Guest Editors' Introduction
Human Rights and Business

Wesley Cragg
York University

Denis G. Arnold
University of North Carolina, Charlotte

Peter Muchlinski
School of Oriental and African Studies

ABSTRACT: We provide a brief history of the business and human rights discourse and scholarship, and an overview of the articles included in the special issue.

KEY WORDS: business, human rights, UN Framework, Ruggie, corporations

DISCUSSION OF BUSINESS AND HUMAN RIGHTS from an explicitly ethical perspective has a unique history. Prior to the last decade of the last century, it was rarely discussed or examined. This might at first glance seem rather surprising. The idea of human rights has been the subject of intense inquiry and debate now since the renaissance and on some accounts before (Lloyd 1991, Lee and Lee 2010). The pursuit of human rights has motivated revolutions, for example the American and French revolutions. Debates about their ethical, political and legal status and foundations have played a central role in academic and political discourse since the Enlightenment. In the twentieth century, the practical political challenges of embedding human rights in international law have dominated the agendas of emerging international institutions like the United Nations, particularly since the end of the Second World War. In contrast, the first discussion of business and human rights in international institutions can be traced back only to the 1980s with the draft UN Code of Conduct on Transnational Corporations (United Nations 1984). Even with this UN initiative, significant academic attention to the topic was ignited only in the early to mid-1990s (an important early work is Donaldson 1991). Surprising as this late emergence of the subject might seem, the reasons are not hard to find. Until late in the last century, it was conventional wisdom that the responsibility for protecting and advancing and enhancing respect for human rights lay with government (Ruggie 2006 and 2007). On this view, the only human rights responsibilities of the private business sector were indirect legal responsibilities. It was only in the 1990s that doubts about the efficacy of this allocation of responsibilities began to gain widespread attention, driven, it is widely agreed, by the phenomenon of globalization (Chandler 2003, Ruggie 2006, Kobrin 2009, Cragg 2010, Lee and Lee

©2012 **Business Ethics Quarterly** 22:1 (January 2012); ISSN 1052-150X pp. 1–7

https://doi.org/10.5840/beq20122212 Published online by Cambridge University Press

2010). By extending the economic importance and reach particularly of multinational corporations, a process encouraged and facilitated by national and international laws and treaties limiting in significant ways the capacity of governments to control the movement of goods based, for example, on the conditions under which they were produced, globalization gave rise to serious questions about both the ability and the willingness of national governments to fulfil their human rights responsibilities.

As Geoffrey Chandler points out (2003), the first red flags were raised by NGOs like Amnesty International in 1991. However, the real catalyst for change was "the arbitrary execution of Ken Saro-Wiwa and eight other Ogonis" by the Nigerian Government in November 1995 (Chandler 2003), an event whose character and impact are explored in this volume of essays by Florian Wettstein (2012). It was subsequent to this event that human rights commitments began to appear in the voluntary ethics codes of major multinational corporations and industry associations encouraged by government exhortations and pressed by NGOs increasingly determined to hold corporations with international business interests to account for human rights abuses.

An early sign that significant shifts in views about the allocation of human rights responsibilities between the public and private sectors were under way occurred in 1998 when the United Nations Sub-Commission for the Promotion and Protection of Human Rights established a sessional working group to study and report on human rights and business. What followed in 2003 was a report entitled "Norms on the Responsibilities of Transnational and Other Business Enterprises with Regard to Human Rights." At the core of the report was the proposal that transnational corporations and other business entities should be brought directly under the ambit of international human rights law, humanitarian law, international labor law, environmental law, anti-corruption law and consumer protection law (Hillmanns 2003: 1070). That is to say, the report was calling for a dramatic shift away from the prevailing conventions and assumptions allocating the fundamental responsibility for protecting and promoting human rights to the State. Not surprisingly, the report aroused strident opposition on the part of a significant section of the business community and governments (Arnold 2010). While the report was never formerly endorsed by the UN, it did have two significant impacts. First, it resulted in a series of recommendations that eventually led the UN Secretary General to appoint, in 2005, a special representative, John Ruggie, to take up the issue of the human rights responsibilities of transnational corporations and other business enterprises. Its second significant impact was to bring into sharp relief three key questions: Was it appropriate to bring corporations under the ambit of international law heretofore focused on nation states and to a lesser degree on individuals? Did corporations have human rights responsibilities beyond those set out by law whether domestic or international? If the human rights responsibilities of corporations did extend beyond those required by law, what exactly was the nature of those responsibilities?

