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Corporations as Agents of Global Justice

1. Introduction

The present age is marked by globalisation, which notably affects our daily lives and its dynamics, in various aspects - from economic, technological, geostrategic, socio-cultural, informational and ecological to political and ethical - frequently remain difficult to understand and assess. This process of widening and deepening interconnectedness and interdependence has brought with it: outlooks of greater economic prosperity; access to the global market; more equal opportunities for many; the breaking of local monopolies; the exchange of knowledge and ideas; enhancements of civil liberties and democracy, and; increased opportunities for establishing a proper framework for solving some of the most pertinent issues that the world as a whole faces today. It has also brought the perils of: unjust economic exploitation and sweatshop economy; diminished cultural diversity; lower standards of democratic accountability, and; new threats to our safety.¹ Within such a wider perspective, this chapter aims to contribute to the understanding of human rights responsibilities in regard to aspects that are related to actors beyond (territorial and extraterritorial) states, in particular those associated with business corporations. It specifically addresses conceptual and ethical challenges related to human rights law in this domain. It relates these challenges with the discussions on global justice in order to establish a framework for a more integrated approach to nuanced realities of globalisation processes. It poses the question of how we can regard corporations as agents of global justice in relation to aspects of the respect for and protection of human rights.

One of the challenges of the condition described above is imagining, planning and setting-up a proper framework of transnational or global justice that would go beyond more traditional, state-oriented conceptions and would recognise these dynamics of the changing world, identifying basic rights to be enjoyed by all human beings and also identifying proper agents of such global justice.² Within such a context, many authors are stressing the need for a more robust theoretical grounding and understanding of human rights as well for a change in the derivation of the scope and content of human rights away from minimalist concerns.³ This includes considerations of which duties and responsibilities basic human rights give rise to (the nature and scope of these responsibilities) and to whom such duties and responsibilities apply (justification and a usable framework for effective implementation). Traditional approaches in the field of human rights and global justice have often overlooked, or rather, neglected the imperative importance of working-out a substantive understanding of obligations given the different agents and agencies in the global order.⁴

One strand of this debate on global justice and human rights focuses on the duties or responsibilities of multinational or transnational corporations with regards to respecting and securing basic human rights.⁵ A central question of the debate on the human rights obligations of corporations seems to be how to delimit and justify duties of corporations regarding human rights. A fairly

¹ David Held *et al.*, *Global Transformations: Politics, Economics and Culture* (Stanford: Stanford University Press 1999), 2.

² Wouter Vandenhole, 'Emerging Normative Frameworks on Transnational Human Rights Obligations' (2012) 17, *EU Working Paper*, 1.

³ cf Seyla Benhabib, *Dignity in Adversity. Human Rights for Troubled Times* (Malden: Polity Press, 2011), 62; Amartya Sen, 'Elements of a Theory of Human Rights', (2004) 32, *Philosophy and Public Affairs*, 317.

⁴ Onora O'Neill, 'Agents of Justice', (2011) 32, *Metaphilosophy*, 180-195.

⁵ Smita Narula, 'International Financial Institutions, Transnational Corporations and Duties of States', in Malcolm Langford *et al.* (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press 2012), 114-150.

straightforward and common sense attempt to answer this initial question would be to start from the current state of affairs, which clearly reveals that the activities of many commercial corporations have very important economic, political, and social consequences and impacts for the lives of individuals and communities alike. The premise would then need to be added that it would need to be established that having such an impact makes them responsible in this regard.⁶ Human rights are plausibly understood as securing the minimal basis for preserving humanity, human existence, and basic capabilities (of individuals and communities); therefore the relevant responsibilities of corporations should extend to human rights. What this picture lacks is, of course, a stable theoretical foundation that would enable such reasoning in the beginning. This paper is an attempt to highlight some aspects of such an emerging foundation.

Approaching the question of the direct human rights obligations of corporations requires a clarification and a stable foundation of background posits underlying attempts to answer it affirmatively.⁷ In this chapter, I deal with a general question of the responsibilities of corporations. In the first section, I present an outline of how and why one might think about corporations as agents of justice. Next, the focus turns to some important lessons from a plausible account of the nature and functioning of corporations as agents that emphasises the importance of approaching such questions by first analysing the concept of group agents.⁸ *Qua* agent, one can be responsible if it meets three conditions, i.e., normative significance, judgmental capacity, and relevant control. A proper understanding of the relationship between corporations and their human rights responsibilities therefore requires answering the following basic questions: Are corporations (group) agents? Do corporations meet the conditions for ascribing responsibility to them? Do these responsibilities include responsibilities related to human rights and, if so, to what extent? Only then can one move towards investigation of the exact nature of such responsibilities, their scope and ways of implementation. This contribution argues that the answers to all these questions are affirmative, though those answers will be framed mostly within an ethical (and not necessary legal) perspective. In the concluding section the contribution discusses a useful way to pinpoint more exactly the nature of the responsibilities and duties of corporations as non-state agents by utilising a version of the distinction between unconditional and conditional duties and situating it within a broader normative framework for understanding duties and responsibilities regarding human rights. The chapter primarily addresses the ethical aspects of this debate, with, of course, no intention of denying the importance and progress both in theory and practice that was accomplished in this field from the legal perspective.

