

Human Rights as a Dimension of CSR: The Blurred Lines Between Legal and Non-Legal Categories

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ABSTRACT. At the UN, important projects laying down transnational corporations' (TNCs) human rights responsibilities have been launched without ever clarifying the relevant theoretical foundations. One of the consequences is that the human rights principles in projects like the 2000 UN Global Compact and the 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights can be understood in different ways, which should not cause surprise given that their authors come from diverse backgrounds, including economics and public policy. An examination of these projects and the views of their authors reveals that, although they are superficially linked to international human rights law, they go well beyond it and attempt to deal with corporate

social responsibility issues in ways that elude neat classification as fitting neatly in either legal or non-legal categories. Too little attention has been paid to how in the course of developing these projects the legal and ethical dimensions have become entwined and how lines have gotten blurred. Meanwhile, there has been recognition that these UN projects have emerged simply as *ad hoc* responses to practical concerns about the sustainability of globalization. The lack of any foundational theory or normative framework should be addressed; it is time to bring together specialists from different fields concerned with the human rights responsibilities of corporations to see if it is possible to define a coherent overarching theory for these UN projects.

KEY WORDS: George Kell, Global Compact, human rights, John Ruggie, Kofi Annan, norms on the responsibilities of transnational corporations, universal declaration of human rights

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Introduction

At the UN, important projects laying down transnational corporations' (TNCs) human rights responsibilities have been proceeding in an *ad hoc* manner without ever clarifying the relevant theoretical foundations. If one examines these projects, one encounters evidence of attempts to deal with corporate social responsibility (CSR) issues that elude neat classification in either legal or non-legal categories. One of the consequences is that the human rights principles in the 2000 UN Global Compact and the 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights can be understood in a variety of ways.

In reviewing how lines between legal and other categories have gotten blurred, after a consideration of Tom Dunfee's experience in our department, the identity of which keeps evolving, a brief history and critical assessment of UN projects affecting the human rights obligations of TNCs will be offered. How diverse the backgrounds of the personnel involved in drafting these projects have been and how the authors shift back and forth from categories like law, ethics, and public policy will be highlighted. This account helps explain why, as lines have gotten blurred, contention has arisen about whether or not these projects do possess a legal character and why calls are being made for constructing a coherent theory about the human rights dimensions of CSR.

The legal studies department's experiences with blurred lines

Initially, I would like to record a few reminiscences about Tom Dunfee's career at Wharton that seem relevant to my topic of blurred lines, aspects of which seem to be encapsulated in the various attempts that have been made to redefine the identity of our department. Earlier in our academic careers as members of what was then known as the Legal Studies Department, Tom and I both worked on assessing business with what were conventional lawyerly tools. We were subsequently drawn to study questions falling under the rubric of CSR but from different academic specializations.

While we both were in the legal camp back in the late-1970s and early-1980s, Tom and I had friendly arguments about topics that were the precursors of our later CSR concerns. For example, we did not see eye to eye regarding the US policy of extending its antitrust law with extraterritorial effect. I did not realize it until much later, but as we argued about the merits of the extraterritorial extension of US antitrust law, we were gnawing on the edges of what was going to become an increasingly urgent and far larger project – how to deal with problems caused by the globalization of business. As globalization advanced, regulating TNCs using national laws – laws that varied greatly in their content and quality – became increasingly difficult and often ineffectual. Many countries with weak or corrupt governments allowed TNCs to operate with unfettered discretion.

Experience showed that this discretion would often be abused. In the same way that an international cartel engaging in price fixing and setting production quotas could base itself in a country where such activity was condoned, other forms of predatory and destructive business activities could be carried out by exploiting the lax regulations that many countries had.

The harms caused to vulnerable populations in poor countries by unregulated globalization could be assessed as unacceptable from several standpoints. As someone who uses the framework of international human rights law, which treats all human beings as being of equal worth and equally deserving of protection for their rights, I considered that allowing TNCs to act in destructive or exploitative ways in poor countries clashed with human rights principles. In my view, expanding the tenets of international human rights law to obligate TNCs to show the same concern for the impact of their business in countries like Bolivia, Burma, or Nigeria that the national laws obliged them to show in countries like Australia, Japan, or Sweden offered a plausible tack. Another possible tack was developing business ethics to provide consistent standards to guide TNCs, the option that Tom selected.

As the years passed, the identity of our department underwent transformations that amounted to blurring the lines between the study of law and other subjects, effectively treating law as a field did not have fixed boundaries and blended into or overlapped other fields. For a while, in accordance with a broader plan envisaged by the Wharton School, our department was merged with a group of academics comprising specialists in public policy and management. During the years when this merger subsisted, we were known as the Department of Legal Studies and Public Management. As Chair, Tom had to try to manage two groups whose members' divergent backgrounds stood in the way of easy communication. Fault lines between the fields became manifest that eventually led to a split. That is, whereas the school seemed to think that the expectations and mindsets of legal specialists and those of specialists in public policy and management had natural affinities, the breakup of the union indicated that they were hard to mesh.

In later years, specialists in business ethics joined our department, and Tom crossed over to the ethics

side. As the number of ethics faculty members grew, pressures mounted for their presence to be formally acknowledged. Belatedly, our name changed this time to the Department of Legal Studies and Business Ethics. This official recognition that our department again combined two distinct fields provoked some contention, which Tom had to deal with when he again became Chair. My own impression – which is not necessarily one that is generally shared – is that communicating across the boundaries separating the fields of law and ethics remains difficult despite our common concern with the optimal regulation of business.

It was noteworthy that after Tom moved into the field of ethics, he and I did not argue any more. In retrospect, I imagine that this was because we no longer felt that we shared the same frames of reference and had in effect lost what had formerly been our common language. As a result, Tom and I never compared how the premises that we were operating on related or differed. We superficially concurred on the proposition that TNCs had to operate in a socially responsible manner, but I cannot say whether or not this was based on a meaningful agreement on foundational principles. I regret now that Tom and I failed to sort out our ideas on such questions while there was still time to do so. In retrospect, I believe that he must have acquired uniquely valuable insights into how academics are socialized in fields like law, ethics, and public policy and how their perspectives relate – and differ – on questions relevant for the study of CSR.