The work of the UN Sub Commission both stimulated and was supported by legal scholarship concerned to determine whether enterprises that enjoy the protection of certain human rights could also be understood to have human rights responsibilities or duties. The result was a growing consensus based on analogy

https://doi.org/10.5840/beq20122212 Published online by Cambridge University Press

with the responsibilities owed by natural persons to observe human rights and the fact that large transnational corporations in particular both had the power to infringe human rights and were guilty of significant human rights abuses, that it followed that transnational corporations could be understood to have direct human rights responsibilities (Clapham 2006).

Over the last two decades, legal practice has also moved in this direction evidenced by litigation under the US Alien Torts Claim Act and some important developments, in common law jurisdictions, concerning parent company liability for human rights related harms caused by overseas subsidiaries. Similar developments have also taken place in civil law countries, notably in France and the Netherlands, where lawyers have begun to engage in socially entrepreneurial public interest litigation (Muchlinski 2009). On the other hand, legislative attempts to extend human rights liabilities to home based companies, in the form of private members bills in the US Congress and the Parliaments of Australia, the United Kingdom and Canada, have all met with failure.

Business ethics scholars have also found themselves drawn into the debate first by reflections on the phenomenon of globalization and its human rights impacts and also by the work of the UN Sub Commission and the more recent work of the Special Representative of the UN Secretary General, John Ruggie (2006, 2007, 2008, 2010, 2011). Business ethics scholars have argued that transnational corporations have direct human rights obligations on contractualist grounds (Donaldson 1991, Cragg 1999) and on an agent based conception of human rights (Arnold 2010). They have also defended the use of human rights as potentially enforceable transnational norms of conduct for TNCs (Campbell 2006, Kobrin 2009). Other scholars have challenged the applicability or usefulness of rights language pertaining to corporate obligations in non-Western contexts (Strudler 2008). As evidenced by the contributions to this special issue, discussion and research have ranged across the ethical dimensions of all three of the questions brought into focus by the debate generated by the Draft UN Norms.

In 2011 the United Nations Human Rights Council endorsed the "Protect, Respect and Remedy" Framework submitted by John Ruggie as Special Representative of the Secretary General of the United Nations. In that report he proposed the adoption of a framework that addresses all three of the questions highlighted by the earlier work of the Sub Commission described above. Ruggie's framework features a State duty to protect human rights, a corporate responsibility to respect human rights, access to effective remedies for human rights abuses and a responsibility on the part of all actors to engage in due diligence with a view to identifying and managing responsibly the potential and actual human rights impacts of their activities. The work of John Ruggie and his proposed framework, now referred to widely as the UN Framework, have had the effect of further sharpening and structuring discussion on the human rights responsibilities of transnational corporations particularly with regard to their operations in developing and underdeveloped parts of the world, in zones of conflict, and in areas in which government has become seriously dysfunctional or deeply and systemically corrupt.

https://doi.org/10.5840/beq20122212 Published online by Cambridge University Press

The influence of John Ruggie's work and his recommendations can be seen to be in play in this special issue (Cragg 2012, Wood 2012, Wettstein 2012, and Muchlinski 2012).

As Peter Muchlinski (2012) points out, the proposal that corporations have direct human rights responsibilities, is "significant, if not revolutionary." Though this responsibility is not a legally binding one under international law, nonetheless it directly challenges prevailing conventional legal wisdom in international law that holds that only governments and to a much lesser degree individuals have direct human rights responsibilities. At the heart of Ruggie's framework is the view that corporations have a responsibility to respect human rights particularly where international and national human rights law does not reach or is not enforced. Corporations should take up this responsibility, Ruggie argues, to avoid reputational and other risks arising from rising public expectations surrounding their "social licence to operate" combined with increased public scrutiny which are all a consequent of globalization.