2. Corporations as Agents of Justice in the Globalised World

The idea of global ethics is first and foremost a response to the recognition that the gravest challenges, including moral challenges that we are facing today, are global in their essence and can only be addressed within a similarly global framework.⁹ A global ethics for the globalised world requires several important changes of perspective when considering global justice. One of these changes pertains to who is to be considered as an agent of such justice and how we can delimit the scope of its responsibilities. This is not merely a pertinent issue for those approaches to global ethics that focus

⁶ S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', (2001) 111(3), *The Yale Law Journal*, 449, 461; Mahmood Monshipouri, C.E. Welch and E.T. Kennedy, 'Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities', (2003) 25(4), *Human Rights Quarterly*, 966.

⁷ Malcolm Langford *et al.* (eds), *Op.cit.* Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies', (2012) 9(2), *European Company Law*, 104; S.R. Ratner, *Op.cit.* 488.

⁸ Christian List and Philip Pettit, *Group Agency. The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011).

⁹ Peter Singer, *One World: The Ethics of Globalization* (New Haven: Yale University Press, 2004); Robert Audi, *Moral Value and Human Diversity* (Oxford: Oxford University Press, 2007); Amartya Sen, *The Idea of Justice* (Cambridge, MA: Belknap Press, 2009).

primarily on human rights, but also for other approaches, such as: global ethos initiatives; global law and global justice approaches; ethical cosmopolitanism; the capability approach; development ethics, *et cetera*. Despite the differences between particular approaches, any theory of global justice has to be attentive to the ascription of relevant duties and responsibilities to agents of justice.¹⁰

Regarding human rights and the duties and responsibilities associated with them, one of the open questions pertains to non-state actors as bearers of at least a portion of those responsibilities. In establishing a global justice, Martha Nussbaum nicely points out that any 'viable theory of justice for the contemporary world ought to have some way of coming to grips with the changing centers of influence and advantage that make our world very different from the world of free republican states envisaged in Kant's Perpetual Peace.'¹¹ This also includes the incentive to look for centres of influence and power beyond national states.

Based on the recognition that corporations are becoming more and more powerful global players, and that this, to an important extent, diminishes or at least transforms the sovereignty of states (without necessarily diminishing their correlated duties regarding human rights)¹² one can raise a set of several important questions. In relation to this, Bernstein highlights the following as crucial: 'If states are losing power to corporations, are states also losing some of their responsibilities and rights, and are corporations acquiring some or all of these, including responsibilities to respect, uphold, and secure human rights? Can corporations acquire and fulfil such responsibilities? If so, does justice require that they do so?'¹³

Further, the present state of affairs of the global justice framework seems to be legally underdetermined in the sense that a combination of strong and weak laws and regulations still leaves a lot of space for ambiguities (extra-territorial jurisdiction, the nature of abuses, the scope of rights, *et cetera*) and this proves, in a way, 'central to the creation of the permissive international "human rights free" environment in which some corporations seem now to operate'.¹⁴ Given the rising power of corporations and their vital role in the global economy, 'the capacity of corporations to affect communities and individuals in ways that would potentially be recognized as breaches of international human rights if committed by States [...] is becoming increasingly pressing'.¹⁵

Given the aforementioned perplexities, one feels the need to provide a more general theoretical underpinning regarding the roles and responsibilities of different actors in this regard. Onora O'Neill offers a very plausible suggestion regarding this issue by first arguing that the perspective of the 'agents of justice' - which she defines as all agents and agencies that can contribute to the construction of justice - play some part in institutionalising principles of justice or conform to them, has been largely neglected in the theoretical debates and as well as human rights movements.¹⁶ The shift towards global ethics, which was in part backed up with the stress on the importance of internationally-recognised human rights, was predominantly focused on the scope of those rights from the recipient perspective by claiming their universality, but has left a clear allocation of obligation and responsibilities vague and underdetermined.

Nowhere is this more evident than in the text of the Universal Declaration of Human Rights of 1948. In this brief and celebrated text, nations, peoples, states, societies, and countries are variously gestured to as agents against whom individuals may have rights. Little is said about

¹⁰ Onora O'Neill, *Op.cit.* 180–195.

¹¹ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Belknap Press of Harvard University Press, 2006), 225.

¹² S.R. Ratner, *Op.cit.* 447, 461; Seyla Benhabib, *Op.cit.* 103.

¹³ Alyssa R. Bernstein, 'Human Rights, Global Justice, and Disaggregated States', (2007) 66(1), *American Journal of Economics and Sociology*, 89.

¹⁴ Justine Nolan and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?', (2009) 87, *Journal of Business Ethics*, 437.

¹⁵ *Ibid.*, 438.

