (Goodin, 1995, p. 85). For deontological ethics, intentions and motives are important so doing what one is required incidentally or accidentally to the pursuit of some other goal does not qualify as discharging one's duties in the fullest sense. In contrast, utilitarian-consequentialists ascribe responsibilities according to outcomes. To discharge one's responsibilities one must oversee that what is required to reach the goal is done, but they leave open the choice for actions to be taken. Contrary to duties, discharging a responsibility is gradual as in a consequentialist ethic different outcomes are

example, he states that “[...] the claim ‘there is a human right to X’ is tantamount to the claim that members of the global order have some *responsibilities* with regard to other members’ having X” (emphasis added) (Pogge, 2009a, p. 42). In another source, he asserts: “the positive *duties* correlative to human rights will be discharged more efficiently if the bearers of these duties focus their efforts within their own country” (emphasis added) (Pogge, 2007, p. 23). Both terms, duties and responsibilities, are treated as correlative to rights³⁴ and therefore are owed to special persons i.e. right-holders (see also Brandt, 1964, p. 375; Fieser, 1992; Frazier, 1998, p. 178).

For Pogge, duties are considered as fundamental unconditional demands that apply to us always, such as the duty to keep a promise. Under certain empirical circumstances certain kinds of duties, generative duties, can generate moral obligations or derivative duties (see Cruft, 2005, p. 31; Macdonald, 2011, p. 557). Obligations merely spell out what the underlying duties entail under given conditions (Pogge, 1992b, p. 234). For example, “a duty to keep one’s promises generates obligations whenever a promise is made. Those who make no promises do not have obligations. But they still have the duty: to keep any promises they make” (Pogge, 1992b, p. 234). Likewise, a positive duty to assist in an emergency in conjunction with a situation of a car crash generates an obligation to –at least– call an ambulance. Therefore, while duties are unconditional, obligations are conditional to particular empirical circumstances.³⁵

suitable in different degrees (Goodin, 1995, p. 85). For utilitarians, responsibilities (goals) can determine duties (actions) if a particulate duty is the only way to discharge a responsibility (Goodin, 1995, pp. 81 -85).

³⁴ According to other typologies, ‘duties’ arise from special status, position, occupation or role, e.g. as a president, as a teacher, as a dean or as a parent (Lemmon, 1962, p. 140; Brandt, 1964, p. 375; Frazier, 1998, p. 178). Whereas ‘obligations’ are based on promises and are voluntarily incurred or created such as giving one’s word or signing an agreement (Lemmon, 1962, p. 141; Brandt, 1964, p. 375; Feinberg, 1966, p. 137). Obligations are said to function in agreement, contractual and retributive relations and are closer related to conscience and personal moral standards; while duties have a more compelling force and the term is normally used in status-situations and when moral demands are backed up by institutional sanctions (Brandt, 1964, pp. 392-393; Lemmon, 1962, p. 142). Frazier (1998, p. 178) suggests that the indistinct usage between both concepts might be explained by the fact that nowadays many roles are taken on voluntary.

³⁵ This typology is similar to O’Neill’s, which nonetheless uses a different terminology; instead of referring to duty and obligation she uses the terms ‘fundamental’ and ‘non-fundamental obligations’ (see O’Neill, 1989, p. 190).

In legal scholarship it is common to make a distinction between duties and responsibilities. For example, Ruggie, refers to “duties” as those claims that are codified in binding legal instruments, whereas “responsibilities” denote standards of expected conduct (2010a, p. 2; 2013, p. 91). Therefore, he distinguishes between the state duty to protect human rights as embodied in binding documents of international law and the corporate responsibility to respect as recognised involuntary and soft law instruments (Ruggie, 2010a, p. 2; 2013, p. 91).

3.2.1. Positive, Negative and Intermediate Duties

Moral duties can be divided between positive and negative duties. Negative duties involve not depriving other people of what they have rights to, or not interfering with their realisation of rights, i.e. duties to respect the rights of others. Therefore they are considered to be less restrictive of individual liberty than positive duties. What is given up in discharging a negative duty is the opportunity to do what one is not supposed to do (Kolstad, 2008, p. 572; Shue, 1988, p. 689). Negative duties are unconditional and universal: the duties not to violate the rights of someone must be observed by everyone, and they are not dependent on the duties observed by others. This is because if someone did not have a duty not to deprive another from a human right, that right would not be secured (Kolstad, 2008, p. 572; Shue, 1988, p. 690). They are also general duties, insofar as they can be provided to everyone and are not weakened by special relations (Pogge, 2008, p. 137; Shue, 1988, p. 689). For example, we all have a negative duty not to harm others and we need to discharge this duty whether or not they are our compatriots, our family or part of any other group with who we share a special relation.

Frequently, negative duties are related to inaction or refraining from performing an action. For example, to fulfil my negative duty not to kill, I must simply refrain from murdering another person. Sometimes, however, negative duties require positive actions to fulfil (Pogge, 2010b, p. 193). For example, if a corporation is releasing highly

poisonous fumes into the air and it wants to fulfil its duty not to kill, it might have to actively do something such as investing in new technology to prevent the release of the deadly pollutants. Thus, while the corporation bears a negative duty not to kill, this triggers the obligation or derivative positive duty to invest in new technology.

By contrast, straightforwardly positive duties are ones that require a moral agent to perform certain actions or provide something to protect, secure or fulfil the rights of others (Caney, 2005, p. 64; Kolstad, 2008, p. 572; Shue, 1988, p. 689). They require the expenditure of some resource that is already in someone's possession, such as money or time, so that fulfilling them can feel more burdensome than fulfilling a negative duty. Though it is also the case that fulfilling negative duties can require positive expenditure and related action. Providing police protection, for example, requires the payment of taxes (Shue, 1996, pp. 51-55). While negative duties fall upon everyone, positive duties need to be divided among capable moral agents and delimited according to some specific criteria (Kolstad, 2008, p. 574; Shue, 1988, pp. 690-691). Comparatively, negative duties are considered to be more stringent than positive duties when what is at stake for all concerned is held constant (Pogge, 2007, p. 74; 2008, p. 140). For example, the duty not to injure someone is more stringent than the duty to prevent injuries caused by someone else; however, this does not convey that we do not have a duty to prevent someone from being injured if we can do so, for example, by anonymously calling the police. Rather, it means that when what is at stake is similar, negative duties have overriding moral relevance.

Pogge usefully identifies a third category of 'intermediate duties', which entail averting harms that one's past conduct may cause in the future (2005c, p. 34). These duties do not comfortably fit into the traditional positive/negative dichotomy: "they are positive insofar as they require the agent to do something and also negative insofar as this requirement is continuous with the duty to avoid causing harm to others. One might call them intermediate duties, in recognition also of their intermediate stringency" (Pogge,

2005c, p. 34). For example, if I have failed to discharge my negative duty not to physically injure someone, my intermediate duty is activated and in consequence, I will be required to ensure that the injury I caused will produce further harm. I can discharge my intermediate duty, for example, by calling an ambulance or administering first aid. In this scenario, my intermediate duty to assist the person that I injured would be greater than the positive duty of a bystander to provide aid, all else being equal.

Within the literature on business and human rights, there is a tendency to use the term ‘respect human rights’ to convey the idea of *not doing harm* or *not violating* human rights.³⁶ For example, in his 2008 report to the UN Human Rights Council, Ruggie states: “[...] to *respect* rights essentially means not to infringe on the rights of others –put simply, *to do no harm*” (emphasis added) (2008, p. 19). Also, in principle 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,³⁷ it is stated that: “failure [of the state] to perform any one of these three obligations [to respect, protect and fulfil human rights], constitutes a *violation of such rights*” (emphasis added) (United Nations, 1997). It is important to note here that ‘harming’ and ‘violating human right’s are not exact synonyms. Harming someone involves making a person worse-off than she would have been. Harms can be understood as shortfalls a person suffers, and they might or might not relate to human rights. For example, one might harm someone else’s health, which corresponds to a human right, but one can also harm someone else’s finances through offering informal, ill-conceived, though well-intentioned advice. That would not necessarily correspond to a human rights violation. For the purposes of this thesis ‘harming’ or ‘doing harm’ will be understood to refer to human rights, and therefore it will be used as a synonym of ‘violating human rights’. Also, in line with the

³⁶ Note, however that the interchangeable use of the terms ‘refrain from harming’ and ‘respect’ has not remain unchallenged (see Karp, forthcoming 2014).

³⁷ The Maastricht Guidelines were conceived in a workshop organised in Maastricht, Netherlands on January 1997 to commemorate the 10th anniversary of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. The Maastricht Guidelines were designed with the purpose of supplementing the Limburg Principles, identifying and understanding the violations to the International Covenant on Economic, Social and Cultural Rights, and providing recommendations to monitor these rights are respected.

current literature on business and human rights, “avoid doing harm” and “respect human rights” will be interchangeably used.

3.3. Moral and Legal Conceptions of Human Rights

Two conceptions of rights are central to this thesis. These are rights as moral claims, and rights as recognised in national and international legal instruments. The moral conception holds that human rights are a set of entitlements all human beings have simply in virtue of their humanity (Shue, 1988, p. 687; Buchanan, 2004, pp. 121-122; Campbell, 2004, p. 12; Griffin, 2004, pp. 33-35; Caney, 2005, p. 64; Pogge, 2005a, p. 17). They have high, if not overriding moral importance by common acceptance (Campbell, 2004, p. 12; Pogge, 2010b, p. 10) because they express ultimate moral concerns relevant to all human beings, and as such, they should not normally be violated in pursue of other goals (Campbell, 2004, p. 22). Therefore, their conception is restricted to certain vital human interests. Something cannot be a human right just because it is desirable or good; it needs to be morally very important to be considered as such (Campbell, 2004, p. 19). Although there is no consensus on which rights should be included as moral human rights, a good account is provided by Buchanan (2004, pp. 128-129). He argues that there exists some basic human rights, whose violation pose the most serious threat to living a decent life, and if respected they protect the most crucial interests of human beings. These rights are the right to life; the right to security of the person; the right against enslavement and involuntary servitude; the rights of due process and equality before the law; the right of freedom from religious persecution; the right to freedom of expression; the right to association; the right against persecution and against the most dangerous and systematic discrimination on the basis of race, gender, ethnicity or sexual orientation (Buchanan, 2004, p. 129).

These rights are often formulated as demands against the state. Pogge, however, offers a more nuanced institutional understanding of human rights, which he conceives primarily as claims on a range of coercive social institutions and secondarily as claims against those who uphold such institutions, especially those who are more influential and privileged (2005b, p. 15; 2008, pp. 50-51). Social institutions are understood as a “[...] public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like” (Rawls, 1999a, pp. 47-48). Thus “a human right to X entails the demand that insofar as reasonably possible, any coercive institution be so designed that all human beings affected by them have secure access to X” (Pogge, 2008, p. 52). This view thus presupposes the existence of social institutions and an institutional order, which are regarded as crucial factors for securing and impeding the access to the objects of human rights.

On the other hand, *legal* human rights refer to the rights recognised in the law and which can be enforced by judicial or administrative mechanisms. Human rights as moral rights can act as the motivation behind the enactment of legal human rights (Sen, 2004, p. 319), and frequently legal human rights have a direct moral counterpart that has inspired them. An example is the moral human right that recognises human life as a universal interest, which has motivated the generation of a legal right to life embodied in Article 3 of the UDHR. However sometimes moral rights do not give origin to legal rights, for example, in the cases of rights that present practical difficulties to be realised or rights that are not widely accepted, such as the rights of the unborn. Therefore, the fact that moral rights are not automatically legal rights and vice-versa means that some moral rights might not be legally recognised, or that certain human rights that are legally recognised might not actually be moral rights (Risse, 2005, p. 9).

Some legal rights cannot be justified by appealing to a corresponding moral right, but to their instrumental value in protecting it, hence they are called “instrumental rights”. “In some cases, the best justification for recognizing a legal right to X is not that

it is the legal counterpart of a moral right to X, but rather that including X as a legal right best serves to protect some moral right to Y” (Buchanan, 2004, p. 145). One example is the (legal) human right to a democratic government. While a moral counterpart to this potential right is not straightforward, it has been argued that democracy might be recognised as a human right because it is the most reliable and effective way of ensuring that other established human rights are guaranteed (Buchanan, 2004, pp. 142-147; Caney, 2005, pp. 75, 125, 185; Christiano, 2011; Sen, 1999, pp. 5, 51-53, 146-159, 178-188).³⁸ While moral rights can have legal counterparts, neither their existence nor their validity depends on their recognition. Contrary to legal rights, moral rights exist independently of whether or not they are incorporated into legal systems (Buchanan, 2004, p. 145; Campbell, 2004, pp. 17, 30). Even in cases when certain rights are being systematically violated or lack any legal recognition, it does not mean that people do not have moral rights. Indeed, it is this independence that allows moral rights to serve as a benchmark for questioning and reforming legal rights (Buchanan, 2004, p. 119).

3.3.1. Human Rights, States and Non-State Actors

The state has been traditionally considered to be the main, if not the only, duty-bearer in relation to human rights (Griffin, 2004, p. 12; Lafont, 2010, p. 198; Seppala, 2009, p. 402). The view that the state is the sole or main duty-bearer in relation to human rights can be traced, in large part, to the historical context in which the human rights regime was developed and by the configuration of the international legal system. The core of the current international human rights regime is embodied in the International

³⁸ According to Buchanan (2004, pp. 143-144) and Sen (1999, p. 152), the accountability mechanisms present in democratic states tend to prevent persistent mismanagements of economic resources as well as violations of human rights. Given that democratic governments are subject to periodic democratic elections, they have high incentives to represent the actual interests of their citizens, which also allows them to have more moral weight in the international arena (Buchanan, 2004, p. 144; Sen, 1999, p. 152)

Bill of Human Rights,³⁹ which as earlier mentioned, consists of three documents: the Universal Declaration of Human Rights (UDHR), adopted in 1948 by the United Nations General Assembly; the International Covenant on Economic, Social and Cultural Rights (1976), and the International Covenant on Civil and Political Rights (1976).⁴⁰

These agreements were created in the aftermath of the two world wars, which were characterised by the brutality of some governments against their own populations and their colonial territories. Therefore, the primary focus of human rights was protecting individuals against the abuse of state power (Beitz, 2009, p. 44; Campbell, 2004, pp. 12, 14; Cragg, 2000, p. 205; 2004, p. 105; De Brabandere, 2010, p. 74; Karp, 2013, p. 21; McCorquodale & Simons, 2007, p. 599; Muchlinski, 2001, pp. 32-34; Reinisch, 2005, p. 38; Weissbrodt & Kruger, 2003, p. 901; Wettstein & Waddock, 2005, p. 305). While states were considered to be the main threat to these rights, they were also regarded as their guarantors, given that states have traditionally enjoyed superior powers and capacities compared to other actors (Buchanan & Decamp, 2006, p. 104; Wettstein & Waddock, 2005, p. 305).

The state-centric approach to human rights is also consistent with the consideration of states as the only subjects of public international law,⁴¹ i.e., entities endowed with international legal personality, which can bear rights and duties under the international legal system (Cheng, 1991, p. 24; ICHRP, 2002, p. 2; Reinisch, 2005, p. 70; Wells & Elias, 2005, p. 145). This characteristic can be explained by the fact that modern

³⁹ Other treaties are commonly cited as contributing to the core of international legal human rights: the Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1969), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1981), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1987), and the Convention on the Rights of the Child (CRC, 1990) (Campbell, 2004, p. 26).

⁴⁰ The Covenants are legally binding upon the states that have ratified them. All the United Nations members have ratified the Covenant on Economic, Social and Cultural Rights except for Belize, Comoros, Cuba, Palau, Sao Tome and Principe, South Africa, and the United States (United Nations, 1966b). China, Comoros, Cuba, Nauru, Palau, Sao Tome and Principe, and St. Lucia have not ratified the International Covenant on Civil and Political Rights (United Nations, 1966a).

⁴¹ Public international law should not be confused with private international law. The former is concerned with the relations among sovereign states while the latter addresses the problem of conflicting jurisdictions.

public international law was partly conceived to legitimise the nascent nation-state system after the Treaty of Westphalia in 1648 (Charney, 1983, pp. 758-759). Hence, public international law has been concerned with regulating the relations among states, while all other actors indirectly interact with it through their national governments and legislations (Charney, 1983, p. 753; Duruigbo, 2003, p. 192).

Under the current structure of public international law, only states have responsibilities to protect human rights, including the obligation to protect against rights violations by non-state actors within their jurisdiction.⁴² Several international conventions require states to sanction the behaviour of non-state actors via national legislation, particularly in sensitive areas such as transnational organised crime, bribery, terrorist financing and environmental damage⁴³ (Murray, Kinley, & Pitts, 2011, p. 85). The responsibilities of non-state actors are considered essentially obligations of “[...] domestic civil or criminal law, backed by the international legal obligation of the state to ensure effective protection of the human rights of the individuals under its jurisdiction” (De Brabandere, 2010, p. 74). If states fail to provide reasonable mechanisms to prevent and redress human rights violations from non-state actors, they might be held responsible for violations even in cases in which no state officials were involved (McCorquodale & Forgia, 2001, pp. 198-199; Muchlinski, 2001, p. 32; ICHRP, 2002, pp. 51-54; McCorquodale & Simons, 2007, p. 599; McCorquodale, 2009, p. 387; Ruggie, 2013, p. 84).

The central idea of modern international human rights is that states must satisfy certain conditions in the treatment of their population (Beitz, 2009, p. 13). Therefore, legal and political studies of human rights had focused on discussing the identity of the

⁴² Frequently jurisdiction is considered very closely related to territory, however “territory” and “jurisdiction” are not synonym concepts (see McCorquodale & Simons, 2007, pp. 602-605).

⁴³ For example, the Convention on the Elimination of All Forms of Discrimination against Women asks states “[...] to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise [...]” (United Nations, 2009). Also, the International Convention on the Elimination of All Forms of Racial Discrimination says that states should legislate to bring to an end “[...] racial discrimination by any persons, group or organization [...]” (United Nations, 1965).

right-holders and the content of rights, while examining the identity of potential duty-bearers, besides the state, has been largely neglected (De Brabandere, 2010; Kolstad, 2008, p. 570; Kuper, 2005, p. ix; Lafont, 2010, p. 199; O'Neill, 2001, p. 183). However, since the beginning of the 21st century, the issue of human rights and non-state actors has been pushed to the forefront of legal and political debates⁴⁴ (De Brabandere, 2010, p. 68; Sorell, 2004, p. 137). The blooming interest on the subject has partly emerged as a response to a perceived shift in the distribution of power between the states and non-state actors. The latter will be understood here as all those actors that are not states or their representatives, that operate at the international level and are consequential to international politics. Some examples would include international non-governmental organisations, transnational corporations and global social movements (O'Neill, 2001, p. 191; Alston, 2005, pp. 14-16).

It has become widely recognised that some non-state actors can rival the economic and organisational powers of states (Donaldson, 1989, p. 163; Cragg, 2004, p. 106; Nussbaum, 2004, p. 4; Pariotti, 2008, pp. 140-141; Buhmann, 2009, p. 7; McCorquodale, 2009, p. 387; De Brabandere, 2010, p. 76), enabling them to interfere with the realisation of human rights, but also putting them in a position to play a role in protecting and fulfilling them (Wettstein & Waddock, 2005, p. 306; Lafont, 2010, p. 201). The next section will present the two main positions on the responsibilities of TNCs under international law.

⁴⁴ An entire journal *Non-State Actors and International Law*, as well as book series such as Ashgate's *Non-State Actors in International Law, Politics and Governance* have been devoted to examining this topic. In addition, some of the most important associations of Political Science and International Relations, the American Political Science Association (APSA), the International Political Science Association (IPSA) and the International Studies Association (ISA) have organised conferences and workshops on this topic.

3.4. Holding Transnational Corporations Accountable Under International Law

The first, which I will call the “statist legal approach”, conforms to the traditional conception of the state as the main duty-bearer in relation to human rights. It contends that while TNCs have significantly increased their power in recent years, their involvement in human rights violations can be explained to a large extent by the lack of enforceability of legal and coercive mechanisms that states have at their disposal to protect the rights of their populations. Thus, this view argues, in order to bridge the existing governance gap, it is necessary to address the responsibilities of home and host countries instead of just transposing their obligations to corporations (De Brabandere, 2010, pp. 67, 76).

This view informs some documents endorsed by the United Nations such as the Protect, Respect and Remedy Framework (see Section 2.5.3) and the Maastricht Guidelines. Both documents emphasise the role of the state as the main entity responsible for protecting and guaranteeing the realisation of human rights. “The first pillar of the UN Framework is the state duty to protect against human rights abuses committed by third parties, including business, through appropriate policies, regulation and adjudication” (Ruggie, 2010b, p. 2). Similarly, the Maastricht Guidelines reaffirm that violations of rights are imputable to the state within whose jurisdiction they occur, and that in order to address them, it is necessary to deal with the accountability of governments for failing to meet their obligations (United Nations, 1997). According to guideline 18,

The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors (United Nations, 1997).

Part of the appeal of both documents is that they provide guidelines to address human rights violations that are consistent with the accepted principles of international law. However, they offer limited guidance in cases when host states do not have enough resources to fulfil their duties, leaving the rights of the affected population effectively unprotected and creating a perverse incentive for corporations to operate in parts of the world where governments lack enough capabilities. This is a relevant obstacle particularly within the extractive and labour intensive industries, because corporations tend to locate their operations in developing countries, some of which have limited organisational and economic capacities to oblige corporations to comply with existing laws.

One of the proposed solutions to this problem is reframing the concept of jurisdiction. Instead of associating jurisdiction with the territory where a company operates, it could convey the notion of effective power, control or authority that the home state can exercise. This could open the possibility of applying the principle of extraterritoriality in cases of corporate abuse, allowing the allocation of some responsibilities to the home state for the conduct of their national corporations abroad (McCorquodale & Simons, 2007). Nonetheless, the prevailing notion of jurisdiction is still very closely associated with territory and thus, when a company abuses human rights, host states can be considered to be breaching their legal obligations if they fail to take appropriate steps to prevent or punish them (Ruggie, 2013, p. 84).

The statist legal view thus ascribes to states the duties to protect, promote, and fulfil human rights, and to provide redress when harm has been done. This is summarised in the third pillar of the UN Framework, which states that “as part of their duty to protect against business-related human rights abuse, states must take appropriate steps within their territory and/or jurisdiction to ensure that when such abuses occur, those affected have access to effective remedy through judicial, administrative, legislative or other appropriate means” (Ruggie, 2010b, p. 3). This does not mean that corporations

do not have any duties towards human rights, but they are limited to avoiding “[...] infringing on the rights of other, and addressing harms that do occur” (Ruggie, 2010b, p. 2).

In contrast, what I call the “non-statist legal approach” argues that TNCs already enjoy certain legal personality, and therefore they can bear responsibilities directly under international law (Muchlinski, 2001; ICHRP, 2002, p. 57; Reinisch, 2005, pp. 42, 43, 74, 75; Wells & Elias, 2005, p. 145; Clapham, 2006, p. 28). This approach proposes to stretch the concept of ‘subject of international law’ to include certain non-state actors in order to enable international law to adapt to the complexity of the global arena, to respond to the raising power of entities such as TNCs, and to address cases of human rights harms involving parties subject to different jurisdictions. This approach contends that, while states have been traditionally considered the main bearers of human rights duties, there are no fundamental legal obstacles to the inclusion of other actors (Charney, 1983, p. 762; Duruigbo, 2003, p. 195). However, this does not mean that non-state actors would be treated on par with the state, which has exclusive rights and privileges such as law-making power, the right to send and receive diplomatic missions, to conclude agreements, to engage in armed conflicts, and to enjoy sovereign immunity within the jurisdiction of other state (Cheng, 1991, p. 38). Instead, this change would allow them to bear responsibilities directly under international law (see Cheng, 1991, p. 23; Duruigbo, 2003, p. 194; Alston, 2005, pp. 19-20; Reinisch, 2005, pp. 70-71; Wells & Elias, 2005, p. 150; Nolan & Taylor, 2009; Murray, Kinley, & Pitts, 2011, p. 85).

According to the non-statist legal view, this is not an unreasonable stretch, given that corporations have been participating *de facto* in the international legal system through signing bilateral investment agreements with states (Charney, 1983, p. 762; Duruigbo, 2003, pp. 198-199). Further, corporations have long enjoyed “international corporate human rights” aimed at protecting them against the abuses of the state (Muchlinski, 2001, pp. 32, 33; 2007, p. 506). For example, the European Court of Human Rights has heard

cases involving alleged violations of human rights against corporations. In addition, corporations have been held to possess several rights, including rights to a fair trial, to free speech and to privacy under the European Convention on Human Rights (ECHR) (Muchlinski, 2001, p. 33). Article 1 of the Protocol to the ECHR establishes that “every natural or legal person is entitled to the peaceful enjoyment of his possessions [...]” (Council of Europe, 2010, p. 31), where the term ‘legal person’ includes corporations.

The non-statist legal view thus argues that TNCs can be considered subjects of international law and can also bear responsibilities under it (see Reinisch, 2005, pp. 42-43; Wells & Elias, 2005, p. 145). There are four main arguments to support this claim. First, while the state has been considered the main threat to human rights, non-state actors such as corporations, political party organisations and individuals have also been involved in human rights violations (Buchanan, 2004, p. 123; Murray, Kinley, & Pitts, 2011, p. 85; Reinisch, 2005, p. 70; Weissbrodt, 2005, p. 58). Thus, if non-state actors have become capable of participating in violations of human rights, it is appropriate to allocate to them certain responsibilities similar to the state’s and to hold them accountable for their participation in human rights violations (Clapham, 2006, p. 28; ICHRP, 2002, p. 57; Reinisch, 2005, pp. 74-75).

The second argument focuses on ways in which some international documents already attribute responsibilities to TNCs,⁴⁵ including the International Labour Organization’s Tripartite Declaration, as well as the Universal Declaration of Human Rights, which in its preamble requires “every individual and organ of society” to promote respect for these rights and this includes corporations (Henkin, 1999, pp. 24-25; Mayer, 2009, p. 568; Muchlinski, 2001, p. 40; Weissbrodt, 2005, pp. 60-61; Wells &

⁴⁵ However, critics maintain that these documents do not attribute responsibilities to corporations but to states to take measures to ensure liability of TNCs and criminalise certain behaviour (De Brabandere, 2010, p. 82).

Elias, 2005, p. 151; Wettstein, 2012a, p. 743).⁴⁶ A third argument rests on the consideration that the traditional private-public division has been blurred by the effective privatisation of some areas that were considered to be part of the public sector (Clapham, 2006). According to this view, the involvement of non-state actors in functions that traditionally belonged exclusively to the state⁴⁷ provides grounds to extrapolate human rights duties to the private sphere and apply them directly to corporations through instruments of public international law (Clapham, 2006, pp. 68-69).

A fourth argument holds that there are strong precedents for attributing responsibilities to non-state actors under international law that date from the end of the Second World War. In the Nuremberg Trials (1945-1946), several German corporations were judged responsible in international military tribunals for their involvement in crimes against peace, crimes against humanity and war crimes,⁴⁸ the chemical company IG Farben⁴⁹ being the most notorious case⁵⁰ (Ishay, 2008, p. 218). In 1947, the United States

⁴⁶ It has also been argued that even if the body of the Declaration is legally binding, the preamble of international legal documents is not. Hence, transnational corporations as “organs of society” do not bear international legal responsibilities under the Declaration (Ruggie, 2007a, p. 12).

⁴⁷ For example, the UK-based transnational corporation Serco participates in areas such as defence, immigration, education, transport, health, housing benefits and welfare services across the world (Serco, 2012). Among its functions, the company trains UK’s national security personnel and provides armed forces as well as prisons and custodial services to a number of countries such as the United Kingdom, Australia and the United States. In the United Kingdom it manages the Atomic Weapons Establishment (AWE), which is in charge of “[...] providing and maintaining the warheads for the country’s nuclear deterrent” (Atomic Weapons Establishment, 2012) and operates two immigration removal centres on behalf of the Home Office’s UK Border Agency. Serco currently operates 7 immigration removal centres and 5 immigration detention centres in Australia. Other areas in which the company has participation are health and welfare systems. In the United Kingdom, Serco has taken over some of the NHS’s pathology laboratories and community hospitals and has gained participation managing the welfare system through programmes such as Flexible New Deal and The Work Programme. In the United States, Serco works with the Department of State for the provision of visas and with local and municipal governments for which it runs a range of services including transportation and traffic management, parking meter operations, driver licencing, road maintenance, street lighting and refuse collection (Serco, 2012).

⁴⁸ The crimes against peace included planning, initiation and waging of wars of aggression in violation of international treaties and agreements. Crimes against humanity included extermination, deportation and genocides; and war crimes referred to violations of the laws of war, a common plan to conspiracy to commit criminal acts against peace, against humanity and war crimes (Ishay, 2008, p. 218).

⁴⁹ The laboratories of IG Farben, with the participation of several prominent scientists provided to the Nazis oil, rubber, nitrates and fibres. They also produced vaccines, drugs such as aspirin, as well as poison gases and rocket fuels (Borkin, 1979, p. 5).

⁵⁰ Other German corporations included Krupp Steelworks and Flick Concern, a large group of industrial enterprises including coal and iron mines as well as steel plants.

filed an indictment against 24 of the highest executives⁵¹ of IG Farben for their direct and active collaboration with the Nazi regime (Borkin, 1979, p. 108). They faced charges of preparation, initiation and waging of wars of aggression and invasions of other countries, plunder and spoliation, as well as slavery and mass murder (Borkin, 1979, pp. 108-109, 121-122). This case set an important precedent, namely that not only states but also non-state actors can be subjects of international law and that corporations can be held liable for their complicity in human rights violations. Since then, responsibilities to non-state actors, particularly individuals, have been ascribed under international law, but only in cases of egregious human rights violations, for example, the genocide in Rwanda in 1994 and war crimes committed in the former Yugoslavia during the 1990s.⁵² The non-statist legal view nonetheless holds that it is possible to extend the attribution of legal duties to TNCs beyond egregious violations of human rights.

The above should offer reason to believe that corporations are able to bear some responsibilities under international law. The next section will present the most recent debates regarding the specific content of such responsibilities.

3.5. The International Legal Responsibilities of TNCs

While states and TNCs share some characteristics, it cannot be simply assumed that both bear the same legal duties. The responsibilities allocated to corporations need to reflect their distinct capacities, roles and purposes. Simply extending state duties to corporations effectively ignores the differences between the natures of both entities (Ratner, 2001, p. 493; Kinley & Tadaki, 2004, p. 961; Zerk, 2006, pp. 79, 83).

⁵¹ The highest executives included the chairman of the supervisory board, the chairman of the managing board, 18 other members of the board and 4 officials. They received sentences that ranged from one and a half years to eight years in prison (Borkin, 1979, p. 108).

⁵² Both the International Criminal Court of Rwanda and the International Criminal Tribunal for the Former Yugoslavia were established to prosecute under international law those responsible individuals for the Rwandan Genocide of 1994 and war crimes that took case in the former territory of Yugoslavia during the 1990s. In the case of Yugoslavia, the Tribunal has been of the opinion that “[...] guilt should be individualised [in order to protect] entire communities from being labelled as ‘collectively responsible’” (ICTY, 2013).

Determining the duties of corporations that reflect a balance between individual liberties and business interests has, however, proved challenging, leading two commentators to go so far as to say that, while it is possible to discern an international legal framework to hold corporations accountable, the content of the law is “wholly absent” (Kinley & Tadaki, 2004, p. 948).