One might read developments in our department since the late-1970s as suggesting that in the study of regulating business it is hard to develop a shared understanding that crosses the lines separating law from other related fields like ethics and public policy. At the same time, one could also read the pattern as indicating that some academics are operating as if the lines separating law from these other fields are blurred – meaning that they are assuming that they can be disregarded without sacrificing coherence. A related assumption may be at work is that the findings in one field can be readily grasped and also appropriated by academics working in another field, meaning that the boundaries separating law from other fields can be treated as being permeable. Additional evidence of lines being blurred is the fact that some are now proposing – perhaps without

intending for this proposal to be taken entirely seriously – that our department should undergo yet another metamorphosis and that the nomenclature should drop all reference to law, with the department reemerging in the guise of “The Department of Normative Studies.” One might say that our departmental evolution offers a microcosmic representation of the difficulties that those wrestling with the social responsibilities of TNCs face in resolving whether legal issues can be treated as facets of related concerns that are developed in fields like ethics and public policy.

Blurred lines in UN projects on TNCs’ human rights responsibilities

The unsettled nature of human rights

Before proceeding to examine UN projects on TNCs’ human rights responsibilities, a background problem must be highlighted – that the nature of human rights remains unsettled. No consensus about the foundations of human rights has yet emerged, which can be overlooked if one too casually assumes that debates ceased with the emergence of the relevant UN documents.

Obviously, lawyers do have reason to claim that human rights principles are tied to law, because they have been incorporated in the UN system of international law since 1945. The UN has been actively developing new rules via UN declarations and conventions, and there is now an extensive set of principles that fall in the category of international human rights law. The most influential statements of human rights remain those embodied in the Universal Declaration of Human Rights (UDHR) and the two main covenants on civil and political rights and on economic, social, and cultural rights that expand its provisions.

Although these UN instruments mean that it is fair to treat human rights as falling within the ambit of international law, lawyers have to concede that human rights spill over into domains like philosophy, ethics, theology, intellectual history, anthropology, political science, and public policy. In a widely appreciated article written over two decades ago, Burns Weston noted that, although there is a consensus supporting the authority of human rights, defining their nature continues to be problematic:

To say that there is widespread acceptance of the principle of human rights is not to say that there is complete agreement about the nature and scope of such rights or their substantive scope – which is to say, their definition. Some of the most basic questions have yet to receive conclusive answers. Whether human rights are to be viewed as divine, moral, or legal entitlements; whether they are to be validated by intuition, culture, custom, social contract theory, principles of distributive justice, or as prerequisites for happiness; whether they are to be understood as irrevocable or partially revocable; whether they are to be broad or limited in number and content – these and kindred issues are matters of ongoing debate and likely will remain so as long as there exist contending approaches to public order and scarcities among resources (Weston, 1984, p. 262).

This candid assessment reminds us that the theoretical foundations of human rights have never been conclusively settled. The fact that the very definition of human rights is open to question also suggests one reason why lines easily get blurred regarding which category is at stake when people in various fields try to define which, if any, human rights responsibilities bind TNCs and on what grounds.

The UN Draft Code of Conduct: older state-centric thinking about economic development and human rights – with a moral twist

Back in the 1970s and 1980s, there seemed to be little prospect of international human rights law, then conceived of as binding on states, treating TNCs as subjects. One can see the older perspective embodied in the Draft Code of Conduct on Transnational Corporations, which was prepared by the UN Center on Transnational Corporations and remained under discussion from 1977 through 1980s. The draft TNC code was prepared by people whose outlooks reflected the ideology of then influential UN instruments like the 1974 Declaration for the Establishment of a New International Economic Order and the 1974 Charter of Economic Rights and Duties of States. The latter title perfectly embodies the state-centric viewpoint prevalent in the UN bureaucracy of that era, where the concern was to set the stage for correcting the inequities of an international economic order that was viewed as

skewed by the legacy of colonialism and biased in favor of the rich countries. As Asante (1989) describes, the aim was to ensure that what were then called Third World countries could exert control over TNCs to ensure that their operations helped advance their development goals and that TNCs would show respect for host countries' sovereignty.

The notion that TNCs could be trusted to participate constructively in advancing the UN human rights mission was utterly foreign to the authors of the draft code. Like other documents of that era, when suspicions of TNCs' motives were rife, the draft code assumed that governments needed to constrain TNCs in the interests of safeguarding human rights. The draft code deemed TNCs' human rights responsibilities worthy of only a brief mention, providing in Article 14:

Transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion.

According to this article, TNCs did have an obligation to respect human rights and fundamental freedoms, but since they were ordered to respect human rights "in their social and industrial relations," it seemed that the scope of this obligation was meant to be limited. The sentence calling for avoiding discrimination, a negative duty, conveyed the impression that discriminatory behavior by TNCs was anticipated. With the background including debates about TNCs' investments in apartheid South Africa, the preoccupation with deterring TNCs from discriminatory employment practices seemed natural.

Negotiations on the draft code ground to a halt in 1992. TNCs and Western governments both had opposed the code, claiming that it was unbalanced and demanding the addition of provisions to protect TNCs' interests. They complained that while it imposed significant duties on TNCs, the code did not protect them by obliging host governments to abide by equally stringent rules regarding expropriation, intellectual property, and profit repatriation – issues of prime concern for TNCs and Western governments.

One feature in the thinking about this draft code that I do not believe has received sufficient attention can be found in a passage in a 1986 publication by the UN Center on Transnational Corporations. The drafters reluctantly admitted that they were facing strong resistance to their plans to get the code accepted as law. As happened later when rules for corporate conduct were under discussion at the UN, the lines between legal and ethical provisions turned out to be blurred. Suddenly and with no explanation, in one passage the UN bureaucrats shifted from law to the domain of morality. As they conceded that the code might never become law and might only have the status of “a voluntary instrument” endorsed by a General Assembly resolution or declaration, they claimed that it might yet have “a strong moral standing as an international standard which cannot be ignored” (UN Center on Transnational Corporations, 1986, p. 27). That is, after years of work to complete a code that was designed to be adopted as law, the drafters seemed comfortable shifting ground and recharacterizing the draft. They referred to a different kind of normative framework and suggested that as an international moral standard, the code could still be efficacious.

