Re-thinking ‘spheres of responsibility’: Business, Human Rights and Institutional Action

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Abstract

This paper considers two prominent, competing approaches to defining the scope of business responsibility for human rights. The first approach advocates extension of business responsibility beyond the boundaries of the enterprise to encompass broader ‘spheres of influence’. The second approach advocates a business ‘responsibility to respect’ human rights (but not a ‘positive’ duty to protect, promote or fulfil rights). Building on a critical evaluation of these competing accounts of business responsibility, the paper outlines a modified account, referred to as a framework of ‘spheres of responsibility’. On such an account, business responsibility for human rights outcomes is conceptualised not only in relation to direct ‘harms’ imposed by the business, but also in relation to corporate influence over broader institutional relationships and structures that shape and constrain the substantive realization of human rights. As elucidated here, this ‘spheres of responsibility’ framework retains the minimalist normative assumptions that underpin the appeal of the ‘responsibility to respect’ framework. However, it goes much further in recognising the need for businesses to accept ‘complex’ as well as ‘simple’ categories of negative duties. The paper suggests that such a framework therefore offers a stronger basis for articulating business responsibility for the important range of indirect, institutionally mediated channels through which business activity influences human rights outcomes.

Keywords

Business and Human Rights; Corporate responsibility; Negative versus positive duties; Responsibility to respect; Spheres of influence

Introduction

Most are now familiar with the broad charge sheet of human rights abuse that has so often been levelled against transnational businesses over the last two decades of economic ‘globalisation’. The charges include: use of foreign ‘sweatshop’ labour in the factories from which prominent global brands source their products; use of market power to push down prices received by poor farmers in developing countries for their agricultural products; and damage inflicted on the health, livelihoods and ways of life of local communities living close to mines or pipelines operated by major global resource companies (Clapham and Jerby 2001; Koenig-Archibugi 2004; Macdonald 2009; Muchlinski 2001). Such transnational business practices are viewed by many as contributing both directly and indirectly to the
violation of human rights of vulnerable individuals and communities around the world – especially in developing countries.

These kinds of persistent human rights violations have been widely represented as products of a ‘governance gap’, characterised by the diminishing capacity of national governments to steer and constrain those dimensions of transnational business activity that affect the human rights of their populations. Such a gap is often claimed to be emerging as a result of the expanded power and capabilities of transnational business and weakened capabilities of states under conditions of economic globalisation (Campbell 2006; Nolan 2009; Ratner 2001; Scherer et al. 2005). The agenda of formulating a clear account of how the responsibilities of transnational business in relation to human rights can be defined and bounded has been explicitly cast as a response to governance gaps of this kind (Human Rights Council 2008a, p.3):

“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.”

In addressing human rights issues related to transnational corporate practices, multiple competing accounts of business responsibility for human rights have been elaborated and debated. In this paper, I focus my analysis on two accounts that have attracted particular attention in recent years as potential means of defining – and importantly also bounding – the scope of business responsibility for human rights: one advocates the extension of business responsibility beyond the boundaries of the enterprise to encompass broader ‘spheres of influence’; the other advocates a business ‘responsibility to respect’ human rights (but not a positive duty to protect, promote or fulfil rights).

The general proposition that business responsibility for human rights could be bounded in accord with the scope of business ‘spheres of influence’ was widely debated following initial reference to such a principle within the UN Global Compact and the UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (Gasser 2007). The ‘spheres of influence’ concept was perceived by some observers as offering a promising means of capturing the diverse and widely varying channels through which businesses affect human rights, both directly and indirectly. However, while this concept’s theoretical elasticity may have bolstered its virtues as a flexible guiding metaphor, its analytical bluntness has made it difficult to operationalise for use in defining operational standards to govern transnational business conduct. Such weaknesses in the framework culminated in its rejection in the most recent report of John Ruggie, the United Nations Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. The Special
Representative has now proposed an alternative framework in which business responsibility is limited to a negative duty to ‘respect’ human rights in the conduct of business activities and relationships.

Many questions remain regarding both the normative grounding and the institutional implications of the above conceptual frameworks, and serious challenges therefore confront both scholars and practitioners seeking to design effective and legitimate means of overcoming the identified governance gap with respect to transnational business and human rights. The central goal of this paper is to critically evaluate these competing accounts of business responsibility for human rights and on this basis to develop a modified account that I refer to as a ‘spheres of responsibility’ framework.¹

In developing this account, I draw for illustrative purposes on empirical sources derived from my multi-country field research involving around 300 individuals and organisations associated with garment and coffee sector supply chains connected to production sites in Nicaragua.² I draw also on my research conducted with the UK’s Corporate Responsibility (CORE) Coalition, utilising case studies of corporate human rights abuses in Nigeria and India (Macdonald 2009). These cases reflect this paper’s central interest in the responsibility of business actors that operating across transnational borders, influencing human rights outcomes among vulnerable individuals and communities in the developing world. They also constitute examples from a diverse range of business sectors and varying institutional contexts, encompassing examples of corporations in the mining sector directly impacting communities; corporate participants in relational networks of the kind that are very common in supply chains in the garment sector; and businesses operating in agricultural sectors such as coffee in which business activity is typically coordinated via more arms length forms of networked and market relations.