¹⁶ Onora O'Neill, *Op.cit.* 181.

any differences between the varying types of agents, or about their capacities and vulnerabilities, and there is no systematic allocation of obligations of different sorts to agents and agencies of specific types.¹⁷

What we are then faced with is a situation where we have a cosmopolitan view of rights and a statist view of obligations in regard to them. This is an especially pressing point in regard to rights to goods and services, since references to such rights are 'often muddled or vague, or both, about the allocation of the obligations without which these rights not merely cannot be met, but remain undefined'.¹⁸

O'Neill identifies as deeply rooted an assumption that the primary agents of justice are states and that all other agents are merely secondary agents of justice in the sense that the latter are 'thought to contribute to justice mainly by meeting the demands of primary agents, most evidently by conforming to any legal requirements they establish'.¹⁹ Furthermore, underlying such claims is the presupposition that states are primary obligation-bearers since they have the relevant powers to secure them.²⁰ Such a picture is highly problematic, especially in present times, where we can see a lot of cases of weak states, which are unable to effectively play the role of primary agents of justice and where especially strong transnational corporations can take advantage of that (corruption, imposition of unjust conditions, impositions of particular policies, opportunism, *et cetera*) or be in other ways complicit in violation of human rights.²¹ We must thus opt for a more realistic and robust division of responsibilities and duties that would be able to be more sensitive to the social context. O'Neill's conclusion in regard to this is that

...it may be worth reconsidering whether all second-order obligations to secure human rights should lie with states. [...] The assumption that states and states alone should hold all the relevant obligations may reflect the extraordinary dominance of state power in the late twentieth century, rather than a timeless solution to the problem of allocating obligations to provide goods and services effectively.²²

Agents of justice are numerous and diverse.²³

The crucial elements in this debate are the capabilities and capacities of different agents (states, systems of states, different non-state actors) to contribute to the global system of justice. We can therefore utilise Sen's notion of capability in order to move the discussion about obligations and responsibilities for human rights from considerations about the status and motives of different agents to their powers, and at the same time offer a more realistic view of what we can reasonably expect to achieve. Capability is not the same as capacity of power in the abstract, and in relation to justice 'agents and agencies must dispose not only of capacities which they could deploy if circumstances were favourable, but of capabilities, that is to say, of *specific, effectively resourced capacities which they can deploy in actual circumstances*'.²⁴ O'Neill thus goes on to claim that what is relevant in determining the scope of responsibilities regarding justice are specific capabilities of agents and agencies in concrete situations and not their abstract capacities or their aggregate power.

Weak states often lack such actual capabilities, so non-state actors in particular, given their relevant effective capabilities, might step into a part of their role, with full awareness that such agents would probably not be able to have or develop the same scope or depth of such "capabilities for justice" that a state has in normal circumstances.²⁵ The development of ideal global justice based on

¹⁷ *Ibid*, 183.

¹⁸ Onora O'Neill, 'The Dark Side of Human Rights', (2011) 81(2), *International Affairs*, 428.

¹⁹ Onora O'Neill, 'Agents of Justice', *Op.cit* 181.

²⁰ Onora O'Neill, 'The Dark Side of Human Rights', *Op.cit* 434.

²¹ Surya Deva, *Op.cit*, 103, 107; Mahmood Monshipouri *et al.*, *Op.cit* 972-977; S.R. Ratner, *Op.cit* 463.

²² Onora O'Neill, 'The Dark Side of Human Rights', *Op.cit* 435.

²³ S.R. Ratner, *Op.cit* 469.

²⁴ Onora O'Neill, 'Agents of Justice', *Op.cit* 189.

²⁵ S.R. Ratner, *Op.cit* 494-495; Surya Deva, *Op.cit* 102.

perfectly just institutions through an impeccably just set of institutions 'would certainly demand a sovereign global state, and in the absence of such a state, questions of global justice appear to the transcendentalists to be unaddressable.'²⁶ Such an attitude readily reduces any endeavours towards global justice as unachievable rhetoric. An alternative approach that could prove more useful is that aimed at the abolition of manifest injustices under non-ideal circumstances using a strategy of piecemeal engineering and also focusing on feasibly institutional reforms.²⁷ A more comprehensive inclusion of various non-state agents in frameworks for the protection of human rights constitutes just this sort of strategic and pragmatic approach.

That is why it is important to also direct our attention to non-state actors as agents of justice. The term non-state agent is rather inclusive, since it defines agents and agencies with reference to what they are not. In this way it can encompass various agents from states, international organisations and corporations to informal groups and individuals. Non-state agents can also be defined in a more restricted sense as 'institutions that are neither states, nor international in the sense of being interstatal or intergovernmental, nor directly subordinate to individual states or governments, but that *interact across borders with states or state institutions*.'²⁸ Such agents and agencies (e.g. international nongovernmental organisations, transnational or multinational companies and global social movements) can further develop important capabilities in regards to global (in)justice.

In cases of weak states, the role of such non-state agents usually even grows in this regard. This presents a special context in which a distinction between primary and secondary agents of justice loses its grip and in which at least some transnational and multinational companies or corporations have capabilities to be agents of justice or (as is often the case) agents of injustice (especially if we consider their collective influence). Such cases of weak states and the dynamics regarding human rights that follow might not merely be rare exceptions and isolated phenomena, but a consequence of a more general trend of a "twilight of sovereignty" emerging as a result of globalisation and global capitalism. Stateness as a 'dynamic capacity of states to react to and control their environments in multiple ways'²⁹ is closely related to a capacity of states to channel at least some of the impacts of economic globalisation to their own advantage. There are many examples of states that are unable to do that and this could be a first step towards weak states, as can be seen in the example of special economic zones, in which 'this form of economic globalization results in the disaggregation of states' sovereignty, with their own complicity. ... [T]here is an uncoupling of jurisdiction and territory in that the state transfers its own powers of jurisdiction, whether in full knowledge or by unintended consequence, to non-statal private and corporate bodies.'³⁰ This can give rise to diminished state protection of citizens and increased dependence on actions of transnational corporations.