Nonetheless it is possible to provide some general principles regarding the content of the responsibilities that corporations can be attributed (see Kinley & Tadaki, 2004; Ratner, 2001). It is generally accepted that TNCs bear at least negative duties to avoid violating human rights and avoid being complicit in their violation (Ratner, 2001, pp. 511-512). It is argued that some rights can only be infringed by the state, for example, the right of equality before the law, the right to nationality, the right to marry, the right to vote and run for public office.⁵³ Therefore, they give precedence to complicity-based duties for corporations (Kinley & Tadaki, 2004, p. 967; Ratner, 2001, p. 512). However, the case of Chevron in Ecuador exemplifies that a corporation can directly infringe upon the right of equality before the law and the right to a fair trial. Since 1993, Chevron has been in court for its involvement in oil contamination in Ecuador that resulted in environmental pollution and related illness and deaths. Chevron has used many judicial and extra-judicial tactics to try to have the case dismissed. Many of these do not involve a relationship with government, e.g., public relations campaigns, legal suits in the United States to force Ecuador into binding arbitration, and counter-suits against claimants (ChevronToxico, 2013b)

Corporations can, however, directly violate other rights, for example, the right to life, giving scope to other duties beyond avoiding complicity (Ratner, 2001, pp. 512-513). In relation to these rights, corporations have at least a negative duty to avoid doing harm. This can then engender some derivative positive duties necessary for compliance

⁵³ These rights correspond to those recognised on articles 7, 15, 16 and 21 of the Universal Declaration of Human Rights.

with the principal duty. For example, the right against torture may generate a derivative positive duty for corporations in the extractive industry to train their security personnel to prevent torture (Kinley & Tadaki, 2004, p. 966; Ratner, 2001, p. 516). They also may be required to ensure that third parties with whom they are associated do not violate rights (Kinley & Tadaki, 2004, p. 969). According to the typology proposed by Kinley and Tadaki, these duties arise from two distinctive categories of rights: core rights and direct impact rights (2004, p. 968). Core rights refer to “the most fundamental rights” that every person and collective entity must respect and protect; these are the rights to life, liberty and physical integrity. The second set of rights, the “direct impact rights” refer to those rights that fall squarely into the TNCs’ spheres of activity and influence, and which are more susceptible to corporate abuse. These include labour rights, environmental rights and rights of indigenous peoples (Kinley & Tadaki, 2004, p. 968).

Positive duties may also arise from the proximity between the company and those affected by its operations. Therefore, it is possible to attribute to TNCs duties to protect the welfare of their employees and the members of nearby communities, and to ensure that other actors, including the state, do not violate their rights (ICHRP, 2002, p. 138; Kinley & Tadaki, 2004, p. 965). The closer the proximity between the corporation and those affected, the greater the duties towards them (Ratner, 2001, pp. 516-517; ICHRP, 2002, p. 136; Kinley & Tadaki, 2004, pp. 963-965;). Positive duties can also arise from the influence and leverage that the corporation has over third parties. Therefore, it is possible to require corporations to ensure that their business partners, subsidiaries, subcontractors and suppliers do not violate human rights. This duty is greater if companies have contractual relations that allow them some leverage to influence their conduct (Kinley & Tadaki, 2004, p. 965). Furthermore, in cases where companies have *de facto* replaced the government and have state-like functions, they can be allocated a wider range of responsibilities (ICHRP, 2002, p. 138). “In such situations, they effectively step into the shoes of governments and should be required to fulfil duties

more akin to those of states” (Kinley & Tadaki, 2004, p. 965). Thus, these duties do not arise from the company’s proximity to those affected or from their primary negative duties, but from the role that the company is playing within a particular context.

Corporations have several mechanisms at their disposal to discharge their positive duties. For example, they can incorporate human rights principles in their contracts and monitor their compliance (Kinley & Tadaki, 2004, p. 972). They can contribute to protecting labour rights by providing workers and workers’ unions with access to information, encouraging the development of organised labour and proving means to secure children’s human rights (Kinley & Tadaki, 2004, pp. 973-982). They can contribute to the protection of environmental rights by disclosing information about their activities that may adversely impact on the environment, allowing members of local communities to participate in environmental decision-making and refraining from impeding access to justice if they have caused environmental damage (Kinley & Tadaki, 2004, pp. 985-986). Corporations can also contribute to the protection of the rights of indigenous populations by facilitating their engagement at all levels of corporate decision-making when they are affected, by ensuring equitable sharing of the benefits arising from the utilisation of the indigenous knowledge and practices, and by ensuring adequate compensation in case of relocation (Kinley & Tadaki, 2004, pp. 990-993).

Regarding the promotion of human rights, two views can be distinguished. One position argues that the state is the main actor responsible for promoting human rights, as that is one of its key purposes. The duty is seen as significantly attenuated for corporations, whose key purpose is generating profits. Thus, while encouraging corporations to promote human rights, especially when they operate in countries with poor human rights records, can be considered as a good policy, extending “[...] their duty away from a dictum of ‘doing no harm’ [...] toward one of proactive steps to promote human rights outside their sphere of influence seems inconsistent with the reality of the corporate enterprise” (Ratner, 2001, p. 518). In contrast, the second view

holds that, even if a key purpose of the government is promoting human rights, “[...] there is simply no reason why TNCs should not be obliged to take steps [...] to provide for and to promote human rights, when such steps are within their power and jurisdiction” (Kinley & Tadaki, 2004, p. 966). This view would see responsibility to promote human rights protections as arising directly from ability, with little attention given to the nature of the rights-promoting actor.

In part in response to such discord on the perceived content of the duties that can be allocated to TNCs under international law, the Special Representative of the Secretary General, John Ruggie, was mandated to identify and clarify the content of the responsibilities that corporations already bear under treaties, soft law instruments and voluntary initiatives of corporate social responsibility.

3.6. The Responsibilities of TNCs Under the Protect, Respect and Remedy Framework for Business and Human Rights

As a result of this process, in 2008, Ruggie proposed the Protect, Respect and Remedy Framework. According to the three pillars of the Framework, corporations’ primary duties involve negative ones to respect human rights, i.e. avoid doing harm in the course of their activities and avoid being complicit in harms. This is consistent with the duties recognised in soft law mechanisms such as the OECD Guidelines noted in the previous chapter, and with the commitments corporations take on when joining the Global Compact⁵⁴ (Ruggie, 2008, p. 8). The negative duties would involve not only refraining from causing harm, but they may also require from corporations acting in a certain way. For example, corporations may be required to practice due diligence in order to become aware of, prevent and address adverse human rights impacts they may

⁵⁴ In the letter of commitment corporations send to join the Global Compact, they commit to support its ten principles, including supporting and respecting the protection of internationally proclaimed human rights and ensuring that they are not complicit in human rights abuses (UNGC, 2013f).

cause, for example, by adopting a human rights policy tracking their performance according to it (Ruggie, 2008, pp. 17-19). On the other hand, the UN Framework rejects the notion that corporations may have strong positive duties to protect human rights, since under both treaty-based and customary human rights law, states are considered to be responsible to protect against third-party abuse (Ruggie, 2007a, pp. 11-14; 2007b, p. 830; 2013, p. 84). Thus, the conclusions of the Framework align with the statist legal view, whose main tenets have been challenged with some success as described in Section 3.4 above.

Further, while a key purpose of the UN Framework was to provide an authoritative clarification of the duties that TNCs already bear in legal and quasi-legal instruments, it also offers some guidelines from moral or broader normative grounds. Corporate responsibility to respect is said to correspond not only to a legal duty, but to baseline expectations that society has for business, which Ruggie describes as “social norms” that

[...] exist over and above compliance with laws and regulations. A social norm expresses a collective sense of ‘oughtness’ with regard to the expected conduct of social actors, distinguishing between permissible and impermissible acts in given circumstances; and it is accompanied by some probability that deviations from the norm will be socially stationed, even if only by widespread opprobrium (2013, pp. 91-92).

The compliance with social norms, Ruggie says, is additional to compliance with national laws, and failure to meet them could subject corporations “to the courts of public opinion” instead of, or in addition to, legal penalties (2008, pp. 16-17). This, however, is a very limited application of moral grounds, focused on existing societal norms, and it can give only limited guidance on the content of TNC duties. We can note that the rights specified in the International Bill of Human Rights may be inconsistent with some local customs or social practices. Thus, at minimum, broader moral principles underpinning the legal rights must be considered as a means of adjudicating between legal rights and local norms. Overall, while TNCs and other actors certainly should be

cognisant of local practices and sensitive to local input, attention to such practices itself cannot provide an adequately comprehensive moral ground for the allocation of TNC duties correlative to human rights.

Further, while the Framework establishes that in all situations corporations ought to respect human rights it is nonetheless unclear what this responsibility entails when states are unwilling or unable to create and enforce laws to protect human rights (Arnold, 2010, p. 382). This problem can be partly explained by the fact that the Framework largely draws from the existing instruments of international law, which are not sufficiently developed to deal with these issues. As Ruggie notes, “the human rights regime cannot function as intended in the unique circumstances of sporadic or sustained violence, governance breakdown and absence of the rule of law” (2008, p. 13). In less comprehensively conflictual situations also, poorer states may have weak capacity to actually promote and protect human rights. Establishing what the duties of corporations entail in challenging contexts is crucial, precisely because in these contexts human rights are more at risk, and because many TNCs operate within poorer states.

In such cases the Framework is vague and only recommends establishing “specific policy innovations” to prevent corporate abuse (Ruggie, 2008, p. 14). However, reliance on international law and policy innovations cannot take us very far as long as the duties of corporations are not clarified. The UN Framework tried to provide such clarification, but its reliance on the international law necessarily restrict their development because the principles of international law have been developed on the premise that states are the only relevant actors at the global level. The Framework tried to overcome this restriction by also providing moral grounds to such responsibility. However, by equating them to “social expectations” the Special Representative obscured rather than clarified.

3.7. Conclusion

This chapter has presented some of the recent developments regarding the status of corporations in international law. This debate is crucial for the development of legal mechanisms to hold TNCs accountable and to provide practical outlets to solve some of the issues associated with the governance gap. Nonetheless, determining the content of the responsibilities that can be allocated to corporations is also key in order to provide substance to the demands that can be placed upon corporations and states. The UN Framework has tried to provide an authoritative interpretation of the duties of corporations based on mechanisms of international law and voluntary initiatives. However, the existing legal mechanisms are helpful only up to a point because they are not sufficiently equipped to deal with situations where the state does not protect human rights, or is weakly empowered to do so.

Noting this deficiency, the UN Framework has not only based its second pillar, the responsibility to respect, in legal but also moral grounds, which the Special Representative has identified as “social expectations.” While the legal foundations of the Framework have been consistently developed, the moral foundations have not. The next chapter will discuss the justifiability of allocating moral duties to TNCs. It will propose understanding corporate duties as essentially negative duties to respect human rights and will discuss some of the perceived shortcomings of alternative moral views on corporate duties.

Chapter 4. The Moral Duties of Transnational Corporations

Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?

–*Baron Thurlow*

4.1. Introduction

The previous chapter presented the main debates on the legal responsibilities of transnational corporations and highlighted how scholars have focused mainly on the mechanisms to hold corporations accountable at the international level on the content of such duties. The latter task is significant, however, in that ascribing specific responsibilities to TNCs will naturally require an analysis of the justifiability of the demands (Karp, 2009, p. 88). This chapter will work to provide such an analysis. It will begin by arguing that transnational corporations are appropriately seen as moral agents since they have a collective intention that is different from the intentions of their individual components, and they have capacities for moral deliberation and action.

Then, it will present two contrasting approaches to attributing responsibilities to transnational corporations: the fiduciary duties approach and the positive duties approach. The former, prevalent in theories of Economics and Business Management, argues that TNCs bear mainly duties to their stockholders (Friedman, 1970; Henderson, 2001a; *The Economist*, 2005b) and denies that they bear positive duties to protect and fulfil human rights. While this approach does not hold that corporations can indulge in harming human rights, it argues that respecting rights can largely be reduced to following the law. In contrast, the positive duties approach contends that corporations bear

negative duties to respect human rights, but also positive duties to protect and fulfil them. One strand of this approach, the conditional positive duties approach, holds that when the primary agents of justice, states, default on their responsibilities, corporations or other actors with the requisite capabilities may be required to act as primary agents of justice. In contrast, the non-conditional positive duties approach argues that even when the state acts as a primary agent of justice, corporations bear some positive duties. This is because 1) corporations have enough leverage, power and/or capabilities to protect and fulfil human rights, and 2) corporations act as *de facto* governance institutions and therefore, they can be attributed similar duties to the state.

Then, the chapter discusses some principled and pragmatic grounds for questioning the positive duties approach. On one hand, it is unclear that leverage, power, capacities or governance capabilities are enough grounds to attribute positive duties to corporations. While having certain capabilities, leverage or power can be considered as necessary conditions to attribute duties, it is unclear if they are enough factors to do so. In other words, I contend, “can” does not necessarily imply “ought”. This is particularly true in the case of corporations, whose profit motive often clashes with the objectives of protecting and fulfilling human rights. Also, while most of the largest companies have committed to respecting human rights, they have tended to reject the idea that they also bear duties to protect and fulfil them, because these are regarded as duties of the state only. This does not mean that TNCs cannot be allocated positive duties, but instead it suggest that it is not feasible to expect that corporations would willingly discharge demanding positive duties simply because they can do so. In turn, compelling corporations to do something that they are largely reluctant to do could generate high transaction costs for those entities in charge of overseeing them, might leave some of the most vulnerable population effectively unprotected and, in short, may not contribute to realising human rights.

As an alternative, this chapter suggests following an institutional understanding of human rights, briefly sketched in Section 3.3.1, which conceptualises human rights as claims on coercive social institutions that generate negative duties for their participants to avoid collaborating in the imposition of an order that generates foreseeable human rights deficits. While it is not denied that corporations may bear some positive duties, it is argued that allocating mainly negative duties to TNCs can help overcome efficiency and compliance issues as well as more substantive criticisms raised against the justifiability of allocating strictly positive duties to corporations.

4.2. Corporations As Moral Agents

One of the first points that must be discussed when attributing moral duties to TNCs is whether corporate actors have the ontological status necessary to be considered moral agents, and therefore whether they can be ascribed moral duties (Erskine, 2001, p. 72). We can distinguish two main positions on this question: individualist and collectivist. Individualists oppose the idea of collective moral agency. They argue that human beings are the basic units of ethical reasoning and that intentional action – a fundamental criterion for determining moral agency – can only be found in an agent with mental and bodily unity, which corporations do not possess (Velasquez, 1983, p. 8). Therefore, for individualists, assigning duties to collective actors is at best just another way of referring to the actions of individual human beings, or at worst, mere nonsense (Moore, 1999, pp. 335-338; Erskine, 2001, p. 69).

Collectivists argue that some groups or institutions share with individuals certain relevant attributes that enable them to act and know in an analogous way to individuals, and therefore they can be considered as moral agents (French, 1979; 1984; 1999; Moore, 1999; Corlett, 2001; Erskine, 2003; Arnold, 2006; Pettit, 2007). One of these elements is intention, understood as commitment to future action (French, 1979, pp. 211-215; 1996,

p. 147; Arnold, 2006). Corporations, it is argued, are capable of performing distinctive intentional actions through their internal decision structures, and this process is not always reducible to human intentions (French, 1996, pp. 147, 152; Arnold, 2013, p. 132).

Corporate plans might defer from those that motivate the human persons who occupy corporate positions and whose bodily movements are necessary for the corporation to act [...], we can, however, describe the concerted behaviour of those humans as corporate actions done with a corporate intention, to execute a corporate plan or as part of such a plan (French, 1996, p. 152).

For example, it is possible to say that corporation X has plans to move somewhere or to open a new shop. This does not necessarily entail that existing employees, the ones who would have been involved in the planning process, will themselves move or take part in the opening (French, 1996, p. 152). Therefore, it is possible to see corporations as distinct from their human component parts, and to argue that corporations can have a collective intention distinct from the individual intentions of the individuals who constitute them.

With French (1984) and Corlett (2001, p. 573), we can differentiate between 'aggregates' and 'conglomerates', which is similar to the distinction between 'associations' and 'institutions' proposed by Arnold (2013, p. 132). Aggregates are formed by a random collection of people without collective purposive action or intention, such as mobs or crowds; they are no more than the sum of their parts and, they cannot therefore be considered moral agents (Pettit, 2007, p. 195). Conglomerates are organised groups that possess identity over time and see themselves as a unit. They have decision-making structures and therefore are capable of collective intent and action (Erskine, 2001, p. 72). Some examples are families, non-governmental organisations and political parties. A corporation can be said to be a collectivity voluntarily formed by individuals working together under a common corporate identity conferred by the brand, the company's values, mission, etc. It also has a clear hierarchical structure that specifies the role, functions and responsibilities of each employee, and has a clear decisional structure. Decisions are taken in a rational manner, considering the purpose and interests of the

corporation as a single entity, including self-preservation, growth and continuity of operations over time.

Another element to consider in determining whether a collectivity can be considered a moral agent is 'value relevance' (Pettit, 2007, p. 177), understood as the capability of the agent to act with a certain degree of autonomy when facing a significant moral choice. For a group, being autonomous means that it is able to make a judgment or form an attitude as a group, to have an identity that is more than the sum of those of its constitutive parts (Erskine, 2001, p. 72). A group may qualify as not autonomous by failing to be an agent distinct from the agents who are its members (Pettit, 2007, p. 180). Corporations in general can be considered to have some autonomy in relation to their members, since they incorporate rules that help to distinguish corporate from personal decisions of its members, and which are usually embedded in the mission, vision and values of the company (French, 1996, p. 151).

Another requirement for moral agency is the capacity for moral deliberation (Erskine, 2001, p. 69) or 'value judgement' (Pettit, 2007, p. 177) understood as the capacity to access, understand and reflect upon moral requirements. One of the characteristics of conglomerates such as corporations is that they have a decision-making structure: they are able to gather information, process it, deliberate about it and act purposively on it (French, 1984, pp. 5, 10, 13, 46 in Erskine, 2001, p. 71; Green, 2005, p. 123). It can be argued that corporations have a decision-making mechanism for presenting evaluative, option-related propositions for group consideration, for example during stockholders' meetings.

A further element is the capacity for moral action (Erskine, 2001, p. 69), or value sensitivity (Pettit, 2007, p. 177). This is the capacity to choose between moral options and act in ways that conform to moral requirements. Even though individuals perform the actions identified with the corporation, the collective agent can be considered responsible for coordinating individual actions and for ensuring that everyone plays their

role. Individuals are fit to be held responsible as enactors of the group's plans, and responsibility can be attributed to them for what they do in the group's name to the extent that they could have refused to play that part. However, the group can also be held responsible, in that its members combine to form a single unit capable of making a judgement (Pettit, 2007, p. 192).

It can be concluded that, according to the presented criteria, transnational corporations are conglomerates or institutions able to have a distinctive intention different from their employees and stockholders, arguably guided by the company's mission and values. They are also capable through internal decision-making mechanisms of evaluating different options and taking joint decisions. While corporations are constituted of individuals who perform the actions identified with the corporation, they comprise a coordinating structure capable of acting as a distinctive unit. The next sections will describe two of the main positions regarding the duties of transnational corporations.

4.3. Corporate Duties as Fiduciary Duties

Theories from Economics and Business Management popularised in the 1960s and the 1970s have tended to conceptualise the corporation as an entity with the goal of maximising profits for its stockholders (Bernstein, 2001 in Stephen, 2002, p. 45; Falk, 2004 pp. 20-21; *The Economist*, 2005b). They have been labelled as "hard libertarian" (Muchlinski, 2004) and "neo-conservative management" theories (Cragg, 2004, p. 109), and have been associated with the "neoclassical business model" (Wettstein, 2009, p. 263). They place a strong value on individual freedom and property rights and tend to reduce the responsibilities of corporations to fiduciary duties to their stakeholders (Donaldson, 1989a, p. 172; Henderson, 2001a; 2001b; Falk, 2004, pp. 20-21). As Milton Friedman puts it,

[...] there is one and only one social responsibility of business –to use its resources and engage in activities designed to increase its profits so long as it stays with the rules of the game, which is to say, engages in open and free competition without deception or fraud. [...] Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible (1962, p. 133).

This position thus presumes that the duties of corporations are confined to pursuing their main goal, i.e. maximising profits, while obeying the law. As long as the corporation operates according to these guidelines, it cannot be considered to be acting improperly (Hartmann, 2002, p. 23). It is argued further that, by acting in pursuit of their enlightened self-interest, corporations also benefit society at large. “The goal of a well-run company may be to make profits for its shareholders, but merely in doing that [...] the company, without even trying is doing good works” (The Economist, 2005a). This is because the invisible hand of the market will take care of punishing those corporations that do not create social good, “[...] as profits are a guide [...] to the value that companies create in society” (The Economist, 2005b). The better the company is, according to this view, the more profitable it will be, creating a virtuous cycle from which both society and business can benefit.

Corporate social responsibility or corporate ethics are regarded in such an approach as counterproductive for social welfare, as they allow anti-competitive practices and promote disinvestment from the developing countries that need it the most in the name of addressing poor labour or environmental standards. Thus, they distract attention from the real problems and create more in the process (The Economist, 2005c). While it is not claimed that corporations can indulge in human rights violations, pursuing other goals such as promoting human rights, it is argued, imposes illegitimate costs, as it diverts attention and resources, impairs performance and limits competition, affecting not only the corporation but also society at large (Henderson, 2001b, pp. 30-31; Wettstein, 2009, p. 264). The approach thus rejects claims that corporations have positive duties to act in the public interest or to protect the needy, as it is not their function;

indeed, it is argued, acting as moral arbiters in the communities where they operate might be perceived as unwelcome interference in domestic affairs.

For this approach, corporate engagement with human rights has only an instrumental value and it is contingent on strategic concerns regarding corporate reputation and its relation to profits (Arnold, 2010, p. 383; Donaldson, 1989a, p. 172; Muchlinski, 2004, pp. 86, 90). Thus, the motivation for corporations to join voluntary initiatives or to adhere to unenforced laws in host countries can be largely explained by corporate enlightened self-interest: corporations are motivated to respect human rights to avert reputation and legal risks, and in doing so, they contribute to enhancing the welfare of their employees and surrounding communities, which in turn can be beneficial for business. While such a principle can certainly be appealing for corporations, its reach is nonetheless limited to cases where respecting human rights does not clash with the goal of generating profits.

According to Cragg (2000, p. 206; 2004, p. 105), the development of this approach to the responsibilities of corporations can be partly explained by a *de facto* division of obligations following the enactment of the Universal Declaration of Human Rights, in which it was assumed that the state would be responsible for protecting and fulfilling human rights, while the private sector would assume the primary responsibility for creating wealth. Indeed, according to Friedman (1970), part of the reason why managers should not engage in social purposes is because they would be effectively spending the shareholders' money, and in any case, enhancing social welfare is the job of elected civil servants.

This position thus assumes the existence of an effective division of responsibilities between the state and the business sector. It also tends to assume the existence of laws to protect human rights in host states as well as the capability and willingness of the governments to do so. Furthermore, it understands human rights narrowly, as legal human rights (Cragg, 2004, pp. 105-106). This, in turn, implies that

human rights at large are appropriately and comprehensively codified in the law, and it assumes that states have the willingness and ability to make other actors to comply with the law. It thus tends to ignore cases in which there are no laws to protect human rights and where the state does not act as primary agent of justice or actively violates the rights of its citizens. Furthermore, its overly optimistic view of a self-regulatory market that naturally rewards corporations that do good seems to be unable to account for cases where powerful and wealthy corporations are involved in human rights violations.

While the fiduciary duties approach focuses on the corporate purpose of maximising profits and the purely instrumental value of human rights, it nonetheless seems to also imply some moral element when it requires corporations to obey by the law. It is true that respecting the law is in many cases a matter of prudence that can prevent corporations from incurring legal suits or fines, but it is also a matter of morality. If it were just a matter of prudence, corporations could follow the law only when the penalties were higher than the perceived gains. However, the decision not to break the law, even when it would enhance the financial bottom line, is a defensible managerial decision “[...] on the grounds that obeying the law is a fundamental corporate moral obligation” (Cragg, 2012, p. 27). Thus, while it is the case that corporations obey the law as a matter of self-interest, we can also see that there is some moral motivation to do so.

4.4. Corporate Duties as Positive Duties

Political theorists and philosophers have called into question the main tenets of the fiduciary duties approach and the premise of a clear-cut division of labour between the public and private sectors upon which it rests. While literature on the moral duties of non-state actors has gained currency in the last ten years, the systematic discussion of the role of TNCs in relation to human rights started blossoming following the dismissal of the UN Norms in 2004 and the creation of Ruggie’s mandate (see Arnold & Bowi, 2003;

Cragg, 2004; Hsieh, 2004; 2006; 2009; Sorell, 2004; 2006; Wettstein, 2005; 2009; 2012a; 2012b; Young, 2006; Kolstad, 2008; Arnold, 2010; 2013; Vandekerckhove, 2010; Macdonald, 2011; Wood, 2012). The idea that TNCs have at least negative duties to respect human rights is relatively uncontroversial, but the claim that they also bear some positive duties is not (Sorell, 2004, p. 129; Kolstad, 2008, p. 570; Maak, 2009, p. 367; Wettstein, 2009, p. 191; Arnold, Audi, & Zwolinski, 2010, p. 573).

Nevertheless, a significant body of literature in political theory and philosophy has been dedicated to defending the idea that corporations do bear some significant positive duties to protect and realise human rights (see O'Neill, 2001; Robinson, 2003, p. 10; Campbell, 2004; Nussbaum, 2004; Sen, 2004; Sorell, 2004; Kolstad, 2008; Vandekerckhove, 2010; Wettstein, 2012a; Wood, 2012). Within this literature, it is possible to distinguish three main concerns: 1) discussing morally relevant grounds for attributing positive duties to TNCs, 2) establishing the criteria for distributing positive duties among relevant moral actors, and 3) limiting the scope of these duties.

4.4.1. Conditional Positive Duties

A significant part of the literature has focused on the attribution of positive duties to corporations in cases of non-ideal conditions, that is, when the state does not act as the primary agent of justice because it is either unwilling or unable to do so (O'Neill, 2001; Kolstad, 2008; Karp, forthcoming 2014). Primary agents of justice are considered to be those entities with capacities to determine how principles of justice are to be institutionalised within a specific domain. Secondary agents of justice, including transnational corporations, are seen as contributing to the realisation of justice mainly by meeting the demands of primary agents, for example, by following established legal requirements (O'Neill, 2001, pp. 181-182; Kolstad, 2008, pp. 571, 577).

Primary agents of justice may construct other agents or agencies with specific competencies: they may assign powers to and build capacities in

individual agents, or they may build institutions –agencies– with certain powers and capacities to act. Sometimes they may, so to speak, build from scratch; more often they reassign or adjust tasks and responsibilities among existing agents and agencies, and control and limit the ways in which they may act without incurring sanctions. Primary agents of justice typically have some means of coercion, by which they at least partially control the action of other agents and agencies, which can therefore at most be secondary agents of justice (O'Neill, 2001, p. 181).

While individuals or even groups with little formal structure can become primary agents of justice, in modern societies, the state has been assigned this role. In cases where it fails to act as the primary agent of justice, the distinction between primary and secondary agents is blurred, and the duties of secondary agents, including corporations, are no longer reduced to complying with the standards set by the primary agent (O'Neill, 2001, p. 181; Wettstein, 2009, p. 309). In cases when the state is unwilling to act as the primary agent of justice, corporations can be attributed a duty to exercise influence on the unjust or oppressive government. When the state deliberately abuses human rights, TNCs are said to bear a duty to protect human rights against the abuses of the government (Wettstein, 2009, p. 309). In these situations, the duties that are traditionally considered to fall upon the state must be addressed by the duty-bearer who is second most capable or efficient to discharge the duty in question, then the third, and so on (O'Neill, 2001, pp. 181-183; Kuper, 2005, p. x; Kolstad, 2008, pp. 572, 574; Wettstein, 2009, pp. 158-164). Even when non-state actors might not be equipped to fully substitute for the range of that contributions states can make to advance justice, they are seen as obliged to do what they can (O'Neill, 2001, p. 193; Kolstad, 2008, p. 578).

This view is grounded on the idea that human rights are of the utmost importance, and therefore it is necessary to discuss who can protect and fulfil them beyond or even instead of the state. Corporations are considered to be candidates for inclusion in such an ordinal arrangement when they have sufficient capability to act as a primary agent of justice. This approach can be described as a forward-looking model of responsibility, as it discusses which actors are best placed to provide remedy, to protect

and fulfil human rights regardless of the casual connection they may have with the insecurity of rights in the situation (see Shue, 1988; Miller, 2001; O'Neill, 2001; Campbell, 2004; Sorell, 2004; Kolstad, 2008; Wettstein, 2009).

4.4.2. Non-Conditional Positive Duties

Within the positive duties approach, other positions do not focus on attributing duties to corporations where the state has defaulted on duties. Instead, they argue that TNCs bear positive duties given their functions and some of these attributes are considered as morally significant for attributing duties to corporations.

4.4.2.1. Allocation of Duties According to TNCs' Governing Functions

One strand of the non-conditional view develops from the observation that TNCs share with the state some characteristics that bestow on the latter positive duties to respect and promote human rights. The fact that human rights duties have been attributed to the state can be explained by several factors. The first one is the superior capacities of the state. As explained in Section 3.3, historically, the state has posed the greatest threat to the interests that human rights are designed to protect. However, it has become recognised that other actors besides the state have the capacity to violate human rights, and that such abuses can be comparable in range and severity to those that governments have perpetrated historically, particularly in weak states (Cragg, 2012, p. 20; Karp, 2013, p. 21). In addition, corporations, like states, have the capacity to protect human rights, particularly where they are involved in the provision of public services such as health and education (Karp, 2013, p. 22) or in situations of emergency.

Second, the state is seen as having the ability to institutionalise rules designed to ensure that the human rights of those falling within the ambit of its authority are respected (O'Neill, 2001, p. 182; Cragg, 2012, p. 19). This is a relevant factor, as to say

that someone has a right means that there exists the possibility to actuate or institutionalise the conditions necessary for that right to be respected. Furthermore, the state is considered to have the capacity to enforce the laws that it creates and institutionalises in order to curb its own human rights abuses as well as those committed by persons and collective entities over whom it exercises legitimate authority (Cragg, 2012, pp. 19-20). Similar to the state, corporations have capacities to institutionalise respect for human rights within their area of operations, to set policies to govern their activities and relations with stakeholders and to “discipline” those with whom they enter contractual obligations by establishing penalties for non-compliance (Cragg, 2012, p. 20). Therefore, given that TNCs bear similar attributes –albeit to different degrees– they can be attributed comparable duties (Cragg, 2012, p. 22).

A further factor in considering the state as a protector of human rights is its “publicness” related in part to its provision of public goods such as education, health and transportation (Karp, 2013, p. 21; forthcoming 2014). In a similar vein, Wettstein argues that corporations bear some positive duties because they are “quasi-governmental institutions” that take *de facto* governing roles, particularly after the wave of neoliberal policies of the 1980s and 1990s (2009, p. 169).

The takeover of public sectors by private corporations [...] at its core it means the partial replacement of governments by corporations for the fulfillment of genuine governmental functions [...]. Privatization is thus not simply an expansion of the private sector into the public realm but a transfer of public authority from governments to private corporations (Wettstein, 2009, p. 239).

However, for Wettstein, the public role of the corporations goes beyond providing services that had been traditionally considered as public. TNCs, according to Wettstein, can nowadays be considered to *de facto* “govern people,” “govern governments” and “govern themselves” (2009, pp. 213-214). TNCs have become the dominant institution in the global production structure and key players in the economic organisation of states; they provide employment, produce economic goods, offer services

and can be an important source of tax revenues. Controlling access to the productive organisation of society is considered to be similar to controlling the livelihood of citizens, which in turns translates into the political power of corporations over citizens (Wettstein, 2009, p. 214). This also means that a significant percentage of the global population has become dependent on corporations for their living, and as a result is willing to or must accept what corporate employers dictate “on almost any terms” (Wettstein, 2009, p. 214).

An example is Bangladesh, the second largest exporter of apparel after China, where the minimum monthly wage is around US\$37. The Bangladeshi garment industry has a significant influence over an important part of the country’s working population. Factory owners have around 10% of the total seats in Parliament, besides being major political donors and moving in recent years into ownership of newspapers and television stations (Yardley, 2012). Despite pressure from non-governmental organisations, the government has resisted expanding labour rights in order to maintain an “investment friendly” environment for foreign and domestic investors (Yardley, 2012). The power of corporations, nonetheless, does not refer only to employment. The increasing economisation of social and political life means that corporations also participate significantly in these areas. While corporations are regarded as private institutions, their actions are of the utmost public relevance, as they significantly affect society; thus their “publicness” increases along with the impact of their actions and policies on society (Wettstein, 2009, p. 182).

The increased mobility of corporations and their power in economic structures has allowed them to enjoy significant leverage over states. TNCs are thus able to press governments for favourable conditions, confronting them with the so-called “exit threat” (Wettstein, 2009, p. 230). In turn, states are forced to compete against each other to attract and retain corporations and economic investment. Finally, corporations are also considered self-governing, due to the lack of regulation at the global level, which has created the governance gap described in Chapter 2. Given that TNCs are operating as

governance entities at different levels, it is argued that, “[...] their actions must be matched with corresponding moral obligations” (Wettstein, 2009, p. 146), similar to those commonly attributed to states as governance institutions.