Although they were straddling the legal and moral domains, the authors declined to elaborate on the basis for their claim that the draft code simultaneously embodied a moral standard. However, viewing the draft code in the context of the state-centric ideology then prevalent in the Center on Transnational Corporations, one can safely infer that the reference was to socialist tenets. Tenets grounded in a socialist ethos would, of course, provide a strong contrast to the liberal, free market thinking that was later to predominate in the UN offices that created the 2000 Global Compact and 2003 Norms. In that later context, one also encounters assumptions that the standards being set for TNCs’ conduct are expressions of ethical or moral claims. However, with the subsequent embrace of the free market and the awareness of governments’ deficient human rights performance, the references to ethical or moral claims would be understood in a very different way. By 2000, TNCs had become viewed in UN circles not as suspect entities given to predatory and exploitative behavior but as vital allies in UN efforts to mobilize market forces to advance the public interest and cure the ills of globalization. The fact

that after the sharp decline in prestige of socialist ideology perspectives on business ethics dramatically shifted is a reminder that, where they are left undefined, abstract references to ethics or morality can be highly ambiguous and potentially correlate with dissimilar priorities and values.

Expanding – and blurring – the scope and nature of TNCs’ human rights responsibilities in relation to those of governments

In the 1990s with the discrediting of socialist economic models, attitudes in the poorer countries toward TNCs were evolved. No longer seen as predators and exploiters but hailed as offering urgently needed funds and jobs, TNCs were courted. The ideology behind the draft code was dismissed as anachronistic and in 1992, the UN office working on it was closed.

As support for free markets grew and the power of TNCs mushroomed, a radically different view of TNCs’ role in the human rights domain was articulated. Although no authoritative theory had emerged supporting the transfer of human rights responsibilities from states to TNCs, one could observe developments on the ground during the 1990s moving in the direction of such a transfer.

The disposition to use human rights criteria to assess the performance of TNCs was part of an overall intensification in consciousness of and concern for human rights. As Rieff (1999, p. 37) has observed, “(i)n these post-communist, post-modern times, human rights seems to have become the dominant moral narrative for thinking about world affairs.” As respect for human rights increasingly became equated with basic decency in people’s minds, it became more difficult for TNCs to escape censure and avoid costs if they failed to adhere to human rights standards – even where governments had approved their actions.

There are many indicators of how the belief that TNCs have significant responsibilities in the human rights domain has grown, which has led to a situation where TNCs feel pressured to demonstrate their concern for human rights. Among the many factors that corporate executives must confront these days are NGOs and labor unions that call for corporations to respect human rights and that expose and

denounce corporate human rights violations, shareholders – including institutional investors and large pension funds – who work to ensure that companies in which they invest act in a manner consonant with human rights, consumers who are inclined to boycott products of companies that have become associated with disregard for human rights, prospective employees who do not want to work for companies whose images are sullied by bad human rights records, and observers around the globe who monitor international business and quickly post information about corporate failings in the human rights domain on Internet sites. Executives have to worry about public interest law firms that pursue actions in US courts against corporate defendants for human rights violations overseas – or complicity in these – using the Alien Tort Claims Act (ATCA). True, plaintiffs' suits charging TNCs with such violations or complicity in such violations have not reached the stage of final rulings that could definitively establish the parameters of TNCs' legal liability for human rights violations. However, ATCA suits create waves, so that the mere bringing of such cases has the potential to harm corporate images.

Transnational corporations that conducted business in ways that did not conform to international human rights law found that they risked being damaged by the classic "name and blame" techniques that have been used by human rights activists to chasten governments that do not respect human rights. Indeed, where exposes of human rights deficiencies were concerned, TNCs were often more vulnerable than most governments were to pressures from human rights activists, because tarnishing their reputations could directly harm their brand and their corporate image, ultimately reducing their profits. At a time when many corporations were signing onto initiatives like the UN Global Compact that offer expansive conceptions of TNCs' human rights responsibilities, corporations that failed to follow their peers risked harms to their reputations.

Regardless of whether they claim to support human rights, TNCs have opposed attempts to hold corporations legally bound to adhere to human rights, advocating instead voluntary models of CSR, like the ones contemplated in typical corporate codes of conduct (Shamir, 2004). Such codes of conduct, which aim to encourage more consistent

adherence to CSR principles over TNCs' geographically diffused operations, proliferated in the 1990s (Liubicic, 1998). TNCs were initially slow to incorporate human rights provisions in their codes of conduct, but mounting pressures eventually persuaded TNCs to signal their commitment to human rights. As of 1993, it was reported that fewer than 5% of US-based retailers and brand name companies were addressing human rights issues through their codes of conduct (Baltazar, 1998, p. 693). Subsequently, human rights provisions in these codes became more common. However, the human rights provisions were composed in an *ad hoc* manner and varied greatly in the human rights commitments that they stipulated. One reason for this was that no authoritative theory on the human rights responsibilities of TNCs had been set forth that could guide companies in writing their codes of conduct.

Codes of conduct often specified only a narrow range of specific rights, as opposed to the wider range of rights set forth in the UDHR and other basic UN human rights instruments. A 2000 survey conducted by the Ashridge Centre for Business and Society of Fortune 500 companies, to which 52 survey targets ultimately responded, found that most companies had corporate policies or guidelines that included at least some basic human rights principles. Most frequently encountered were prohibitions of discrimination (94%) and calls for ensuring safe and healthy working conditions for employees (92%) and respect for cultural identity (58%). Only 16% expressly referred to specific international human rights standards like UN conventions or the UDHR (Wilson and Gribben, 2000, p. 15).

Notwithstanding these striking inconsistencies, by adopting codes of conduct with human rights provisions and by committing themselves to implement these provisions, TNCs have indicated in large numbers that they are responding to the growing clamor for them to commit to respect for human rights. The widespread adoption of such codes does tend to promote corporate cultures where human rights are treated as normative at the same time that it also raises expectations on the part of outsiders that TNCs will be adhering to international human rights law.

This does not mean that TNCs are acquiescing in the proposition that international human rights law governs them the way it governs states. Even when

their codes incorporate elements of international human rights law, TNCs have insisted on the voluntary nature of their commitments. That is, TNCs' codes may speak as if they accept principles of international human rights law, but only on the assumption that in this context it will not actually operate as law, leaving decisions on compliance voluntary. One sees lines between law and other kinds of norms being blurred here.