In such a context, the responsibility of a corporation is not limited to merely obeying the laws and other regulations or customs in force, since those are often ill-defined or corrupt in many ways. Focusing on the capabilities (rather than the motivations) of corporations helps us to break away from the over-simplistic view of corporations which sees them as limited to the single aim of maximising profit for shareholders.

3. Group Agency, Group Agents and Responsibility

In this section, I deal with a layout of the account of group agency developed recently by List and Pettit,³¹ which tackles several important foundational issues related to groups as agents over and above its individual members and also points to several important normative consequences. Focusing

²⁶ Amartya Sen, *Op.cit.* 25.

²⁷ Corinna Mieth, 'Global Injustice, Individual Duties and Non-ideal Institutional Circumstances', (2012) 12, *Civitas*, 55.

²⁸ Onora O'Neill, 'Agents of Justice', *Op.cit.* 191.

²⁹ Seyla Benhabib, *Op.cit.* 103.

³⁰ *Ibid.*, 104.

³¹ Christian List and Philip Pettit, *Op.cit.*

on group agency is not merely a path for providing a plausible part of the justification for responsibilities of group agents such as corporations, but may also provide valuable insights into the nature of group agents, their characteristics and the perils that might result from their actions. The latter could prove useful in setting-up rules, regulations and recommendations (either internal or external) for their formation and functioning, as well as effective control. The starting idea is that group agent behaviour is dependent of the organization and behaviour of its members and that group agents are an important part of the social reality.³²

Recognising or viewing an entity as an agent makes a serious difference on how it should be treated and approached methodologically. The marks of an agent are the possession of representational states, motivational states and the capacity to process them in a way to interact with the environment; an 'agent is a system that has representational and motivational states such that in favourable conditions, within feasible limits it acts for the satisfaction of its motivations according to its representation'.³³ A group is thus an agent (as opposed to, for example, a mere collection of individuals) if it exhibits the three mentioned features. Usually it is formed with joint intention, i.e. on the basis of the existence of a shared goal, individual contributions in respect to some salient plan, interdependence between individuals and a common awareness about these aspects. A variety of groups of individuals meet these specified conditions, including: political groups such as town assemblies; political parties; governments and states; various commercial entities (small businesses, unions, trade organisations, transnational corporations), and; other civic groups (cultural organisations, sport societies, churches, universities, *et cetera*). Furthermore, group agents can be nested within other groups and group agents.³⁴

In order to pinpoint aspects of group agency that are especially relevant for the question of their responsibilities, we must first look at what happens at the group level and how this is connected with the individual inputs. A key question here is how does a group agent form consistent and rational representational and motivational attitudes based upon the attitudes of its members? What emerges out of this discussion is a surprising autonomy at the group level, which is a consequence of the intentional attitude aggregation problem that is related to the paradox of majoritarian attitude aggregation. To elaborate this in simple terms, this means that attitudes (e.g. beliefs or motivations) that arise at the group level are not necessarily the same as those which the majority of the individuals making up the group agent have. What this means is that a group agent can exhibit a gap between its attitudes on the group level and the attitudes of its individual members.³⁵ As a consequence, a 'group agent is autonomous in the relevant sense to the extent that the features that make it an agent – particularly its attitudes – are not readily reducible to features of individual members: again, crucially their attitudes'.³⁶ What makes this relevant for our discussion is the connection with ascribing responsibility to group agents for their actions which can come apart from the responsibility of individual members – even managing members or corporations officials.³⁷ It provides us with a clear theoretical rationale (besides practical or pragmatic reasons) to separate these two kinds of responsibility and also shapes the relevant emerging normative framework.

Another issue that is important is what we can learn from the structure and functioning of group agents in this theoretical sense that is pertinent for the more practical questions about their design, performance and monitoring. We can specify several general *desiderata* (of good organisational design) for group agents as they are relevant for our discussion about the responsibility of corporations and regulations of their creation and functioning that we might impose. This can

³² *Ibid*, 7–11.

³³ *Ibid*, 20.

³⁴ *Ibid*, 33–41.

³⁵ *Ibid*, 43–47.

³⁶ *Ibid*, 76–77.

³⁷ S.R. Ratner, *Op.cit*, 473–475.

provide us with an insight on how to efficiently develop organisational regulation (both internal and external) and in this way also determine the extent and nature of the responsibility of group agents.

