On the Division of Moral Labour for Human Rights Between States and Corporations: A Reply to Hsieh

Denis G. ARNOLD*

Abstract

In a series of previous articles I have defended the claim that there are robust, theoretical justifications for concluding that corporations have human rights obligations and that those obligations are distinct from the larger set of human rights obligations that are properly attributed to states. Hsieh claims that corporations do not have human rights obligations. In this reply it is argued that even if one takes what Hsieh refers to as an ‘institutional approach’ to understanding the human rights obligations of states, corporations are nonetheless properly understood to have human rights obligations regarding those with whom they interact, such as workers, customers and community members.

Keywords: business and human rights, corporate human rights obligations, corporate duties, corporate responsibility, division of moral labour

One distinctive feature of the post-Westphalian international order is the significant increase in the influence and power of corporations throughout the world and the inability on the part of many governments to constrain corporate operations that directly or indirectly violate human rights in the interest of increased revenues. In many developing nations, the law enforcement and judicial apparatus necessary to ensure that transnational corporations (TNCs) comply with laws that protect individuals from harm is often weak or non-existent. TNCs operating in such nations are often free to determine for themselves whether or not they will adhere to host nation laws designed to protect citizens from harm and guarantee their internationally recognized human rights. Direct and indirect human rights violations by TNCs are all too common. The office of the United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises examined 320 cases of alleged corporate human rights violations and found that TNCs ‘impact the full range of human rights … including civil and political rights; economic, social and cultural rights; and labour rights.’1 Nearly sixty per cent of these violations were directly caused by the firms through acts or omissions.2 The ability of TNCs to exploit governance gaps in this way has been a central concern of business ethics scholarship for many years.

* Jule and Marguerite Surtman Distinguished Professor of Business Ethics and Professor of Management, Belk College of Business, University of North Carolina at Charlotte.


2 Ibid, 4.
In a recent article in this journal I synthesized existing business ethics scholarship regarding the human rights obligations of TNCs and other business enterprises and developed a series of arguments regarding business and human rights. I argued that TNCs have the ontological status necessary for moral agency and moral responsibility and that they are capable of either ignoring human rights obligations, or of integrating human rights protections into their international operations. I argued that there are compelling reasons to believe that TNCs have agentically grounded moral obligations to respect basic human rights and also that there are sound social contract-based arguments for concluding that businesses have human rights obligations. The main conclusions of that article are that TNCs are properly understood as corporate moral agents, capable of being duty bearers and entities morally responsible for their actions, because they have internal decision structures, designed and managed by human agents, including the ethical infrastructure of the firm, corporate intentions understood primarily as plans, and the capacity for reflective assessment of corporate plans and practices. TNCs, in other words, are properly characterized as having human rights obligations, or duties, and should be held morally accountable for violating human rights, as well as praised and esteemed when their policies and practices protect human rights.

The article is an extension to management and business ethics of a long and rich history of philosophical theorizing on the nature, content, and ethical implications of human rights that extends at least as far back in intellectual history as Locke. In the later half of the twentieth century, theorists such as H L A Hart, Joel Feinberg, Maurice Cranston, Henry Shue and Loren Lomasky, among many others, sought to clarify our understanding of human rights and corresponding duties. However, human rights theorists in this tradition largely ignored the role of corporations in the moral division of labour in society regarding human rights. It was not until Thomas Donaldson’s now classic work, The Ethics of International Business, that theorists took up the human rights obligations of corporations in a sustained manner. My article sought to advance the discussion of corporate human rights obligations in light of recent developments regarding business and human rights in the international system of human rights and in business ethics scholarship.

A minor element of that article is a set of criticisms of recent claims by my esteemed colleague Nieh-hê Hsieh that we should ‘reject assigning human rights obligations to MNEs [multinational enterprises] and their managers.’ Hsieh’s core claim, as I understand it, is that because only states can fully protect the equal standing of citizens (status egalitarianism), TNCs should not be regarded as having human rights obligations. I argued that this claim is untenable because TNCs have direct human rights obligations

---


to those with whom they interact, such as workers, customers and those who live in the communities in which TNCs operate. This is a position shared by many scholars of business and human rights such as Donaldson, Wesley Cragg, Michael Santoro and Florian Wettstein. In his commentary on my article Hsieh seeks to further explain and defend his position. In this reply to that commentary, I explain why Hsieh’s supplemental arguments do not support the conclusion that TNCs and their managers have no human rights obligations and why his position remains unpersuasive.

One of two things is true regarding Hsieh’s account. Either Hsieh is stipulating that only states can have human rights obligations, or he allows that entities other than states have human rights obligations. The former claim appears to be his position. In his commentary he writes, ‘Status egalitarianism, however, is a claim against specific duty-bearers – namely, those with ability to enforce laws and those that have a responsibility to ensure the equal moral standing of individuals within their jurisdiction.’ Since only states are perceived to have this legitimate authority, he surmises that only states have human rights obligations. However, there are good reasons for rejecting this position. To limit the class of actors with human rights obligations to states is to commit the fallacy of equivocation, since ‘human rights’ are widely recognized in philosophical scholarship, in law, and in practical application, to have a meaning that allows them to be appropriately and legitimately applied to actors other than states. In business ethics scholarship, the attribution of human rights obligations to corporations was first made in a sustained manner by Donaldson over 25 years ago. Peter Muchlinski, along with other scholars, has pointed out that US law, for example, recognizes that corporations can directly violate human rights.

In a 2010 article, I pointed to the dangers of attributing to corporations the identical human rights obligations that states (or national governments) have, given the different functions of states and corporations in society. A failure to distinguish between the moral division of labour for human rights was a critical mistake of the United Nation’s Working Group on the Methods and Activities of Transnational Corporations and its 2003 draft ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (hereafter, Draft Norms). It was one of the features that led to the demise of the Draft Norms and the creation of the mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.