In another sign of the spreading conviction that TNCs have human rights responsibilities, an important addition was made in 2000 to the voluntary Guidelines for Multinational Enterprises drafted by the Organization for Economic Cooperation and Development (OECD). These had originally been adopted in 1976 without dealing with human rights issues. Significantly, in a June 2000 revision, the guidelines were modified to include a call for corporations to "respect the human rights of those affected by their activities," to "contribute to the effective elimination of child labor," and to end "forced or compulsory labor in their operations" (OECD, 2008). Obviously, in OECD circles as of 2000, it was thought that it had become essential for corporate guidelines to stipulate TNCs' human rights responsibilities. However, the singling out of forced labor and child labor left open the possibility that the OECD was only intending to impose a limited range of human rights obligations on TNCs, such as ones in the area of employment relations.

This contrasts with trends on the ground, which have been heading in the direction of construing the human rights responsibilities of TNCs more expansively. The line between the responsibilities of governments and those of TNCs has become blurred, with corporations increasingly being expected to undertake what were formerly seen as the functions of governments in protecting human rights and fulfilling rights claims. Today, TNCs are not only being expected to refrain from acts violating human rights (like discriminating in the workplace, preventing workers from organizing unions, or using child labor), but they are also being called onto shoulder obligations that require affirmative steps, being expected to carry out tasks that years ago were deemed the province of governments.

Thus, when and if corporations commit to uphold human rights, they may find that expectations

are that they will adopt pro-active roles that entail assuming a wide range of functions designed to advance the cause of human rights and to enhance public welfare. TNCs are being pressured to take steps such as setting up schools, constructing health clinics and supplying HIV/AIDS sufferers with free anti-retrovirals, and establishing monitoring systems to audit labor conditions in independently owned factories that supply them. TNCs are being called upon to protect people who are protesting against government policies or the TNCs' own operations and to modify or abandon proposed projects that may be approved by governments but that jeopardize the lives of indigenous peoples. Furthermore, TNCs are being asked to use their influence to persuade states to desist from human rights violations and to advocate and promote respect for human rights – including undertaking human rights advocacy in countries where this goes against policies of repressive regimes. As TNCs increasingly assume quasi-governmental roles, people interested in global governance are naturally being drawn into the discussions of their human rights responsibilities.

Disputes about whether international human rights law governs TNCs

The fact that in practice are TNCs commonly being charged with human rights responsibilities that were formerly viewed as being incumbent upon states does not mean that any persuasive and broadly supported theory has been put forward to justify this. The absence of a theory explaining why and when human rights responsibilities should be shouldered by TNCs has continued to trouble thoughtful observers. Complicating any efforts to construct such a theory is that academics and governments are still debating whether, as a matter of doctrine, international human rights law does govern TNCs. When the question is asked whether TNCs do have obligations under international human rights law, the range of responses shows that a consensus remains elusive.

It is not hard to find those who resist the idea that TNCs are bound to adhere to international human rights law. For example, in a 2000 publication, Garth Meintjes, who is Associate Director of Notre Dame's Center for Civil and Human Rights,

asserted: “It is true that international law alone does not at present impose clear human rights obligations on TNCs” (Meintjes, 2000, p. 96). In an article from a Cornell University Symposium on the Global Compact, two academic authors maintain that international law does not reach issues of CSR, asserting: “There are no existing international legal obligations that require cooperate [sic] social responsibility” (Meyer and Stefanova, 2001). In a landmark 1999 report on human rights violations in India resulting from Enron’s wrongdoing at its Dabhol power plant, Human Rights Watch maintained: “There are no international regulations on transnational corporations (TNCs) that oblige them to respect human rights” (Human Rights Watch, 1999, p. 104).

In contrast, according to the eminent human rights authority Louis Henkin, ever since the UDHR was adopted in 1948, there has been a legal basis for saying that international law imposes human rights obligations on TNCs. In this connection, one needs to recall that the UDHR itself is treated as a statement of customary international law. In a 1999 essay, one that focuses on the wording of a passage in the UDHR proclamation that precedes its substantive principles, Henkin pointed to language that he argued extended its reach to TNCs. In the proclamation, the UDHR describes the principles as:

a common standard for all peoples and all nations, to the end that **every individual and every organ of society**, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction. (emphasis added)

Henkin interpreted this language as supporting the proposition that TNCs have human rights obligations, being encompassed in the phrase “every organ of society” (Henkin, 1999, pp. 24–25). Thus, if one accords weight to the wording of the proclamation, as organs of society, TNCs are legally bound by the UDHR.

A skeptic might observe that Henkin’s reading does not seem to be the most natural interpretation of the language. One would not ordinarily rush to

conclude that by enjoining individuals and organs of society “to promote respect for rights and freedoms via teaching and education and by progressive measures, national and international” one was asserting that profit-making companies were as obligated as states were to implement the UDHR. Indeed, had Henkin’s view been a natural reading of the proclamation, one would have expected claims that TNCs were bound by the UDHR would have emerged decades ago.

Henkin’s position, which rests on subtle reading of the language of the proclamation rather than a coherent explanation for why it makes sense for TNCs to take over human rights responsibilities, has been seized on by advocates of extending the reach of international human rights law. Even if it seems to stretch the language of the UDHR, this interpretation of the proclamation has won currency in important quarters. The influential human rights NGO Amnesty International, which endorses the idea that international human rights law covers TNCs, has embraced the same reading of the UDHR proclamation (Amnesty International). It is also the interpretation that is utilized in the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. This document includes in its preamble the statement that:

even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights (UN Commission on Human Rights, 2003).

Shifting human rights responsibilities to TNCs as a default option; the genesis of the 2000 Global Compact

People who do not adopt Henkin’s interpretation of the wording in the UDHR or who regard it as insufficient may offer other rationales for asserting that TNCs must shoulder responsibilities set in international human rights law. In UN circles, the rationale that is most frequently encountered is that TNCs are the only entities with the power to

mitigate the ills that threaten the sustainability of globalization.

Treating TNCs as major new actors in the human rights domain has become a natural default option in the wake of sobering experiences over the last decades with the bad human rights records of typical governments in the Global South. In the climate of idealism prevailing in the aftermath of the founding of the UN, hopes were that states generally would undertake in good faith to carry out the human rights mission that had been assigned to them. However, these hopes have now been dashed; most of the population in the Global South now lives under oppressive and exploitative regimes that show disregard for human rights. Recognition of the widespread governance deficits has prompted an historic shift in thinking about the role of TNCs.