4.4.2.2. Allocation of Duties According to TNCs’ Attributes

Other authors, subscribing to a non-conditional positive duties approach, argue that TNCs bear positive duties even when the state acts as the primary agent of justice, because they have the capabilities and opportunities to do so. As Sorell argues, “even when one takes the class of democratically elected countries as the leading or sole custodians of human rights activity [...] a role for businesses is not ruled out. Individual democratic countries can invite companies to co-operate with them in human rights work [...]” (2004, p. 142). This is because companies can significantly contribute to protecting and advancing human rights due to their local knowledge, expertise, infrastructure and efficiency in moving people and things (Sorell, 2004, pp. 142-143). Not attributing to them some positive duties in order to alleviate some of the most pressing social problems in the world is considered to signal a “spectacular” loss of opportunity (Shue, 1988, p. 696).

It has also been argued that particular attributes of corporations generate some positive duties. While there are several possible grounds on which to attribute positive duties to moral agents, perhaps the most fully explored is a capacity approach. This argues that the moral community of human beings is obligated to create and maintain conditions that are conducive to the protection and realisation of human rights. If the collective obligation is to carry weight, those with superior capabilities bear *prima facie* positive duties to protect and promote human rights (Shue, 1988; O’Neill, 2001; Campbell, 2004; Sen, 2004; Sorell, 2004; Kolstad, 2008, p. 570; Wettstein, 2009; 2012a, p. 754). Capability is thus considered “[...] a necessary and in some cases even a

sufficient condition for such obligations” (Wettstein, 2009, p. 139). Thus “[...] when businesses have the opportunity to promote or protect human rights where they operate, they are often also obliged to do so” (Sorell, 2004, p. 130).

This is particularly true under certain conditions; for example, when the rights being violated are very basic, when the violations are systematic, and when the cost of helping is very small (Sorell, 2004, pp. 130,132). This claim is exemplified with a scenario in which a passing tourist witnesses an accident and is in position to help at a reasonable or low opportunity cost. Even if the person is alien to the community where the accident happened, if the main purpose of her visit was not to provide help, even if she do not have any relation to the person in need or is not responsible for the accident, she still has a duty to provide some help if she is in a position to do so (Sorell, 2004, p. 130). This is similar to the famous Peter Singer example in which a child is drowning in a shallow pond. If one has the opportunity to help at a very low opportunity cost (ruining an expensive pair of shoes and arriving late to class), one has an obligation to help regardless of who the child is, our relationship with her and our lack of contribution to putting her in the pond (Singer, 1972).

Contrary to the fiduciary duties approach, which stresses the distinct role and functions of the TNCs, the positive duties approach contends that the profiting motive of corporations does not constitute a fundamental impediment to attributing them positive duties. While the main corporate goal is generating profits, a company may also have other objectives, such as advancing the well-being of the communities where they operate, contributing to the realisation of human rights or raising the living standards of their employees (O'Neill, 2001, p. 192; Sorell, 2004, p. 130; Wood, 2012, p. 72). Furthermore, generating profits is not necessarily incompatible with other objectives. Corporations can pursue social justice without turning “[...] into non-businesses, forsaking commercial purposes and becoming full-time warriors in a moral crusade [...]” (Sorell, 2004, p. 129). An example is the ‘B corps’ or benefit corporations, which take into consideration the

impact of their decisions on the environment, employees, nearby communities and other stakeholders, and which explicitly have generating a positive impact on society and the environment as part of their purposes (Howard, 2012). A significant number of these corporations comprise small local companies making ecological and organic products and consultancy services providers. However, some transnational corporations are also involved, such as the US premium ice-cream company Ben and Jerry's.

4.4.3. Distribution of Duties

While negative duties to respect fall upon everyone, positive duties to protect and fulfil human rights need to be distributed among duty-bearers according to defined criteria. A recurring question, then, has been how to determine an appropriate distribution of duties among those candidates which bear positive duties. Some of the proposed principles are capacities (Campbell, 2006, p. 261; Santoro, 2010), capabilities (Wettstein, 2009, pp. 135-139), leverage (Wood, 2012), efficiency (Kolstad, 2008, p. 587), influence (Kolstad, 2008, p. 581) opportunities (Sorell, 2004, p. 130; Campbell, 2006, p. 261), benefit (Hsieh, 2004) and power (Wettstein, 2009, p. 141). The greater the level of these attributes that the corporations possess, the more extensive their duties are presumed to be.

Note that while capacities and capabilities might imply the possession of monetary wealth or other resources, they can also depend on other factors. For instance, a small company may have the capacity to contribute to protecting and advancing human rights within the surrounding communities and its workforce. Other aspects, such as the location of the company or its reputation, may enable capability as well (Sorell, 2004, p. 139). The capabilities of states and corporations might be different but no less important for the realisation of rights. While corporations may not be able to pass national laws or sign international treaties to prohibit or prevent violations of human

rights, this does not mean they do not have any influence over advancing them. The largest corporations would certainly have the means to promote human rights objectives and influence the conduct of governments in this regard. “Indeed, they may have many means at their disposal more effective than coercive law” (Campbell, 2004, p. 17).

Other factors cited in distributing positive duties to TNCs include direct involvement in large-scale violations of rights (Kline, 2003, p. 22; Sorell, 2004, p. 133), the *relationship* between the company and the right-holder (Santoro, 2010, p. 292) and the *connection* between them (Miller, 2001, pp. 468-471). The closer the involvement and the relationship of the company, the stronger its duties. Wood (2012) provides several cases to illustrate the varying degrees of a company’s relations and how they alter its duties. For example, when public authorities interfere with employees’ rights to assembly, their employer has a stronger responsibility than a stranger does; where security forces use products from a company to commit human rights violations, the maker has a stronger responsibility than others that do not manufacture them; and when a company operates in a developing country, it has more responsibility for human rights there than elsewhere where it does not operate (Wood, 2012, p. 83).

A related factor is the relevance that a right has to the company’s business (Sorell, 2004, p. 133; Wood, 2012, p. 83). In a situation where human rights are being violated, the closer the connection between the interest that is threatened and the company’s activities, products or services, the stronger the responsibility. For example, a pharmaceutical company operating in a country with limited access to medicines could have a stronger duty to do something to solve this problem than a company that manufactures furniture.

4.4.4. Scope of Duties

A final aspect of the positive duties approach that needs to be considered is delimiting the scope of duties. A starting point is the capacities of a moral agent. This principle recognises that the demands made upon an agent should be within the limits of their capacities if these duties are to carry any moral weight. It is necessary to establish boundaries on duties, within which capable agents are permitted to devote resources to themselves (Shue, 1988, p. 690).

Following Rawls' framework of *The Law of Peoples* (1999c), Hsieh proposes benefit as one of a few possible benchmarks to delimit the duties of TNCs (2009). Hsieh argues that there are two main types of societies: well-ordered and burdened societies, which he equates with developed and developing countries.⁵⁵ Well-ordered societies are societies designed to advance the good of their members, they are effectively regulated by a public conception of justice and have basic social institutions that satisfy these principles (Rawls, 1999a, p. 197). Meanwhile, burdened societies lack the political and cultural traditions, the human capital and know-how, the material and technological resources needed to be well ordered (Rawls, 1999c). Therefore, well-ordered societies normally have in place some institutional framework to protect their members against harms associated with market failures but burdened societies may not (De George, 1993, p. 48; Hsieh, 2009, p. 258).

When corporations operate in burdened societies, frequently they obtain some benefit from the burdened conditions of these states and the lack of an institutional framework similar to the existent in well-ordered societies. For example, in burdened societies lax labour, fiscal and safety regulations may allow corporations to pay low

⁵⁵ This however is not an accurate comparison as "not all [burdened] societies are poor, any more than all well-ordered societies are wealthy. A society with few natural resources and little wealth can be well-ordered if its political traditions, law, and property and class structure with their underlying religious and moral beliefs and culture are such as to sustain a liberal or decent society" (Rawls, 1999c, p. 110).

wages, pay little or no taxes and invest less in safety and environmental measures than in their home countries. While corporations may not be violating directly any rights, participating “[...] in a system profiting in which one's activities give rise to potential harms and persons subject to the possibility of harm lack protection and the basic means to seek redress [...]” (Hsieh, 2009, p. 259) is nonetheless morally wrong. In such cases, if corporations want to fulfil their negative duty not to harm, they face two options: withdraw from the country altogether so they do not benefit from the market failures⁵⁶ or promote the development of institutions similar to those of the well-ordered societies (Hsieh, 2009, pp. 258-259). However, the duties of benefiting corporations are limited. Hsieh (2004, p. 651; 2009, p. 264) argues that the duties of assistance of TNCs are limited by the benefit they obtained from the burdensome conditions of host countries and by what is required to avoid the harm that results from the lack of well-ordered institutions.

However, promoting just institutions does not only conforms to the TNCs' negative duty not to harm, but also to their duties of assistance. According to *The Law of Peoples*, well-ordered societies have some duties of assistance towards their burdened counterparts in order to bring them into the Society of well-ordered Peoples (Rawls, 1999c, p. 110). Duties of assistance normally lay on governments of the well-ordered societies, or in this case, of economically developed countries. However, when they fail to discharge them, their national corporations operating abroad acquire these duties as an extension of their shareholders' duties as citizens of well-ordered societies (Hsieh, 2004, pp. 649-651). This aspect also limits the duties that corporations acquire due to the unwillingness of their governments to discharge them. Transnational corporations are not expected to make inhabitants of burdened societies as well-off as possible (Hsieh, 2004, p. 648). Instead, shareholders are obliged to contribute the same share that would

⁵⁶ According to this account, corporations should also consider to withdraw from a country if it is unlikely they will promote fair institutions through their activities. For example, if they are operating in a country where the government violates the human rights of its citizens, as long as the TNC continues to pay taxes to the rogue government of the host country, it is contributing to the continuation of that regime (Hsieh, 2009, p. 265).

have been required as citizens of well-ordered societies if their governments had fulfilled their duties of assistance. Thus, the sum of the shareholders' obligations would indicate the maximum amount that a TNC is obliged to contribute to fulfil their governments' duties of assistance (Hsieh, 2004, p. 651).

Another criterion seen as limiting the duties of TNCs is that of proximity. Specifically, the term "sphere of influence" introduced by the Global Compact depicts an image of concentric circles, with the companies' operations at the core, moving outwards according to physical proximity to the company, to suppliers, community and society as a whole. The further the circle from the centre, the less the influence and responsibility it has. This approach has been criticised because, while useful in many cases, it ignores the fact that companies might also endanger the human rights of end users who are physically distant from the company, as in the case of Internet service providers. A case in point is the involvement of US-based Internet provider Yahoo! in the arrest and sentencing of Shi Tao, a Beijing-based journalist, in 2005. The previous year, Shi Tao had used his Yahoo! email account to send an article to a pro-democratic publication in New York in which he summarised a government order directing media organisations in China to downplay the upcoming commemoration of the Tiananmen Square protests. After investigations were conducted, it was discovered that Yahoo! provided to the Chinese government information that led to the arrest of the journalist (Ruggie, 2013, pp. 14-15, 50). This case sparked international controversy about the business practices of some Internet providers and highlighted the fact that corporations can also inflict harm at a distance.

4.5. Problems of Attributing Positive Duties to TNCs

The previous sections presented some of the main arguments for attributing positive duties to transnational corporations. While this thesis does not reject the idea

that TNCs may be allocated some positive duties in relation to human rights, it is possible to offer some principled as well as pragmatic grounds for questioning such approach. One of these principled grounds refers to the fact that TNCs' main goal is maximising profits and that, unlike states, they do not have as their constitutive aims protecting and promoting human rights. In addition, maximising profits and protecting human rights is not always compatible, which may constrain what legitimately can be required from corporations. While some authors have argued that TNCs can be allocated duties similar to those of the states' because they provide public goods or have *de facto* governing functions, corporations and states have significantly different functions, purposes and incentives, which might call this argument into question.

Further objections can be raised against the idea that companies can be attributed positive duties to protect and promote human rights because they can do so. While it can be said that having sufficient capabilities is a necessary criterion for considering a moral agent a candidate for bearing positive duties, that does not in itself demonstrate that it is also sufficient. Mainly focusing on the capabilities of moral actors to protect human rights can lead to a possible unprincipled attribution of duties by unduly burdening the most capable actors while letting off the hook the legitimate bearers of positive duties, i.e. states. This, in turn, may create some perverse incentives for corporations to hide or minimise their capabilities in order to reduce their moral burden.

The positive duties approach also leads to some efficiency problems. Very demanding or continuous positive duties are often in tension with the TNCs' primary role and organisational purpose. Therefore, it is unlikely to expect that companies will willingly discharge them, as illustrated by the opposition of TNCs to accept stringent responsibilities prior to the 1990s. In turn, this might generate large transaction costs for governments and other authorities to ensure that companies actually discharge their allocated duties. Such objections may be more a practical than normative reasons to limit

duties, but reasonable costs provisos are standard in formulations of positive duties, and more straightforward efficiency of human rights provision or protection would likely be sub-optimal if non-protective organisations such as TNCs were expected to continuously play the protective role of states.

While such shortcomings do not demonstrate that corporations bear no positive duties at all they nonetheless suggest that allocating stringent positive duties to TNCs is not necessarily defensible and may not ultimately contribute as significantly as expected to the realisation of rights. A more defensible alternative will be to conceptualise the duties of corporations as essentially negative duties. This approach, it is argued, can contribute to overcoming some of the substantive and efficiency-related shortcomings of the positive duties approach and also can better take into account the impact corporations may have over human rights at a distance. The following sections will elaborate in more detail the perceived shortcomings of the positive duties approach.

4.5.1. The Profit Motive

We can presume again that the main goal of TNCs is generating profits for their stockholders. While they may have other goals, such as generating value for society or contributing to the welfare of their employees, those objectives are subordinated to the generation and increase of profits (except in particular cases such as B corporations and L3C corporations earlier mentioned). This again has important implications for expectations of actual compliance with human rights standards, and ultimately with the conceptualisation of TNC duties. It is plausible to expect companies to respect human rights when doing so aligns with maximising their profits. The picture is more mixed when it does not so align. While some corporations may choose to continue to protect human rights, even if it means sacrificing a portion of their profits, others may choose to maximise their profits, even when this means violating their minimal duties to avoid

doing harm. Choices in favour of profit maximisation are visible, for example, in the employment of sweatshop labour, transference of earnings to low-tax nations or other mechanisms of tax avoidance.

A paradigmatic example is the case of the Ford Pinto. In 1968, the Ford Motor Company started producing the Pinto model at an accelerated pace, but the results of crash tests soon revealed a problem with the car fuel system's design which made it vulnerable to exploding in cases of rear-end collisions (Dowie, 1977; Leggett, 1999). According to a cost-benefit analysis legally required by the US National Highway Traffic Safety Administration, Ford calculated that implementing a mechanism to prevent this vulnerability would cost the company approximately USD\$11 per car. Multiplied by the 12.5 million cars planned for production, this would total USD\$137.5 million. Ford also calculated the expected cost in litigation and legal judgments from burn deaths, injuries and burned-out vehicles. That total was USD\$49.53 million –almost USD\$90 million less than the amount it would have had to pay to fix the faulty mechanism (Leggett, 1999). Eventually, Ford decided not to implement the change in the design of the Pinto and to continue with the production of the car as planned. This case illustrates the utilitarian responses of some corporations when faced with conflicting goals, even sometimes at the expense of human lives.

Further, while some companies may choose to support human rights, they may do so for its instrumental value, i.e., as a public relations strategy, an advertising tool to promote the company's brand, as a mechanism to increase the company's visibility and to improve employee morale, or as a way to avoid reputational risks (Porter & Kramer, 2002, p. 57; Cragg, 2004, p. 126). Here it could be argued that the motivation behind corporate activity is irrelevant as long as companies behave well. For example, O'Neill argues,

in many cases it may be a moot point whether their motivation in supporting greater justice is a concern for justice, a concern to avoid the reputational disadvantages of condoning or inflicting injustice, or a

concern for the bottom line simpliciter. However, unclarity about the motivation of TNCs does not matter much, given that we have few practical reasons for trying to assess the quality of TNC motivation. What does matter is what TNCs can and cannot do, the capabilities that they can and cannot develop (2001, p. 193).

Nevertheless, it seems that assessing the motivation of companies may be relevant, because it can affect their behaviour and thus the likelihood of corporations actually discharging their assigned duties. If the only motive a company has to protect human rights is enhancing its public image in order to guard its bottom line, it cannot be expected to engage in sincere efforts to advance human rights when its reputation is not at risk. This could help to explain why most of the largest corporations of the world have stated that they adhere to respecting and sometimes even protecting human rights, while at the same time engaging in harmful but less publicly visible practices such as tax avoidance schemes. This particular practice is so widespread that more than 50% of the largest companies quoted on the London Stock Exchange have admitted to using “novel tax planning ideas” in order to reduce the taxes they pay in every jurisdiction where they operate (Christensen & Murphy, 2004, pp. 38-39). Therefore, focusing on the capabilities of corporations seems to be too optimistic a reading of what TNCs can actually be expected to do efficiently without significant oversight. This, in fact, was the point that NGOs made in the 1990s when they fervently advocated for firm corporate accountability, instead of a weaker corporate responsibility approach, after realising that the voluntary commitments that corporations had taken upon themselves made little difference in practice (see Chapter 2).

Another challenge in assigning positive duties to transnational corporations is the significant leverage they have to decide by which means they will discharge their duties and to what extent. For example, BP understands its own contribution to human rights as lying in “helping meet the world’s energy needs.” In doing so, they argue, “we make a significant contribution to human welfare and development: by fuelling heat, light, and mobility; by paying taxes that support public services; and by creating

economic opportunities through direct employment and our value chain” (BP, 2005). Exxon Mobil, on the other hand, considers that employee training, meetings, conferences and publications on critical human rights issues are helpful for addressing the human rights challenges faced by the communities in which they operate (2009). Thus, without a strict specification of what the duties to protect entail, it can be expected that corporations will interpret them according to their needs.

4.5.2. Possible Unprincipled Attribution of Duties

One strand of the conditional positive duties approach argues that, under ideal conditions, states as the primary agents of justice bear positive duties to protect and fulfil the human rights of their populations. Other actors are said to normally bear negative duties to respect human rights, which can be largely reduced to obeying the laws imposed by the state and not curtailing its capacities to discharge its duties. When the state defaults on its responsibilities, however, other agents with sufficient capabilities to provide for human rights can become candidates for acting as primary agents of justice. Yet, it is unclear under what circumstances corporations can transition from candidates to actual primary agents of justice. The ordinal arrangement of secondary agents to act as primary agents of justice thus needs to be clarified (Kolstad, 2008; Wettstein, 2009, ch. 4). This is particularly necessary when there are other capable agents that, unlike corporations, have as one of their constitutive purpose advancing human rights, for example, certain NGOs and intergovernmental organisations such as the United Nations. Therefore, if it is accepted that all secondary agents of justice may intervene if the state defaults on its duties, it seems necessary to discuss some possible principles for attributing duties among them, instead of automatically attributing positive duties to TNCs just because they have the capacity.

As argued in previous sections, some scholars in the positive duties approach have contended that TNCs can be attributed some positive duties on the basis of their capabilities. However, I argue, capabilities alone are not sufficient grounds to attribute corporations positive duties. “Merely pointing out that the institution could provide X – or even showing that it is the only existing institution that can do so– is not sufficient to show that it has a duty of justice or any duty at all to provide X” (Buchanan & Keohane, 2006, p. 421). For example, it could be argued that some of the largest drug cartels have enough capabilities to provide human rights because they have considerable monetary resources as well as significant organisational capacities. Nevertheless, it would be difficult to argue that drug cartels bear positive duties in relation to human rights, even when there is evidence of their involvement in providing public services in some countries (see Skaperdas, 2001, p. 186). Such difficulty in allocating positive duties to drug cartels might stem, for example, from their illegal nature, from their participation in undermining their capacities of the state, etc. Therefore, it is possible to argue that having sufficient capabilities is not sufficient rationale for allocating positive duties to individual and collective entities. Instead, there would be additional requirements, such as being a legal entity or having constitutive aims compatible with advancing human rights.

Ultimately, there is a danger here of “duty dumping”, or “[...] arbitrarily assuming that some particular institution has a duty simply because it has the resources to fulfil it and no other actor is doing so” (Buchanan & Keohane, 2006, pp. 420-421). This is particularly worrying in the case of TNCs, as a significant part of the literature seems to advocate simply transferring the positive duties of states to corporations in order to fill a vacancy wrongly left by governments with little regard for the justifiability of such decisions. The problem with duty dumping is that it can lead to incorrectly assigning duties to institutions without offering adequate justification for why particular responsibilities should be imposed, distracting attention from the task of determining a justifiable allocation (Buchanan & Decamp, 2006, p. 96; Buchanan & Keohane, 2006, p.

421). In turn, this can serve as a mechanism for the legitimate duty-bearer to evade its responsibilities.

In the policy arena, TNCs have been concerned that being allocated positive duties on the basis of their superior capabilities could wrongly incentivise governments to “[...] deliberately fail to perform [their] duties in the hope or expectation that a company will yield to social pressures to promote or fulfil certain rights [...]” (Ruggie, 2008, p. 20). Such a practice could generate perverse incentives for corporations. If the attribution and extent of duties are positively related to the capabilities of TNCs, corporations may be inclined to misrepresent them in order to reduce their moral burden. A comparable case is the engagement of corporations in tax avoidance schemes, which allow corporations to misrepresent their operations and earnings in order to reduce their tax burdens. Thus, if discharging positive duties is perceived to interfere with the goal of profit maximisation, it can be expected that corporations would systematically evade such responsibility.

4.5.3. Adoption of the Approach

One of the issues of the positive duties approach relates to the fact that while transnational corporations have tended to accept that they bear negative duties to respect human rights, they have been reluctant to accept that they also bear positive duties to protect and fulfil them, considering that they are against their perceived interests. This can be illustrated, for example, by the dismissal of the UN Norms, which placed significant positive duties on corporations. In contrast, home states and TNCs have widely embraced the UN Framework and the Guiding Principles, which have limited the duties of corporations to respect human rights, as well as other initiatives such as the Global Compact, which despite attributing some positive duties to them, in practice require a minimal voluntary commitment.

The fact that corporations do not accept for themselves duties to protect and fulfil human rights again does not mean that they cannot be ascribed some positive duties. Instead, what I try to highlight is the practical point that if corporations reject the principle that they bear non-discretionary positive duties, it is unlikely that they will act to protect human rights, and instead will try to avoid doing so. The fact that corporations do not currently embrace the idea that they should play a role in protecting and promoting human rights does not mean that this perception cannot change over time. As described in Chapter 2, before the early 1990s, discussion of the duties of TNCs in relation to human rights was almost non-existent in the global agenda. Before that, it was widely accepted that companies had the goal of increasing profits within the limits of law. Prominent NGOs' campaigns and awareness-raising on the issues of business and human rights have contributed to mainstreaming the idea that TNCs must at least respect human rights. While companies bore moral negative duties prior to the 1990s, significant social changes were necessary in order for corporations to start committing to discharging such duties and implementing practical measures to deliver on them. Further changes were also necessary in order for companies to admit that such duties had to be extended to at least some of their business relations.

Thus, even if in the future companies become less reluctant to accept that they do not only bear negative duties to respect, but also positive duties to protect and fulfil human rights, this thesis proposes an account that builds upon the duties that TNCs have already accepted for themselves. Such a procedure might thus contribute to advancing the discussion on the moral duties of transnational corporations by overcoming some of the obstacles posed by the positive duties approach.

4.6. Corporate Duties As Moral Negative Duties

Most of the accounts identified with the positive duties approach have tended to follow an interactional conception of human rights that regards them as a set of entitlements held by all human beings by virtue of their humanity, and which assigns responsibility for rights fulfilment directly to individual and collective agents. This conception has at least two different implications, as illustrated by the two main strands identified within the positive duties approach. The responsibility to fulfil human rights can give rise to a hierarchy or ordinal arrangement of duty-bearers in charge of protecting human rights and ensuring that other actors respect them. Another implication is that positive duties to protect human rights are shared among all capable moral agents, whose degree of responsibility may vary according to their resources, capacities, leverage, etc. In any case, the main concern is to ensure that human rights are protected and fulfilled, thus emphasising the positive duties of the duty-bearers.

However, as explained in Chapter 3, there is also an institutional conception of human rights, primarily as claims on coercive social institutions and secondarily as claims against those who uphold such institutions, including individual but also collective moral agents such as transnational corporations. This means that “a human right to X entails the demand that, insofar as reasonably possible, any coercive institution be so designed that all human beings affected by them have secure access to X” (Pogge, 2008, p. 52). In this view, therefore, the responsibility of individual and collective moral agents is an indirect shared responsibility for the justice of any practice that they help to impose. Such a conception thus entails at least “[...] not to cooperate in the imposition of a coercive institutional order that avoidably leaves human rights unfulfilled [...]” (Pogge, 2008, p. 176). Thus, unlike the interactional conception of human rights that stresses the positive duties of capable agents, the institutional approach constructs human rights demands mainly as negative duties. While both approaches subscribe to different

conceptions of human rights and the duties they entail, they can be compatible and can complement each other, as will be further explored in Section 5.2. So, while this work does not reject the idea that TNCs may bear positive duties, it argues that conceiving corporate duties as essentially negative duties, as argued by the institutional approach, is a more robust theoretical framework that could contribute to overcoming some of the efficiency problems of the positive duties approach outlined in the preceding sections.

It has been argued that one of the problems of the positive duties approach is that companies tend to reject them, and therefore, this could impair the chances of other proposed approaches being incorporated at the policy level, thus constraining their contribution to realising human rights. In contrast, the conception of the moral duties of companies as essentially negative duties to respect has found wide acceptance at the policy level, as illustrated by the reception of the UN Framework by companies and home countries. This can be explained because first, in general, negative duties tend to be less demanding than positive duties and are considered less burdensome (Shue, 1988, p. 690). Positive duties are considered as a greater constraint on the pursuit of one's goals, whereas negative duties limit responsibility such that the duty-bearers have considerable discretion in the way in which they choose to lead their lives and allocate their resources (Scheffler, 1995, p. 225). This is a significant aspect for contemporary corporations which, as they tend to value freedom to pursue their own interests, largely oppose policies or practices that might constrain it.

Another issue with the positive duties approach was the possible unprincipled attribution of duties to TNCs on the basis of their superior capabilities. While it is necessary to discuss the principles for allocating positive duties among capable moral actors, negative duties to respect are nonetheless borne by all moral agents, irrespective of their capabilities or any other attributes and regardless of whether other moral agents discharge their own duties. Thus, affirming that corporations have at least negative duties to respect is not susceptible to the criticism that companies are unfairly burdened with

responsibilities that legitimately belong to the state. Even the fiduciary duties approach concedes that corporations bear at least negative duties to respect the law.

Furthermore, this approach also has significance for the discussion of the moral duties of TNCs, namely that negative duties are owed to all right-holders regardless of proximity. Negative duties are universal, which means that we have a duty not to harm foreigners and people with whom we have a limited relation, as much as we have a duty not to harm our compatriots and neighbours. In Pogge's terms, "[...] the strength of an agent's moral reason not to harm another unduly does not vary with the potential victim's relational closeness to the agent [...]" (2008, p. 138). On the other hand, positive duties to protect or realise human rights can vary in strength according to the physical proximity of the right-holder to the duty-bearer, as embodied in the concept "sphere of influence". However, such a presumption proves to have limited applicability in the case of TNCs, as their influence is geographically spread and is not always exercised directly through the company's operations but also through institutional channels. Take, for example, a TNC based in Germany that manufactures its products through casual subcontractors in China and Bangladesh, where it does not have a physical presence. The positive duties approach might have a limited standing to convincingly attribute some positive duties to TNCs towards the people who manufacture the company's products in China or Bangladesh on the basis of proximity or relation. In contrast, it can be argued that the corporation has as much responsibility to avoid doing harm in the communities near their operations in Germany as it has in China and Bangladesh, and therefore has to take proactive steps to ensure that it is not violating rights, regardless of the proximity.

4.7. Conclusion

This chapter presented a summary of the positions prevalent in political theory and philosophy on the moral duties of transnational corporations in relation to human

rights. It discussed recent literature exploring ways in which TNCs can be said to bear negative duties to respect and also positive duties to protect and fulfil human rights. While some agree that corporations acquire some positive duties when the state is unable to fulfil its role as the primary agent of justice, others contend that corporations do not only bear stringent positive duties in such cases, but also when the state can act as the primary agent of justice, because of some of their attributes or their *de facto* governing roles.

The second part of the chapter highlighted some principled and pragmatic grounds for questioning the positive duties approach and proposed as an alternative conceptualising the duties of corporations as essentially negative duties to respect. Such approach does not allocate to corporations positive duties on the basis of their capabilities, but on the harm they may cause or contribute to produce, thus avoiding some of the principled objection against the positive duties approach. In addition, it also overcomes some of its efficiency-related problems, as it builds upon the duties to respect human rights that companies have already accepted for themselves. Such negative duties, however, this thesis proposes, should not only be understood as duties to refrain from doing harm through their direct operations. Instead, they should be broadly understood in order to encompass the participation of companies in the creation of structures that inflict institutional harm. This proposition will be further elaborated in the next chapter.

Chapter 5. An Institutional Approach to Allocating Moral Responsibility to TNCs

In this point of the case the question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions.

– Andrew Jackson, US President 1829-1837

5.1. Introduction

Thus far this thesis has argued that corporations bear primarily moral negative duties to respect human rights and has indicated some problems of allocating them *prima facie* positive duties to protect and fulfil them. This chapter will focus on exploring what the negative duty to respect human rights implies. Recent guidelines for corporate responsibility, most notably the UN Framework, have tended to follow an interactional view of harm, where harm is viewed as resulting directly from the actions of an agent. This understanding, however, is very restricted, as it does not take account of the harms that corporations contribute via institutional channels. As a result, contemporary accounts of corporate responsibility have attributed responsibility to corporations only on the basis of their direct impact on human rights, which refer to direct causation and contribution to human rights harms. This chapter will propose a more comprehensive understanding of the possible negative duties of transnational corporations, one that takes into consideration their institutionally mediated contributions to human rights

deficits. This understanding will also emphasize duties not to cooperate in the imposition of a global institutional order that foreseeably and avoidably causes human rights harms.

The discussion of the chapter is structured as follows. First, it will give an overview of both the interactional and the institutional moral approaches in order to establish a framework against which accounts of responsibility can be evaluated. Then, it will show why current approaches to corporate responsibility can be regarded as interactional accounts. While they are appropriate to analyse most of corporate wrongdoings, they are limited insofar as they do not reflect the complex network of institutions within which corporations operate. While this deficiency has been noted in recent literature (see Macdonald, 2009; 2011; Young, 2004), proposed alternatives remain too limited, as they tend to focus only on specific institutional channels through which corporations can exert harm, such as business networks and supply chains. In contrast, this chapter will argue that some responsibility should also be attributed to corporations for the human rights outcomes to which they contribute by shaping and supporting a global institutional order that foreseeably and routinely leads to human rights deficits. To support this claim, this chapter will provide some empirical evidence on how corporations contribute to the global institutional order by acting both in the political and the private spheres. If it is true that corporations contribute to harm through the global institutional order, the responsibility attributed to them should be considerably expanded, and we should also take account of some derivative obligations, as will be explored in Chapter 6.

5.2. Interactional and Institutional Moral Approaches

An influential frame for allocating duties in cosmopolitan political theory⁵⁷ has been to draw distinctions between the ‘interactional’⁵⁸ and the ‘institutional’ moral approaches (Follesdal & Pogge, 2005, p. 2; Pogge, 2010a, pp. 14-15). In the interactional approach, social phenomena are considered to be the effects of the conduct of agents (Follesdal & Pogge, 2005, pp. 2-3; Pogge, 2010a, p. 14); therefore social phenomena can be traced back to specific collective or individual entities. This approach involves questioning whether the agents involved could have foreseen their actions would lead to a regrettable outcome, and whether they could have acted differently without substantial costs to themselves or to anyone else (Pogge, 2010a, p. 15). “For example, the fact that some particular child suffers from malnutrition, that some woman is unemployed, or that a man was hurt in a traffic accident. We can causally trace such events back to the conduct of individual and collective agents, including the person who is suffering the harm” (Follesdal & Pogge, 2005, p. 2; Pogge, 2010a, p. 15). The interactional approach sees principles of distributive justice applying directly to the conduct of moral agents. Therefore, a person’s rights generate duties on all others regardless of the existence of common social institutions (Pogge, 1992a, pp. 50-51).