The first paper in this special issue (Cragg 2012) examines the "enlightened self interest" account Ruggie argues provides corporations with a persuasive reason to take up the "responsibility to respect" and identifies it as a serious weakness in the justificatory foundations of the UN Framework. The paper argues that the UN Framework can be expected to acquire significant traction on the part of transnational corporations only if the corporate responsibility to respect human rights is clearly demonstrated to be and acknowledged by corporations themselves to be a direct and explicitly ethical or moral obligation, a moral obligation that is distinct from their obligation to obey the law. The paper argues that paradoxically the most effective way of extending the direct reach of international human rights law to include transnational corporations is to acknowledge, and persuade the corporate sector to acknowledge, that the "responsibility to respect" human rights is in the first instance an explicit and direct moral obligation

The UN Framework constructed by John Ruggie (2008, 2010, 2011) allocates to governments the duty to protect, a positive duty, and to corporations the duty to respect, an essentially negative duty to do no harm. In "Silence as Complicity: Elements of a Corporate Duty to Speak Out against the Violation of Human Rights," Florian Wettstein (2012) challenges this allocation of responsibilities. He argues that when four conditions are satisfied—voluntariness, connection to the human rights violation, power to significantly influence the perpetrator, and a certain social or political status—corporations have a positive moral obligation to speak out against human rights abuses perpetrated by governments with a view to protecting or helping to protect potential or actual victims.

Building on conditions similar to those set out in Florian Wettstein's analysis of silent complicity, Stepan Wood questions, in the third article, John Ruggie's rejection of the view that "sphere of influence" should play a role in defining the human rights responsibilities of corporations. To the contrary, Stepan Wood argues, the ability of corporations to influence the actions of others as a result of their relationships or "their leverage" does generate significant moral obligations that go beyond the "responsibility to respect," a negative moral responsibility to do no harm, to include a responsibility to protect human rights, a positive moral responsibility to

https://doi.org/10.5840/beq20122212 Published online by Cambridge University Press

do good. The central purpose of Wood's analysis is then to define the nature of the responsibilities that come with leverage.

If we accept that corporations have human rights responsibilities, then the next task is to define the responsibilities of corporations for ensuring that their human rights responsibilities are effectively fulfilled. A related set of issues concerns the responsibilities of other key players for ensuring that corporations fulfil those responsibilities. Individual and institutional investors are an example. A formal feature of Canadian corporate law permits equity holders to bring shareholder proposals to the attention of other equity investors for discussion and decision by formal vote. In 2008, a group of institutional investors used a shareholder proposal to persuade a large Canadian gold mining company, Goldcorp, to commission a human rights impact assessment of the operations of its Marlin Mine in Guatemala. In the fourth article, Aaron Dhir (2012) analyzes the law allowing shareholder proposals (the very controversial use made of the shareholder proposal tool to bring about a human rights impact assessment of the Marlin Mine), implementation of the subsequent assessment, its impact on communities adjacent to the mine and the implications of this initiative for the ethical use of shareholder proposals.

In the fifth, penultimate, article, John Bishop (2012) strikes a cautionary note pointing out that with responsibilities come rights. If corporations have human rights responsibilities, they must be accorded the rights required to fulfill those responsibilities. It is important therefore to identify carefully the rights required by corporations as the nature and scope of their human rights responsibilities are delineated. A key purpose of this article is to undertake that analysis and to assess the boundaries of corporate human rights responsibilities through a consideration of the boundaries appropriately placed on the nature and scope of corporate rights.

In the concluding paper in this special issue, Peter Muchlinski (2012) argues that the UN Framework requirement that corporations exercise due diligence for the purpose of ensuring that they meet their responsibility to respect human rights will lead to the evolution of legally binding duties under both national and international law. He suggests that the development of binding duties will be of particular value to involuntary stakeholders. Finally, picking up a theme central to the first paper in the special issue, he suggests that the result of an evolving understanding of the human rights duties in corporate law might well be a view of the purpose of the contemporary shareholder owned corporation that goes beyond enlightened shareholder self interest to a stakeholder focus grounded on a more integrated ethical understanding of the role of business in society in the twenty-first century.