The first issue is that of the information which corporations act upon. Since agents operate on the basis of beliefs, it is important that those beliefs are reliable and true. In relation to this, group agents benefit from democratisation, decomposition and decentralisation. Democratisation roughly means that group agents should allow epistemic input from a wide set of members. Decomposition means that it is epistemologically wise to divide some complex judgmental task into smaller ones, thus preferring these simple judgments to more complex collective ones. And decentralisation means that a group agent can benefit epistemologically from dividing or distributing epistemic tasks among several subgroups that are more specialised and reliable given those tasks.³⁸

Secondly, it is desirable for group agents to have an organisational structure that is incentive-compatible, which means resilient to individual strategic behaviour.³⁹ It should be designed not merely for ideal members, but for members who are sometimes (or even often) pursuing some particular agenda. Incentive compatibility could be attained through the "organisational route", i.e. by adapting the organisational structure in a way that takes the existing preferences of individuals and then models organisational structure in a way that would make, for example, truthfulness and cooperativeness (if these are among the desired characteristics) as incentive-compatible as possible. The other way is to try to influence and change individuals' behaviour (through persuasion, education, *et cetera*) so as to change their attitudes while keeping the organisational structure intact.

Thirdly, the organisational structure of group agents should give their members spheres of control, autonomy and freedom, since some group agents can be very powerful and there should be mechanisms in place to protect their members.⁴⁰

Next, we must take a closer look at our understanding of responsibility. A fairly standard account of responsibility takes it to encompass the following three basic elements: (i) *normative significance*: the agent is faced with a normatively significant choice (possibility to do something good, bad, right, wrong, ...); (ii) *judgmental capacity*: the agent has an adequate understanding and access to evidence required for making normative judgments about his options, and; (iii) *relevant control*: the agent has the relevant control required for choosing between options.⁴¹ Each of these aspects is a necessary condition for holding someone responsible and together they also represent sufficient conditions. Holding someone responsible also raises a question about proper regulation, which may encompass two distinct aspects: instrumental (sanctions in the form of rewards or punishments) and developmental (providing incentives to develop responsibility and treating someone as if they were responsible to promote self-regulation).

Group agents could easily meet the first, normative significance condition, and they actually do so at least regarding some of their actions (e.g. a corporation deciding to invest in a particular country or withdraw operations from another certainly has significance both from the aspect of global justice as well as human rights). Group agents also have the judgmental capacities that enable them to form judgments on normative propositions and if any group agent was organised in a way to prevent or exclude that, we should surely regulate the situation and prohibit it from incorporation. Clear decision procedures in corporations are thus very important in order to responsibly exercise their judgmental capacities. Corporations, despite the fact that their operations are limited both with regulation and by their core goal of pursuing profits, nonetheless enjoy control relevant for the ascription of responsibility. Of course there are always individuals who act in the name of a group agent, but this does not mean that, because of that, the control only lies in their hands. Just as we can have multi-level causality, there is a multi-level exercise of control. A group agent programs the decision or action and

³⁸ Christian List and Philip Pettit, *Op.cit.* 90.

³⁹ *Ibid.*, 104.

⁴⁰ *Ibid.*, 124–150.

⁴¹ *Ibid.*, 155.

members/individuals implement this decision or action.⁴² Therefore, group agents can be held responsible in the most direct sense of the word.

As already noted above, the responsibility of group members does not mean that the group agent as a whole is not responsible or accountable and *vice versa*. This can be most easily seen in cases where we have no clear case for holding individual members responsible but we do consider a group agent responsible. Pettit mentions the case of *Herald of Free Enterprise*, a ferry operating in the English Channel that sank in 1987 - an unfortunate event resulting in 193 deaths. The inquiry revealed the discrepancy between the absence of determinable responsibility of individual management employees and the responsibility of the ferry company as a whole, exhibiting a 'disease of sloppiness' and negligence at all levels of the corporation's hierarchy.⁴³ It is very important, then, to stress this corporate responsibility, not merely in the instrumental sense but also in a developmental sense, which should raise awareness and provide incentives for members and shareholders to structure a group agent in a way to secure proper acting. An emerging global justice order, which would include corporations as agents of justice (in particular in relation to human rights), would, without a doubt, be an important step in this direction.

4. Responsibilities and Duties of Corporations Regarding Human Rights

4.1. Justifying Duties and Responsibilities of Corporations

Corporations are not merely group agents that can be held responsible, but can further be regarded as persons, not only in the special sense of a legal personhood, which they undoubtedly fall under. Corporations can be regarded as persons if we adopt a performative conception of personhood, according to which to be a person is to have the ability to perform as a person in the social realm, which further consists of being capable of functioning in the realm of a shared system(s) of conventions, social obligations and entitlements, responsibilities and rights.⁴⁴ Connected to this issue is a question of whether group agents as persons of the sort described should be given equal status and rights as individual persons. And are they – despite the respect and autonomy which personhood commands – to be subject to special restrictions and obligations? List and Pettit opt for a negative answer to the former question and a positive answer to the latter. We need to limit the powers (emerging on the basis of their financial assets, wide social network, mortality-free time horizon, absence of, for example, anxiety and similar emotions, *et cetera*) of group agents in the interests of individual persons, and also for purposes of deterrence and prevention. In this vein, D'Souza speaks about dramatic changes in economic and social structures which have led to enormously powerful corporations and concludes that 'while the political idea of "rights" promotes the ideal of equal opportunities for all, the juridical idea rests on the foundational myth that the "corporate person" stands on the same footing as the "natural person"'.⁴⁵ This myth should be rejected in light of the fact that transnational corporations in particular have grown in size enormously and that they possess great power, influence and resources for their functioning and in terms of impacting upon the lives of individuals.⁴⁶

Human rights can be understood as a tool for the (at least minimal) protection of the interests of individuals, and we can see how this relationship between citizens as individuals and states as group agents creates a special obligation on the part of states to respect, protect and promote human rights. 'If it makes sense to presuppose that all of us share basic needs, basic interests, transcendental interests, or rational interests concerning basic goods, it seems sensible to declare their protection a matter of

⁴² *Ibid*, 163.