In contrast, the institutional approach sees social phenomena as effects of the institutional structure in place, of how our social world is shaped (Pogge, 1995, p. 241; 2010a, pp. 14-15). The institutional account recognises that while certain events can be

⁵⁷ Contemporary cosmopolitan theories share three main elements, 1) individualism: they consider that human beings are the ultimate units of concern; 2) universality: the status of unit of moral concern is attached equally to every human being; and 3) generality: persons are units of moral concern for everyone and not just to particular groups, such as fellow compatriots (Pogge, 1992a, pp. 48-49; see also Caney, 2010).

⁵⁸ It is important to distinguish between the term “interactional” and “interactionist” found in Buchanan (2004, pp. 83-85). The latter refers to a position that supports the idea that justice is a morally obligatory goal of the international legal system based on three premises: 1) there is a global basic structure that has effects on individuals, 2) because of the pervasive effects of the structural arrangement, it is subject to assessment from the standpoint of justice, and 3) justice ought to be the goal of the institutional arrangement. Therefore, while Thomas Pogge does not develop an interactional approach, he offers a “special version of the interactionist approach, one that relies on the general moral obligation not to harm other persons” (Buchanan, 2004, p. 85).

seen as the result of particular agents' conduct, some of them can also be traced back to the standing features of the social system in which they occur (Pogge, 2010a, p. 15), which include schemes of trade, property, money, markets, governments, laws, conventions, etc. (Pogge, 1992, p. 51; 1998, p. 263; 2010 p. 15; Caney, 2005, p. 106). It requires making counterfactual statements about how such outcomes would have been different if the social rules had been different (Follesdal & Pogge, 2005, p. 3; Pogge, 2010a, p. 15). "In this vein, one might causally trace child malnutrition back to high import duties on foodstuffs, unemployment to a restrictive monetary policy, and traffic accidents to the lack of regular motor vehicle safety inspection" (Pogge, 2010a, p. 15).

For the institutional approach, individuals' membership in an institutional scheme is morally relevant, as it is presumed that the pervasive nature of social institutions has impact on most aspects of their members' lives and interests. "The moral importance [of institutions] stems, then, from the extent to which they affect people's ability to further their interests and to exercise their abilities and pursue their conception of the good" (Caney, 2005, p. 112). Principles of distributive justice are seen as applying to institutions, and the main concern is how to design or choose the institutions that mediate the distribution of resources (Pogge, 1992a, p. 56). For principles of justice to apply, it is presumed that some common institutional scheme must be in place. Thus, for this view, the existence of cosmopolitan principles of justice is contingent on the existence of a common global institutional scheme (Caney, 2005, p. 106). If we lived in a world of autarkic states, distributive justice would be limited to the domestic sphere. Given, however, that current institutions which shape the distribution of resources such as property and trade have a global impact, they activate cosmopolitan principles of justice. Responsibility is thus attributed to moral agents in function of the institutional schemes they establish and support (Pogge, 1992a, p. 50).

Criticisms against the institutional account indicate apparent contradictions on attaching moral significance to the institutional order. Cosmopolitans –including

institutionalists— tend to argue that morally arbitrary facts, such as place of birth, should not affect one life’s prospects. At the same time, the institutional approach attaches moral significance to the institutional order in which people are born, which is also arbitrary. “If someone is born into an impoverished system that has no links with the rest of the world, a wholly institutional account⁵⁹ must maintain that members of the latter have no duties of justice to the former –thereby penalizing them, depriving them of the very means to live, simply because of their ‘place of birth’” (Caney, 2007, p. 283). A wholly institutional perspective is also seen as creating perverse incentives for the better-off to disassociate themselves from the disadvantaged in order to avoid being bound by the duties generated from sharing an institutional order (Caney, 2007, pp. 284-286). Further, a wholly institutional approach seems to presume that only institutions can have impact on their members’ lives or at least that the most significant constraints to someone’s choices and interests come from the social institutional arrangement to which they belong. Therefore, it fails to consider the possibility that other actors outside the institutional system may also exert considerable influence (Caney, 2005, p. 112).

Such criticisms, however, may have little practical relevance in the current globalised world. Arguably, nowadays virtually every person across the globe lives under a common institutional order that has impact on the configuration of national institutions, and ultimately shapes opportunities for all persons. Thus, criticisms based in the exclusion of some persons would lose force, as would those about dissociation, given the extent of global institutional interdependence and a plausible presumption that full dissociation simply would not be possible (see Pogge 1992a, p.51).

The contrasting views on the moral relevance of institutions between the two approaches also generate different interpretations of human rights. For the interactional

⁵⁹ Caney makes a distinction between what he calls the “wholly institutional approach” and the “partial institutional approach”. The former contends that duties of justice are owed only fellow members of one’s institutional schemes; whereas the latter argues that some, but not all, of the duties of justice one has are owed to fellow members of the scheme. Therefore, the partial institutional approach allows that one may have duties of justice to people outside one’s own scheme (Caney, 2007, p. 281).

account, human rights are moral demands made by each human being against all others, whereas for the institutional account, human rights are primarily claims on social institutions and secondarily, claims against those who uphold those institutions (Pogge, 2008, pp. 50-51). As human rights impose constraints on shared practices, they are contingent to the existence of such practices. While everyone has a duty not to uphold a harmful institutional scheme against everyone else, human rights-based obligations are only owed to fellow participants in the scheme (Pogge, 1992a, p. 51). Therefore, what counts as a human right violation for each approach is different (Pogge, 1992a, pp. 50-55). For example, it could be said that a just institutional scheme would protect a right against unjust discrimination; however it cannot be reasonably expected that an institutional arrangement will reduce the incidence of discrimination to zero. The institutional account would see a right against unjust discrimination as satisfied if the institutional order reasonably secures this right for its participants, by for example, imposing and enforcing penalties for those who violate the rights. If, under this order, some person were discriminated against, the interactional approach would count it as a human rights violation. The institutional approach would not necessarily register a single instance of discrimination as a violation because the order provided reasonable protection for that right. In contrast, if the institutional order provided inadequate protection against discrimination, the institutional approach would regard it as a human rights violation even if the interactional view did not, e.g., in the case that those insufficiently protected persons were not facing active discrimination. The prospect that they would face such discrimination because of inadequate protections would be seen as a violation in the institutional approach (see Pogge, 1992, p. 55).

Naturally, the two approaches lead to different descriptions, explanations and moral assessments of social phenomena (Follesdal & Pogge, 2005, p. 2; Pogge, 1995, p. 241). However, despite the differences, both views are not necessarily incompatible; rather they can complement each other (Pogge, 1992a, p. 50; Shue, 1996, p. 225; see

Caney, 2007 for an hybrid account). The interactional approach can be seen as offering a “microexplanation” of a social phenomenon or salient event, while the institutional approach provides a “macroexplanation” (Pogge, 1989, p. 273) that considers the general context and the structural constraints. As an example, the incidence of human rights violations by corporations in developing countries can be explained by the institutional approach as a matter of global exploitation and unequal division of labour between the global North and the South. However, this explanation may not be necessarily true for each particular case, where the interactional approach may offer a better analytical tool.

5.3. TNCs Responsibility Under the UN Framework: An Interactional Approach

The dominant current approaches to ascribing human rights responsibilities to transnational corporations are interactional. The UN Framework and the OECD Guidelines tend to see TNCs as harming human rights or having negative impact on them⁶⁰ directly through their conduct, business decisions and operations. In these approaches, impact is assessed on the basis of the outcomes a corporation has generated or contributed to generating through its independent decisions and actions. It does not include those outcomes in which TNCs indirectly participated or that have been mediated by institutional structures. In fact, in one of his early reports as Special Representative on the Issue of Business and Human Rights, Ruggie rejected the use of the concept ‘sphere of influence’ to describe the contribution of TNCs to human rights outcomes. He based his decision on the lack of “legal pedigree” of the term (Ruggie, 2007a, p. 24), but also on the fact that at least one of its possible meanings did not follow the interactional notion of impact and responsibility. As he explains:

⁶⁰ In line with the usage of the Special Representative, “harm” and “impact” will be used as synonyms (see for example, Ruggie, 2008; 2011).

[the term] sphere of influence conflates two very different meanings of influence: one is impact, where the company's activities or relationships are causing human rights harm; the other is whatever leverage a company may have over actors that are causing harm. [...] Anchoring corporate responsibility in the second meaning of influence requires assuming, [...] that 'can implies ought'. But companies cannot be held responsible for the human rights impacts of every entity over which they may have some influence, because this would include cases in which they were not a causal agent, direct or indirect, of the harm in question [...]. Asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another (Ruggie, 2008, p. 19).

The Special Representative makes a sharp distinction between “influence” and “impact”. While he recognises that companies may have some influence in cases where they were not direct or indirect causal agents of harm, it is not enough for attributing responsibility. In contrast, he accepts the idea of determining responsibility on the basis of the impact corporations may exert on human rights. Here, the defining characteristic of impact seems to lie on the exercise of unmediated agency and the somewhat direct contribution to human rights harms through their activities and relations.

Similar considerations of impact and responsibility tied to unmediated agency can be found in the 2011 edition of the OECD Guidelines. They ask corporations to “[...] address adverse human rights impacts with which they are involved [...], within the context of their own activities, avoid causing or contributing to adverse human rights impacts [...and] provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts” (OECD, 2011b, p. 31). As can be observed, the Guidelines have a similar approach to the UN Framework, which they have expressly endorsed. Responsibility is attributed in function of the impacts they caused or contributed to cause, while the involvement of corporations on human rights harms is limited to “the contexts of their own activities”.

The extended usage of such approaches, which directly link unmediated agency-impact-responsibility, seems to partly respond to certain appealing theoretical features and their adequacy to explaining most of the current cases involving TNCs in human rights harms. Such approaches seem to command certain “naturalness” attributable to its relation with the “phenomenology of agency” that is “[...] a characteristic way of experiencing ourselves as agents with casual powers” (Scheffler, 1995, p. 227). According

to this orientation, agents perceive their own agency as more implicated the closer the effects of their actions are felt, when such effects are produced individually rather than collectively, and if they are caused by actions rather than by omissions. The attractiveness of these interactional approaches also “[...] 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 [...]” (Macdonald, 2011, p. 551). The extended acceptance of the liberal understanding of individuals as the ultimate right-holders and duty-bearers make this approach appealing to global regulatory efforts insofar as it offers a common ground to discuss this topic across a diversity of actors.

In fact, it seems that corporations embrace the idea that their responsibility is limited by the impact they may exert, which in turn is confined to cases when they exercise unmediated agency. For example, the German sportswear company, Adidas, says it focuses its human rights efforts on areas within its own direct influence “[...] by safeguarding the rights of [its] employees and those of the workers who manufacture [its] products through direct supplier relations” (2011, p. 4). Similarly, the American software corporation, Microsoft, notes its “[...] commitment to respect fundamental human rights of [its] employees, people working for [its] suppliers, and [its] customers” (2012) and delineates four key areas in which it can exert impact: products and partnerships, employees, suppliers and communities in which it has some non-for-profit programmes. Meanwhile, the American consumer goods company, Procter & Gamble, maintains that the company “[...] is committed to universal human rights, particularly those of employees, communities in which [it] operate[s], and parties with whom [it does] business” (2009). As can be observed in these examples, the particular areas in which corporations recognise they bear responsibility are those in which they can exercise direct agency and are close to their operations such as employees, customers, suppliers and nearby communities.

Such accounts of responsibility also seem to be widely developed due to their effectiveness in analysing most cases involving corporations in violations of human rights. In many of them the relationship between the corporation and the population affected is proximate in time and space and attributable in very direct ways to the agency of the corporation involved (Macdonald, 2011, p. 552). Examples include Shell dumping toxics into the Niger Delta and oil trader Trafigura unloading toxic waste, causing environmental and health problems to the nearby communities. In these cases corporations contributed to harm through their direct actions and the regretful outcomes can be traced to an identifiable source. Thus in a large proportion of cases of corporate misconduct, interactional accounts seem to be the most appropriate approach to determining impact and attributing responsibility.

5.3.1. Limitations of the Interactional Approach

While interactional accounts of responsibility have certain attractive features and are able to account for many cases involving TNCs in human rights harms, they have an important deficiency: “this is that [they are] based on the 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 resulting human rights outcomes” (Macdonald, 2011, p. 552). These approaches tend to rely on an artificial image of the world, where the conduct of agents generates social phenomena that, in turn, are traceable to specific agents. As a result, these accounts tend to be suitable for analysing specific cases in which corporate wrongdoing is confined within narrow geographical and temporal boundaries.

Approaches consistent with the interactional account can acknowledge that an agent’s conduct may have long-term and spatially distant implications. They tend, however, to focus on proximal outcomes. The attribution of responsibility relies on

tracing the causal relation between the agent's conduct and the effects to which it contributed, and such relations tend to be more clearly identifiable in proximity. Also, agency tends to be perceived as implicated to a larger extent when it affects local surroundings in the present and near future (Scheffler, 1995, p. 228). Such a conception thus tends to ignore the rising importance of global actors and their profound effects over international rules and practices, as well as over national policies (Pogge, 2010a, p. 17). It also tends to overlook the fact that the political and economic developments in one part of the world can have dramatic effects on people in other places and epochs (Scheffler, 1995, p. 229).

These agent-related accounts of responsibility have generally identified corporate harm with direct harm, which means that corporations might not be considered to have impact on human rights in cases when the harms are not directly linked to the corporation's operations and activities, even if it has reaped the benefits or contributed to producing harm through complex institutional channels. Another limit of analysing complex social phenomena like poverty or human rights violations exclusively through the interactional approach is that the resulting explanations might be at best misleading or incomplete. Furthermore, considering exclusively direct impacts from TNCs creates perverse incentives for corporations to obscure their involvement in negative human rights outcomes. For instance, in the 1990s, major retailers and brands in the garment industry, as well as coffee roasting companies, responded to anti-corporate campaigns by pointing to long chains of subcontracting and outsourcing as evidence that violations of human rights in factories and farms were beyond their control (Young, 2004, p. 367; Macdonald & Macdonald, 2010, p. 34). Still nowadays, corporations across manufacturing industries opt for a distant relation with their supply chains instead of keeping them under direct control, in part as a way to avoid legal responsibility in host countries (Wells & Elias, 2005, p. 150).

Macdonald (2009; 2011) has indicated such crucial shortcoming of the current approaches and in turn has proposed the Spheres of Responsibility Framework. This is a multilevel account of corporate responsibility that takes into consideration the participation of corporations in several institutional channels through which they can influence human rights outcomes, such as business networks and supply chains (Macdonald, 2011, p. 553). The next section will present the Spheres of Responsibility Framework.

5.4. The Spheres of Responsibility Framework

As discussed in the previous sections, most accounts have tended to attribute responsibility to TNCs on the basis of their negative impact on human rights, which in turn is closely related to exercise of unmediated agency thus ignoring harms which TNCs produce or contribute to produce via institutional channels. However, it has also been argued that institutions and institutional channels are relevant factors to consider in the conceptualisation of the impact corporations may have on human rights and on the allocation of moral responsibility, given that they may enable or constrain the exercise of corporate agency (Macdonald, 2011, p. 552).

The Spheres of Responsibility Framework suggests the use of the concept “complex negative duties”, encompassing both what Macdonald calls “distributed negative duties” and “derivative positive duties” (2011, p. 557). The concept of ‘distributed negative duties’ refers to the “[...] distribution of responsibility between multiple actors contributing to complex processes of human rights harm” (Macdonald, 2011, p. 557). It acknowledges that human rights are being affected by decisions made through institutional arrangements such as supply chains. Here, she proposes to disaggregate responsibilities among the decision makers. Such a measure seems to be particularly relevant in certain industries. For example, in the case of commodity grade

coffee in Nicaragua, the state is allocated the responsibility under existing guidelines to look after the well-being of workers and producers. In fact, the control of some of the decisions that affect such individuals are distributed across a range of state and non-state decision makers across the whole supply chain (Macdonald, 2007, p. 796). She also proposes attributing some derivative positive duties to such decision-makers in order to avoid participating in collective practices that will foreseeably produce harm (Macdonald, 2011, p. 558).

The Spheres of Responsibility Framework captures more accurately the way in which TNCs operate within an arrangement of institutions through which they may produce or contribute to produce harm. This is an important development in the direction of a more precise attribution of responsibility, and it rightly highlights some relevant mechanisms through which TNCs can contribute to human rights violations, which have tended to be ignored by recent accounts of corporate responsibility. Nonetheless, this framework is still limited, as it overlooks at least one other possible way in which corporations can also contribute to human rights harms: by helping to shape and maintain a global institutional order that engenders human rights deficits.

5.5. The Global Institutional Order and Its Impact on Human Rights

The global institutional order has been described as a scheme of globally shared institutions, where the term ‘institution’ refers to

[...] a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses, and so on, when violations occur [...]. An institution exists at a certain time and place when the actions specified by it are regularly carried out in accordance with a public understanding that the system of rules defining the institution is to be followed (Muchlinski, 2007, pp. 47-48).

This order includes schemes of trade, property, money, markets, governments, borders, treaties, diplomacy, communications, laws, and conventions (Pogge, 1989, pp. 263, 276; 2010, p. 15; Buchanan, 2004, p. 85; Caney, 2005, p. 106;). Such institutions define and regulate property, the division of labour, political and economic competition and how institutions themselves can be established, modified, revised and enforced (Pogge, 2008, p. 37). According to the institutional approach, institutions and the institutional order are crucial factors to understand social phenomena, as they create expectations, encourage some forms of behaviour and discourage others, define and install core norms, identities, capabilities, purposes and relationships and also act as constraints of agency (Macdonald, 2011, p. 552).

This institutional order has increasingly profound effects over the domestic lives of nations (Pogge, 1992a, p. 51; 2010a, p. 17). As the interaction across traditional borders expands, so does the necessity to establish common transnational, regional and global institutions in more areas. While these institutions are developed at a macro-level, the design of the global institutional order has impact upon national policies and the conditions of life experienced worldwide (Pogge, 2010a, p. 19). For example, global rules of trade and investment may require countries to modify domestic laws, while rules on intellectual property may alter the way in which they organise their education, healthcare system or agricultural sector. For example, under the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), implemented with the World Trade Organisation's launch in 1994, South Korea was required to restrict the copying of textbooks and software, which was common practice in education provision until 1987 (Drahoš & Braithwaite, 2002, pp. 19-20). That is not to say that clear violations of human rights ensued. Rather, it demonstrates the pervasiveness of the current global institutional order. Global institutions can have impact on the lives of billions of people across space and time, even if they had little or no input in the design of such arrangement.

It has been argued that the design of the current global institutional order foreseeably and avoidably engenders human rights harms including severe poverty and radical inequality (Pogge, 1992, p. 56; 2000; 2002; 2005c, 47-50; 2005d, p. 55; 2008, esp. ch. 4; 2010a, esp. ch.2). This is reflected, for example, in the 20 million people who die every year of poverty-related causes and the fact that the bottom half of the world population shares only 1.1% of the global private wealth, while the top 10% enjoys 85.1% (Pogge, 1992a, p. 62; 2010a, pp. 4-5). An institutional order can be judged as harmful by the incentives and penalties it has in place, which make an outcome more or less likely to occur. Thus, while it is true that we may not foresee the exact effects of a particular institution, we can evaluate the likelihood of certain outcomes, given the structures in place. While we cannot know the exact outcomes an institution will produce, we can reasonably expect, for example, that increased patent protection of medicines will result in higher prices, thereby affecting the access of the poorest people to patented drugs. Therefore, it can be argued that the harmful features of the order could arguably be averted by taking reasonable measures. For instance, Pogge has proposed an alternative system for drug pricing that gives incentives to corporations to make affordable drugs for treatable diseases with disproportionate incidence in developing countries (see Pogge, 2009). Thus the harm the current global order produces can be described as being easily avoidably insofar as there exist at least one feasible alternative, which adoption entails reasonable costs.

The current global order is not a natural but a socially constructed arrangement in which some of its wealthiest members have played a dominant role in its design (Pogge, 2008, p. 178; 2010a, p. 21). They have done this, for instance, by establishing organisations that represent their own interests, sometimes at the expense of the poorest countries. For example, the World Trade Organisation has faced many criticisms for its double standards regarding open markets in detriment of the global poor. Developed countries have systematically imposed many protectionist measures in sectors in which

developing countries have a competitive advantage such as agriculture and textiles in order to protect themselves from cheap imports (Jones, 2004, pp. 155-157; Pogge, 2007, p. 34; 2010a, p. 18). They also have proposed and achieved the passage of agreements such as TRIPS which benefit industries that are disproportionately concentrated in their territories, e.g., software, entertainment, pharmaceutical and agribusiness (Drahos & Braithwaite, 2002, p. 11; Pogge, 2009a, p. 197).

Another way in which the wealthiest countries contribute to shaping the global order, and arguably contributing to harm through it is by the imposition of rules that contribute to engender human rights deficits instead of alleviating them. An example is the structural adjustment programs of the International Monetary Fund. These are imposed on developing countries, which have had to resort to IMF lending to address balance of payments crises. The conditionalities, or strings attached to such loans have been criticized as one-size-fits-all, and for causing avoidably high levels of dislocation harm in terms of increased unemployment and poverty in regions such as Latin America and South East Asia, particularly during the 1980s and 1990s. The outcomes, as economist Joseph Stiglitz notes, are closely related to institutional power structures and the predominance of richer states:

Underlying the problems of the IMF and the other international economic institutions is the problem of governance: who decides what they do. The institutions are dominated not just by the wealthiest industrial countries but by commercial and financial interests in those countries, and the policies of the institutions naturally reflect this. The choice of heads for these institutions symbolizes the institutions' problem, and too often has contributed to their dysfunction. While almost all of the activities of the IMF and the World Bank today are in the developing world (certainly, all of their lending), they are led by representatives from the industrialized nations [...]. The problems also arise from who *speaks* for the country. At the IMF, it is the finance ministers and the central bank governors. At the WTO, it is the trade ministers. Each of these ministers is closely aligned with particular constituencies *within* their countries. The trade ministries reflect the concerns of the business community [...] (emphasis original) (Stiglitz, 2002, p. 19).

The existing design of the global institutional order thus reinforces the very inequality that enables the representative of the wealthiest countries to impose such a skewed design in the first place (Pogge, 2010a, p. 35).

An institutional approach, then, would ascribe some responsibility to those agents who have shaped and maintained a global order that foreseeably and avoidably engenders human rights deficits. Given that the G7⁶¹ countries are reasonably democratic, their citizens are seen as sharing this responsibility (Pogge, 2005d 58; 2010, esp. Ch. 1 & 2). While it is true that the present citizens of affluent countries cannot be held responsible for the initial creation of such an order, they are seen as liable for its recent design and for supporting its continuance (Pogge, 2005d, p. 55). These citizens have enough information to know what is happening in other parts of the world that they could thus require their governments to re-shape some of the institutions of the global order.

Some have seen the approach proposed by Pogge as overwhelmingly state-centric. It gives strong emphasis to states as actors in the global arena, in particular on the richer, more powerful states (Gould, 2007, p. 388). The responsibility of individuals is ascribed only on the basis of their state membership. Yet, we can note that most individuals have very limited power to influence international institutions, albeit with few exceptions such as extremely wealthy individuals like Warren Buffet or Bill Gates, whose business choices might have significant impact on entire national economies. In the vast majority of cases, citizens' influence on the global sphere is mediated by their states. Also, while the emergence of a "post-Wesphalian order" has been discussed and non-state actors have increased their participation in the global arena, the state still holds unique prerogatives such as signing treaties, creating domestic laws or being a full member of international organisations such as the United Nations. Also, given the

⁶¹ The Group of 7 is composed by some of the wealthiest nations in the world: Canada, France, Germany, Italy, Japan, the United States and the United Kingdom.

original configuration of these organisations, most of the decisions taken tend to be formulated on state level. For example, in the case of the IMF, its lending policies are targeted to member states, not to citizens or other groups.

If we only consider individual and state influence, however, we overlook the fact that international non-state actors can also exert considerable influence in the shape and maintenance of the global institutional order. Unlike citizens, their actions are not bounded by membership in a state community. This, in fact, constitutes one of the main factors in the existence of the governance gap, as argued in Chapter 2. As even Pogge admits, “[...] the traditional conception of the world of international relations as inhabited only by states is rapidly losing its explanatory adequacy –through the [...] creation and increasing stature on the international stage of non-state actors, such as multinational corporations, international agencies, regional organizations, and NGOs” (Pogge, 2010a, p. 17). Moreover, even when states have a privileged position in governmental organisations, other entities such as NGOs and TNCs have an input in the states’ decisions, but also beyond them.

At the same time, the participation of transnational corporations in the configuration of a global institutional order seems to be different from the participation of individual agents. In Pogge’s account, the input from citizens is confined to their actions as public individuals and their participation in the political life of their national states. Thus, there appears to be a clear distinction between the public and private participation of the individual. In fact he uses the term “citizens” instead of “nationals”, “inhabitants” or “individuals”, emphasising the public role of the these actors. Although in the conceptualisation of global institutions Pogge mentions “social practices”, which might also be influenced or modified through the actions of individuals as private actors, he does not acknowledge it or at least he does not allocate duties to citizens for their actions in the private arena. For him, “[...] all these institutional schemes are shaped and reshaped though political struggles” (Pogge, 2010a, p. 4).

Corporations, in contrast to individuals, do not influence the global institutional order only via national governments. Some of the largest corporations or corporate associations can also directly participate in international organisations and forums. Furthermore, unlike ordinary individuals, corporations' economic power, size and high mobility allow them exert considerable influence when they are performing in the private sphere. For example, Wal-Mart's purchasing power and its market share allow the company to exert influence across several economic sectors. Although companies might make decisions that are essentially of private nature, such as what to buy and sell and at what price, they can also exert some influence over the configuration of the global order. Transnational corporations, therefore, influence the global institutional order through their actions in the political but also in the private arenas.

In the next section, the role of corporations in the political and private spheres will be reviewed in more detail. For purposes of clarity, I will present them as separate. However, it is important to note that the impact of TNCs in the private sphere can have important public consequences.

5.6. Transnational Corporations in the Political Sphere

Transnational corporations can be considered private entities representing private interests, but their significant power and participation in several aspects of the public life allow them to have impact on public interests. "In a market-controlled society the institutions that shape and dominate the global economic sphere inevitably turn into major political forces that affect the organization of society as a whole" (Wettstein, 2009, p. 180). Corporations can engage in the political sphere by participating in national or international forums, by supporting political campaigns, by lobbying national legislators, by normalising rules and practices or even by engaging in illegal activities such as bribery of government officials in order to incentivise or deter legislations.

5.6.1. Lobbying

One of the mechanisms by which TNCs can influence the deliberation and establishment of legal rules is the practice of lobbying. The most evident case is the United States, where corporations and other collective groups are allowed to indirectly participate in the policy-making process and decisions to represent their interests (Wettstein, 2009, p. 240). With the increasing “marketisation of politics”, political campaigns, candidates and parties have become more dependent on the financial contributions from corporations (Wettstein, 2009, p. 240). As a result, it is possible to observe “regulatory capture”, which refers to the process through which corporations end up influencing the government agencies that were supposed to regulate them (Dal Bó, 2006, p. 203). This means that public interests, which were supposed to be represented by democratic governments, are in effect subordinated to private interest.

The impact of lobbying is not confined to national boundaries. Economic interests increasingly drive relationships among states, and given the pervasive role of corporations in the economy, they, along with industry associations have earned a prominent place in deliberating foreign policy in the capacity of experts or advisors (Wettstein, 2009, p. 241). A consequence is that corporations have become able to exert significant pressure and influence on governments to curb regulations or to design them to protect their private interests. Such regulations, even if they are of domestic nature, can have significant consequences for global structures. An example can be found in the financial sector. In 1999, the United States Glass-Steagall Act, which prohibited commercial banks from engaging in the investment business was repealed. One year later, US President Bill Clinton signed the Commodity Futures Modernization Act, which effectively allowed unregulated trading of financial derivatives and put them beyond the reach of federal regulators. This arguably played a key role in the 2008 financial crisis (Corn, 2008; Topham, 2011, p. 134). The Modernization Act also made possible the entry of commercial banks into markets of derivatives based on food commodities. This

is seen as playing a critical role in the soaring prices of food since around 2005, threatening food security across the developing world (De Schutter, 2013, pp. 2-3; 2012).

There is evidence that some of the largest financial corporations exerted significant influence in passing the Modernization Act (Corn, 2008; Harper, Leising, & Harrington, 2009; Lipton, 2008; Martinelli, 2012, p. 36). It has been estimated that large Wall Street banks spent more than US\$5 billion from 1998 to 2000 to lobby to pass it and overhaul the Glass-Steagall Act (Topham, 2011, p. 142). Evidence of corporate influence on the Modernization Act can also be found in a legal provision requested by the former US energy company Enron, the so called “Enron Loophole”, which exempts crucial energy commodities from government oversight (Corn, 2008; Lipton, 2008; Martinelli, 2012, p. 36). “Even though it is difficult to link certain policy changes to a specific donor company, the general correlation between industry donations and the number of votes in Congress in favor of the respective industries leaves no doubt about the success of such corporate political strategies” (Wettstein, 2009, p. 240). Thus, by “feeding the political carousel”, corporations ensure their interest are represented in the political arena, and in turn, political processes become a reflection of corporate interests and a manifestation of corporate authority (Wettstein, 2009, pp. 240-241). While corporations were able to exert significant influence on national scale, the Modernization Act had significant consequences in the configuration of financial instruments and institutions, an important part of the global institutional order, whose effect in the international prices of basic commodities has an impact well beyond the United States’ borders.

Another example can be found in the negotiation of the TRIPS Agreement within the WTO’s predecessor, the General Agreement on Trade and Tariffs. The TRIPS requires all WTO members to establish minimum standards for protecting and enforcing intellectual property rights, including patent protection for pharmaceutical drugs. The consequences of adopting the TRIPS have been particularly negative for developing countries, as patents tend to increase prices of drugs, effectively limiting the access of the

poorest people to even essential medicines. There is ample evidence that some of the largest TNCs in intellectual property related industries, e.g. film, chemical, pharmaceutical, software and publishing, heavily invested to push for an agreement to protect their perceived interests (Drahos & Braithwaite, 2002, p. 12; Novogrodsky, 2010, p. 346). “[...] Transnational corporations [...] leveraged their relationship with state officials to shape trade law and influence the robust expansion of intellectual property rights into previously unreached markets” (Novogrodsky, 2010, p. 347).

Further, we can note the earlier Intellectual Property Committee (IPC), created in 1986. It was an *ad hoc* agreement of 13 major US corporations⁶² dedicated to negotiate a comprehensive agreement on intellectual property in the GATT. One of the activities of the CEOs of these US-based companies was contacting their counterparts in Europe and Japan and urging them to pressure their national governments to support the inclusion of intellectual property in the forthcoming GATT’s Uruguay Round. Corporations played a direct role in the international negotiations. While much of the work of the IPC was lobbying national governments, some of its members accompanied the United States delegation to the GATT Ministerial Conference in an advisory capacity and some even participated as negotiators, trying to secure the support of other delegations of developing countries (Drahos & Braithwaite, 2002, p. 118).

The cases presented on financial derivatives and the TRIPS are representative of the US political system, however, similar cases can be found in other regions. In Europe, for example, large corporations are believed to spend up to €1 billion on lobbying yearly (Wettstein, 2009, p. 242). Large industrial groups such as the European Roundtable of Industrialists (ERT⁶³) and the Union of Industrial and Employers' Confederations

⁶² Bristol-Myers, DuPont, FMC Corporation, General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International and Warner Communications.