At the same time governments are falling grievously short in terms of living up to their human rights responsibilities, in the wake of the near universal acceptance of market economies, TNCs now rank among the major globalizing forces. The largest TNCs have more extensive power, far more abundant resources, and a larger capacity to influence outcomes for good or for ill than most national governments. This shift in power to market forces generally and to TNCs in particular can lead people to conclude that human rights obligations that under the original logic of the human rights system should remain incumbent on governments must in practice be transferred to TNCs – even if they realize that a persuasive theoretical basis for making this shift has yet to be articulated.

Apprehensions have mounted that, if TNCs are not persuaded to work to advance human rights, the UN human rights system will forfeit any chance of becoming more effective and that the yawning wealth gap will be destined to grow even more worrisome. Observers see dire perils in the growing disparity between the most affluent and the most impoverished regions of the world, forecasting a situation where the stability and sustainability of the global political and economic order could be jeopardized by the enormity of the inequalities. It was in a climate of preoccupation with stark imbalances and inequities that the July 26, 2000, Global Compact emerged under the auspices of former UN Secretary General Kofi Annan. Both he and his associates have assumed that sustainable globalization necessitates a

project like the Global Compact that could bring TNCs into partnership with the UN in advancing human rights. Of course, as they venture to enunciate norms in this area, they can draw reassurance from the facts that corporations have already in various forms announced their commitments to human rights – such as including human rights in their codes of conduct – and that public opinion widely supports the idea that TNCs must respect human rights.

The backgrounds of those who played central roles in creating the Global Compact should be briefly described. Interestingly, despite the fact that human rights figure prominently in the Global Compact, all are in fields other than law. Annan, who spearheaded the Global Compact, earned a BA in economics at Macalester College, pursued graduate studies in Geneva at the Institut Universitaire de Hautes Etudes Internationales, and later earned an M.S. in Management at the Massachusetts Institute of Technology. In the UN, he served in a variety of positions as an international civil servant and administrator before assuming the Secretary General's responsibilities. The main architect of the ideas behind the Global Compact was John Ruggie, an international political theorist who worked closely with Annan. He has since served as the Special Representative of the Secretary-General on the issue of human rights and TNCs and other business enterprises. He has also taught at the Kennedy School of Government at Harvard as Professor of International Affairs and Director of the Center for Business and Government. The economist Georg Kell likewise made important contributions. He worked with Annan in preparing the Global Compact and became Executive Head of the United Nations Global Compact after serving as the Chief Economic Adviser in the Executive Office of the Secretary General. Working with an assistant, he put together an important paper on how the Global Compact developed (Kell and Levin, 2002).

Kell chronicles steps in the thinking leading to the Global Compact. He records how in an address given in Davos, Switzerland, in January 1999, Annan set the stage for the Global Compact by asking a gathering of the world's most influential business leaders to work with the UN in addressing the deficiencies of global capitalism (Kell and Levin, 2002, p. 5). Annan warned his audience of the perils of failing to take measures to rectify

the strains and imbalances that the world was witnessing:

The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance between the economic, social and political worlds can never be sustained for very long (Kell and Levin, 2002, p. 6).

As Kell describes it, Annan's thinking was that "the longevity of globalization will remain threatened" until measures to protect the environment and human rights are taken that are commensurate with the current system of "extensive rules for economic priorities" (Kell and Levin, 2002, p. 2). In his discussion of the genesis of the Global Compact, Kell reports that the worry was "that the global economic architecture was not embedded in a broader framework of shared social values and thus lacked the social legitimacy critical to its survival" (Kell and Levin, 2002, p. 4). According to him, "(a) disequilibrium in international governance structures persisted in which strict rules and enforcement capacities for economic expansion were not matched by strong rules for social justice" (Kell and Levin, 2002, p. 4). That is, in the Office of the Secretary General, the view was that for a stable globalization system to emerge, concerns of social justice had to be given their due.

After the Global Compact was under way, Kofi Annan appealed to business leaders to act out of enlightened self-interest when he warned at the World Economic Forum in New York on February 5, 2002, that pressure was mounting as "far too many people are condemned to lives of extreme poverty and degradation" and that "the forces of envy, despair and terror in today's world are stronger" (Secretary-General Urges, 2002). He urged the assembled business leaders to "show that economics, properly applied, and profits, wisely invested, can bring social benefits within reach not only for the few but for the many, and eventually for all" (Secretary-General Urges, 2002). Anticipating resistance, he argued for the proposition that business had to cross the line and undertake what had conventionally been thought of as governmental responsibilities:

Some of the business leaders among you may respond that that is not the business of business – that your job is only to look after the bottom line, and the interests of shareholders. They would argue that

social policy is a matter for governments, and also that it is up to governments to ensure that more people enjoy the benefits of capitalism, by creating a business-friendly climate in each country.

Certainly, there is much that governments can and must do... However, more and more business leaders are realizing that they do not have to wait for governments to do the right thing and indeed they cannot afford to. In many cases, governments only find the courage and resources to do the right thing when business takes the lead (Secretary-General Urges, 2002).

Annan essentially acknowledged that he had concluded that governments were falling short in their response to the crisis of globalization and that by default TNCs had to take a leading "social policy" role. Of course, if this amounted to the entire basis for saying that TNCs had human rights responsibilities, people who did not agree with Annan's factual assessment of the crisis of globalization or with his assertion that TNCs' "social policy" initiatives could cure it could conclude that Annan had made a weak case. That is, the validity of arguments like his rested on the accuracy of analyses of a particular factual problem and ways to remedy it, not on any reasoned general theory about why TNCs should have human rights responsibilities. Annan's approach was typical of the *ad hocism* in the thinking leading up to the Global Compact that made it hard to pin down what it ultimately signified.

Kell in his many publications on the Global Compact has underlined the urgency of getting TNCs to contribute to a healthier globalization by upholding human rights. However, he recognized that these concerns did not suffice as a normative or theoretical framework for the Global Compact and proposed that work needed to be done to elaborate such a framework. Without explaining why he singled out the field of business ethics rather than other fields like law or public policy, he proposed that "business ethicists" should be especially attracted to this project:

Another potential area of study surrounding the Global Compact would appeal especially to business ethicists. The initiative currently lacks a normative and theoretical framework, but is such a framework necessary and how might it be created? Researchers might approach the question by identifying the normative

theories that justify the conventions from which the Global Compact principles were derived. One could then attempt to construct a normative framework for the Compact by applying the theories to the modern business arena (Kell and Levin, 2002, p. 29).