⁴³ Philip Pettit, 'Responsibility Incorporated', (2007) 117(2), *Ethics*, 171.

⁴⁴ Christian List and Philip Pettit, *Op.cit.* 173–174.

⁴⁵ Radha D'Souza, 'What's Wrong with Rights?', in David Boersema (ed.), *Philosophy of Human Rights. Theory and Practice* (Boulder: Westview Press, 2011), 164.

⁴⁶ Mahmood Monshipouri *et al.*, *Op.cit.* 971–972.

rights and duties.⁴⁷ This creates a real of justice and calls for identification of duty bearers, rights holders, and for the setting of priorities among them. We can generalise the above point into the thesis of *normative individualism*: whether or not group agents should be allowed to exist, in what form, and what obligations to impose on them ought to be settled by reference to the rights, benefits and interests of individuals (whether those individuals are members or non-members).⁴⁸ Group agents should be especially stringently checked to avoid illegitimate “master/subject” relations, in which the master controls the choices of the subject even though it does not necessarily exercise its powers at all. This is especially relevant for commercial corporations, given that there is little regulation and a lack of tradition of guarding against their powers.⁴⁹

This provides us with a basis to formulate the following general argument in relation to the duties and responsibilities of corporations regarding human rights. Group agents can be held fully responsible and their status, rights and duties should be determined primarily by reference to the interests of individuals (*normative individualism*).⁵⁰ It can never (or hardly ever) be in the interest or benefit of an individual that her human rights are not respected or are endangered. Transnational business corporations, as group agents, may pose a threat to human dignity and are capable of serious infringements of human rights, as well as having the capability, effective power or decisive influence for the protection, promotion and fulfilment of them (*capability thesis*).⁵¹ Group agents can be held responsible and ascribed both negative and positive duties regarding human rights. We all accept this for states as group agents. Transnational business corporations can be legitimately seen as agents of justice, especially in circumstances where they are deeply intertwined with basic institutions and practices of weak or developing countries. Therefore, transnational corporations can be ascribed with both negative and positive duties regarding human rights.

Given the sketch of the argument above it is not surprising that Nussbaum, as a proponent of the capability approach, includes in her list of ten principles for the global structure a responsibility of multinational corporations for promoting human capabilities in the regions in which they operate, which includes: devoting a substantial amount of profits to promoting education and good environmental conditions; promoting good labour conditions, and; going beyond what local laws require - all this being based on the standard of decency.⁵² In many cases transnational corporations also become part of the basic structures of developing societies, which extends their duties even further.

4.2. A Framework of Duties

How can we use this general outline for a more specific debate of corporations and human rights obligations with the aim of presenting a plausible picture of systematic regulation of this field? Rights (and correlative claims and demands against others) imply duties; that is, rights must be secured by a corresponding allocation of duties if we are to surpass a merely inspirational understanding of human rights. ‘A normative view of rights claims has to take obligations seriously, since they are the counterparts of rights; it must view them as articulating the normative requirements that fall either on all or on specified obligations-bearers’.⁵³ Rights create corresponding duties.

What is further required is a framework by which to conceptualise the different duties and responsibilities of corporations. Besides more traditional distinctions like that between positive duties

⁴⁷ Corinna Mieth, *Op.cit* 49.

⁴⁸ Christian List and Philip Pettit, *Op.cit* 180–182.

⁴⁹ *Ibid*, 183.

⁵⁰ *Ibid*, 182.

⁵¹ S.R. Ratner, *Op.cit* 443, 469.

⁵² Martha Nussbaum, *Op.cit* 322; Martha Nussbaum, *Creating Capabilities. The Human Development Approach* (Cambridge, MA: The Belknap Press of Harvard University Press, 2011), 117.

⁵³ Onora O’Neill, ‘The Dark Side of Human Rights’, *Op.cit* 430.

(duties to act in a certain way to achieve x; e.g. protecting, promoting or fulfilling human rights) and negative duties (refraining from acting in a certain way, e.g. refrain from directly violating human rights) or universal duties (applying to all agents of justice at all times) and non-universal duties (not owned by all agents of justice), we must find further ways to lay foundations for a more complex structure of human rights protection in light of global justice. This structure must be such to be able to accommodate questions regarding different agents of justice and their priority position in this system of protection, the extent of their possible human rights duties, differences between particular human rights and the time perspective of their respect, protection, and fulfilment.