⁶³ The ERT, founded in 1983, is a group of up to “[...] 50 chief executives and chairmen of major multinational companies of European parentage [...]” (ERT, 2012). It was born out of the preoccupation of the lack of competitiveness of the European Union, symptom of the so-called ‘euroclerosis’. Companies currently represented in the ERT include: the Swedish technology company Ericsson, the German electronic and engineering conglomerate Siemens, the German chemical company BASF, the British-Dutch oil

(UNICE) are considered to have an important input on the decision making processes in Europe (Balanya, Doherty, Hoedeman, Ma'anit, & Wessel, 2003). While there is no consensus on the level of influence of these groups in shaping European law, it is widely acknowledged that they had active involvement in the enactment of the 1989 Single European Act, the legal framework of the European Single Market. Some argue that TNCs business groups were decisive sources of the single market initiative (Balanya, Doherty, Hoedeman, Ma'anit, & Wessel, 2003, pp. 5,6,21). According to this account, the document *Completing the Internal Market*, which became the basis of the 1989 Single European Act, was almost identical to the document *Europe 1990: An Agenda for Action* presented in 1985 by Wisse Dekker, the ERT's chairman. However, others consider that this claim exaggerates the role of corporate groups, which only reacted to initiatives that were proposed by governments or the European Commission and the Parliament (Moravcsik, 1998, p. 356). Whatever the ultimate demonstrable impact of such groups in the creation of the Act, what is clear is the existence of a close relationship between industrial leaders and government officials (Balanya, Doherty, Hoedeman, Ma'anit, & Wessel, 2003, pp. 5-6).

5.6.2. The Revolving Door Phenomenon

In both the United States and European countries it is not uncommon to find cases that illustrate the revolving door phenomenon, which refers to the movement of personnel between roles as public servants and employees in the private sector – including corporations, lobbying groups, business networks and councils, chambers of commerce, and trade associations (Drahos & Braithwaite, 2002, p. 70). A prominent example is Dick Cheney, who after serving as CEO of the oil company Halliburton

company Royal Dutch Shell, the British energy company E.ON, the Italian oil and gas company Eni, the German automaker BMW, the French oil and gas company Total, the British-Australian mining company Rio Tinto, the Swiss food and beverage company Nestlé, the Italian automaker Fiat, the Finnish communication company Nokia, the Spanish clothing company Inditex and the British telecommunications company Vodafone.

became vice-president of the United States in 2001. Other cases include senior figures in Pfizer such as former CEO Edmund Pratt who later joined the US Advisory Committee on Trade Negotiations and Gerald Laubach, former president of Pfizer who later became part of the Pharmaceutical Manufacturers Association and the Council of Competitiveness (Drahos & Braithwaite, 2002, p. 69). In Europe, this phenomenon is also observable among members of the European Commission, which have later joined boards of large transnational corporations. For example, Peter Sutherland, who served as European Commissioner from 1985 to 1989, later became Director General of GATT and Group Secretary and General Counsel of WTO from 1993 to 1995, and since then has been part of the advisory boards and has occupied senior positions in several TNCs⁶⁴ (Bloomberg Businessweek, 2013b). Another example is Étienne Davignon, who served as European Commissioner from 1977 to 1984 and later held senior positions in European and American TNCs in a range of industries, from energy to hotels⁶⁵ (Bloomberg Businessweek, 2013a).

While the precise impact of the revolving door phenomenon is still discussed, there are elements to argue that it may bias regulators in favour of business. Having a background in the industry may influence politicians to make pro-industry decisions, either because they become biased partisans of business interests or because they become more sensitive, receptive or aware of the concerns of business (Dal Bó, 2006, p. 214). On

⁶⁴ Sutherland has been Chairman of the British oil and gas company, BP, and of the Allied Irish Bank. He has also been Director of the BW Group, a Bermuda-based company that provides maritime transportation services for energy and Non-Executive Director of the Swedish multinational technology company, Ericsson. He has had similar posts in the Royal Bank Of Scotland and on the UK-based National Westminster Bank (Natwest). He has served on the board of the German financial services provider, Allianz, and of Turkey's top industrial conglomerate, Koç Holding. He has also been member of the advisory boards of China National Offshore Oil Corporation and the American pharmaceutical Eli Lilly. Currently, he is Chairman of the Board and Managing Director of Goldman Sachs International, UN Special Representative for Migration and Development and Member of Foundation Board of World Economic Forum (Bloomberg Businessweek, 2013b).

⁶⁵ He has hold senior positions in several Belgian TNCs including Compagnie Maritime Belge (maritime group), Recticel (plastics), Brussels Airlines, Fortis (insurance, banking and investment) Umicore (technology materials), Ageas (insurance), Sofina (holding company) Compagnie de Wagons Lits (hotels and travel), Sibeka (mining), Petrofina (oil), Tractebel (energy), Solvay (chemicals). He has also hold positions in the French hotel group Accor, the French electric utility company GDF Suez, the American biotechnology company Gilead Sciences, the British mining company Anglo American, the Canadian mining company Rio Tinto Alcan, and BASF, the largest chemical company in the world, headquartered in Germany.

the other hand, the possibility of future employment in the industry may bias decisions of politicians, who may act in accordance to enhancing their change of future employment in a company (Dal Bó, 2006, p. 214). Furthermore, the employment of former government officials by lobby groups allow them to have privileged access to legislators, which in turn, can generate favourable legislative outcomes for companies (Blanes i Vidal, Draca, & Fons-Rosen, 2012).

5.6.3. Other Practices

Corporations can influence policy-making not only through lobbying or by participating in international negotiations, but also by setting the agenda of public discussion. While the issue of property rights had been widely discussed in national and international forums, from the early 1980s some companies had begun to exert public pressure to turn intellectual property into a trade issue at the global level. The World Intellectual Property Organisation (WIPO) was publicly criticised by senior members of corporations for its weak approach to standards of intellectual property protection. Drahos & Braithwaite (2002, p. 27) highlight the prominent role of corporations of certain industries –including computer, pharmaceutical and chemical– to bring the topic into the national discussion and to influence public opinion on this issue by linking copyright violation to organised crime.

A similar approach has been found in the biotechnology industry, where some corporations have tried to promote genetically modified food (GM) by changing the public perception about this technology through a rhetoric that has appealed to the end of world hunger, food security and environmental sustainability (see Williams, 2009). Overall, in the early 2000s, the top 200 TNCs held 90% of the world patents, while in the biotechnology industry only 5 companies controlled 95% of the gene-related patents (Wettstein, 2009 p. 202). Corporations thus can act in the political arena through formal

national and international political channels, but also through informal means to influence the perception of a particular issue by exerting discursive power.

Companies also can influence the political arena by participating in political and social activism. An example is the UK cosmetics company, The Body Shop, which has been continuously involved in social campaigns in the areas of human rights, environment, animal cruelty, etc. and explicitly cites as one of its core values defending human rights (The Body Shop, 2013). In 1998 the company partnered with Amnesty International and the Dalai Lama in the “Make Your Mark” campaign to mark the 40th anniversary of the Universal Declaration of Human Rights. It became one of the largest, if not “[...] the largest corporate-NGO collaborative campaign in support of human rights ever conducted” (Fabig & Boele, 2003, p. 276).

So far I have presented examples regarding the influence of TNCs on national and international legislation; however, institutionalised practices are also an important element of the global order. An example is the international borrowing privilege that refers to the accepted principle that whoever rules a country –regardless how she seized power– can borrow funds in the name of the whole country, which has foreseeable harmful effects especially on countries ruled by dictators (Pogge, 2000, p. 57; 2005c, p. 49). In a similar vein, corporations uphold and normalise international practices particularly harmful for developing countries. For instance, some corporations have been actively involved in the exploitation of minerals in countries in conflict, making available financial resources to rebel groups and aiding the transfer of illicit funds thus incentivising the emergence of illegal networks and fuelling conflict⁶⁶ (UNSC, 2001, pp. 3, 37).

⁶⁶ There are many notorious cases of corporate involvement in the exploitation of minerals such as diamonds, coltan, cassiterite, cobalt, copper and gold in African countries, particularly in the Democratic Republic of Congo (DRC), Angola, Ivory Coast, Sierra Leona and Zimbabwe. In an extensive report on the situation in the DRC, the UN Security Council denounces the participation of many TNCs based in Western countries and concludes that their role has been vital in the continuation of exploitation and conflict (2001, p. 37). Among the companies mentioned are Citibank, which aided financial transfers of illicit funds as a

Another example is the imposition of stabilization clauses from corporations to signing countries in investment agreements. These clauses aim at protecting foreign investors against political risks by dictating how future changes in the law are to be treated and the extent to which they may modify the rights and obligations of foreign investors. For example, they can fix the term of applicable legislation thus insuring investors against future modifications of national laws; they can also bind the signing government to indemnify the investor for the costs of complying with new laws. While these clauses may intend to give confidence to foreign investors, they have tended to be detrimental for host countries, as they curtail the freedom of the government to improve social or environmental standards and its ability to discharge its human rights duties (Ruggie, 2009, p. 12).

An example of arguably more directly harmful practices in which TNCs actively partake is bank secrecy in places such as Switzerland, Luxembourg, the City of London, Singapore and the US state of Delaware (IBAHRI, 2013, p. 57). This system has facilitated money laundering of groups linked with narcotics and terrorism (IBAHRI, 2013, pp. 70-71), as well as plundering and embezzlement by public officials of developing countries, including Muammar Gaddafi in Libya, Ferdinand Marcos in the Philippines and Sani Abacha in Nigeria, all of who had large bank accounts in secrecy jurisdictions. Such systems incentivise the continuation of harmful practices, undermine domestic processes in developing countries, and also deprive them from substantial resources that could be invested in policies and programmes to eradicate poverty, reduce inequality and fulfil human rights. It has been estimated that between 2001 and 2010, developing countries lost US\$5.86 trillion to illicit financial flows, from which corporate tax abuses accounted for 80 per cent of those outflows (IBAHRI, 2013, p. 7).

correspondent bank of the Banque de Commerce, du Développement et d'Industrie; Belgian airline Sabena and French Bolloré group for transporting coltan, and many mineral importers based in Belgium, the United Kingdom, Germany, the Netherlands, Pakistan, Russia, and Canada (UN Security Council, 2001).

Thus it is possible to argue that TNCs contribute to the establishment and support of harmful rules that form part of the global institutional order through their relation with government authorities and political channels. They can do this, for example, by influencing their national governments to support certain national rules with a broad impact or to represent their interest at the global level, either through legitimate or illegal mechanisms such as bribing. However, TNCs can also participate in the global institutional order by supporting and normalising rules and practices that predictably and avoidably contribute to human rights deficits.

5.7. Transnational Corporations in the Private Sphere

Transnational corporations can also contribute to shaping the global institutional order within the private sphere, which refers to the domain out of the reach of the government in which they enjoy certain leverage to conduct their day-do-day operations and to take decisions than mostly affect their business. Here, corporations may use particular attributes such as purchasing power, reputation, established networks and size to influence common practices, conventions and industry standards. They can do this through several mechanisms including establishing a corporate culture, launching voluntary initiatives, funding think-tanks, preventing or enabling technology transfer, etc.

One example can be found in the global food system, which is currently dominated by just a handful of TNCs that control the whole food process from production to distribution and retail (Clapp & Fuchs, 2009, p. 1; Fuchs, Kalfagianni, & Arentsen, 2009, p. 31). In the case of the agri-food industry, only five companies share 90% of the world grain trade, and just six (Syngenta, Bayer, Monsanto, BASF, Dow and DuPont) accounted for the 85% of the total sales of pesticides in 2006 (Madley, 2008, p. 39). This large concentration of power has allowed corporations to significantly influence the rules that govern the global food system by creating a sort of price-fixing cartel

(ActionAid, 2005, p. 4; Madley, 2008, p. 28; Clapp & Fuchs, 2009, pp. 1-2; Fuchs, Kalfagianni, & Arentsen, 2009, pp. 33-34). Corporations can also make use of their leverage by creating and modifying standards of conduct, environment, welfare, quality and safety. While corporations need to comply with minimal legal standards, they nonetheless have significant leverage in certain areas, such as in their supply chains. They have the capacity in these chains to require and comply with higher standards. Many supermarkets now have, for example, their own supplementary quality assurance and safety standards or they endorse some common collective standards such as the Global Food Safety Initiative (GFSI), the International Food Standard (IFS) or the Ethical Trading Initiative (ETI) (Fuchs, Kalfagianni, & Arentsen, 2009, p. 35).⁶⁷

The privileged position of at least the largest TNCs allow them to improve standards within an industry but also to maintain and normalise existent practices. For example, before the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997, bribery was a highly widespread phenomenon across international business transactions (OECD, 2011a, p. 6). Indeed, prior to the Convention, in some countries including Australia, Austria, Belgium, France, Germany, Luxembourg, Netherlands, Portugal, New Zealand and Switzerland, bribes to foreign government officials were tax deductible as business expenses (Milliet-Einbinder, 1997). This case exemplifies how commonly accepted and extended behaviours of corporations that mostly belong to the private realm can affect expectations, influence public perception of key issues and normalise practices at the international level. In this case, although bribery to foreign officials was a legalised practice in the aforementioned countries, corporations as private actors had the choice to comply with minimal standards or to set higher standards to end this common practice.

⁶⁷Some authors are critical of these private standards, noting that they can improve aspects of a particular industry, but they can also serve as instruments to discriminate against certain companies in favour of others in order to preserve the status quo (Clapp & Fuchs, 2009, pp. 14-15; Fuchs, Kalfagianni, & Arentsen, 2009, pp. 30, 34).

5.8. Conclusion

Mainstream accounts consistent with the interactional moral approach have tended to treat transnational corporations and their impact on human rights as independent from institutions and the global institutional order in place. However, such an approach is very limited insofar as human rights harms cannot always be traced back to the conduct of identifiable agents, but to the configuration of the features of the institutional order in place (Pogge, 2010a, p. 15). Therefore, it tends to exclude the role of institutions and institutional channels as mediators between corporate conduct and the resulting human rights outcomes, as well as the impacts over human rights to which corporations contribute by supporting an institutional order that contributes to human rights harms. In turn, these omissions can lead to underestimating the real impacts of transnational corporations on human rights, and therefore to a flawed attribution of responsibility.

The incorporation of both an interactional and institutional dimension of corporate responsibility has two significant consequences. Recognising that corporations can contribute to human rights harms not only through their operations but also by shaping and supporting a global institutional order provides a more accurate picture of the way in which corporations operate. It also provides a more adequate and complete understanding of what the duties for corporations to respect human rights entail: to avoid doing harm, both directly through their operations and via institutional channels. More specifically, corporations can be ascribed a negative duty not to contribute without compensation to the shape and maintenance of a global institutional order that foreseeably produces human rights harms. They also can be ascribed some responsibility for such negative human rights outcomes. The implications of this more comprehensive approach to impact and responsibility will be further developed in the next chapter.

Chapter 6. Institutional Responsibilities Framework

He who has the gold makes the rules.

–*Samuel J. LeFrak*

6.1. Introduction

During the mid-1990s and early 2000s the issue of corporate involvement in human rights violations received significant attention after some notorious cases of misconduct involving well-known transnational corporations in the extractive sector and apparel industry, as explained in Chapter 2. A growing awareness of the poor conditions in which garments were produced in developing countries led to the emergence of social movements in some of the countries where those companies were headquartered, including the United States, the United Kingdom and Germany. The anti-sweatshop movement aimed to attract the attention of consumers to put pressure on TNCs to change the working conditions in which their products were manufactured. While activists believed that people in developed nations had a moral responsibility for the poor working conditions overseas, others were sceptical of the attempts to regulate and modify them. Iris Marion Young summarises the arguments of the opponents of the anti-sweatshop movement:

We are not the cause of the injustice the workers suffer, and we do not control those who are. The owners and managers of the factories clearly have a primary responsibility for the treatment workers receive, the hours they are required to work, their wages and benefits, and the safety of the work environment. They make specific cost minimization decisions that result in sweatshop conditions, they make the rules that

prohibit bathroom breaks or days off, they lock the doors and verbally abuse the workers, they or those they hire threaten and beat workers who try to organize unions. If there are any agents to blame for the plight of these workers, surely the owners and managers must be first in line [...]. We who go to work and school here in Chicago have no connection to workers in Bangkok or Manila or Tegucigalpa. However awful the conditions under which they work, we have not caused them, and we are not in control of the factors that would remedy them (2004, pp. 365-367).

This chapter will argue that, while in most cases owners and managers of factories have direct responsibility for the harms that workers suffer there, this does not mean that no one else bears any responsibilities for such conditions, or that the responsibility of the factories only arise from the harm they directly inflict. In the case presented above, students and workers in Chicago, as well as corporations of other sectors, may not be directly exploiting child labour in a sweatshop in Tegucigalpa, but they can be allocated some responsibility for the human rights harms suffered there. Such responsibility does not only arise from their decisions and actions as consumers or as sellers of such products, as the activists stressed, but also from their support for a global institutional order that foreseeably and avoidably produces human rights deficits, as argued in Chapter 5. This chapter will introduce supplementary grounds for allocating moral responsibility to TNCs, namely, actively benefiting from harm.

In the broader literature, the central presuppositions of the global institutional approach have been subject to intense scrutiny and have given rise to several objections. For example, criticisms have focused on the moral significance the approach attaches to the membership in an institutional order, its focus on negative duties, as well as its proposition that non-elites as well as elites can be ascribed responsibility for institutionally mediated harms. This chapter will argue that even though the current framework shares some propositions with the global institutional approach, it is not subject to the same objections, at least not to the same extent. Given that TNCs can be considered as elites with significant capabilities to impact on the institutional order, either directly or through national governments, their connection to the harms

engendered is much clearer. In addition, the fact that by definition TNCs exist and operate within a global institutional order contributes to clarifying why the institutional order should be ascribed moral significance.

6.2. Benefiting as Additional Grounds to Allocating Moral Responsibility to Transnational Corporations

In previous chapters it was noted that several recent accounts allocate moral responsibilities to TNCs according to an interactional notion of impact, i.e., according to corporations' direct causation of and contribution to human rights harms. This grounding is relatively unproblematic for the allocation of moral responsibility as "[...] the question of responsibility in a certain unjust situation is commonly answered simply by asking who caused the outcome" (Wettstein, 2009, p. 135). However, this thesis has contended that such notions of impact should be expanded to encompass the contribution of corporations to the shape and maintenance to the global institutional order, which foreseeably and avoidably engenders human rights harms.

Further, there is at least one other significant grounding to be used in allocating duties to TNCs: actively benefiting (or profiting⁶⁸) from injustice (Pogge, 2008, p. 203). It is possible to make a distinction between two types of benefits: 'active benefiting' and 'being passively benefited by' (Anwander, 2005, p. 43). Active benefiting refers to the

⁶⁸ Profit and benefit are two concepts that are commonly used interchangeably (Anwander, 2005, p. 39), however this chapter will only use the term 'benefit' so as not to confuse it with the Marxist definition of profit –although it is clear that Pogge does not refer to this meaning. According to Marxist political economy, the owners of the means of production profit by extracting surplus value from the labour power of members of the proletariat. In turn, surplus value can only be generated by exploitation: paying to the workers less than the value of what they produce. For example, it could be argued that companies like Kodak, which provide X-ray products and services, have indirectly benefitted from the Hiroshima bombing in the Second World War. However, the company is not profiting (in the Marxist sense) from the technical discoveries but from the surplus value extracted from exploited workers, and the products they sell are simply means to conduct economic exchange. Therefore, unlike people who receive radiation and who might be said to passively being benefited by injustice, companies are actively benefiting from wrongdoing and contributing to maintaining a capitalist system that by definition reproduces injustice. From a Marxist perspective, profiting always contributes to producing some harm as exploitation necessarily takes place in capitalism. The purpose of this section however is not to discuss the creation of profit but to establish grounds to allocate responsibility. Therefore, this chapter will only refer to benefit without equating it with profit understood as the direct result of exploitation.

cases in which one seeks to take advantage of injustice, to reap a benefit at the expense of someone else. In contrast, one may passively be benefited by harm even if one did not participate in producing it, if one does not seek to perpetuate it and if one contributes to mitigating its consequences. Examples include employees of poverty relief organisations and academics who write about poverty. Although they are being benefited in some way by the existence of misery, they do not actively seek to perpetuate it or actively benefit from distress (Anwander, 2005, p. 43).

However, this sort of passive benefiting is relatively rare in cases involving TNCs and human rights deficits; instead, active benefiting is much more frequent. For example, in the case of the anti-sweatshop movement, the activists acknowledged they were benefiting from the exploitation of workers abroad by having access to an abundance of cheap clothes. Here, one could argue that they passively were being benefited by the cheaper prices engendered from the differential in wages and the current global division of labour. While it might be true that consumers in developed nations have little direct control over the conditions of sweatshops, by buying cheap clothes manufactured in such places they are in fact actively taking advantage of injustice as they reap a benefit at the expense of the sweatshop workers (Pogge, 2005d, p. 72). Likewise, the clothing retailers who use sweatshops can be said to actively take advantage of injustice insofar as they are making use of the established division of labour, which foreseeably engenders human rights deficits for a large part of the global population. Seeking to follow the lowest environmental standards or paying low wages means that they are benefiting at the expense of someone else's income, health, welfare, etc.

Contributing and benefiting from injustice tend to be closely related. They are, however, independent grounds for allocating responsibility. Benefiting from injustice does not necessarily entail that the beneficiary is contributing to or causing injustice, and *vice versa*. Anwander (2005, p. 40) provides the example of benefiting from the nuclear bombings of Hiroshima and Nagasaki during the Second World War. Most of the

current safety data used to set radiation doses in medical practice can be directly traced back to events which many have seen as disproportionate and otherwise unjust use of force against civilian populations (Lackey, 2003; Rawls, 1999b). Therefore, it might be argued that any person who has had an X-ray or had undergone radiotherapy has indirectly been benefitted by the harms inflicted on the people in Hiroshima. However, they cannot be as easily charged with causing or contributing to the injustice suffered there.

While contributing to injustice does not necessarily entail benefiting from it, most of the times it does, particularly in cases involving TNCs and human rights violations. It is unlikely that a company would willingly and knowingly cause or contribute to injustice unless it received some benefit or the costs of halting its contributions were high. Paying low wages to manufacturing workers and avoiding implementing health and safety measures means that companies can cut costs to offer low prices, thus remaining competitive and generating profits. In turn, the cases in which the people who benefit do not have any connection or do not contribute in any way to injustice are very rare in the real world (Anwander, 2005, p. 40).

Although the proposed Institutional Responsibilities Framework draws on Pogge's institutional account, it recognises that the stringency of the moral responsibility of corporations and the wrongness of benefiting from injustice are significantly different from those that Pogge attributes to ordinary citizens of affluent countries. Given that the governments of affluent democracies are elected by their citizens, respond to their interests and benefit them, those citizens are said to share a responsibility for the human rights deficits engendered by the structural design their national governments uphold and contribute to shaping (Pogge, 2008, pp. 27-28). They can thus be ascribed negative duties not to uphold or participate in a global institutional order that foreseeably and avoidably leads to human rights deficits. In order to discharge their duties, such citizens can opt to stop participating in the institutional order by not paying taxes or migrating to an

impoverished country. However, given that such options are unreasonably onerous, citizens of affluent countries can instead opt to make compensation for their contributions to the global order. They can do so, for example, by advocating for institutional reform or by supporting poverty-relief organisations and making contributions as a form of compensation for harm (Pogge, 2008, p. 26). Nonetheless what they can do to discharge their duties is limited by their powers as citizens. Ordinary citizens cannot do much more than writing letters to their government, voting for a government more committed to fight for social justice, engaging in political debates, etc.

The alternatives corporations have at their disposal to discharge their duties not to contribute to a harmful global order are considerably different from those of citizens of affluent countries. Nor are corporations in a wholly analogous position to individual citizens. Take for example, a large British bank that trades in the food commodities market. If such bank decided to establish its headquarters outside the United Kingdom and stopped paying taxes to the British government, it would not necessarily mean that the company would have stopped contributing to injustice via the global institutional order. Even if it moved to an impoverished country, implying that it is a state which does not have a prominent role in the maintenance and shape of the current arrangement, the bank could still contribute to and uphold the existing institutional system by continuing participating in food speculation, or by lobbying to prevent the restriction of such practice. For corporations then, the option of emigrating would not mean they have stopped upholding unjust global institutions. Furthermore, given that TNCs can operate in different countries at the same time, even if a corporation ceased operations in one country it could still contribute significantly to harm in or from another.

The differences between the mechanisms available to citizens and companies to discharge their duties also should alter the perceived wrongness of benefiting from injustice. Pogge (2005b) and Anwander (2005) argue that it is not always wrong to benefit from injustice as long as certain conditions are met. Pogge again argues that

contributing to injustice or benefiting from it is not always wrong as long as we compensate the victims “[...] by making as much of an effort, aimed at protecting the victims of injustice or at institutional reform, as would suffice to eradicate the harms, if others followed suit” (2005d, p. 70). In turn, Anwander (2005, p. 46) argues that benefiting from injustice is not always wrong as long as we do not also contribute to unjust harm. While he does not claim that benefiting from injustice is not wrong *per se*, he acknowledges that the close relation between benefiting and contributing to injustice may lead to confusing cases where someone is merely benefiting instead of contributing and benefiting. Thus, he notes “[...] relevant actions are wrong not in virtue of benefiting from injustice but on account of some other factor, most plausibly that we are *contributing* to unjust harm” (emphasis original) (Anwander, 2005, p. 41).

Pogge argues that consumers of products manufactured in sweatshops do not necessarily do wrong by buying such things; what is wrong is to pocket the gain of unjustly low prices, which are a reflection of the externalisation of costs (2005d, p. 72). As an alternative, people in developed countries can buy fair-trade products or make donations to an antipoverty organisation such as Oxfam, in order to compensate for the harm they indirectly inflict by sustaining clothing production in sweatshops (Pogge, 2005d, p. 72). Here, it would seem as if Pogge suggests that it is not all that bad to benefit from child labour by buying cheap clothes so long as those who buy them make some sort of compensation. This, I believe, could lead us to think about the poor as a pool of people rather than as individuals, as giving money to Oxfam would not guarantee that those affected by our decisions as consumers will be compensated. However, I think that what Pogge has in mind is that given that the global institutional order engenders injustice, it is not morally relevant where we direct our efforts to reform the institutional order as in the long run everyone would be able to enjoy the benefits of a fairer system.

Reading Pogge’s account one could also be led to believe one can “offset” injustice in general by providing some sort of compensation. For instance, he argues that

negative duties not to collaborate and not to benefit from injustice “[...] do not make it wrong to contribute to, or to profit from, a collective injustice when one makes compensating protection and reform efforts for its victims [...]” (Pogge, 2005d, p. 69). This could potentially lead to perverse incentives, as corporations may think they could get away with contributing to injustice as long as they provide compensation. However, it is important to note that Pogge does not argue that any harm or injustice is necessarily acceptable so long as we provide redress. It is only given that it would be unreasonable and very onerous –if not impossible– for a person to stop participating in an order that is collectively maintained, that it is possible to discharge such negative duties by compensating the victims of harm.

My Institutional Responsibilities Framework for TNCs holds a similar position insofar as it does not require corporations not to benefit from harm at all. However, it contends that the duties placed upon corporations can be more demanding than those expected of citizens. The wrongness of benefiting in a global institutional system is “offset” if citizens of affluent countries make some compensation for such injustice, because the alternative is unreasonable and perhaps impossible to realise. In contrast, the case of corporations is different, as they have more alternatives available to discharge their moral duties and they have significantly more influence on the configuration of the global institutional order, not only via national governments but also by participating in international negotiations or by acting within the private sphere, as discussed in the previous chapter. What TNCs can do to help shape the global order so as to honour their negative duties is considerably greater, particularly in the case of large and wealthy transnational corporations.

One example is the requirement of government of the United States to Internet service providers such as Google, Facebook and Yahoo! to disclose information about their users to the US National Security Agency (NSA), which has been perceived as threat to the right to privacy and freedom of expression. These companies have had to

comply to maintain the secrecy of the agency's requests as revealing such information is considered as revealing government secrets and committing treason against the United States, which means that their executives could face jail penalties. However, they have pushed for the right to be allowed to publish the number of requests they receive from the agency and Yahoo! has (unsuccessfully) sued the foreign intelligence surveillance court, which provides the legal framework for NSA surveillance (Rushe, 2013). Similar cases can be found in China, where companies such as Google and the micro-blogging service, Twitter, are required to limit the information its citizens can access as a form of control, and arguably, in detriment of freedom of speech. While these companies have to follow the law in order to continue operating in China and thus can be accused of being complicit in human rights violations, they have tried to implement some (modest) measures to avoid participating in such harmful practices. For example, Google suggests to their Chinese users alternative keywords to those banned by the government and also, from 2010, it began redirecting mainland China users to its Hong Kong site after concerns over censorship and hacking (UNGC, 2013d). Similarly, Twitter, announced that it is developing technology with the aim of preventing repressive governments from being able to censor its users (UNGC, 2013d). While these companies might not be doing enough to "offset" the harms to which they contribute, these cases exemplify that corporations have some resources at their disposal to try to challenge some harmful laws and institutions.

Thus, the cases in which TNCs' contributions to injustice can be "offset" by compensating the victims should be limited to those in which the injustice can be traced back to features of the global institutional order which they have limited opportunity to affect. Otherwise, they should be expected to halt harmful practices. For example, labour is one of the areas in which corporations have considerable influence. The benefit they get from the poor economic and labour conditions of sweatshops should not be allowed to be offset by simply giving some monetary compensation to victims of injustice or

charitable contributions. They can have a significant impact on changing harmful labour conditions, including implementing and complying with high standards of health and safety for their employees, paying living wages and allowing labour unions. While “business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights [...] this does not offset a failure to respect human rights throughout their operations” (Ruggie, 2011, p. 13).

Here it might be objected that sweatshops, factories in export processing zones (EPZs) and overall poor labour standards exist as a strategy for some countries to attract foreign investment. While this might be true, nonetheless this does not exempt corporations from their duties not to benefit from injustice if they can clearly avoid doing so. In contrast to ordinary citizens, corporations have several options available to avoid benefiting from injustice such as not using sweatshops, coordinating with other companies and setting industry-wide standards to improve labour conditions in their factories. A further objection, in line with the opponents of the anti-sweatshop movement, could be that if clothing retailers want to stay competitive they must make cost minimisation decisions that result in sweatshop conditions. However, while cutting labour costs is one of the possible routes to remain competitive, it is certainly not the only one. For instance, some of the largest and most financially successful companies have opted for adopting ethical standards in their operations. An example is the largest Spanish clothing distributor Inditex Group, which has brands such as Zara, Massimo Dutti, Pull & Bear and Bershka. It is not only financially very successful, but it also has been regarded as one of the most ethical business in the apparel industry; it is one of the few companies that have committed to ensuring freedom of association and that a living wage is delivered through its supply chain (Labour Behind the Label, 2011, p. 33).

For corporations, it is not enough to claim that the global division of labour has been established and they are just reaping some of the benefits of the differential of

labour prices, producing cheaply and selling at a high profit. TNCs, unlike citizens, can do more to alleviate injustice and change the structures that contribute to systematic harm. This further restriction is also true as some of the harms inflicted cannot be truly compensated *post hoc*, as in the case of destruction of ecosystem or deaths. Note, however, that in contrast to the positive duties approach, the Institutional Responsibilities Framework does not attribute positive duties to corporations based on their resources or capabilities. Instead it claims that corporations bear negative duties to respect human rights, and in order to fulfil them corporations should avoid benefiting from, contributing to and upholding institutions that foreseeably engender human rights deficits. Fulfilling their negative duties entails some derivative positive duties. Those are the subject of the next chapter.

So, to this point, this thesis has argued that it is possible to ascribe moral responsibilities to corporations on the basis of their direct and indirect impacts on human rights, including their participation in a global order that foreseeably and avoidably engender human rights deficits. This chapter has highlighted another route to allocating responsibilities to TNCs, on the grounds of the benefits they can actively reap from injustice. Introducing the additional sources of responsibility does add complexities in allocating specific responsibilities, however, as discussed in the next section.

6.3. Allocation of Responsibility

Approaches associated with the interactional moral account such as the UN Framework tend to focus on tracing human rights harms to identifiable sources, to the actions and decisions of particular agents. Therefore, attributing and allocating moral responsibility in many cases can be reduced to asking who produced or contributed to causing harm. In contrast, in the institutional account, responsibility is attributed on the basis of the contribution of individual or collective agents to the existence of a harmful

institutional order. It requires asking who is participating in the design and maintenance of the global order and how they are doing so. Therefore, individual contributions are harder to identify, and consequently, responsibilities are much harder to allocate and distribute. It is possible, however, to identify some ways in which this can be done.

One possibility would be allocating responsibilities according to the marginal contribution of each company to producing harm. This is problematic, however, as it is impossible to know precisely which effects can be attributed to the conduct and decisions of specific corporations. As corporations' decisions reverberate around the world, their effects intermingle with the billions of decisions made by other corporations and individuals, making it impossible to disentangle the impacts of individual decisions (Pogge, 2007, p. 17). For instance, while it could be argued that a giant retailer that uses sweatshop labour has contributed more than a small firm to the continuation of the current division of labour, it is not possible to assess each one's marginal contribution. Furthermore, the indirect effects of each company's decisions are not only too numerous to trace, but they are also impossible to estimate because it cannot be accurately deduced how one decision of a company affected the decisions others later took (Pogge, 2007, p. 17).