9 Donaldson, note 5.


To better understand the distinction between varieties of human rights obligations that exist, consider the different types of obligations that states themselves have. As Hsieh seems to acknowledge, not all states have the same human rights obligations. As he points out in his commentary, states that meet their obligations and protect human rights have an obligation to intervene in states that fail to meet their human rights obligations (e.g., by engaging in or tolerating genocide). ‘In the case of states, the failure to uphold human rights provides grounds for intervention by other states despite claims of sovereignty.’

States that routinely, or systematically, violate human rights do not have obligations to intervene in the same way, because they do not enjoy the same status as rights upholding states in the international order. Different varieties of states, then, have different human rights obligations. Why should it be supposed that if non-state actors have human rights obligations, they must be identical to those of state actors? The position of most business ethics scholars working in this area is that it is fallacious to claim that the obligations of corporations and states are identical, but it is equally fallacious to claim that TNCs and their managers have no human rights obligations.

This position is not a mere conceit or stipulation, it is based on the recognition that all international treaties regarding human rights are grounded in conceptions of human dignity that no person, group, or state may violate. For example, the Universal Declaration of Human Rights states that the basis for human rights is the ‘inherent dignity’ and ‘equal and inalienable rights of all members of the human family’. Article 30 states that ‘Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.’ In other words, even if one takes what Hsieh refers to as an ‘institutional approach’ to human rights, persons, including managers, and groups, including corporations, have obligations not to violate human rights. However, they do not have the same obligations as states for the protection of the human rights of all citizens.

The language of international agreements among nations is often intentionally vague to allow for broad support, especially in the initial stages of policy development. The Brundtland definition of sustainability is a notorious example of a definition that allows for broad consensus, while at the same time remaining vague to the point of meaningless. For this reason, we should not be overly concerned that the “‘Protect, Respect and Remedy’ Framework for Business and Human Rights’ and its accompanying Guiding Principles on Business and Human Rights attribute ‘responsibilities’ to corporations and ‘duties’ to states. As both Wesley Cragg and

13 Hsieh, note 8, 304.
16 Ibid.
I have argued previously, the distinction between ‘responsibilities’ and ‘duties’ or obligations, lacks a coherent conceptual basis, although it does serve to helpfully signal differences between corporate and state obligations. In light of the earlier failure of the Draft Norms, such signalling was probably necessary for an atheoretical document informed by pragmatism to achieve consensus in the United Nations Human Rights Council.

Hsieh claims that there may not be much disagreement between his position and the account of TNC human rights obligations that I have previously defended, in part, because he wants to distinguish between three different moral categories: ‘basic moral rights that ground duties on the part of TNCs’, human rights obligations, and human rights duties. For my part, it is important to rebut claims that TNCs have no human rights obligations and to point out that such a position is not theoretically justified. To be theoretically well motivated, at a minimum, sound, coherent conceptual distinctions between duties, obligations, and responsibilities would need to be articulated and defended in light of existing human rights theory. The content and basis for distinguishing between these concepts, on Hsieh’s account, remains obscure. As I have previously pointed out, the corporate ‘responsibility’ to protect human rights articulated by the ‘Protect, Respect and Remedy’ Framework is grounded merely in ‘social expectations’ and in prudential risk management. According to the tripartite framework, ‘Failure to meet this responsibility can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts.’ The concept of corporate ‘responsibility’ for human rights has no explicit moral or theoretical foundation in the ‘Protect, Respect and Remedy’ Framework, so it seems odd and idiosyncratic to adapt the tripartite framework’s pragmatic, politically motivated distinction in an effort to deny human rights obligations for TNCs.

In his commentary, Hsieh places special emphasis on jurisdiction, which following Samantha Besson, he defines as political and legal authority that claims to be or is perceived to be legitimate. Hsieh quotes Besson to explain that ‘jurisdiction consists in effective, overall and normative power or control (whether it is prescriptive, executive, or adjudicative). It amounts to more than the mere exercise of coercion or power, as a result: it also includes a normative dimension by reference to the imposition of reasons for action on its subjects and the corresponding appeal for compliance.’ This normative dimension of jurisdiction is of special relevance for our analysis. What, we should ask,
are the normatively legitimate reasons for holding TNCs accountable for human rights violations both domestically and across national borders in the host nations in which they operate?

One reasonable answer is that when TNCs fail to meet their human rights obligations to those individuals with whom they interact, they operate in a manner inconsistent with human dignity and are justly held accountable. That is, they fail to operate in a manner expected of all persons and groups and as such are appropriately held accountable by states because of this failure. This is, after all, the core justification of all internationally recognized human rights. To suggest otherwise would be to hold that there are only strategic reasons for TNCs to adhere to the rights articulated in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the International Labour Conventions. That is, it would be to hold that the only reasons TNCs and their managers have to adhere to the international system of human rights are that states and civil society will punish the TNCs and their managers in meaningful ways that outweigh firm profits and executive compensation. John Ruggie’s approach in the ‘Protect, Respect and Remedy’ Framework adapts this stance, a view that has been criticized extensively.25

The upshot of our analysis is that there are compelling arguments for attributing human rights obligations to TNCs and their managers that are not identical to the set of obligations that states have with respect to human rights and that it is logically difficult to deny this conclusion. At least, I have not seen a compelling argument against this conclusion. This is not to say that there are not important conceptual issues that remain to be addressed and which require our attention. The scope and limits of TNCs human rights obligations are important subjects and ones that merit further conceptual analysis and scholarly attention in a post-Westphalian international order, one in which the power and influence of TNCs continues to grow and in many instances challenges the power and influence of nation states.

25 Arnold, note 11; Cragg, note 19.