**Business ‘responsibility to respect’ human rights: understanding its appeal**

One prominent account of how business responsibilities for human rights may be defined and bounded is that developed by the United Nations Special Representative (UNSR); this focuses on the business obligation to ‘respect’ human rights, and derivative obligations of due diligence. The business ‘responsibility to respect’ is presented as part of a broader framework that also includes the principles of a state duty to protect against human rights abuses by third parties, including business, and the need for more effective access to remedies (Human Rights Council 2008a).

The account of responsibility presented in this and similar frameworks (e.g. (Ratner 2001), (Jungk 1999)) – can be understood as what is commonly termed a ‘liability’, ‘blame’ or

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¹ This phrase has been variously employed by a number of other authors and commentators, including (Lehr and Jenkins 2007) and (European Coalition for Corporate Justice 2008).

² Interviews were conducted with key stakeholders and decision makers within garment and coffee supply chains that reached from factories in Nicaragua, to both consumer markets in the US and locations of investors and civil society activists spanning the US, Europe and East Asia. For further detail, see (Macdonald 2007a, b).
‘agent-relative’ account of responsibility (Goodin 1987). Although such conceptions of responsibility actually reflect a loose grouping or family of theoretical accounts, they concur on the central proposition that attributions of responsibility rest solely or at least primarily on facts about agents and their relations to certain harmful or favourable events or states. Attribution of responsibility is therefore tightly linked to the consequences of an agent’s actions and choices (Haydar 2005; Kutz 2002):

“Agency conceptions suppose that the way in which a deed or consequence is attributed to the agency of its author, that is responsibility as attributability, provides the basis for the moral interest we take in the responsibility of others” (Ripstein 2004).

On this account, simply the existence of acknowledged needs or entitlements does not necessarily imply responsibilities for all those with capabilities to assist. Rather, responsibilities of a more stringent kind are allocated to those actors who have some way contributed to bringing about the outcomes in question. For this reason, agent-relative accounts of responsibility are usually associated with a distinction between what are commonly referred to as ‘negative’ as opposed to ‘positive’ duties. As (Scheffler 2001) describes, this distinction implies that:

“individuals have a special responsibility for what they themselves do, as opposed to what they merely fail to prevent. This doctrine is sometimes expressed in the principle that negative duties are stricter than positive duties, where this means, roughly, that it is more important to avoid doing certain sorts of things to people than it is to prevent unwelcome occurrences from befalling them or to provide them with positive benefits”.4

Deployment of such a positive/negative distinction by the UN Special Representative’s ‘responsibility to respect’ framework is explicit (Human Rights Council 2008a, p.9): “To respect rights essentially means not to infringe on the rights of others – put simply, to do no harm”.5

The appeal of this framework can be understood in part as resulting from its normative grounding in a set of individualist normative assumptions that command a reasonably broad-
based consensus across a range of political and ideological positions, particularly within a liberal moral universe. The normative grounding of such a view rests importantly on a particular conception of responsibility as moral agency: the idea that “responsibility is a moral property of agents that consists in or supervenes upon underlying facts of agency and upon agents’ connections to the world” (Kutz 2002, p.550). Such an account is linked importantly to the liberal view of individuals as primary bearers of rights and responsibilities. Moreover, the negative duty to avoid actively harming others tends to be experienced as constituting less of a constraint on the pursuit of one’s own goals than does the more stringent positive duty to aid others (Scheffler 2003; Shue 1988). The negative/positive distinction therefore plays an important role in bounding the scope of business responsibility within an agent-relative view, giving rise to an account of responsibility that is relatively minimalist and non-demanding.

The appeal of such a minimalist normative view is further reinforced by the apparent ‘naturalness’ of an agent-relative view of responsibility, which (Scheffler 2003, p.39) suggests may be attributed to certain features of the ‘phenomenology of agency’ – the way we tend to experience and imagine the impacts of our own agency – wherein greater weight is placed on individual versus group actions, and on near as opposed to remote effects. Such a phenomenology of agency therefore lends some support to the familiar distinction between acts and omissions, which in turn importantly underpins the distinction between ‘negative’ versus ‘positive’ obligations.