Thus, evidence indicates that the impetus for constructing the Global Compact came from pragmatically oriented assessments of what measures were needed to remedy an unsustainable status quo. However, from the standpoint of an insider like Kell, the absence of any theoretical framework supporting the Global Compact could be acknowledged as a problem that needed to be addressed. In Kell's case, one saw an economist working in the area of global governance appropriating principles from international human rights law. However, rather than relying on the authority of law, he proposed instead that business ethics specialists would be needed to construct the foundational theory and normative framework for the project that had already been set forth.

Kell's assessment that what was missing in this UN initiative was an ethical framework provides another example of the blurred lines in the area of work on TNCs' human rights responsibilities. Although neither Kell nor the other thinkers, who took the lead in shaping the Global Compact, were grounded in the field of ethics, Kell conceived of the project as depending on ethical justifications. He presumed that it would be intelligible to ethics specialists, who could be called onto elaborate its theoretical framework.

As of this time, questions remain: One wonders: What are the prospects for a rationale other than the *ad hoc* one that is discussed above to emerge and also win general acceptance? Will Kell's hopes that specialists in business ethics can set forth a theory that retroactively accounts for and justifies the Global Compact project be realized? Answering such questions would seem to require organizing collaborative studies by people from the various fields that are linked to CSR to examine these UN projects and compare their assessments.

The Global Compact as a project straddling legal and other categories

Perhaps due to the lack of an explicit normative framework, the Global Compact can be understood

in different ways by persons coming from different backgrounds. The central figures – Annan, Ruggie, and Kell – were not disposed to think in terms of international law or recent developments in international human rights law, their backgrounds being in areas like governance, economics, and management. As they saw it, even though the human rights principles refer to the UDHR and also look like they could be part of the human rights provisions in a code of conduct, they were not intended to serve as such. The Global Compact is not law according to Kell; it does not afford “a regulatory framework or a code of conduct for companies” (Kell and Levin, 2002, p. 2).

As Kell puts it in his account, the authors conceived of the Global Compact as something on the order of “an open system of nested learning networks” (Kell and Levin, 2002, p. 10). In Kell's words, the Global Compact is “not a regulatory instrument or code of conduct for companies,” but constitutes “a value-based platform designed to promote institutional learning,” and it facilitates “transparency, dialogue, and the dissemination of best practices” (Kell and Levin, 2003, pp. 151–152). Far from seeing their venture as linked to the ongoing disputes about the reach of international law, the authors aimed to use the Global Compact as a basis for establishing a network that was exclusively voluntary and extra-legal. The ambiguity in the Global Compact project – one where an economist like Kell will naturally attribute different significance to its terms than lawyers do – amounts to another illustration of how lines between legal and non-legal categories are blurred.

In contrast, noting its explicit references to international human rights, lawyers looking at the Global Compact would tend to assume that it ties in with the contemporaneous debates about extending the reach of international law to TNCs, seeing it as endorsing the proposition that TNCs are obligated to adhere to international human rights law. Lawyers will be inclined to see in the Global Compact an initiative reinforcing arguments like Henkin's in favor of extending the reach of the UDHR to cover business. They would turn to the two human rights principles, which were worded as follows:

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: make sure that they are not complicit in human rights abuses.

The Global Compact indicates the provenance of these principles, the website claiming that its human rights provisions derive from the UDHR (Global Compact). With the UDHR principles being treated as stating elements of customary international law, the link to international law would seem established.

Some questions are naturally raised in this connection. What would have led the Global Compact's authors, who according to their own statements were thinking not in terms of establishing legal standards but in terms of setting up learning networks, to invoke international law as the source of its human rights principles? According to Kell's depiction, the reference to the UDHR is part of the authors' efforts to root the Global Compact in principles that were universally endorsed (Kell and Ruggie, 1999).

This is reinforced by a statement in the Global Compact website asserting that its principles in the areas of human rights "enjoy universal consensus" (Global Compact).

That is, the authors wanted to lean on the universality of the UDHR but did not sense that the Global Compact would be understood to be saying anything *about* international law or *about* its current reach. However, despite the authors' intentions, when viewed against a background of the contemporaneous initiatives promoting the idea that TNCs were governed by international human rights law, the Global Compact would inevitably be understood by many lawyers as positioning the UN, the organization within which international human rights law is generated, on one side of the contested question of whether TNCs are governed by international human rights law.

In this regard, the Global Compact seems a good illustration of the blurred lines between legal and non-legal categories that have already been alluded to. The fact that a lawyer would be likely to understand the Global Compact quite differently from authors like Kell also illustrates how a superficial consensus can mask underlying differences in perceptions.

Upon further scrutiny of the first two principles of the Global Compact, a lawyer might realize that

Kell's claim that the principles rested on the UDHR would require some qualification, because they actually expand its reach. With regard to the human rights principles, Kell says that "(s)pecifically, they were derived from the Universal Declaration of Human Rights" (Kell and Levin, 2002, p. 5). In actuality, the two principles go well beyond anything that is explicitly stated in the UDHR, which never expressly confirms that TNCs have human rights responsibilities. To the extent that the drafters of the Global Compact in some sense have *derived* principles 1 and 2 from the UDHR, it can only have been via a very indirect process, involving an intermediate step in which the drafters rethought the original reach of UDHR and teased out its potential implications for TNCs, including issues of corporate complicity in rights violations.

It seems that the authors wanted to endorse the notion that TNCs bore indirect responsibility for governmental wrongdoing. The call in the second principle for TNCs to avoid "complicity" in human rights violations stands out as having absolutely no counterpart in the UDHR, which never deals with issues of "complicity." Rather than being based on anything in the text of the UDHR, the complicity rule seems to have been a response to numerous cases that had arisen where TNCs had been criticized for complicity after they had collaborated with host governments that ran roughshod over human rights in the course of pursuing various business projects. The case of Unocal in Burma, in which the ruthless execution of a pipeline project had led to egregious violations of international human rights law in which Unocal was allegedly complicit, became perhaps the most notorious of these complicity cases after a lawsuit under ATCA was filed in 1996. The plaintiffs were villagers from Burma who alleged that the Burmese military had evicted them from their homes, terrorized them with tactics like rape, and used them as slave laborers to build roads and to clear the way for a gas pipeline that Unocal owned jointly with the Burmese government and the French oil firm Total. Although the abuses were perpetrated by the Burmese military, which has become infamous for its brutality, the plaintiffs asserted that Unocal as Burma's business partner could be held liable for the human rights violations. Before it could go to trial, the case went through various procedural

stages and appeals, eventually being settled out of court in 2004 and leaving the highly contested corporate complicity issue unresolved (Chambers, 2005).