Another option is allocating responsibilities according to the benefits a company is reaping from the current shape of the global institutional order, measured against a fairer and feasible alternative: the larger the benefit, the more responsibility. Thus, even if it is not possible to establish the exact contribution of pharmaceutical companies to the creation of the TRIPS Agreement, it is possible to roughly calculate how much more each company is actively benefiting from the protection of intellectual property than it would in a scenario where the agreement did not exist. The advantages the company enjoys as a result of the shape of global institutions and the global institutional order could serve as a benchmark for distributing responsibilities. This could be a more feasible

alternative insofar as in several cases it is possible to assess some of the benefits companies are reaping from the existence of a harmful institutional order.

This proposition, nonetheless, also has some limitations. For instance, the benefits that can be quantified might not reflect the actual contribution of companies to the production of harm. A company that significantly contributed to the adoption, shape and maintenance of an institution, but which did not then reap significant benefits, might seem to hold less responsibility than others that contributed equally but benefitted more. As noted, however, those most frequently contributing to and benefiting from harm are generally related. Thus, the benefit a company is reaping from a harmful situation could be a good reflection of its contribution to harm. The second shortcoming of this approach is in setting a baseline to determine what the company's situation would be without the harmful institution in place. In the example of TRIPS, while it could be possible to calculate the portion of a corporation's earnings that come from patented drugs, is not possible to know whether or not those earnings only correspond to the fact that such medicines are protected under an international agreement.

A third possibility is distributing responsibilities according to special attributes such as capabilities or power: the greater these attributes, the greater the responsibility. "While everyone in the system of structural and institutional relations stands in circumstances of justice that give them obligations with respect to all the others, those institutionally and materially situated to be able to do more to affect the conditions of vulnerability have greater obligations" (Young, 2004, p. 371). Note that in comparison to the positive duties approach, duties are not being allocated to corporations as a function of specific attributes and regardless of their connection with the harm in question. What is proposed in this approach is that once it has been established that TNCs bear some responsibility for harms they inflicted directly or contributed to inflicting via the global institutional order, responsibility can be allocated among them according to special traits or privileged position. Thus, a powerful company with significant leverage to influence

the shape of the global institutional order may be allocated more responsibility even when it has not benefitted as much as another one, which has comparatively less capabilities to influence the shape of the global order.

These three proposed criteria to allocate responsibilities are, in fact, related. Powerful corporations frequently benefit more than small companies from the established global institutional order, which arguably has allowed them to amass significant power in the first place. Given that part of their power comes from the current shape of the global order, they have incentives to contribute to its maintenance and may have significantly more resources at their disposal to do so. Despite the fact that allocating responsibilities among corporations is necessary to operationalise the proposed Institutional Responsibilities Framework, its most important contribution is not offering ways to quantify the responsibilities of corporations (see Young 2004, 379). Rather, the main contribution is highlighting the participation of transnational corporations in social processes that have some unjust outcomes, for which they can be ascribed moral responsibility. Realising that corporations can have negative impacts on human rights both directly and by participating in structural processes serves as a basis to require corporations to contribute to change the global order to avoid or reduce injustice, not as a matter of benevolence or charity, but because they bear a stringent moral responsibility to do so. This assertion starkly contrast with the traditional view on corporate responsibility, which has been regarded as largely philanthropic and subjective (Robinson, 2003, p. 9).

6.4. Possible Objections to the Proposed Approach

As noted, Pogge's approach has been subject to rigorous analyses and several of its assumptions and implications have been subject to criticism (see Anwander, 2005; Chandhoke, 2010; Cohen, 2010; Cruft, 2005; Gilibert, 2005; Patten, 2005; Risse, 2005a; Satz, 2005; Steinhoff, 2012; Tan, 2010). This section details further ways in which, while

the Institutional Responsibilities Framework draws on Pogge's account it is not subject to the same criticisms. The fact that it focuses on a defined set of moral agents with certain qualities (i.e. transnational corporations), as opposed to 'citizens of affluent countries', allows it to overcome some of the weaknesses identified in the global institutional approach. Furthermore, the proposed approach can complement the diagnosis it makes about the configuration of the global institutional order and therefore, the allocation of responsibility to moral agents. This section will introduce some of the more frequent and stronger objections to the global institutional approach and will test their validity for the Institutional Responsibilities Framework.

6.4.1. Objection 1: Human Rights as Claims Against Those Who Share an Institutional Order

One of the main criticisms against Pogge's approach is its particular conception of human rights, as claims against those who share a global institutional order, as opposed to claims from all human beings against all others (Caney, 2007; Tan, 2010, p. 48). Limiting human rights protection to only those subject to a common institutional order, it is argued, "removes protection from the most vulnerable", since frequently the most defenceless are precisely those considered as non-members of a given social order, as in the case of colonialism (Tan, 2010, p. 50). However, as Pogge has clarified, the institutional conception of human rights does not imply that the members of an institutional order do not have any duties towards non-members. "[...] Our human rights-based obligations are indeed limited in scope to those relevantly affected by institutional arrangements we contribute to upholding. But our human rights-based duties are universal" (Pogge, 2010b, p. 197). This means that members of an institutional order have a universal duty to avoid doing harm to members and non-members of such arrangement, just as we may have a universal duty to keep a promise or not to kill.

However, our human rights-based obligations are activated by particular empirical circumstances, such as sharing an institutional order or making a promise.

A more fundamental objection has pointed to the moral significance that is attached to the institutional order of which one is member (Caney, 2007; Chandhoke, 2010). “If someone is born into an impoverished system that has no links with the rest of the world, a wholly institutional approach⁶⁹ must maintain that members of the latter have no duties of justice to the former [...]” (Caney, 2007, p. 283). Attaching moral significance to a shared institutional order in practice penalises people for their membership to a particular scheme, which is as arbitrary as birthplace (Caney, 2007, p. 283). The distinction between members and non-members of an institutional order has theoretical importance, because individuals can exist outside an institutional order or even without it. In contrast, transnational corporations by definition can only exist within a shared transnational institutional order that includes some economic rules, trade agreements and international legal norms.

Furthermore, the institutional approach has significantly different implications for the discussion of the responsibilities of TNCs than it has for the responsibilities of individuals. The interactional conception of human rights argues that such rights are entitlements every person can claim against all others on the basis of humanity. Thus a “weak connection” such as humanity is enough for generating human rights obligations against all other human beings. In contrast, the institutional approach argues that for human rights obligations to arise, a stronger connection is necessary between right-holders and duty-bearers, namely, a shared institutional order.⁷⁰ Recent accounts of corporate responsibility suggest that TNCs have duties in relation human rights that arise from a strong connection with the duty-bearers. Advocates of the positive duties approach frequently relate this strong connection to a shared geographical space between

⁶⁹ See supra note 62.

⁷⁰ Here I am describing humanity as a “weak connection” in comparison to a global institutional order because the former is shared by more individuals than the latter.

the company and the right-holders, which is as indicated by the term 'sphere of influence' that we previously saw critiqued by Ruggie.

In this context, Sorell argues that “[...] when businesses have the opportunity to promote or protect human rights where they operate, they are often also obliged to do so” (2004, p. 130). Similarly, Kolstad contends that “[...] duties to secure human rights can [...] be quite extensive and demanding in certain situations. Multinational corporations operating in poor and/or undemocratic countries may face particularly extensive obligations” (2008, p. 581). In a similar vein, Wettstein adds that “[...] the positive duty to protect is tied more closely to a corporation’s capabilities. Because the capability of a corporation to protect human beings from human rights violations is dependent on its proximity to the potential perpetrator, it is closely related to the concept of complicity in general [...]” (2009, p. 305). This strong connection is not only present in the attribution of positive, but also of negative duties. For example, the UN Framework considers that corporations may negatively impact on the human rights of those with whom they share some strong connection, such as a contractual agreement or a business relation (Ruggie, 2008, p. 17).

The Institutional Responsibilities Framework, however, holds that even when the company does not share a geographical space or does not have a strong and direct connection to the right-holder, it can be allocated stringent moral duties that arise from a shared institutional order. Thus, while the institutional approach narrows the set of human beings towards whom we have human rights obligations, it enlarges the group of those to whom transnational corporations are presumed to bear moral duties. For the Institutional Responsibilities Framework, connections are still important to give rise to human rights obligations; however, it holds that “weaker” connections than a shared geographical space or contractual relations are morally significant.

6.4.2. Objection 2: The Role of the Global Institutional Order

The global institutional approach argues that the current institutional order is harmful as it foreseeably and avoidably engenders human rights deficits, including severe poverty. In contrast, it has been objected that the global order does not harm the poor and in fact, it benefits them thanks to the “miraculous” economic progress of the past 200 years (Risse, 2005, p. 12). Moreover, it has been argued, the institutional order has created conditions for countries to economically develop, as in the cases of China and India (Cohen, 2010, p. 32). However, the baseline against which the institutional approach compares the current order is not an historical one. Instead, it is defined in terms of a just regime feasible at the time in question. “An institutional order harms people when its design can be shown to be unjust by reference to a feasible alternative design” (Pogge, 2008, p. 25).

Nonetheless, even when one accepts this assertion, it is unclear that most human rights deficits can be attributed to the global order. While it is true that not all human rights deficits can be traced to national factors, not all human rights deficits can be explained as a function of the configuration of the global institutional order. The purpose of the proposed framework nonetheless is to emphasise the harms the institutional order engenders. This is because the domestic factors of harm, such as the complicity of corporations with corrupt governments, have received much of the attention. In contrast, the contributions of corporations to the structures that create incentives for the continuation of such behaviour are much less explored. The Institutional Responsibilities Framework does not deny the importance of domestic factors for the explanation of human rights deficits, but it considers necessary to also include in the analyses structural harms and the contribution of TNCs to them.

A further objection is that even when it is accepted that the global order inflicts harm, this does not mean that some relatively small changes in global rules will suffice to

overcome most of the current deficits (Wenar, 2010, p. 127). For instance, Wenar argues that it is not realistic or feasible to expect to completely abolish the ‘international resource privilege’ –the international recognition conferred on anyone who exercises effective power to claim legal ownership over the natural resources of the country in question– given the high economic and political stakes involved (Wenar, 2010, p. 133).

Oil companies are very powerful transnational actors. Four of the top five, and seven of the top ten, largest privately traded corporations in the world are oil companies. Their priorities are to locate as much as they can, extract as much as they can, and send as much as they can on to consumers. [...] The resource privilege, so deeply implicated in how rich countries get their most vital resources, will not be easily restructured (Wenar, 2010, p. 134).

Note that part of the difficulty Wenar finds for changing the system relates to the interests of transnational corporations, which along with those who sell the natural resources and the countries who enable conditions to store and transfer these funds, are the major components of this problem. If citizens of affluent countries were considered responsible for this harmful institution as in Pogge’s approach, reforming it would be predictably a difficult and slow process. However, transnational corporations have significantly more power and capabilities to challenge and modify this system. While it is true that the current order creates incentives for corporations to preserve the status quo, this does not negate a compelling moral responsibility for them to avoid doing so.

6.4.3. Objection 3: Negative Duties Are Not Necessarily More Stringent

The global institutional approach argues that the global rich should make some efforts to modify the current global order, but not on the basis that such changes will clearly alleviate human rights deficits. Instead, it is argued, such efforts are required if people want to discharge their negative duties to avoid doing harm without adequate compensation. However, the idea that the duty not to do harm is more compelling than the moral injunction to alleviate suffering or ensure full justice has been questioned

(Cohen, 2010, p. 28). In response to this objection Pogge has argued persuasively that one of the purposes of appealing to negative duties is to make the argument more compelling to citizens of affluent countries and more effective for the alleviation of harmful conditions, particularly world poverty (Pogge, 2008, pp. 176-177). Frequently, citizens of affluent countries feel they are not responsible for such conditions because they are geographically distant or because they attribute them to the corrupt and ineffective institutions of developing countries. In unveiling the connections that people of developed countries have to the preservation of the institutional order, Pogge aims to demonstrate how ordinary citizens of affluent countries are implicated in such harms, and therefore bear some moral responsibility for them.

Similarly, the purpose of developing a framework on the grounds that TNCs bear stringent negative duties is twofold: reconciling the moral demands of TNCs with their profits goal and making the duties more compelling to companies. As argued in Chapter 4, allocating *prima facie* positive duties to transnational corporations is hard to reconcile with their main purpose. While it is true that TNCs frequently have more capabilities than many states, this is not a sufficient condition to transfer to them the duties that have traditionally belonged to the state. Transnational corporations have also tended to reject the claim that they have positive duties of justice on the basis of their capabilities. Instead, they seem to regard them as discretionary duties of beneficence. However, TNCs have tended to accept that they bear negative duties to avoid doing harm, which has been reflected in the favourable reception of the UN Framework and the Guiding Principles within business circles. Thus the Institutional Responsibilities Framework builds upon this accepted principle, but it adds that the negative duties to avoid doing harm must include the participation of corporations in the global order. Showing that corporations have some connection to the harmful conditions suffered abroad and appealing to their accepted negative duties may have considerably better prospects for acceptance, as developments discussed in the next chapter seem to indicate.

6.4.4. Objection 4: Privileged Agents as Duty-Bearers

Some commentators have objected to the leap the global institutional approach makes from attributing responsibility to affluent countries to concluding that their citizens should be held responsible for the harms the global institutional order engenders (see Steinhoff, 2012; Satz, 2005). In his account, Pogge seems to assume that the citizens of affluent countries exert considerable influence on their governments' decisions and their foreign policy. Thus it seems that Pogge is equating the citizens of affluent countries with citizens of democracies. Indeed he has referred to this group as the "privileged citizens of the rich democracies" (Pogge, 2005c, p. 45). Nonetheless, not all the wealthiest countries have this political system. For example, China can increasingly be regarded as an "affluent country" in terms of macroeconomic indicators such as its GDP and annual growth. It is the country with the third largest nominal GDP, after only the United States and Japan, and it is one of the fastest growing economies of the last decade. Yet, given that China is a non-democratic country, it is questionable that its citizens can exert considerable influence on their government's behaviour.

Even in democratic states, the ascription of stringent responsibilities to citizens may be problematic. It has been questioned whether non-elites, and especially the worse-off citizens of affluent countries can plausibly be assigned stringent responsibilities for harmful conditions abroad only on the basis of their membership in a nation-state (Satz, 2005, p. 51). Questions also have been raised around whether those such as young children who cannot be said to have contributed to imposing the global institutional order should be held accountable for it (Cabrera, 2010, p. 91). The implausibility of holding citizens accountable for all of their governments' decisions has also been noted, as many decisions salient to the present discussion are not subject to democratic deliberation and scrutiny (Satz, 2005, p. 50; Steinhoff, 2012, pp. 132-135). Pogge has partly addressed these objections. He has argued that while citizens of affluent countries

bear responsibilities for the harms the global order engenders, those who have more capabilities, privileges and influence bear more responsibility for their country's policies than fellow citizens with the opposite characteristics (Pogge, 2005d, p. 80). Also, he asserts that, while many political decisions are made behind closed doors, it is the responsibility of citizens to insist on transparency and accountability (Pogge, 2005d, p. 79).

The issue of the responsibilities of non-elites and non-contributors is significantly less problematic in the case of transnational corporations. This is because TNCs can be regarded as economic elites which are clearly contributing to and benefiting more from the institutional order than unprivileged citizens of affluent countries. Furthermore, in contrast to ordinary citizens, corporations have comparatively more access to information through their connection with political figures, as exemplified by the revolving door phenomenon described in Section 5.6.2. They also often have privileged access to national and international policy-makers, forums and negotiations.

The global institutional approach sees individuals as contributing to shaping and maintaining the global institutional order through their governments. The Institutional Responsibilities Framework recognises that transnational corporations may contribute in the configuration of the global institutional order through governmental channels and outside them. Therefore, it does not solely ascribe duties to corporations of developed countries, but to TNCs in general. While the bulk of the largest transnational corporations are headquartered in developed countries, there are also many TNCs from emerging economies, which can considerably contribute to shaping and maintaining the global institutional order within the political and private spheres.

6.4.5. Objection 5: The Approach Is Very Demanding

Another common objection to the allocation of responsibility within the global institutional approach is its excessive demandingness upon individuals (Ci, 2010, p. 86; Steinhoff, 2012, p. 124). It has been argued that the institutional approach exaggerates the input of average citizens, which according to some is “at least infinitesimally close to zero” and it is compensated by even small contributions to development aid or charities (Steinhoff, 2012, p. 124). However, while the individual contribution of individuals to the shape and maintenance of the global institutional order may be considered as negligible, the contribution of TNCs, especially the largest and most powerful ones, is not. While most common citizens must act collectively to generate substantive changes, and their success partly depends on the action of their fellow citizens, large transnational corporations can significantly accomplish more change even if they act singlehandedly, especially where they are leaders of their industries.

6.5. Conclusion

This chapter proposed a distinction between actively benefiting from harm and being passively benefited by it, and argued that the former can be considered a morally significant ground for allocating responsibilities to transnational corporations. Pogge’s institutional approach holds that it is not always wrong to contribute to or to benefit from injustice as long as there is some compensation to the victims. The possibility of “offsetting” the wrongness of harms seems to be at least partly allowed due to the limited power of individual citizens; if the person does the most she can as a citizen to change such conditions of injustice and she is not successful, the benefit she obtains from harm can be somewhat dispensed by compensating the victims. In contrast, at least the largest TNCs can have significantly more impact on the configuration of the global institutional order and therefore, the ‘compensation clause’ should only be applied when they cannot

plausibly be expected do more to avoid actively benefiting from and contributing to harm. The proposed Institutional Responsibilities Framework thus allocates significantly more responsibilities to corporations than those that Pogge attributes to citizens of affluent countries.

Besides detailing the grounds for attributing responsibilities to transnational corporations, this chapter also discussed some possibilities for allocating responsibilities among corporations and argued that, even when it is difficult to calculate the individual contributions of each company to the global institutional order, it does not mean that they do not have a relation of responsibility to the process that produces harm (Young, 2004, p. 372). While this discussion is significant, the purpose of the proposed Framework is not to establish the exact responsibilities of every corporation, but to bring to attention the institutional channels through which corporations can contribute to inflicting harm.

Finally, the chapter addressed some of the strongest criticisms of the global institutional approach and evaluated their validity for the proposed framework. It argued that even when both approaches share similar principles, the Institutional Responsibilities Framework is not susceptible to the same objections, or at least not to the same extent. This is because, in contrast to citizens of affluent countries, transnational corporations have significantly more leverage to impact the global institutional order. Furthermore, unlike citizens, corporations by definition operate within a global institutional order.

Chapter 7. Implications of the Proposed Framework

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted.

–Dwight D. Eisenhower, US President 1953-1961

7.1. Introduction

This chapter will present an overview of some of the theoretical and practical implications of the proposed Institutional Responsibilities Framework. As argued in Chapter 4, the moral duties of TNCs can be mainly understood as negative duties to avoid doing harm. While most of the recent approaches to corporate responsibility tend to focus solely on the harm corporations directly inflict, Chapter 5 argued that it is possible to allocate responsibilities to corporations according to their contributions to a harmful institutional order. Chapter 6 added that actively benefiting from harm is also a morally relevant ground for attributing responsibilities to transnational corporations. While TNCs bear primarily negative duties, in order to fulfil them, corporations are required to also discharge a set of positive duties, including duties of due diligence, duties of coordination, duties to strengthen the capabilities of the nation-state, duties to promote institutional change, and duties of accountability. There is, however, another set of duties that do not derive from their negative duties to respect: duties of rescue.

TNCs are compelled to discharge them in certain extraordinary situations, even if they did not contribute to bringing about a regretful outcome and are not actively benefiting from it. These duties will be discussed in this chapter.

The proposed Institutional Responsibilities Framework also has some important implications for the UN Framework. The latter attributes negative duties to TNCs to avoid doing harm on the grounds of their recognition in mechanisms of soft law, on the expectations that society has for business, and on enlightened self-interest. Such grounds are nonetheless insufficient to advance human rights, because they are susceptible to changing social practices and the interests of TNCs. Incorporating the proposed Institutional Responsibilities Framework would give more coherence to the UN Framework by explicitly allocating duties of justice to corporations. While both frameworks develop from the premise that TNCs bear mainly negative duties to avoid doing harm, the contribution of companies to shaping and upholding a global institutional order requires expanding the UN Framework's notion of impact, and therefore the scope of corporate responsibility.

Finally, the chapter will discuss some of the implications of the proposed framework for the global institutional approach to allocating moral duties. Both stress that human rights harms come about as a result of the configuration of the global institutional order. However, the Institutional Responsibilities Framework has argued that some TNCs can have similar, if not superior capabilities to states in shaping the global institutional order by participating in the political and private spheres. Therefore, if TNCs can be seen as independent and powerful actors in the global arena, it is necessary to re-evaluate the moral responsibilities Pogge allocates to citizens of affluent states for their part in helping to shape the global institutional order.

7.2. Derivative Positive Duties

Frequently, discharging a negative duty requires a moral agent to avoid doing something. For example, a negative duty not to kill an innocent person requires that one refrains from doing so. However, sometimes to fulfil a negative duty one must actively do something. The duty not to break one's promises requires an action, for example, that one repays the debts which one has incurred (Pogge, 2010b, p. 193). Thus it can be said that a debtor has an obligation to pay debts, which derives from an original negative duty not to break promises. While all TNCs, large or small, of any industry may bear negative duties to respect human rights, what is required from them to fulfil such duties may vary. For example, a big retailer such as Wal-Mart can be said to bear the same duty to respect human rights as a small company, but what it is required from both of them can be significantly different depending on the possible impacts they may have on human rights. The following sections will outline some of the derivative positive duties that can be attributed to corporations.

7.2.1. Duties of Due Diligence

Transnational corporations have negative duties to avoid inflicting, contributing to and actively benefiting from harm, both directly and through the global institutional order. "To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts" (Ruggie, 2008, p. 17). As has been argued in previous chapters, the UN Framework tends to link impact to unmediated corporate agency, and therefore the areas in which it specifies that TNCs may contribute to or cause harm are significantly limited. However, the UN Guiding Principles extended the scope and stated that human rights due diligence "[...] should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may

be directly linked to its operations, products or services by its business relationships” (Ruggie, 2011, p. 17). In addition, the Spheres of Responsibility Framework (see Section 5.4) argues that in order to address indirect harm, it needs to broaden due diligence obligations to include looser contractual and networked relationships within supply chains (Macdonald, 2011, p. 558). Recent developments have demonstrated that the most progressive corporations have started to include in their due diligence processes value-chains, joint ventures, mergers, acquisitions and disposals, suppliers and service providers, licensing and franchising, and direct customers and investor-state relationships (IHBR & GBI, 2012, p. 24).

In order to survey the instances in which TNCs may also inflict institutionally mediated harm, their participation in the global institutional order should be included in due diligence processes. As a result, the areas that corporations include in their assessments should be considerably widened. For instance, according to the Institutional Responsibilities Framework, corporations would be required to consider foreseeable long-term consequences of policies, organisations and agreements that they support, of shared practices they can incite, perpetuate and normalise, etc. While it would certainly be difficult to predict all the potential implications of a particular policy, norm or agreement, it is possible to foresee some outcomes, and these are the only ones that corporations may be held accountable for. A paradigmatic example is the TRIPS Agreement that some industrial sectors supported (see Chapter 5). Before it became effective on January 1st 1996, several commentators noted that increasing the patent protection of drugs would be detrimental for developing countries (Dhar & Rao, 1992). In spite of objections raised before the implementation of the agreement and the demonstrably harmful effects of the agreement, it has been systematically implemented (Correa, 2000; Drahos & Braithwaite, 2002). While several mechanisms to overcome some of the harmful effects of the TRIPS Agreement have been proposed –such as tiered pricing based on a country’s ability to pay– “all of these proposals have been resisted by

the international branded pharmaceutical industry, by the U.S. government, and, to a lesser degree, by other developed countries” (Harris & Siplon, 2001, p. 35). Thus according to the proposed Institutional Responsibilities Framework, corporations could be held liable for the predictable human rights harm to which they have contributed by supporting the TRIPS Agreement.

We can note that an essential prerequisite for the attribution of responsibility in the proposed framework is the *predictability* of human rights deficits that might arise in the current global institutional order. While a specific agreement might not foreseeably give rise to human rights deficits by itself, it might do so by the context in which it operates. It can be argued that protecting intellectual property is something desirable to economically incentivise corporations to create new medicines, and that the purpose of the TRIPS Agreement did not include preventing access to essential medicines. While it is true that TRIPS does not explicitly ban access to certain types of medicine, in a world where most states are poor, the agreement contributes to an affordability gap for such goods. The possible consequences of a particular agreement or law must therefore be assessed whilst considering existing structural conditions or institutional arrangements. While the agreement does not *establish*, that is, mandate or authorise limiting access to essential medicines and food, it nonetheless *engenders* these deprivations (Pogge, 2008, p. 179). Thus, the moral assessment of these agreements is not limited to the harm it causes within a particular arrangement but also includes contributions to the continuation of a harmful arrangement.

7.2.2. Duties of Coordination

Frequently, corporations can fulfil their negative duties by refraining from acting in a particular way that would contribute to the maintenance of a harmful institutional order. At other times they may be required to coordinate with parts of their supply chain

or other companies in order to avoid doing harm or to actively benefit from it. An example can be found in the apparel industry. If clothing retailers want to discharge their negative duties it is not enough that the parts of their business operations that they directly control respect human rights. They also bear stringent duties to coordinate with the different parties to the business process in order to ensure that independent decision-making does not cause or contribute to negative human rights outcomes. For example, corporations may engage in multi-stakeholder initiatives such as the Fair Labour Association (FLA) and the Ethical Trading Initiative (ETI). The FLA conducts external audits and holds their members accountable for implementing the FLA's code of conduct across their supply chains (Fair Labor Association, 2011). Similarly, the ETI acts as a coordinating mechanism among retailers, brands and suppliers to improve the working conditions of those involved in the manufacturing process (Ethical Trading Initiative, 2013).

In the past, corporations have been reluctant to acknowledging such duties. During the 1990s major retailers and brands in the garment industry responded to anti-corporate campaigns by pointing to long chains of subcontracting and outsourcing as evidence that violations of human rights in factories were beyond their control (Macdonald & Macdonald, 2010, p. 34; Young, 2004, p. 367). Even today, many corporations opt for a distant relationship with their supply chains as a way to avoid legal responsibility in host countries (Wells & Elias, 2005, p. 150). However, it has been increasingly difficult for companies to distance themselves from the harmful conditions prevalent across parts of their business processes. For example, in 2012, the electronics company Apple was subject to intense criticism following a case of mass suicides in some factories operated by its Chinese subcontractor Foxconn, the world's largest electronics manufacturer. While Apple is not in direct control of Foxconn, it became the main target of complaints about the poor labour conditions there (China Labor Watch, 2012; Kan, 2012a). Contrary to the reaction of the clothing retailers in 1990s, Apple partnered with

the FLA and committed itself to improving workers' conditions in subcontracted factories (Kan, 2012b). As reflected in the UN Guiding Principles, there has been an increasing acceptance of the idea that TNCs bear some responsibility for what happens within their supply chain and business relations, and they can be held accountable for it.

Duties of coordination may also require companies to harmonise efforts to improve prevailing practices within a given industry. For example, corporations are likely to oppose adopting stringent environmental policies or high labour standards if they perceive those will hinder their competitive edge. Therefore, they have little incentive to unilaterally adopt them. Further, if one company decided to adopt these measures, it could make little difference if the others continued in their harmful practices. This, however, does not mean that companies are obliged to act only if the others follow suit. Rather, in such cases, coordinated action among the members of the same industry might be necessary to eliminate extending harmful practices. The demandingness of such duties would be partly determined by the capabilities of corporations and their position within an industry. A company that has a large share of the market and can set standards for the whole industry will have significantly more responsibility to do something to change the system than a small company with little leverage.

7.2.3. Duties Not to Undermine the Capabilities of the State and to Strengthen Its Capabilities to Discharge Positive Duties

Duties to protect and fulfil human rights have been traditionally allocated to the state, which has been considered the most capable and suitable actor to discharge them. This traditional view is reflected in instruments of international law such as treaties and covenants, including the Universal Declaration of Human Rights, in whose drafting process states' delegates assumed such responsibility for themselves (Ruggie, 2007b, p. 819; 2008). This consideration assumes a robust institutional framework within which corporations operate (Hsieh, 2009, p. 251) as well as the existence of a division of labour

where states are actually able to protect, promote and fulfil the human rights of the people under their jurisdiction. However, for such a division of moral labour to be effective, it must be respected by non-state agents (Kolstad, 2008, p. 573). Therefore, corporations need to respect the division of labour and refrain from undermining the ability of states to discharge their duties through harmful practices such as bribery, corruption or aggressive lobbying to obtain private gains that foreseeably undermine human rights (Kolstad, 2008, p. 576).

It must be acknowledged, however, that an image of the world where states are able and willing to protect, promote and fulfil the human rights of their populations is not always accurate (Scherer, Palazzo, & Baumann, 2006, p. 508). Even when other agents respect the moral division of labour, governments may lack the capability to discharge their full range of duties, as in the case of failed, weak and quasi-states. In these cases, states might be unable to regulate TNCs operating within their territory. Further, they may be unable to protect their population against the activities of other non-state actors, or provide effective mechanisms for redressing grievances. In this scenario, a possible way to deal with the inability of the state to discharge its role could be attributing to corporations –or in fact any other entity with superior capabilities– some of the duties of the state. This can be an appropriate response in situations of genuine emergency, where the state is temporary unable to discharge some of its duties. This is not, however, a satisfactory solution where the inoperability of the state is long-lasting. In these circumstances, it would be necessary to re-evaluate the role of the state, and non-state actors in relation to human rights, taking into consideration their functions and purposes. For instance, even if certain TNCs operating in Somalia were the most capable actors in terms of fulfilling human rights of the people in that country, that does not mean that they should be expected to replicate the role of the government wholesale, especially in the longer term.

TNCs operating in such contexts do bear more duties than if they operated in conditions where states acted as primary and generally effective agents of justice. Corporations operating in countries where governments are unable to fulfil their range of duties may acquire further derivative positive duties, including contributing to restoring the capacity of the state to discharge the full range of its duties. This is comparable to the duty of TNCs to promote just background institutions in the countries where they operate, proposed by authors such as Hsieh (2009) and De George (1993, pp. 54-56). Such a duty is grounded in broader negative duties not to cause harm and not to benefit from injustice. For instance Hsieh (2009, pp. 258-259, 264) argues that when corporations operate in countries where the state does not protect the rights of its citizens, they might harm or contribute to injustice. Even when corporations might not directly harm someone, it is wrong to benefit from a system that gives rise to potential harm by allowing companies to pay very low wages, pay little or no tax and refrain from enforcing safety and environmental regulations. In order for them to discharge their negative duties, corporations can withdraw their operations from that country or promote the development of institutions similar to those of developed countries.

The proposed Institutional Responsibilities Framework agrees that corporations have some derivative positive duties to contribute to enabling governments to protect and fulfil the human rights of their population. However, it holds that even if corporations withdraw their activities from a country with a weak state, they could still fail to fulfil their negative duties. For example, if a corporation from the extractive industry withdraws its activities from a country with a tyrannical government but supports a global institutional order that foreseeably gives rise to tyrannical governments in certain parts of the world, that corporation would not be honouring its negative duty to avoid doing harm. Thus the Institutional Responsibilities Framework is more demanding than the aforementioned account, as it takes account not only of the direct impact

corporations may exert on human rights but also their institutionally mediated contributions to harm.

It is important at this point to consider the appropriate extent or depth of corporations' duties. To do this it is necessary to consider the overarching purpose of the corporation, as well as the ground on which duties are attributed. In terms of the latter, the Institutional Responsibilities Framework sees duties again as arising from TNCs causing, contributing to or actively benefiting from human rights harms. At the same time, it recognises that corporations are not comprehensive governing institutions like states. Rather, they are role-specific private organisations which must meet operating expenses and generate some surplus in the form of profit in order to remain viable entities. Thus, they should not be expected to perform the full functions of a state for any extended period, or even limited such functions, as they are not organisationally well equipped to do so. This leads to some further practical reasons not to ascribe duties to TNCs based solely on their economic capacity. That is, expecting them to convert any surplus they control to governance purposes could generate perverse incentives for corporations to underreport their earnings, and it could generally hinder efforts to compel them to accept further human rights responsibilities or accountability mechanisms (see Chapter 4). A more appropriate approach, specifically under conditions of state incapacity over the longer term, would be to set limits to TNC contributions according to the active benefits they obtain from the inability of the state to discharge its duties.