Given the nature of the globalised world and the state-centric practice of human rights protection, it is very useful to first employ concepts of unconditional and conditional duties and of division of moral labour as Kolstad does in his way of framing of this debate.⁵⁴ The concept of unconditional duties can be understood as duties every agent has regardless of what duties others observe and conditional duties as 'duties to be assumed depending on the actions of other agents in a more closely specified succession of duty-bearers.'⁵⁵ The use of these terms here differs from a more standard use, where unconditional duties are understood as universal and binding for all agents and conditional duties as arising out of specific arrangements, contracts, relationships, or roles one occupies. Nonetheless, understanding it in the former manner, the distinction is helpful when introducing the structure of the division of moral work, where 'different agents fulfil different duties whose sum total is full coverage in terms of rights realization.'⁵⁶ So we can, *inter alia*, talk about primary, secondary and tertiary, duty-bearers. Such a solution also has advantages over a sort of a zero sum view, where an increase of responsibility of one (type of) agent of justice results in a reduced responsibility of others.

Another dimension that we can add to this is a distinction between exclusive and supplementary duties. The former are duties that can only be ascribed to one type of agent of justice (e.g. states), while the latter are duties that allow for a division of work and joint protection, respect or fulfilment. Within this category we can further differentiate between simultaneous (in a sense, also joint) and subsidiary duties; the former either requiring or allowing for the simultaneous responsibility of several agents of justice, with the latter allowing for one agent of justice to step into place of another. If we now conjoin these distinctions with the aforementioned more traditional distinction like that between positive and negative duties, we get a useful multidimensional framework of different categories of duties, which of course should not be understood as entirely static over time. The intersection of positive conditional duties (either simultaneous or subsidiary) is the most relevant and important for the discussion on corporations and human rights. What such duties are and who has them depends upon the division of moral labour. Again, there are many adjoining questions and issues which determine that: resources, capability, roles (primary, secondary, tertiary, *et cetera*), possible justifiable excuses and discharges of duties, *et cetera*.

Kolstad argues⁵⁷ that unconditional duties of corporations include the following: a duty not to violate (neither directly nor indirectly, e.g. by supporting governments that grossly violate human rights) the human rights of others and a duty to comply with the division of moral labour scheme. In addition, conditional duties of corporations include duties to protect, promote and fulfil human rights as non-primary bearers of those duties. In the usual case the state has a role of a primary bearer of such duties, and the international community or other countries a role of secondary bearer. Corporations can, in many cases, be next in line (as the most powerful non-state agents with relevant capabilities) as tertiary bearers. The exact character of the actions that such duties require can vary, e.g. if the state is unable to secure some human rights and the international community is not

⁵⁴ Ivar Kolstad 'Human Rights and Assigned Duties: Implications for Corporations', (2007) CMI Working Papers.

⁵⁵ *Ibid*, 3.

⁵⁶ *Ibid*, 2.

⁵⁷ *Ibid*, 5–9.

responsive, corporations might just find themselves in the role of fulfilling at least some of them; if on the other hand the state is able to fulfil them, but unwilling, the actions of corporations might go into the direction of putting pressure on the government or state to start fulfilling them.⁵⁸

The proposed account is a bit indefinite in the use of terms like responsibility, duty and obligation. This openness is primarily pragmatic. Mieth observes that, if 'we shift from duties to responsibilities (as is common in the current debate), this might have the advantage that we can shift from a moral concept to a strategic one'.⁵⁹ On the other hand, Deva claims that, by 'using the term "responsibility" to respect rather than the "obligation" to respect human rights, a misleading impression is created as if all human rights responsibilities of companies are without any legal consequences'.⁶⁰ There are clear rationales behind both concerns, but the proposed approach to these issues should be strategic and pragmatic enough (the aim being to secure full human rights for as many as possible), focusing on what is achievable and most effective given non-ideal circumstances, but bearing strongly in mind the lessons of normative individualism, which gives priority to individuals and their respective basic human rights, therefore pushing for a more restrictive interpretation of corporate responsibility and moving it towards the discourse of duties and obligations.

5. Concluding Remarks

The above discussion has shown that both ethics and law should fruitfully cooperate to set the limits of an acceptable and productive division of moral labour regarding human rights that could also be clearly reflected in regulation and adopted by corporations as a guiding standard. The consequences of globalisation, the rising power of transnational corporations and changes to our understanding of the role of the states in relation to the protection of human rights compel us to work out new normative frameworks for addressing the problems which are emerging.⁶¹ In relation to this, Martha Nussbaum exposes the vision of moral decency, which encompasses the recognition that a sustainable, just and morally decent future for us all includes an acknowledgment that 'we are citizens of one interdependent world, held together by mutual fellowship as well as the pursuit of mutual advantage, by compassion as well as self-interest, by a love of human dignity in all people, even when there is nothing we have to gain from cooperating with them'.⁶² This notion of moral decency requires us to formulate, embed and enforce a stricter ethical framework for corporations (regarding institutions, policies and practices) and include them as important agents of global justice.⁶³