When carefully compared with the original wording of the UDHR, the first two principles turn out not to correspond to the text of the UDHR but instead to express the authors' approval of the growing trend to expand the human rights dimensions of CSR. If principles 1 and 2 were actually drawn from the UDHR in the sense of restating principles regarding which there was already a universal consensus, it would mean that these principles were replicating settled principles of customary international human rights law. However, as noted, there actually is no consensus on whether the conduct of TNCs is covered by international human rights law. While invoking standards of international human rights law, the authors of the Global Compact – inadvertently, it would seem – moved well beyond the parameters of the UDHR to outline standards on TNCs' human rights responsibilities that reflected their endorsements of some current trends in the CSR domain.

In this area, one has an illustration of the confusion that potentially results when the lines separating the legal category from other categories become blurred. Lawyers would tend to look at the Global Compact as stating propositions concerning the scope of international human rights law. However, when one examines the thinking behind the Global Compact, one appreciates that the UDHR was being invoked simply, because it was seen as embodying universal values. The authors, who were looking at matters from the standpoint of public policy and global governance, aimed to exploit the fact that these values enjoyed wide prestige outside the field of international human rights law to enhance the authority of the Global Compact. Upon closer scrutiny, it turns out that, despite the express references to the UDHR, the human rights principles that were set forth in the Global Compact ventured well beyond the scope of the UDHR but without its authors meaning to extend the purview of the UDHR as a statement of customary international law – and without appreciating that they would be understood as doing so.

Disputes about the legal character of the 2003 Norms

The human rights principles in the Global Compact were subsequently expanded in a new UN initiative, the 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The document refers in its preamble to an extensive list of international human rights law instruments, including the UDHR and various human rights conventions, as well as to the Global Compact. Not only do these references link the Norms to international human rights law, but the work on this project proceeded under the auspices of the UN Commission on Human Rights, subsequently renamed the UN Human Rights Council. Thus, the Norms seem more tightly connected to the UN system of international human rights law than was the Global Compact.

It is noteworthy that, in contrast to the team behind the Global Compact, the membership of the Sessional Working Group charged with preparing the Norms was legally oriented. The group included David Weissbrodt, one of the preeminent scholars of international human rights law. The Chairperson was the eminent Senegalese jurist El-Hadji Guissé, and another member was the Cuban international human rights expert, Miguel Alfonso-Martínez. The other two members, Vladimir Kartashkin and Soo-Gil Park, had served in other UN entities concerned with international human rights law. Showing how perspectives of figures immersed in international human rights law differ from those of non-lawyers, this working group did not view the Global Compact the way that Kell described it, as a framework for a learning network that was devoid of any legal significance. Instead, this working group treated it as the germ of what were intended as a set of legal rules governing TNCs' human rights responsibilities.

In the preamble, the Norms assert that TNCs have a broad range of human rights responsibilities, asserting “transnational corporations and other business enterprises, their officers and persons working for them are obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments.” Moreover, principle 1 is similarly ambitious in scope, offering the sweeping claim that “[w]ithin their respective spheres of activity and

influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law..." (UN Norms). The Norms implicitly endorse the trend to construe TNCs' human rights obligations expansively.

These human rights principles are intended to be mandatory in two respects: they must be adopted as the internal rules of corporate operation and they must also form the basis of all contractual relations with other TNCs. That is, host states' human rights policies become irrelevant in this scheme – as befits a document produced in 2003 after decades of disillusioning experience with governance deficits that had held back progress toward realizing human rights. Even if the legal systems in host states fail to operate according to international human rights law, the Norms provide that TNCs are legally bound (Backer, 2006). This constitutes a dramatic change, amounting to a plan to use corporate law and the private contracts setting up TNCs' business relations to bind TNCs to follow international human rights law.

However, there is far from being a consensus that the Norms do set legally binding standards. This ambitious project has met resistance from those who continue to insist that only states have obligations under international human rights law. Among other things, the United States has opposed the Norms. At the UN, it has objected that international human rights law applies to states, not to non-state actors, and has condemned the norms as part of "the anti-business agenda" pursued at the UN (Statement by the U.S. Delegation, 2005). Of course, the "anti-business" characterization was linked to the free market ideology espoused by administration of George W. Bush, which dovetailed with TNCs' views opposing projects for making human rights obligations legally binding on them.

Against the background of these contrasting positions, John Ruggie came up with a third position on the nature of the 2003 Norms – that they belonged in an intermediate category. He presented this in a 2007 report that he authored for the UN Human Rights Council called "Business and human rights: mapping international standards of responsibility and accountability for corporate acts." He noted that the Norms assume that their provisions "reflect and restate existing international law," and

that they "attributed the entire spectrum of State duties under the treaties – to respect, protect, promote, and fulfil rights – to corporations within their spheres of influence" (Ruggie, 2007, para. 35). After reviewing relevant international human rights instruments, Ruggie took issue with this position, concluding that treaties currently do not impose direct legal responsibilities on corporations (Ruggie, 2007, para. 44).

Ruggie contests the idea that TNCs are directly bound by international human rights law even though he accepts Henkin's view that the UDHR applies to TNCs (Ruggie, 2007, para. 37). One recalls that Henkin, a lawyer, used language in the UDHR proclamation to argue that TNCs were legally bound by the UDHR. Ruggie, an expert in global governance, does acknowledge that one finds "hard law developments" in the imposition of liability on TNCs by national courts using international standards (Ruggie, 2007, para. 84). By this, one assumes that he means the liability under international human rights law that could potentially be imposed via suits under ATCA or analogous statutes. However, in general, although he agrees that Henkin's argument that the UDHR reaches TNCs as organs of society is sound, Ruggie's view is that this is not as law but rather as aspirations and a set of "moral claims," the underlying premises of which he does not explain. Ruggie asserts:

Henkin is surely correct in stating that the aspirations and moral claims of the Declaration were addressed, and apply, to all humanity and... companies themselves invoke it in formulating their own human rights policies. But that does not equate to legally binding effect (Ruggie, 2007, para. 37).