A more challenging situation is when a government is able but unwilling to fulfil its duties and acts against the rights of its population. The UN Framework offers little guidance in these cases. It directs states to protect human rights, but it does not clarify how to deal with less than ideal conditions. For instance, the UN Guiding Principles indicate that the corporate responsibility to respect "[...] exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws

and regulations protecting human rights” (Ruggie, 2011, p. 13). It does not elaborate on the cases where strong contradictions exist between regulations and the duties to respect.

On the other hand, the Global Compact has explored the issue in depth and has concluded that in some cases of weak or conflict-prone states, corporations can discharge their duties by collaborating with international institutions in charge of helping the affected population, by following and developing benchmarks aimed at guiding the activities of corporations in these situations, or in some cases, divestment (UNGIC, 2007). In the proposed Institutional Responsibilities Framework, as in the UN Framework, it is presumed that a functional government is required to actually protect and fulfil the human rights of a population. However, while the UN Framework tends to assume the existence of such a government, the proposed framework involves corporations in the creation of such conditions. In sum, the duty to strengthen governments’ capabilities stems from the assumption of ideal conditions of the division of labour that underpins the protect-respect-remedy triad.

7.2.4. Duties to Reforming the Global Institutional Order

As has been discussed, the proposed Institutional Responsibilities Framework argues that TNCs have stringent negative duties to avoid doing harm, both directly and by supporting a global institutional order that foreseeably and avoidably gives rise to human rights deficits. However, transnational corporations may not always be able to halt their participation in the institutional order, as their existence and operations are dependent on such a system. In cases where they are unable to avoid supporting the global order, TNCs can discharge some compensatory duties in order to “offset” the harm to which they contribute (see Section 6.2). Nonetheless given that the shape of such order could continue generating harm, corporations have additional duties to promote its reform. Reforming the global institutional order thus does not arise from a positive duty,

but from a negative duty not to participate in the imposition of a scheme that causes harm.

The global institutional approach discussed in Chapter 5 contends that what citizens of affluent countries can do to reform the global order is limited to their political participation through their national governments, as states are considered the main actors in shaping the rules that underpin such arrangements.⁷¹ In contrast, corporations can contribute to the global institutional order by acting in both the private and political spheres, through and beyond national governments. Corporations have several mechanisms at their disposal to discharge their duties to contribute to reforming the institutional order. “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” (Macdonald, 2011, p. 559). Corporations can also use their clout with political leaders in order to promote institutional change, or they can use their reputation to advance much needed reforms or raise awareness of critical issues. A prominent example is the UK cosmetics company, The Body Shop, which has been involved in several social campaigns, including protesting against Shell for its alleged involvement in the execution of Nigerian civil society leader Ken-Saro Wiwa and other activists in 1994. One of its most recent campaigns, Stop Sex Trafficking of Children and Young People, presented “[...] over 7 million campaign petitions to the United Nations Human Rights Council, making it one of the largest petitions in the history of the United Nations” (The Body Shop, 2012).

⁷¹ This position has been contested. For example, Young argues that “our working through state institutions is often an effective means of such collective action to change structural processes, but states are not the only tools of effective collective action” (2004, p. 380). Individuals, for example, can join civil society organisations or other decentralised civil organisations (Young, 2004, p. 380).

Promoting institutional change can be regarded as backward looking insofar as it requires understanding how social structures work and identifying the features of the institutional order that foreseeably engender harm (Young, 2004, p. 379). Such evaluation, however, has a forward-looking purpose, namely, changing the features that contribute to the production of human rights harm. While each company bears this obligation individually, discharging it may entail some degree of coordinated action of TNCs together with other companies, states and non-state actors (Macdonald, 2011, p. 559).

7.2.5. Duties of Accountability

Accountability is commonly understood in relation to the demands an individual, group or entity can make on an agent to report on her activities and, in the case of non-compliance, has associated penalties. Often, accountability implies some delegation of authority to act (Keohane, 2003, p. 139; Koenig-Archibugi, 2004, p. 236). Thus CEOs are accountable to shareholders, just as democratic governments are to their citizens. In this traditional conception of accountability, it is not obvious why TNCs should be accountable to society in general, as there is not direct delegation of authority (Koenig-Archibugi, 2004, p. 236) even though a relationship exists between society and corporations through legal mechanisms, including concession agreements between states and companies, charter granting and provision of limited liability.

It has been persuasively argued, however, that accountability can also be grounded on the impact an entity has over the people whose lives are affected by it (Held, 1995; Keohane, 2003; Koenig-Archibugi, 2004, p. 236). This has been identified as “external accountability”, as opposed to “internal accountability”, which exists within the institutional entity (Keohane, 2003, p. 141). Contemporary patterns of global interconnectedness and interdependence significantly challenge the assumption widely

held through the 19th and 20th centuries of the existence of a symmetrical relationship between political decision-makers and the recipients of political decisions (Held, 1995, p. 16). It became apparent that populations were not only being affected by the decisions of their national governments, but also by the decisions of foreign governments and transnational non-state actors. Thus, some theories of democracy have argued that impact and not only delegation of authority could be an element to generating accountability relations, including beyond the boundaries of the nation-state. Duties of accountability to TNCs thus can be grounded on the impact they exert on populations, and also on the claims that can be made against them. So far, the proposed approach has detailed the main obligations TNCs bear in relation to human rights, which derive from the primary negative duty to avoid doing harm. If it is accepted that at least these duties apply to corporations, it is necessary to establish accountability processes to ensure that they are discharged. Increased transparency and availability of information from corporations to other stakeholders is necessary to conduct a significant due diligence process, to strengthen existing accountability mechanisms and to develop new ones.

7.3. Duties of Rescue

While the proposed Institutional Responsibilities Framework maintains that TNCs bear mainly negative duties in relation to human rights, it does not deny that they may also need to discharge some stringent positive duties in special cases, such as emergencies. These are understood as serious, *unexpected*, and often dangerous situations requiring immediate action. Sorell gives the example of a car accident witnessed by a passing tourist. In such a case, he argues, the tourist has a duty to help the injured person even if providing relief was not the main purpose of the tourist's visit to a foreign country (2004, p. 130). According to Sorell, simply being in a position to provide help means the tourist has some responsibility to do so, even if she did nothing to bring about the emergency situation. Sorell draws a parallel between this example and the case of a

corporation that operates in a country where human rights have been violated. He argues that, similar to the tourist, corporations acquire some responsibilities of rescue, especially when “[...] the rights being violated are very basic, and the violations are systematic” (Sorell, 2004, p. 130). I will suggest, however, that the two situations are only partially analogous.

In Sorell’s example of the passing tourist and Peter Singer’s case of the child drowning in a pond (see Singer, 1972), those in a position to help are obliged to do so, not only because they have the capabilities or opportunities to do so, but also, I contend, because such situations are extraordinary. If on the way to the airport the tourist witnesses an accident and is capable of acting but decides not to do so in order not to miss the flight, she could be blameworthy. However, if the next day the tourist found herself in the same situation, and the day after that, and the three following days, she might not be subject to the same blame if they decided not to act. This is, first, because every time the tourist acts and misses the plane, she is incurring a financial cost, and she might also be incurring other expenses or risks such as exceeding her legal stay in the country. Therefore, her marginal opportunity cost for acting every day to rescue the injured person increases, until at some point it is not reasonable to expect her to do more. Secondly, the tourist might not be blameworthy after she decided not to continue rescuing those injured, because it might be that if such accidents are continuous, someone else is failing to discharge their duties, e.g. ensuring that roads are well maintained, that people do not drive recklessly or securing immediate medical help from those injured during road accidents. Focusing on ascribing blame to the passing tourist or to corporations for systematic harms might distract the attention for discussing who else is falling short from their duties. It could divert attention from the more central task of designing and implementing mechanisms that could prevent such regretful situations from happening in the first place.

I presume that the situations that Sorell is referring to do not engender duties for corporations because of the emergency of the situation, but because of the benefit they are obtaining from injustice. He in fact says that “[...] the human rights abuses that companies confront do not crop up suddenly and unexpectedly, like the road accident: they often predate the entry of the company and are known in advance to be features of local life [...]” (Sorell, 2004, p. 130). If knowing this in advance a corporation decides to start operating in a country, it is arguably because it is getting some benefit from regretful conditions. In these cases, therefore, the duties would be grounded on the benefit corporations get from injustice and not on the opportunities and capabilities they have to provide help.

Therefore, according to the Institutional Responsibilities Framework, in cases of emergency, corporations may be attributed some positive duties to protect and fulfil human rights. Even in countries where the state acts as the primary agent of justice and is able and willing to protect and fulfil the rights of its population, emergencies occur and corporations might be in a position to help at a low opportunity cost. Therefore, they may be ascribed some responsibility regardless of their main objectives, functions, causality or relation with the affected people (Shue, 1988, p. 73; Sorell, 2004, pp. 130-132; Wettstein, 2009, p. 146). However, this does not mean that the duties of another agent (the state) have been transposed into a more capable agent, but instead that the urgency of the situation activates some obligations for those witnessing the emergency, to rescue those in imminent danger.

To close this section, we can distinguish with greater clarity some elements of a situation that can trigger duties of rescue. First, the situation in question should be an *emergency* where something of great importance, for instance, health or life, is at risk and requires immediate attention. If an apparent non-emergency situation could foreseeably lead to an emergency if the witness did not act, she also has an obligation to help. Second, the corporation or person witnessing the emergency should have the *capability* to

help. In the case of the road accident, it is presumed that the witness is able to easily and efficiently drive the injured person to the nearest hospital. If the witness did not have the capability to act, for example because of a physical disability, she would not be morally blameworthy for failing to help. Thus, capability is an essential element to attribute duties in such cases.

Third, the opportunity cost of acting is *reasonable*. In the accident example, the expense for providing help to the injured person could be a missed flight. However, if the passing tourist had to provide help day after day, she would not be able to lead anything resembling a normal life, and therefore she could be excused for failing to help indefinitely. Furthermore, even if the witness is capable of helping but at risk of dying or being severely injured, she cannot be blameworthy, or at least not so clearly blameworthy or accountable. Providing help at a very large cost can be a matter of simple responsibility but of heroism. Most authors who defend a positive duties approach stress that intervening is required when it does not entail “significant costs” for the duty-bearer (Buchanan, 2004, p. 89). Note that this restriction is presented as taking into consideration that the person witnessing the emergency was not causally responsible for it. If the person pushed 20 children into a pond, and thus violated her negative duties, she would have to provide significant redress for the harm caused, even if it entails onerous costs.

7.4. Implications for the Protect, Respect and Remedy Framework

The following sections will critically analyse the grounds upon which the UN Framework allocates to TNCs negative duties to respect and will argue that they are not enough to sustain a human rights agenda against competing business interests. In turn, it contends that the discussion of TNCs’ duties of justice developed in this thesis can inform the Framework’s principles and could contribute to overcoming some of its

shortcomings. It, however, would entail significant changes in the understanding of corporate impact and the allocation of corporate responsibilities.

7.4.1. Grounds for Attributing Duties to Respect and ‘Principled Pragmatism’

The UN Framework, and other policy documents that have adopted its main tenets, see TNCs as bearing a negative duty to respect human rights (Ruggie, 2008, p. 8). This duty is grounded first on its recognition in instruments of soft law such as the Tripartite Declaration and the OECD Guidelines, which have been embraced by most states, the largest corporations and salient business organisations such as the International Organisation of Employers, the International Chamber of Commerce, and the Business and Industry Advisory Committee to the OECD (Ruggie, 2008, p. 8). In contrast, the UN Framework rejects claims that corporations have obligations to protect and realise human rights, which in most instruments of international law are explicitly allocated to states (Ruggie, 2007a, pp. 11-14). The reliance of the UN Framework on legal and quasi-legal mechanisms to specifying the duties of TNCs can be partly explained by the mandate given to Ruggie, and his goal of creating “a formula that was politically authoritative” by following the route of “principled pragmatism” (see Section 2.5.3) (2013, p. xlvi). While the UN Framework, and its widespread acceptance particularly across the business community, can be described as a political victory — particularly after the fate of previous United Nations initiatives— the emphasis on the legal duties of TNCs and the pragmatism of the framework have had important implications for business and human rights issues in general.

The responsibility to respect, as the Special Representative understands it, partly depends on its recognition in instruments of soft law, whose adoption, in turn, depends on the support of states and some non-state actors. For example, the rejection of UN Norms can be partly explained by the perception from corporate home states and TNCs

that such documents were against their interests, as it would burden them with significant responsibilities (see Section 2.5.2). Therefore, the responsibilities that the UN Framework attributes to corporations are determined to a large extent by what influential states and TNCs are willing to accept for themselves. This means that the UN Framework is unable to act as an independent source for generating or discussing the human rights responsibilities of TNCs, and instead is a reflection of the interests of the most powerful international players.

One of the main goals of the UN Framework was to offer a pragmatic approach to specifying the responsibilities of TNCs. However, such pragmatism has the risk of making it unresponsive to some stakeholders such as NGOs and the society in general. “From a general public policy perspective, it is important that business entities fulfill their human rights responsibilities, not because doing so will advance business interests, but because doing so will advance human interests and signal respect for human rights based on their instrumental but also their intrinsic moral value” (Cragg, 2012, p. 11). Thus, focusing excessively on the practical aspects of business duties effectively overlooks the concerns of relevant stakeholders (Cragg, 2012, p. 11).

Such pragmatism, I argue, has repercussions not only for the UN Framework, but for the whole business and human rights issue. While the framework’s original purpose was to clarify the duties of corporations under international law, it has come to be regarded as the main referent for political, ethical and legal discussions on the issue of business and human rights. Initiatives at the policy level and corporate codes of conduct have been deeply influenced, and even sometimes replaced, by the tenets of the UN Framework and the Guiding Principles. The pragmatic view has thus permeated dialogue around business and human rights.

As earlier noted, while a key purpose of the UN Framework was to provide an authoritative clarification of the duties that TNCs already bear in legal and quasi-legal instruments, the framework does not only base its pillars on legal considerations, but also

on moral grounds i.e. social norms that “exist over and above compliance with laws and regulations” (Ruggie, 2013, pp. 91-92). The UN Framework, for example, mentions that one of the grounds in attributing responsibilities to TNCs relates to the expectations corporations have of business, which grants them a “social licence to operate” (Ruggie, 2008, pp. 8, 17; OECD, 2011b, p. 32). In other words, “respect for human rights is the global standard of expected conduct for enterprises” (OECD, 2011b, p. 32). Human rights, however, as recognised in the International Bill of Human Rights, will at times not be consistent with local customs, and therefore, not something that society may expect from corporations (Cragg, 2012, p. 14). For example, in countries such as Pakistan or Saudi Arabia, where women are systematically segregated, the expectations regarding the treatment of women within and by TNCs might be different than more liberal societies where blunt discrimination of women is penalised.

It is also possible that the conception of the corporations’ role in society may vary among different countries due to past experiences. For example, in countries where corporations have continuously violated human rights, the population may have different expectations than in parts of the world where corporations have been socially expected to provide welfare services, such as in education or health. Expectations can change over time and may also vary according to sector, particularly if they are directly related to the provision of a human right, e.g. the health sector. This does not mean that human rights are wholly culturally relative or that TNCs should be condoned for engaging in human rights violations when the social and cultural frameworks allow or encourage such practices. Instead, these examples try to highlight that the expectations societies have from business are variable. Thus, while it would be desirable if corporations had high standards in their operations across the world, there is hardly a “global standard of expected conduct.”

According to the UN Framework, the failure of TNCs to meet their responsibility to respect “[...] can subject companies to the courts of public opinion [...]

and occasionally to charges in actual courts” (Ruggie, 2008, pp. 9, 16). Thus, part of the justificatory grounds offered to corporations for endorsing and implementing the framework and for respecting human rights relies on avoiding reputational and legal risks that might negatively impact on their finances. In other words, the UN Framework partly appeals to corporations’ enlightened self-interest to discharge their duties (Cragg, 2012, p. 12). While such grounds might be attractive for business, they are “[...] not capable of sustaining the human rights agenda against competing business imperatives [and also] makes the framework both pragmatically and intellectually unpersuasive” (Cragg, 2012, p. 10).

Attributing responsibilities to corporations on the basis of their recognition in mechanisms of soft law, along with enlightened self-interest, provides at best a precarious foundation for allocating duties that can serve as guides for corporate conduct, particularly in cases when they clash. The lack of independent grounds for attributing duties to TNCs, along with the underlying appeal to enlightened self-interest, contradicts the rationale of human rights, which instead seem to be mostly appreciated for their instrumental value. The next section will argue for the necessity of discussing and integrating in the UN Framework the duties of justice of TNCs, similar to those developed in this thesis.

7.4.2. TNCs Duties of Justice

Discussing and integrating duties of justice may have some significant implications for the UN Framework and other similar policy documents. Treating the responsibilities of TNCs mainly as legal duties has important limitations as

[...] TNCs that are not legitimately bound by the Framework and that have no instrumental reasons for adhering to elements of the Framework, have no reasons for respecting laws that protect human rights when they could lawfully do otherwise, and they have no reason

for adhering to unenforced laws within states barring independent considerations (Arnold, 2010, p. 383).

Therefore, grounding the responsibility of TNCs in soft law mechanisms can only convey sufficient authority when corporations have explicitly adhered to, or endorsed them, and where there is a somewhat clear authority capable of setting expectations. In contrast, duties of justice are unconditional moral duties that TNCs bear whether they are recognised in legal documents or not, and regardless of the existence of an external authority to enforce them. Acknowledging that TNCs bear moral duties as opposed to only legal duties may clarify the fact that, regardless of the contractual duties corporations voluntarily acquired, they also bear mandatory non-discretionary moral duties of respect (Cragg, 2012, p. 29). Thus, grounding the responsibilities attributed in the UN Framework in duties of justice could make it much more persuasive even for stakeholders critical of the stand of the political documents upon which it has been developed.

Discussing TNCs' duties of justice could also contribute to bridging the governance gap generated by the lack of effective regulation of corporate conduct. Some of the attempts to bridging this gap have been focused on establishing common international standards for corporate conduct e.g. the UN Norms, or on clarifying and giving coherence to the existing politically recognised responsibilities, as in the UN Framework. However, such efforts depend on the recognition and support from states. In contrast, human rights as moral rights, and corresponding moral duties, are universal and apply globally wherever corporations engage in business (Cragg, 2012, pp. 16-17). An explicit reference to corporate duties of justice could provide an alternative pathway to the regulation of TNC conduct, independent from political considerations. In turn, this recognition could legitimate moral demands to corporations regardless of their affiliation to voluntary agreements or initiatives.

Corporations have been traditionally reluctant to support commitments that impose on them more obligations or legally binding mechanisms that could eventually

translate into costly legal suits, hindering entrepreneurship or giving unequal advantage to some companies (Ruggie, 2013, pp. xxii-xxiii). Regardless of the validity of such arguments, it would be much harder to deny that TNCs have minimal moral duties – ones which exist regardless of whether they acknowledge them. In fact, TNCs have already accepted some moral duties for themselves. For example, respecting the law is in many cases a matter of prudence, but it is also a matter of moral responsibility. If it were just a matter of prudence, corporations could follow the law only when the penalties were higher than the perceived gains. However, the decision not to break the law, even if it would enhance the financial bottom line is a defensible managerial decision “[...] on the grounds that obeying the law is a fundamental corporate moral obligation” (Cragg, 2012, p. 27). In an analogous way, it could be possible to justify respect for human rights not only from a prudential consideration of enlightened self-interest, but as a moral duty, a duty of justice, which must be discharged regardless of the impact on the bottom line (Cragg, 2012, p. 27).

Recognising that transnational corporations have moral duties to avoid doing harm, as this thesis argues, provides a viable addition to the UN Framework, as both share a similar premise, namely, that corporations bear essentially negative duties to respect human rights. Such an addition could provide it with more clarity and address some of its perceived shortcomings. This does not mean that clarifying the moral duties of TNCs would provide a definitive answer to the most pressing conundrums regarding TNCs and human rights, as disputes on the hierarchy of human rights or derived obligations are likely to arise in complex cases. However, it provides a solid point of departure to reconcile human rights and competing corporate interests. The following section will argue that integrating the proposed approach into the UN Framework will require a substantive modification of its consideration of impact, which in turn would amend and expand the scope in which TNCs would be considered to bear some moral responsibility.

7.4.3. Broadening the Conception of Impact

According to the approach proposed in this thesis, normative accounts should acknowledge the fact that corporations may affect human rights not only by their direct operations or only through their activities and business relations, but also via the global institutional order (see Chapter 5). This would entail for the UN Framework explicitly broadening its notion of ‘impact’. As described in Section 5.3, the UN Framework makes a sharp distinction between ‘influence’ and ‘impact’. This is of great relevance, given that only the former constitutes acceptable grounds to attribute responsibility under the UN Framework. The crucial element for defining ‘impact’ seems to lie in the exercise of unmediated agency, while a corporation is said to exert ‘influence’ over human rights if it has some leverage over the actors to whom human rights harm can be traced. Influence in this frame does not necessarily give rise to corporate responsibility (Ruggie, 2008, p. 19). According to the Special Representative, the UN Framework avoids attributing responsibility on the basis of influence, as it would be very burdensome for TNCs and could generate negative incentives. In an extreme scenario, corporations would have little motivation to grow and expand because it could mean expanding their leverage over other entities, and therefore their influence-based responsibilities. Also, Ruggie is wary that such grounds would lead to a case of duty dumping, particularly from governments which “[...] can deliberately fail to perform [their] duties in the hope or expectation that a company will yield to social pressures to promote or fulfil certain rights [...]” (Ruggie, 2008, p. 19). Therefore, in his view, attributing and distributing duties based on this specific understanding of influence would be very onerous for corporations.

While attributing responsibility to corporations based on their influence might be burdensome, the narrow understanding of ‘impact’ potentially excludes many cases of corporate harm. It also creates perverse incentives for corporations to distance

themselves from the harms to which they contribute. The closely linked ‘agency-impact-responsibility’ means that corporations might not be considered to have exerted impact over human rights in cases where human rights harm cannot be traced back to the exercise of unmediated corporate agency. Also, cases when the harm is not directly linked to the corporation’s operations and activities might be excluded even if the corporation has reaped the benefits or contributed to harm through complex institutional channels.

In line with the framework proposed, responsibility is still tied to the impact corporations exert over human rights, which in turn is linked to corporate agency. However the limits of what constitutes agency are appropriately stretched. This conception of agency differs from the traditional one because it acknowledges the relevance of institutionally mediated agency to conceptualise corporate impact. It also considers existing concerns on taxing corporations for human rights deficits to which they have not contributed. It proposes that corporate impact and its corresponding responsibilities should exclusively be attributed in cases where human rights deficits can be linked to corporate agency exercised directly or via the global institutional order.

Note that while the concept of impact is significantly stretched, it differs from Ruggie’s understanding of influence insofar as it does not equate impact to leverage. Rather, the proposed definition of impact considers the inclusion of unmediated and mediated exercise of corporate agency. For example, if a given national law produces human rights harm, corporations would not be considered to exert impact if they did not contribute (directly or via the institutional arrangement) to the regretful outcome, even if they had some leverage over the national government to abrogate the law. On the other hand, corporations would be considered to exert impact if they promoted or encouraged a law that foreseeably and avoidably caused or contributed to human rights harm. For example, in the case of TRIPS discussed in Section 5.6.1, it can be said that corporations did not exert direct agency to bring about human rights harm connected with the

configuration of that particular agreement. However, they exercised corporate agency in many instances in the creation of the TRIPS, from raising the issue in national agendas to lobbying national governments to include it as a trade-related issue in the WTO. Incorporating the proposed notion of impact in the UN Framework and other current related policy initiatives would entail recognising the relation between agency and the institutional dynamics in place. In turn, it “[...] provides a basis for holding business responsible for their indirect impacts on human rights, on the grounds that institutionally mediated casual enable business to ‘do harm at distance’” (Macdonald, 2011, p. 553).

While responsibility has tended to be attributed on the basis of impact, which in turn is closely linked to unmediated corporate agency, such an approach has slowly expanded. It has started to be acknowledged the impact corporations may exert on human rights via their immediate relation with suppliers, vendors, subcontractors, etc. (IHBR & GBI, 2012) For example, the Guiding Principles on Business and Human Rights intended to help operationalize the UN Framework, maintains that the responsibilities of corporations to respect human rights requires them to “[...] avoid causing or contribute to adverse human rights through their own activities, and address such impacts when they occur” (Ruggie, 2011, p. 14). However, they also require that corporations “seek to prevent or mitigate human rights impacts that are directly linked to their operations, products or services by their business relations, even if they have not contributed to those impacts [...]” (Ruggie, 2011, p. 14).

In the first clause, the element of unmediated agency is clearly present, as it requires corporations to prevent human rights harm they might cause through their own activities. However, the second one seems to contradict the idea of the UN Framework, as it does not necessarily involve the exercise of unmediated agency. This is an important shift, because it recognises that TNCs can exert harm via institutional channels. The instances in which TNCs are recognised to have some impact on human rights are significantly more restricted than those proposed in the Institutional Responsibilities

Framework. Nonetheless, these developments show an increasing awareness and acceptance that TNCs may be held to account for indirect harms, providing fertile ground for some of the ideas proposed in this thesis.

7.5. Implications for the Global Institutional Approach

While the Institutional Responsibilities Framework proposed in this thesis has adopted some of the main ideas of the global institutional approach as developed by Thomas Pogge, its focus on transnational corporations as opposed to citizens has important implications for the global institutional approach. As Section 6.4 discussed, the conceptualization of TNCs as transnational agents with significant clout to shape and maintain the global institutional order through and beyond national governments contributes to overcoming some of the most significant objections made against the global institutional approach. At the same time, if it is accepted that undemocratic TNCs may have a significant impact on the configuration of the global institutional order and that their national alliances are weak at best, it is possible to question the extent of the responsibility Pogge attributes to the citizens of affluent countries, because their interests can only be expected to be channelled through the state, which in turn seems to be losing power vis-à-vis corporations.

In Pogge's account, citizens of affluent countries again are considered to bear most of the responsibility for the current shape of the global institutional order, as it is presumed that they are the actors with the most power to influence such order. This account tends to treat TNCs on par with citizens, and to presume that powerful democratic national governments represent the interests of their citizens and "their" corporations.

In negotiations about the design of the global order, particular decisions that are best for the governments, corporations, or citizens of the affluent countries are not always best in terms of avoiding severe

poverty elsewhere. [...] When faced with such conflicts, negotiators for the affluent states generally (are instructed to) give precedence to the interests of *their own* country's government; *corporations*, and citizens over the interests of the global poor (emphasis added) (Pogge, 2007, p. 34).

Nonetheless, treating corporations as part of, or as a tool of, a single nation-state does not capture the complexity and transnational nature of TNCs, which is what has contributed to the governance gap in the first place. In many respects, transnational corporations can be regarded as instruments of states. When the first TNC, the East India Company, was established in 1600, it was closely related to the host state and carried out some of the British crown's affairs in its colonies. Many of the political appointees of Britain to its colonies were indeed employees of the East India Company (Hartmann, 2002, p. 50). Other examples are the roles of ITT Corporation and the United Fruit Company in South America mentioned in Chapter 2, which advanced the interests of the United States abroad. Still nowadays, the bond between home states and corporations is very close. In fact, several governments of developed nations explicitly or implicitly acknowledge that one of their priorities is to assist *their* corporations to win contracts abroad and lobby other governments against regulatory and political barriers (McCorquodale & Simons, 2007, p. 598).

Nonetheless, in other respects, the national allegiances of TNCs seem to be weak at best. Corporations can have headquarters in one country but be formally based in another in order to avoid or minimise tax burdens. Therefore, it is increasingly difficult to assign a nationality to a corporation in the same way that we do with people, as well as to match the interest of a TNC to the interest of a single nation-state. While for Pogge the state represents the interests of its citizens and its corporations, he does not consider the fact that both interests might be opposed, or that the different interests of companies might be represented by more than one state. For example, one developed state might represent the interest of pharmaceutical companies by advocating for international patents, while a developing nation may advance the flexible labour laws that can allow

corporations to exploit its own workers. In turn, the corporation, as essentially an undemocratic entity, seems to represent only its private interests and not those of any polity at large.

Therefore, if it is true that not only states but also corporations are powerful entities that can make significant contributions to shaping and upholding the current global institutional order, the responsibility of citizens of affluent countries should be limited to the input that their country has in that process. Specifically, this is why in his account to attribute responsibility for human rights violations, Pogge mainly refers to affluent countries. If corporations are regarded as actors with similar or even superior capabilities to the state to influence the global institutional order, and if corporations are essentially undemocratic entities, the responsibility of citizens of affluent countries might be considerably more limited than Pogge realises. As Gould suggests, Pogge's "[...] focus on state actors leads to an overly narrow diagnosis of the problems with globalization and the concomitant responsibility to rectify its impacts in developing countries" (2007, p. 389).

However, this does not mean that citizens of affluent countries do not have any responsibility because they are powerless in face of corporate power. Rather, it means that their contribution to shaping and upholding the global institutional order as citizens of democratic affluent states might be more limited than Pogge suggests, particularly in certain aspects such as finance, in which the power of TNCs is significant. They might nonetheless be attributed other moral responsibilities as facilitators or enablers of corporate power, e.g. as consumers and employees. Clearly, these responsibilities go beyond citizens of affluent countries and can encompass a broader range of actors, such as the middle-income and wealthy citizens of developing countries, which Pogge largely ignores in his account. The discussion of TNCs highlights the deficiency of the global institutional approach for taking into account non-state actors and their input on the shape and maintenance of the global institutional order. Nonetheless, it also offers a

plausible way to complement it. Instead of assuming that states are the main global players as Pogge does, this thesis has argued for the necessity of reassessing the different channels through which the global institutional approach can be shaped and maintained in order to more accurately attribute some responsibility to non-state actors.

7.6. Conclusion

This chapter has argued that in order to fulfil their negative duties to avoid doing harm, transnational corporations are also required to discharge some derivative positive duties. These include duties of due diligence in order to become aware of the instances in which they may negatively impact on human rights directly and through the global order. Companies are also required to be accountable to those that may be affected by the company's actions and to collaborate in reforming the institutional order. For meaningful changes to take place, nonetheless, some coordinated action is required among companies, state and non-state actors. The attribution of primarily negative duties to TNCs draws from the idea that states are capable and willing to protect, promote and fulfil the rights of their citizens, thus TNCs are required not to undermine these capabilities and to respect the established division of labour. When states do not have the capacity to fulfil their role, corporations are required to contribute to strengthening such capacity. There is, however, another set of duties that do not derive from the negative duties to respect, namely, duties of rescue that companies are required to discharge when amidst an extraordinary and urgent situation they can act at a relatively low opportunity cost.

This chapter also argued for the need to integrate corporate duties of justice in the UN Framework, such as those developed throughout this thesis. This would require expanding the current notion of impact so as to reflect the institutional channels through which TNCs operate. While the Institutional Responsibilities Framework attributes more

onerous duties to corporations than recent accounts of corporate responsibility such as the UN Framework and the Spheres of Responsibility approach, the proposed account reflects more accurately the different ways in which corporations may inflict harm. Recent policy developments have started to take into consideration the indirect impact of TNCs on human rights, indicating the existence of some conditions for the adoption of some of the ideas here proposed.

Finally, this chapter also explored the implications of the proposed framework for the global institutional approach as developed by Thomas Pogge. It contended that recognising that not only states, but also corporations exert significant impact on the shape and maintenance of the global order challenges the scope of responsibility Pogge allocates to citizens of affluent countries.

Chapter 8. Conclusions

There can be no effective control of corporations while their political activity remains.