The outline presented is a general approach to the question of the responsibility of corporations regarding human rights. Focusing on the importance of the group agent perspective, it has an advantage over some competing approaches or strategies. It provides a more stable foundation than, for example, the corporate citizen approach, since the latter can mislead us into justifying the ascription of some rights to corporations that should be limited to individuals and at the same time runs into troubles with regard to understanding transnational corporations within a statist framework. The corporate citizen approach makes sense in the context of national regulation of corporate behaviour and when one is focused primarily on the topic of corporate social responsibility. The presented approach also avoids some of the problems that the "moral soul" or "consciousness of corporations" approaches have due to their implicit presupposition of some sort of emergentist theory of group agency that is not plausible and can thus fail to notice the central structural characteristics of group agents and the responsibilities of their members. It rests on the most plausible understanding of the nature of group agency and is coupled with a general normative framework, within which we

⁵⁸ *Ibid.*

⁵⁹ Corinna Mieth, *Op.cit.* 63.

⁶⁰ Surya Deva, *Op.cit.* 103.

⁶¹ Wouter Vandenhole, *Op.cit.* 1.

⁶² Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, *Op.cit.* 324.

⁶³ Surya Deva, *Op.cit.* 109.

can understand the duties and responsibilities of corporations. It also provides more resources than approaches that focus mainly on individual agents (managers of corporations, employees, decision and policy makers, *et cetera*) since these usually underestimate the autonomy of group agents.

Globalisation processes pose important challenges to our understanding of human rights protection systems, especially in light of the focus on the so-called agents of justice that are seen as bearers of duties and responsibilities regarding human rights, particularly social and cultural rights. As the relevant role and effective capabilities of states as supposedly primary bearers of human rights obligations are undergoing changes on the other hand, the increased power of transnational corporations is changing the landscape in which we try to establish global justice. This contribution is thus an attempt to show how the fields of ethical theory and group agency can provide useful guidance on setting up transnational human rights obligations frameworks given these changes.

References

- Audi, R., *Moral Value and Human Diversity* (New York: Oxford University Press 2007)
- Benhabib, S., *Dignity in Adversity. Human Rights for Troubled Times* (Malden: Polity Press 2011)
- Bernstein, A.R., 'Human Rights, Global Justice, and Disaggregated States' (2007) 66(1), *American Journal of Economics and Sociology*, 87–111.
- Deva, S., 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9(2), *European Company Law*, 101–109.
- D'Souza, R., 'What's Wrong with Rights?', in: David Boersema (ed). *Philosophy of Human Rights. Theory and Practice* (Boulder: Westview Press 2011), 160–165.
- Held, D., McGrew, A., Goldblatt, D. and Perraton, J., *Global Transformations: Politics, Economics and Culture* (Stanford: Stanford University Press 1999)
- Kolstad, I., 'Human Rights and Assigned Duties: Implications for Corporations' (2007) 7 *CMI Working Papers* 1–1. Available at: <<http://www.cmi.no/publications/file/2814-human-rights-and-assigned-duties.pdf>> accessed: 27 December 2012
- Langford, M., Vandenhole, W., Scheinin, M. and van Genugten, W. (eds.) *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (New York: Cambridge University Press 2012)
- List, C. and Pettit, P., *Group Agency. The Possibility, Design, and Status of Corporate Agents* (New York: Oxford University Press 2011)
- Mieth, C., 'Global Injustice, Individual Duties and Non-ideal Institutional Circumstances' (2012) 12(1), *Civitas*, 47–69.
- Monshipouri, M., Welch, C.E. and Kennedy, E.T., 'Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities' (2003) 25(4), *Human Rights Quarterly*, 965–989.
- Narula, S., 'International Financial Institutions, Transnational Corporations and Duties of States', in Langford, M., Vandenhole, W., Scheinin, M. and van Genugten, W. (eds.) *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*. (New York: Cambridge University Press 2012), 114–150.
- Nolan, J. and Taylor, L., 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' (2009) 87, *Journal of Business Ethics*, 433–451.
- Nussbaum, M., *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Belknap Press of Harvard University Press 2006)
- Nussbaum, M., *Creating Capabilities. The Human Development Approach* (Cambridge, MA: The Belknap Press of Harvard University Press 2011)
- O'Neill, O., 'Agents of Justice' (2011) 32(1/2), *Metaphilosophy*, 180–195.
- O'Neill, O., 'The Dark Side of Human Rights' (2005) 81(2), *International Affairs*, 427–439.

- Pettit, P., 'Responsibility Incorporated' (2007) 117(2), *Ethics*, 171–201.
- Ratner, S.R., 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111(3), *The Yale Law Journal*, 443–545.
- Sen, A., 'Elements of a Theory of Human Rights' (2004) 32(4), *Philosophy and Public Affairs*, 315–356.
- Sen, A., *The Idea of Justice* (Cambridge, MA: Belknap Press 2009).
- Singer, P., *One World: The Ethics of Globalization* (New Haven: Yale University Press 2004)
- Vandenhole, W., 'Emerging Normative Frameworks on Transnational Human Rights Obligations' (2012) 17, *EUI Working Papers RSCAS*. Available at:
<http://cadmus.eui.eu/bitstream/handle/1814/21874/RSCAS_2012_17.pdf> accessed: 12 May 2014