As has already been demonstrated, the pattern of recharacterizing legal principles as ethical or moral claims is not unusual in this context. Later in his report, having decided that TNCs' human rights responsibilities as stipulated in the 2003 Norms are not law but do state "moral claims," Ruggie proposes the label "soft law hybrids," a term that correlates with a mindset that minimizes distinctions between law and ethics. Seven years after the Global Compact, he admits that he does not see an answer to the vexed question of where governmental responsibilities end and those of TNCs begin, asserting that:

disputes between Governments and businesses over just where the boundaries of their respective responsibilities lie are ending up in courts. The soft law hybrids have made a singular contribution by acknowledging that for some purposes the most sensible solution is to base initiatives on the notion of “shared responsibility.” This is a conclusion some moral philosophers have also reached with regard to global structural inequities that cannot be solved by individual liability regimes alone. This critical nexus requires greater clarification (Ruggie, 2007, para. 87). (original footnote omitted)

In effectively acknowledging that he sees the lines separating the human rights responsibilities of states from those of TNCs as blurred, Ruggie has identified the need for clarifying a “critical nexus,” positing the potential relevance of ideas in the category of moral philosophy. As he contemplates the uncertain dimensions of TNCs’ human rights responsibilities, he concludes that more study is needed – a conclusion that evidence to date suggests is amply warranted. Obviously, if it is not yet clear whether we can definitively classify what responsibilities should be placed on TNCs and what ones are incumbent on governments, this aggravates the uncertainty regarding which academic field or fields are best suited for study of this topic.

Ruggie’s awareness that it was desirable to have more theoretical coherence did not deter him from taking a position similar to the one adopted by his colleagues Annan and Kell – that there was a practical urgency for crafting a response to the grievous ills and inequities afflicting the world. Like them, Ruggie is prepared to state publicly that the main reason for supporting TNCs’ responsibilities in the area of human rights is the pragmatic concern to avoid a destructive backlash against globalization. Writing in 2007 and having enjoyed a good vantage point for pondering the significance of the Global Compact and the 2003 Norms, Ruggie proposes that the vast inequalities that had opened up in the course of globalization had made it essential to demand that TNCs take on human rights responsibilities. Ruggie admonishes:

There are lessons to be drawn from earlier periods. The Victorian era of globalization collapsed because Governments and business failed to manage its adverse impact on the core values of social community.

Similarly, the attempt to restore a laissez-faire international economy after the First World War barely made it off the ground before degenerating into the destructive political “isms” that ascended from the left and right, and for which history will remember the first half of the twentieth century – all championed in the name of social protection against economic forces controlled by “others.” There are few indications that such extreme reactions are taking root today, but this is the dystopia that States and businesses need to consider, and avoid, as they assess the current situation and where it might lead. Human rights and the sustainability of globalization are inextricably linked (Ruggie, 2007, para. 83).

Ruggie does not pretend that this *ad hoc* response should be deemed satisfactory. He acknowledges that he cannot identify a coherent theoretical rationale for shifting what once were states’ obligations to TNCs, conceding that this occurs simply by default:

Where Governments lack capacity or abdicate their duties, the corporate sphere of influence looms large by default, not due to any principled underpinning (Ruggie, 2007, para. 87).

As has been argued here, the *ad hocism* characteristic of important UN initiatives like the 2003 Norms and the failure to articulate their theoretical premises is one reason that the lines between what belongs in the legal and non-legal categories remain as blurred as they are 7 years after the Global Compact came on the scene.

Conclusion

There are lessons to be drawn from this brief survey of UN projects on the human rights responsibilities of TNCs. To a lawyer, these may seem to fit in the legal category, but these projects may also be viewed as spilling over into fields beyond law. Others may presume that they involve overlapping legal and ethical frameworks, or that the insights of business ethicists are particularly relevant. Public policy and global governance expertise may come into the mixture, as well. To date, the tendency has been to treat the lines separating different fields as blurred, without paying much attention to the consequences of doing so or the ambiguities that may be engendered.

On occasion, central participants have signaled their awareness that these important UN projects have been proceeding in an *ad hoc* manner and have pointed out the need for establishing a coherent theoretical framework. It is noteworthy that when eminent figures like Kell and Ruggie call for input from moral philosophers or business ethicists, they seem to assume both that the potential for constructing such a framework does exist and also that it will justify the projects that have already been undertaken at the UN. While conceding that possibility, one might add that there is also potential for a different outcome: rigorous analysis might produce a theory that would indicate that these projects have rested on flawed assumptions. To be viable, a theory should try to offer more than an *ex post facto* rationalization for what has already occurred.

It is high time for academics and others who are working on the human rights dimensions of CSR on the basis of training in different fields to share their perspectives in forums designed to help them to identify where they agree and where they differ. Lawyers, ethicists, specialists in global governance and public policy, and others with interests in this area need to meet together and set up exchanges that can clarify where they stand on the question of the human rights responsibilities of TNCs. Such exchanges could enable them to make what are long overdue comparative assessments of the bases for their respective positions. Acknowledging that people with dissimilar training are likely to have different perceptions and probing what actually lies behind the blurred lines in this area could provide a salutary corrective to an unsatisfactory status quo. As various positions on the human rights responsibilities of TNCs are being articulated and debated, we have reached a stage that at times resembles the ancient Tower of Babel. Our contemporary difficulty may be one of specialists in various disciplines speaking a plethora of mutually unintelligible languages. However, at times it may also be one of speakers using what seems superficially to be the same language – as when they make references to the UDHR – but while having in mind very dissimilar referents, so that any apparent consensus is insubstantial.

In the course of investigating the potentially different ways of thinking that lie behind these blurred lines, we need to evaluate whether we do have the grounds for an overarching theory for imposing

human rights responsibilities on TNCs, an endeavor that should include wrestling with whether these responsibilities should be deemed to have a legal or ethical character – or possibly both. If it turns out that no overarching theory on the question of the human rights responsibilities of TNCs can be achieved, then it is time to step back and to engage in thoughtful inquiries about why and on what grounds specialists in law, ethics, and fields like global governance diverge in their assessments of how to approach this topic. This could facilitate the kind of conversations that I now regret that Tom Dunfee and I did not pursue while there was still time to do so.

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