NOTE

To preserve the integrity of the editorial process, the editors of the special issue played no role in the review of the papers by Cragg and Muchlinski. Those submissions to the special issue were instead managed by former editor-in-chief and current senior associate editor Gary Weaver.

https://doi.org/10.5840/beq20122212 Published online by Cambridge University Press

REFERENCES

Arnold, D. G. 2010. "Transnational Corporations and the Duty to Respect Basic Human Rights," *Business Ethics Quarterly* 20(3): 371–99.

Bishop, John. 2012. "The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations," *Business Ethics Quarterly* 22(1): 119–44.

Campbell, Tom. 2006. "A Human Rights Approach to Developing Voluntary Codes of Conduct for Multinational Corporations," *Business Ethics Quarterly* 16(2): 255–69.

Chandler, Geoffrey. 2003. "The Evolution of the Business Human Rights Debate," in *Business and Human Rights*, ed. Rory Sullivan, 22–32 (Sheffield, UK: Greenleaf Publishing Ltd.).

Clapham, Andrew. 2006. "Corporations and Human Rights," in *Human Rights Obligations of Non-State Actors*, chap. 6 (Oxford: Oxford University Press).

Cragg, W. 1999. "Human Rights and Business Ethics: Fashioning a New Social Contract," *Journal of Business Ethics* 27(1–2): 205–14.

_____. 2010. "Business and Human Rights: A Principle and Value-Based Analysis," in *Oxford Handbook of Business Ethics*, ed. George Brenkert and Tom Beauchamp, 267–305 (Oxford: Oxford University Press).

_____. 2012. "Ethics, Enlightened Self Interest and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the Proposed UN Human Rights Framework," *Business Ethics Quarterly* 22(1): 9–36.

Dhir, Aaron. 2012. "Shareholder Engagement in the Embedded Business Corporation: Investment Activism, Human Rights, and TWAIL Discourse," *Business Ethics Quarterly* 22(1): 99–118.

Donaldson, T. 1991. *The Ethics of International Business* (Oxford: Oxford University Press).

Hillmanns, Carolin F. 2003. "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *German Law Journal* 4(10): 1065–80.

Kobrin, Stephen, J. 2009. "Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights," *Business Ethics Quarterly* 19(3): 349–74.

Lee, Daniel E., and Elizabeth J. Lee. 2010. *Human Rights and the Ethics of Globalization* (Cambridge: Cambridge University Press).

Lloyd, Denis. 1991. *The Idea of Law* (Harmondsworth: Penguin Books).

Muchlinski, Peter. 2009. "The Provision of Private Law Remedies against Multinational Enterprises: A Comparative Law Perspective," *Journal of Comparative Law* 4(2): 148–70.

_____. 2012. "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation," *Business Ethics Quarterly* 22(1): 145–77.

https://doi.org/10.5840/beq20122212 Published online by Cambridge University Press

Ruggie, J. G. 2006. *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*. UN Doc E/CN.4/2006/97.

_____. 2007. *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*. UN Doc A/HRC/4/035.

_____. 2008. *Protect, Respect and Remedy: A Framework for Business and Human Rights.* UN Doc A/HRC/8/5.

_____. 2010. *Business and Human Rights: Further Steps toward the Operationalization of the "Protect, Respect and Remedy" Framework*. UN Doc. A/HRC/14/27.

_____. 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. UN Doc. A/HRC/17/31.

Strudler, Alan. 2008. "Confucian Skepticism about Workplace Rights," *Business Ethics Quarterly* 18(1): 67–83.

United Nations. 1984. "*Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises*. UN Doc. E/1990/94.

Wettstein, Florian. 2012. "Silence as Complicity: Elements of a Corporate Duty to Speak Out against the Violation of Human Rights," *Business Ethics Quartery* 22(1): 37–61.

Wood, Stepan. 2012. "The Case for Leverage-Based Corporate Human Rights Responsibility," *Business Ethics Quarterly* 22(1): 63–98.

https://doi.org/10.5840/beq20122212 Published online by Cambridge University Press