– *Theodore Roosevelt, US President 1901-1909*

This thesis presented an approach to discussing the moral duties of transnational corporations in relation to human rights. It argued that TNCs bear primarily negative duties to respect human rights, i.e. to avoid doing harm, and that they can be held responsible when they fail to discharge such duties. It discussed how most approaches have focused on attributing responsibility to TNCs for their unmediated negative impacts on human rights. However, such approaches have a significant limitation, namely not taking sufficiently into consideration the institutional channels in which TNCs participate, such as supply chains and business relations, through which they can also have negative impact on human rights. TNCs also can indirectly participate in inflicting harm, and in a morally and practically very significant way, by supporting a global institutional order that foreseeably and avoidably engenders human rights deficits. This thesis thus proposed the Institutional Responsibilities Framework, which attributes to corporations moral responsibility for their direct and also indirect impacts on human rights, including those inflicted via the global institutional order.

To advance these arguments, as well as to situate the contribution of this work, I began by discussing the main positions in political theory and philosophy regarding the moral duties of transnational corporations in relation to human rights. It was noted that a significant number of scholars subscribe to a positive duties approach, which argues that TNCs bear negative duties to respect human rights and also positive duties to protect and

fulfil them. Then, I described the two main strands of this approach. The first, the conditional positive duties approach, argues that TNCs acquire some positive duties to protect and fulfil human rights when the state is unwilling or unable to do so. This view is grounded in the idea that, given that human rights are of the utmost importance, it is necessary to discuss who can serve as a substitute to protect and fulfil them when the state does not. Corporations are thus contemplated as possible back-ups when they have sufficient capabilities to act as primary agents of justice.

By contrast, the non-conditional positive duties approach argues that even when the state can act as the primary agent of justice, other actors including transnational corporations are required to promote and fulfil human rights. According to some commentators, this is because TNCs have enough capabilities, leverage and/or opportunities to do so. Therefore, not requiring them to discharge some positive duties would be a “lost opportunity”. In contrast, others argue that TNCs can be attributed some positive duties similar to those borne by the state because they share some similar characteristics, such as substantial powers and capacities to protect human rights (as well as to abuse them). Additionally, some companies have taken *de facto* governing roles and have also engaged in providing public goods that have been traditionally considered as a responsibility of the state. Therefore, it was argued, if TNCs share some characteristics and roles with states, they can be attributed similar duties to protect and promote human rights.

However, unlike states, which have as a constitutive aim protecting and promoting human rights, the main goal of companies is arguably generating profits, which is sometimes in tension with the objectives of advancing human rights. Thus, given the particular interests and motivation of TNCs it is possible to question the justifiability of the positive duties approach. In addition, the idea that companies can be attributed positive duties on the basis of their superior capabilities was challenged and it was argued that although this might be a necessary requirement to bear positive duties, it

is not the only one, as illustrated with the example of vary capable drug cartels, which are not considered to be able to bear similar duties. Furthermore, if as the positive duties approach argues, the attribution and the extent of duties are positively related to the capabilities of TNCs, corporations could be inclined to misrepresent these in order to reduce their moral burden, as exemplified with the cases of tax heavens and secrecy jurisdictions.

Additionally, the positive duties approach poses some problems of efficiency or compliance. While transnational corporations may have several objectives, it seems accurate to say that their main goal is generating and maximising profits. To this end, corporations often externalise costs by economising expenses related to the improvement of working conditions and the maintenance of environmental standards. Thus, I argued, it would be inefficient to expect TNCs to protect human rights, as many of them would seek an escape clause or simply shirk, making it costly to monitor them and try to obtain compliance. Furthermore, I contended that historically, transnational corporations have been reluctant to accept the allocation of stringent positive duties, considering that they are against their perceived interests. Hence, it is unlikely that, for the time being, companies will deliver on more responsibilities, as discussed in the positive duties approach.

Then, I explained that the positive duties approach tends to follow an interactional conception of human rights as a set of entitlements which all human beings have by virtue of their humanity, and which assign to individual and collective agents direct responsibility for their fulfilment. This conception thus attributes to moral agents positive duties to protect and promote human rights. As an alternative, I proposed following an institutional conception of human rights, which sees rights primarily as claims on coercive social institutions and secondarily as claims against those who uphold such institutions. According to this approach, the responsibility of the participants in an institutional order is an indirect shared responsibility for the justice of any practice they

help impose. Such a conception thus entails mainly a negative duty to avoid cooperating in the imposition of a coercive institutional order that foreseeably and avoidably creates human rights deficits.

Conceptualising the duties of corporations as essentially negative duties to respect, I argued, helps circumventing the main theoretical and efficiency issues of the positive duties approach. For instance, it was argued that in order for a right to exist (e.g. right to life) every individual and collective agent has at least a negative duty to avoid doing harm (e.g. refrain from killing). Thus, while it can be questioned if TNCs can bear positive duties, it is clear that as moral agents they bear at least negative duties. Such consideration is not only relevant in theory, but it also helps to overcome some the efficiency problems of the positive duties approach. For instance, while companies have been reluctant to accept that they are responsible for protecting human rights, they have widely embraced the idea that they must respect human rights as reflected in the UN Framework and the UN Guiding Principles. Thus, the fact that the Institutional Responsibilities Framework develops from this established notion makes the proposed approach more appealing in practice than others that develop from the idea that companies must protect human rights because they have the capabilities to do it.

Then, I made a case for rethinking what the negative duties of TNCs to avoid doing harm entail. I explained that most of the recent approaches that discuss the duties of transnational corporations have tended to consider that they can only inflict harm directly through their actions and operations. For example, an oil company would be violating the human rights of the populations near its operations when it unsafely dumps oil residues in a river or releases pollutants into the environment; whereas a pharmaceutical company may violate the human rights of parts of the population by conducting unsafe drug trials. These approaches can be identified with what Thomas Pogge refers to as interactional moral analyses, which explain social phenomena by tracing them back to the conduct of individual or collective entities, which, in turn, are

attributed moral responsibility (2010a, p. 15). They are applicable to many kinds of cases involving TNCs in human rights violations, as frequently harm can be traced to a specific source –the oil and pharmaceutical companies– and responsibility can be attributed to them for the negative outcomes.

There are, however, other channels through which transnational corporations can indirectly participate in human rights violations, for example, through their supply chains and business networks, which mediate the actions of the company. An example is the responsibility of retailers for the sweatshop-like conditions in the factories that manufacture the products that they sell. In such incidents, the contribution of a corporation to human rights violations is less clear, and so is the responsibility that it can be attributed for the regretful outcomes. However, as reflected in the UN Guiding Principles, there has been increasingly more acceptance that TNCs bear some responsibility for what happen across their supply chains and business relations, and that they can be held accountable for it. In those cases, interactional approaches have limited explanatory adequacy, because they cannot capture the complex network of institutional channels through which corporations operate. Also, they are very limited insofar as they are unable to recognise the role of the institutional structures in place to engender some human rights harms, for example, a disproportionate prevalence of sweatshops in certain parts of the world.

The Institutional Responsibilities Framework developed in this thesis highlights the relevance of the global institutional order in the incidence of human rights harms and the participation of corporations in its design and maintenance. It contends that such an order can be described as harmful, since the incentives and penalties it has in place make human rights violations likely to occur, particularly within certain segments of the global population. Such incentives include, for example, international agreements tilted in favour of some powerful countries, unequal representation in international organisations such as the WTO, IMF and UN Security Council, and commonly accepted international

principles, such as the borrowing privilege, which allows whoever is in power to borrow funds in the name of a whole country, often leaving the debts on the books for decades.

I then argued that states as well as some non-state actors, including transnational corporations, play an important role in the configuration and maintenance of this order. They influence the shape of the global institutional order by acting in both the political and private spheres. By political sphere, I referred to the involvement of corporations in public life, for example, by participating in international negotiations and forums such as the World Trade Organisation, and by ensuring that their interests are represented by national governments through practices such as lobbying and political activism. However, corporations can also contribute to shaping the global institutional order within the private sphere, that is outside of the reach of the government, where they enjoy certain leverage to conduct their day-to-day operations. Here corporations can influence the shape of the global order through several mechanisms including establishing a corporate culture, launching voluntary initiatives, funding think-tanks, preventing or enabling technology transfer.

The Institutional Responsibilities Framework thus holds that in order to avoid doing harm, TNCs should also refrain from upholding a global order that foreseeably and avoidably engenders human rights deficits, and that they can be attributed some moral responsibility if they fail to do so. Then I explained that often, even when companies want to honour their negative duties, halting or avoiding participation in the global order is not possible because the penalties associated are unreasonably high. For example, corporate contribution can take the form of tax compliance with governments that support the shape of the global order or compliance with laws that engender human rights harms as exemplified in the cases of Internet-based companies operating in China. However, stopping paying taxes or disobeying laws may entail high penalties, such as the dissolution of the company or incarceration of their executives. In such cases, corporations can be required to provide some compensation for the harms to which they

contribute. Thus they acquire some remedial duties. Providing such redress to victims of harm is not a matter of benevolence or charity, but a matter of justice, which means that the duty to provide compensation is not discretionary and corporations can be attributed moral responsibility if they fail to discharge it.

Having established that directly inflicting or indirectly contributing to human rights harms can be considered grounds for attributing moral responsibility to TNCs, I then argued that actively benefiting from such harms are additional grounds for attributing responsibility. By active benefiting, I refer to cases in which companies seek to take advantage of injustice or to reap a benefit at the expense of someone else, for example, by paying very low wages, by skimping on environmental and safety standards or by avoiding paying their fair share of taxes, thus depriving governments of significant revenues. Therefore, according to the Institutional Responsibilities Framework, companies bear some negative duties to avoid contributing to a harmful institutional order without providing adequate compensation and to avoid actively benefiting from harm.

While it was argued that corporations bear mainly negative duties, honouring them also requires discharging some positive duties, including the following.

- Duties of due diligence: these refer to the responsibility that corporations have to conduct an assessment of the instances in which they might negatively impact human rights. They can discharge this duty, for example, by conducting due diligence processes as required by the UN Framework, the OECD Guidelines and the UN Guiding Principles.
- Duties of coordination: sometimes in order to avoid doing harm, corporations need to coordinate with other companies or parts of their business operations. For example, a retailer can be allocated a duty to coordinate with its

subcontractors in order to avoid violating human rights through the production process of the garments it sells.

- Duties of accountability: it was argued that corporations bear some duties of accountability towards those affected by their operations and conduct, not only to their stockholders. Corporations thus could be required to make some information available to the public and to engage in accountability processes such as external audits.
- Duties not to undermine and to strengthen the capabilities of the state to protect and fulfil human rights: corporations are required to avoid undermining the capabilities of the state as the primary agent of justice. This requires, for example, not engaging in bribing government officials or aggressively lobbying to obtain private gains. Nevertheless, when the state is unable to act as the primary agent of justice, companies may also be required to strengthen its capabilities in order to preserve the division of labour between primary and secondary agents of justice.
- Duties to reform the global institutional order: In order to fulfil their negative duties, companies are also required to contribute to reforming the global order so as to prevent the continued generation of human rights deficits.
- Duties of rescue: These duties do not derive from a corporation's negative duties to avoid doing harm. However, it may be required to provide help in extraordinary situations of emergency, when it can do so at a relatively low opportunity cost.

After discussing the main principles of the proposed framework, I argued that it could inform current policy-making mechanisms and documents on the issue of business and human rights, specifically the UN Framework and the UN Guiding Principles. I suggested that incorporating the discussion on the duties of justice into the UN

Framework could provide it with more coherence among competing corporate interests and changing political and economic conditions.

Although the Institutional Responsibilities and the UN Framework share the premise that TNCs mainly bear negative duties in relation to human rights, the institutional conceptualisation of harm of the proposed approach would entail the UN Framework widening the instances in which it considers that corporations can have negative impact on human rights. It would also require modifying the due diligence processes of companies, as it would require corporations to survey the impact to which they contribute by participating in the global institutional order. While this proposed addition would be more demanding on companies than current approaches, the duties that the Institutional Responsibilities Framework allocate to TNCs are given in regard to the function of their contribution to harm, not to their superior capabilities or powers. Therefore, it is not subject to the principled objections against the positive duties approach in that it does not “penalise” the companies for their large assets and capabilities. Thus, the fact that the proposed framework develops from similar considerations from those already widely accepted makes it more attractive than others that develop from the positive duties approach. Furthermore, the fact that some of the newest documents on business and human rights such as the UN Guiding Principles have started to recognise the impact that corporations can exert via some institutional relations provide reasons to believe that there are conditions for the adoption of the principles of the proposed framework.

In addition, I analysed some of the implications of the Institutional Responsibilities Framework for the global institutional approach. I explained that the such an approach sees states as the main actors that shape and maintain the current institutional order, and, given that they represent the interests of their national citizens, the latter are held responsible for the harms that such an institutional order engenders. Nevertheless, I have argued that corporations are also powerful and independent actors

that have a significant input into the configuration of the global order, and whose interests do not necessarily match the interests of a particular nation-state or group of citizens. Therefore, I proposed re-evaluating the responsibility that can be attributed to citizens of affluent countries for the shaping and maintenance of the global institutional order in light of the significant input of TNCs as entities that largely escape democratic processes of accountability.

I then went on to assess some of the main criticisms against the global institutional approach, with which the current framework shares the conceptions of human rights and harm. One of the main criticisms refers to the adoption of the institutional conception of human rights, which attaches moral significance to a shared institutional order and thus penalises people for their membership of a particular scheme. To address this criticism, I argued that the distinction between members and non-members has little pragmatic significance as, arguably, given the globalisation process, virtually everyone lives within a common institutional arrangement, and therefore everyone can be considered a member of it. Moreover, the moral relevance attached to the global institutional order corresponds to the fact that, by definition, TNCs can only exist and operate within a global institutional arrangement which includes, for example, economic rules, trade agreements and international legal norms.

The second criticism refers to the validity of the claims that the global order engenders human rights violations. Some commentators have argued that the global order does not violate human rights, but in fact contributes to realising them. However, in line with the global institutional approach, I contended that the design of the global institutional order engenders foreseeable human rights deficits and can be described as unjust in comparison to a feasible alternative design. Further objections could be made against the claim that negative duties are necessarily more stringent than positive duties. Here, I explained that the proposed approach does not deny that TNCs may have some positive duties, but instead the approach builds upon the negative duties that

corporations have already admitted for themselves in order to overcome some of the efficiency problems of the positive duties approach.

Additionally, some objections have been raised against the global institutional approach for assuming that national governments represent the interests of their citizens, which in turn can be considered as the main entities responsible for the global order. It has been argued that, even in democratic countries, governments do not represent the interests of all of their citizens, and as individuals they wield limited power. In contrast, TNCs as global elites can exert significant influence in the configuration of the global institutional order and have several mechanisms at their disposal to ensure that their interests are represented by national governments. Thus the attribution of responsibility to TNCs for the shape of the global institutional order seems to be less problematic than the attribution of responsibility to individual citizens. Finally, although the proposed framework is significantly more demanding than other accounts of corporate responsibility, it reflects more accurately the different instances in which TNCs may negatively impact human rights and, unlike the positive duties approach, it does not “penalise” companies for having significant power or capabilities.

Although the Institutional Responsibilities Framework shares some principles and core assumptions with the global institutional approach, it is not susceptible to the same objections, or at least not to the same extent. This is because the proposed framework focuses on analysing defined agents with significant leverage to have impact on the global institutional order, as opposed to citizens of affluent countries whose participation in the global order is more attenuated and complex to determine. Furthermore, unlike individuals, corporations by definition operate within a global institutional order, which in turn contributes to clarifying the significance that the proposed framework attaches to that order.

8.1. Further Research

One contribution of this thesis lies in establishing that corporations inflict human rights harms directly, but also indirectly, by shaping and maintaining the global institutional order through several mechanisms, as described in Chapter 5. The approach could be advanced and deepened through empirical research aimed at systematically identifying the main channels through which corporations contribute to shaping the global order, in both the political and private spheres. While it would be virtually impossible to survey all of these, it is feasible to detect the main ones and assess the contribution of firms. This could make it more feasible to incorporate them explicitly in policy documents such as the UN Guiding Principles. In turn, this could provide some grounds to hold corporations accountable for their contribution to human rights harms through the global institutional order, and to require corporations to expand their due diligence processes to include instances that are currently neglected.

Further, while this thesis largely focused on privately-owned transnational corporations, it would be useful to widen the scope of analysis, in both normative and empirical terms, to state-owned enterprises. Intuitively, the duties of state-owned enterprises would be considerably different, as these companies can be regarded as branches of national governments. It also would be useful to treat in more detail how to reconcile the moral negative duties to respect human rights within particular industries which seem to inherently contradict those duties, such as arms manufacturers. Finally, a future step could involve elaborating specific policy recommendations that incorporate the ideas of the proposed approach.

Appendix A: Core Documents and Initiatives

Draft UN Code of Conduct on Transnational Corporations (the Draft UN Code)

Written in 1976 by the UN Commission on Transnational Corporations. It aimed at establishing common standards for the conduct of TNCs, enhancing the negotiating capacities of host states and establishing rules for the treatment of foreign investment. It touched upon political, economic, financial and social issues associated with the operation of TNCs, disclosure of information, treatment of TNCs by host countries and intergovernmental cooperation.

OECD Guidelines for Multinational Enterprises (OECD Guidelines)

Created in 1976 by the OECD (updated in 2011). They are non-legally binding recommendations addressed to TNCs operating from or in adherent countries to the organisation (plus Argentina and Brazil) in a range of issues such as employment and industrial relations, human rights, taxation, science and technology, environment, information disclosure, competition and consumer interests.

The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the Tripartite Declaration)

Enacted by the ILO in 1977 (revised in 2001), urged for the creation of international instruments to regulate the conduct of TNCs and to define the terms of the relations between companies and host countries.

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (the Maastricht Guidelines)

Created in 1997 with the purpose of supplementing the Limburg Principles, identifying and understanding the violations to the International Covenant on Economic, Social and Cultural Rights, and providing recommendations to monitor these rights are respected. It affirms that it is the responsibility of the state to ensure that private entities including transnational corporations over which they exercise jurisdiction, respect human rights.

The United Nations Global Compact (the Global Compact or the UNGC)

Established in 2000 by the then UN Secretary-General, Kofi Annan, it was designed as a learning forum to promote socially responsible practices in the areas of human rights, labour, environment and anti-corruption. Currently, it is the largest initiative on corporate responsibility with around 7,000 participant companies and national networks in more than 50 countries.

Appendix A: Core Documents and Initiatives

UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the UN Norms)	Presented in 2004 to the Commission on Human Rights (now Human Rights Council). They aimed at establishing a common enforceable set of standards to regulate the activities of TNCs and prevent human rights violations and other corporate misconducts in the areas of sovereignty, corruption, environmental protection, child labour, working environment, adequate wages, workers' rights and the right of security of the person. They intended to become part of soft law that could eventually lead to the development of a treaty.
UN 'Protect, Respect and Remedy' Framework (the UN Framework)	Unveiled by John Ruggie in 2008, the Framework aims at clarifying the duties of TNCs as existent in international legal documents. It puts forward the idea that corporations have the primary responsibility to respect human rights as recognised under various international instruments of soft law, whereas states bear the duties to protect the rights of their population and seek remedy for the victims of abuses committed by third parties, including business.
Guiding Principles on Business and Human Rights for Implementing the UN 'Protect, Respect and Remedy' Framework (the UN Guiding Principles)	Presented in 2011, the document comprises 31 principles to implement the UN Framework, which correspond to its three pillars: protect, respect and remedy in relation to human rights.

Appendix B: Timeline

1940s	1950s	1960s	1970s	1980s	1990s	2000s
<ul style="list-style-type: none"> •••1948: Universal Declaration of Human Rights (UDHR) 			<ul style="list-style-type: none"> •••1972: ICC's Guidelines for Multinational Corporations •••1974: UN Centre on Transnational Corporations •••1974: UN Commission on Transnational Corporations 	<ul style="list-style-type: none"> •••1976: UN Draft Code of Conduct on Transnational Corporations (the Code) •••1976: OECD's Guidelines for Multinational Enterprises 	<ul style="list-style-type: none"> •••1991: Maquiladora Standards of Conduct •••1991: The Miller Principles •••1994: The Caux Round Table Principles •••1999: The Global Sullivan Principles 	<ul style="list-style-type: none"> •••2000: UN Global Compact (UNGC) •••2003: UN Norms on the Responsibilities of Multinational Corporations and Other Business Enterprises with Regard to Human Rights
			<ul style="list-style-type: none"> •••1977: EU's Community Code of Conduct for Enterprises Having Affiliates, Subsidiaries or Agencies in South Africa •••1977: Sullivan Principles •••1977: ILO's Tripartite Declaration Concerning Multinational Enterprises and Social Policy 	<ul style="list-style-type: none"> •••1980: Valdez Principles •••1984: MacBride Principles •••1988: The Slepak Principles 	<ul style="list-style-type: none"> •••1992: Transnational Corporations Management Division •••1993: Division of Investment Technology and Enterprises •••1998: ILO's Declaration on Fundamental Principles and Rights at Work 	<ul style="list-style-type: none"> •••2005-2011: Ruggie Reports •••2008: UN Respect, Protect and Remedy Framework for Businesses and Human Rights

- Organisations
- Non-binding documents
- Documents intended to be binding/part of the soft law

Appendix C: Alien Tort Statute Cases

Year	Case	Resolution
1961	Seth v. British Overseas Airways Corp.	Did not consider ATS claim
1964	Damaskinos v. Societa Navigacion Interamericana SA	Dismissed
1966	Valanga v. Metro Life Insurance Co.	Dismissed
1971	Abiodun v. Martin Oil Services Inc.	Dismissed
1974	Benjamins v. British European Airways	Dismissed
1974	IIT v. Vencap Ltd.	Dismissed
1975	Papageorgiou v. Lloyds of London	Dismissed
1975	Soultanoglou v. Liberty Transportation Co.	Dismissed
1978	Canadian Overseas Ores v. Compania de Acero del Pacifico SA	Dismissed
1979	Akbar v. N.Y. Magazine Co.	Dismissed
1979	Vietnam Association for Victims of Agent Orange v. Dow Chemical Co.	Dismissed
1980	Trans-Continental Investment Corp. v. Bank of Commonwealth	Dismissed
1982	Tamari v. Bache & Company (Lebanon) SAL	Dismissed
1982	Hedge v. British Airways	Dismissed
1983	De Wit v. KLM Royal Dutch Airlines, NV	Dismissed
1984	Munusamy v. McClelland Engineers Inc.	No ATS relief
1984	Jaffe v. Boyles	ATS case not rejected
1986	Jones v. Petty Ray Geophysical Geosource Inc.	Dismissed
1986	Carmichael v. United Tech. Corp.	Dismissed
1989	Castillo v. Spiliada Maritime Corp.	Motion to dismiss denied
1991	Amlon Metals, Inc. v. FMC Corp.	Dismissed
1991	Hamid v. Price Waterhouse	Dismissed
1993	Aguinda v. Texaco Inc.	Dismissed
1996	Beanal v. Freeport-McMoran Inc.	Dismissed
1996	Alomang v. Freeport- McMoran Inc.	Dismissed
1996	Eastman Kodak Co. v. Kavlin	Dismissed
1996	National Coaliton Government of Burma v. Unocal Inc.	Dismissed
1996	Doe I v. Unocal Corp.	Dismissed
1996	Wiwa v. Royal Dutch Petroleum Co.	Settled
1997	Bigio v. Coca-Cola Co.	Dismissed
1997	Jama v. Esmor Correctional Services Inc.	Jury verdict for defendant on ATS
1997	Doe v. Bolkiah	No jurisdiction under ATS
1997	Bodner v. Banque Paribas	Settled
1998	Iwanowa v. Ford Motor Co.	Dismissed
1998	Bao Ge v. Li Peng	Dismissed
1998	Burger Fischer v. Degussa AG	Dismissed

Appendix C: Alien Tort Statute Cases

1998	Wong-Opasi v. Tennessee State University	Dismissed
1999	Bowoto v. Chevron Corp.	Jury verdict for defendant
1999	Friedman v. Bayer Corp.	Dismissed
1999	Alperin v. Vatican Bank	Dismissed
2000	Empagran S.A. v. Hoffman-La Roche Ltd.	Dismissed
2000	Mendonca v. Tidewater Inc.	Dismissed
2000	Kruman v. Christie's International PLC	No ATS relief
2000	Abrams v. Société Nationale des Chemins de fer Français	Dismissed
2000	Sarei v. Rio Tinto, PLC	Pending
2000	Tercero v. C&Y Order <i>re</i> Stipulation Sportswear Inc.	Dismissed
2000	Flores v. S. Peru Copper Corp.	Dismissed
2001	Does I v. Gap Inc.	Motion to dismiss granted
2001	Ungaro-Benages v. Dresdner Bank AG	Dismissed
2001	Doe v. Exxon Mobil Corp.	Dismissed
2001	Sinaltrainal v. Coca-Cola Co.	Dismissed
2001	Aldana v. Del Monte Fresh Produce NA Inc.	Dismissed
2001	Robert v. Bell Helicopter Textron Inc.	ATS claim rejected
2001	Abdullahi v. Pfizer Inc.	Settled
2001	Herero People's Reparations Corp. v. Deutsche Bank AG	Dismissal affirmed
2001	Adamu v. Pfizer Inc.	Settled
2001	Arias v. Dyncorp	Pending
2001	Presbyterian Church of Sudan v. Talisman Energy	Dismissed
2002	Maugein v. Newmont Mining Corp.	Dismissed
2002	Estate of Rodriguez v. Drummond Company Inc.	Trial verdict for defendant
2002	Khulumani v. Barclay	On appeal
2002	Javier H. v. Garcia-Botello	Pending
2002	Burnett v. Al Baraka Investment & Development Corp.	Motion to dismiss denied
2002	Kiobel v. Royal Dutch Petroleum Co.	Pending
2002	Doe v. Reddy	Settled
2003	Mujica v. Occidental Petroleum Corp.	Pending
2003	Ponce-Rubio v. Order of Dismissal, N. Brevard Inc.	Dismissed
2003	Stutts v. De Dietrich Group	Bank dismissed
2004	Ganguly v. Charles	No ATS relief
2004	Bauman v. Daimlerchrysler AG	Pending
2004	Arndt v. UBS AG	Dismissed
2004	Saleh v. Titan Corp.	Dismissed
2004	Ibrahim v. Titan Corp.	Dismissed
2004	Makro Capital of America Inc. v. UBS AG	Dismissed
2005	Tsunami Victims Group v. Accor North America	Dismissed
2005	Corrie v. Caterpillar Inc.	Dismissed
2005	Hereros <i>ex rel.</i> Riruako v. Deutsche Afrika-Linien GmbH & Co.	Dismissed
2005	Doe v. Nestle SA	Dismissed

Appendix C: Alien Tort Statute Cases

2005	Siswinarti v. Jennifer Shien Ng	Pending
2005	Frazer v. Chicago Bridge & Iron	Summary judgement granted for defendant
2005	Bano v. Union Carbide Corp.	Dismissed
2005	Doe v. Wal-Mart Stores Inc.	Dismissed
2005	Keating-Traynor v. Westside Crisis Centre	Dismissed
2005	Türedi v. Coca-Cola Co.	Dismissed
2006	Fagan v. Deutsche Bundesbank	Dismissed
2006	El-Masri v. United States	Dismissed
2006	Chen v. China Central Television	Dismissed
2006	Deirmenjian v. Deutsche Bank AG	Dismissed
2006	Flomo v. Firestone	Dismissed
2006	Government of Dominican Republic v. AES Corp.	Settled
2006	Shiguago v. Occidental Petroleum Co.	Settled
2006	Licea v. Curacao Drydock Co.	Judgement for plaintiffs
2006	Abagninin v. AMVAC Chemical Corp.	Dismissed
2006	Barboza v. Drummond Co.	Motion to dismiss granted
2006	Sinaltrainal v. Nestle U.S.A. Inc.	Withdrawn
2007	Aguilar v. Imperial Nurseries	One defendant settled; default judgement for 3 defendants
2007	Xiaoning v. Yahoo! Inc.	Settled
2007	Mohamed v. Jeppesen Dataplan Inc.	Dismissed
2007	<i>In re</i> Chiquita Brands International Inc.	Appeal pending
2007	Torrez v. Correctiosn Corporation of America	Dismissed
2007	Mastafa v. Australian Wath Board Ltd.	Dismissed
2007	Aikpitanhi v. Iberia Airlines of Spain	Dismissed
2007	Park v. Korean Broadcom Systems	Dismissed
2008	Estate of Manook v. Unity Resources Group	ATS claims dismissed
2008	Bank Julius Baer & Co. v. Wikileaks	Dismissed
2008	Zheng v. Yahoo! Inc.	Dismissed
2008	David v. Signal International	Pending
2008	Chowdhury v. Worldtel Bangladesh Holding Limited	Dismissed
2008	Al-Janabi v. Stefanowicz	Dismissed
2008	Ahmed v. Dubai Islamic Bank	Dismissed
2008	Al-Ogaidi v. Johnson	Dismissed
2008	Al-Quraishi v. Nakhla	Dismissed
2008	Al-Taee v. L-3 Services Inc.	Dismissed
2008	Tamam v. Fransabank	Dismissed
2008	Al Shimari v. CACI International Inc.	Dismissed
2008	Licci v. American. Express Bank	Dismissed
2008	Adhikari v. Daoud & Partners	Pending
2008	Mainawal Rahman Building and Construction Corporation Ltd. v. DynCorp International LLC	Settled
2008	Bleiser v. Bundersrepublik Deutschland	Appeal pending
2009	Abecassis v. Wyatt	Dismissed
2009	Margallo-Gans v. Farrell	Dismissed
2009	Aziz v. Alcolac Inc.	ATS claims dismissed

Appendix C: Alien Tort Statute Cases

2009	Matias v. Taylors International Services Inc.	ATS claims dismissed
2009	Guanipa v. Chavez	Dismissed
2009	Viera v. Eli Lilly & Co.	Dismissed
2009	<i>In re Xe Services Alien Tort Litigation</i>	Settled
2009	Giraldo v. Drummond Co.	Appeal pending
2009	Shan v. China Construction Bank Corp.	Dismissed
2009	Krishanthi v. Rajaratnam	Motion to dismiss denied
2009	Orkin v. Swiss Confederation	Dismissed
2009	Baloco <i>ex rel.</i> Tapia v. Drummond Co.	Dismissed
2010	Diaz v. Grupo Mexico Inc.	Dismissed
2010	Agurenko v. Arab Bank PLC	Pending
2010	Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank	Dismissed
2010	Mohamed v. Erinys International Ltd.	Dismissed
2010	Jaso v. Coca-Cola Co.	Pending
2010	Magnifico v. Villanueva	In favour of plaintiffs
2010	Fiouris v. Turkish Cypriot Community	Pending
2010	Mastafa v. Chevron Corp.	Dismissed
2010	Prince Hotel, SA v. Blake Marine Group	Dismissed
2010	Saharkhiz v. Nokia Corp.	Dismissed
2010	Genocide Victims of Krajina v. L-3 Services Inc.	Motion to dismiss denied
2010	MAKS, Inc. v. EODT General Security Co.	Dropped
2011	Hidalgo v. Siemens Aktiengesellschaft	Dismissed
2011	Cooperhill Investments Limited v. Republic of Seychelles	Dismissed
2011	Luu v. International Investment Trade & Services Group	Pending
2011	Doe I v. Cisco Systems Inc.	Dismissed
2011	Tymoshenko v. Firtash	Dismissed
2011	Daobin v. Cisco Systems Inc.	Pending
2011	Singh v. Crompton Greaves Ltd.	Dismissed
2011	Kaplan v. Al Jazeera	Dismissed
2011	Lim v. Government of Singapore	Dismissed
2011	Ivanovic v. Overseas Management Co.	Dismissed
2011	Okpabi v. Royal Dutch Shell, PLC	Dismissed
2011	Doe v. Neveleff	Pending
2011	Saldana v. Occidental Petroleum Corp.	Appeal pending
2011	Bera v. Shell Petroleum Development Company of Nigeria	Pending
2011	Guzman-Martinez v. Corrections Corporation of America	Dismissed
2011	Weisskopf v. United Jewish Apparel	Dismissed
2012	Thuy Thi Vu v. W & D Apparel Corp.	Dismissed
2012	Martinez v. BP PLC	Pending
2012	Turkcell Iletisim Complaint, Hizmetleri A.S. v. MTN Group Ltd.	Pending
2012	Delgado v. Villanueva	Pending
2012	Latchford v. Turkish Republic of Northern Cyprus	Pending
2012	Cong v. Conocophillips Co.	Pending

Appendix C: Alien Tort Statute Cases

2012	Fischer v. Erste Group Bank AG	Pending
2012	Doe v. Amal	Pending

*List of ATS cases in which at least one of the defendants was a company.

Source: Goldhaber, 2013, pp. 139-147.

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