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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

1.1 HUMAN RIGHTS AS A PHILOSOPHICAL CONCEPT AND A HISTORICAL PHENOMENON

1.1.1 What Human Rights Are

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

1.1.2 The Moral Foundations of Human Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1.3 Human Rights and their Characteristics

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Human rights and the law

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

From their first appearance in modern Western societies, however,

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

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

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

1.1.4 Human Rights as Legal Constructs

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

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

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

Accordingly, the significant advances in the institutionalization of

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

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

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

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

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

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

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

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

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

1.1.5 The Internationalization of Human Rights

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

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

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

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

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

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

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

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

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

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

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

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

1.2 CORPORATIONS AND HUMAN RIGHTS

1.2.1 Model One: The Legal Model

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2.2 Globalization and the Shifting Responsibilities of Business and Government

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2.3 Model Two: A Self-regulatory Model

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

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

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

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

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

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

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

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

1.2.4 Model Three: The Draft Norms Model

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

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

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

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

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

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

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

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

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

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

Strengths and weaknesses of Model Three

This third model has clear strengths.

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2.5 Summary

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

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

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

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

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

1.3 IDENTIFYING THE HUMAN RIGHTS OBLIGATIONS OF CORPORATIONS

1.3.1 The Nature and Scope of Corporate Human Rights Obligations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3.2 Corporations and the Institutionalization of Human Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3.4 Final Questions

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

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

Is the Hybrid Model vulnerable to these objections?

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

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

Third, corporations have the management tools and capacity to think

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTES

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

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

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

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

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

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

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

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

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

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