Not only is this simple, minimalist account of business responsibility normatively and phenomenologically appealing, it is also practically useful for a number of important applications. The landscape of transnational business activity is replete with cases in which business impacts on human rights involve the direct imposition of harms of the kind apparently contemplated by an agent-relative account of business responsibility. Some of the clearest examples of violations of this kind come from the mining sector, in which there are a number of prominent cases of direct human rights violations resulting from transnational business activity. One clear example is the practice of flaring gas in Nigeria. This is a practice undertaken by oil companies when oil deposits are mixed with gas and it is judged more profitable simply to burn off the gas rather than capturing it for utilisation or re-injection. Gas flaring is carried out in Nigeria by five multinational oil companies, of which Shell is the greatest contributor to the total flaring. As detailed elsewhere (Macdonald 2009), these flaring activities have resulted in alleged harms to the health of communities living near the flaring sites, including respiratory problems and other serious health issues. Further, local communities have suffered damage to their environment and livelihoods, with loss of food security due to destruction of their crops.

6 “Ideas of individual desert play an important role in our practice of treating one another as responsible agents, and desert has traditionally been seen as having a central role to play in both distributive and retributive justice” (Scheffler 2003, p.98).

7 All companies operate in joint ventures with the Nigerian National Petroleum Corporation, which is a statutorily established, state owned corporation.
In another case of direct human rights violations resulting from the activities of transnational mining companies, the UK listed company Vedanta has allegedly committed a broad range of human rights violations as part of its bauxite mining activities in the Indian state of Orissa. Concerns have focused in particular on damage to local livelihoods, health, environment and ways of life among tribal people living in affected areas. To make way for the construction of the Lanjigarh refinery, villages have been razed and over 100 tribal families moved from their land, in many cases to a crowded cement-house “rehabilitation colony” with inadequate land for farming and grazing. Particular concerns have focused on Vedanta’s toxic waste management at the Lanjigarh refinery, which produces up to three million tons of caustic soda waste each year. People have complained of breathing difficulties and skin problems, as well as damage to crop yields and livestock (Macdonald 2009).

In cases such as these, the relationship between businesses and the populations they affect are proximate in time and space, and attributable in very direct ways to the agency of the transnational mining companies involved. If ascribing responsibility is essentially a matter of pointing fingers, as (Goodin 1987) suggests, then on an agent account of responsibility in such cases the finger of blame points very clearly towards these corporations that have directly inflicted the harms in question when clearly they could reasonably have acted otherwise. In such cases, the characterisation of human rights violations as resulting from the direct ‘abuse’ of human rights appears highly appropriate.

Contemplating cases such as these, it makes sense to regard the business and human rights governance challenge as essentially one requiring containment of abuses committed by “powerful global actors that some states lack the resources or will to control” (Ratner 2001, p.461). Reflecting such a view, the ‘governance gap’ has been widely characterised as a regulatory environment that permits wrongful or negligent acts to occur and that fails to provide appropriate remedies to victims of abuse (Human Rights Council 2008a). In response to governance gaps of this kind, the ‘respect’ framework of business responsibility offers an important basis on which to establish strengthened systems of enforcement and remedy in such individual cases.

**Institutionally mediated action: the limits of ‘responsibility to respect’**

Although appropriate in many cases, an agent-relative account of corporate responsibility such as that described above has a significant deficiency. This is that it is based on a conception of corporate agency that does not take sufficiently seriously the significance of social institutions as mediating channels between the exercise of corporate agency and resultant human rights outcomes. To elaborate this point, I first examine some of the most common dynamics of institutionally mediated action through which business agency is extended and/or constrained. I then consider the implications of these dynamics for the limits of the ‘responsibility to respect’ framework.

*The dynamics of institutionally mediated action*
Social institutions mediate between individual actors and social outcomes at a number of different levels. Institutions constitute social actors in various ways, defining and instilling core norms, identities, capabilities, purposes and relationships. Institutions can also act as constraints on the exercise of agency, in part as a result of their actions combining with the actions of others in typically unintended and uncoordinated ways, and also as a result of the dynamics of institutional mediation through which actions are separated in time from their effects. Further, dynamics of institutional interaction operate to distribute agency across different actors. In cases where institutional structures cause agency to be widely diffused, as within market-based systems of social coordination, the diffusion of costs, benefits and information associated with such structures may give rise to widely recognised barriers to both individual and collective action.

Such dynamics of institutional mediation have important potential implications for the plausibility of competing accounts of business responsibility. First, recognition of these dynamics provides a basis for holding businesses responsible for their indirect impacts on human rights, on the grounds that institutionally mediated causal processes enable businesses to ‘do harm at a distance’. This account of responsibility for indirect impacts acknowledges that when individual agents act within institutions, it is often the confluence of their unintended and/or uncoordinated actions that results in harms giving rise to human rights claims (Gosselin 2006). Second, recognising dynamics of institutional mediation may support the placement of limits on the scope of business responsibility, on the grounds that the need to act within institutions places constraints on the extent to which individual decision makers can control outcomes. Although ‘can’ does not necessarily imply ‘ought’ (Human Rights Council 2008a), the reverse is true, in the sense that capacity enters as a precondition for the meaningful attribution of responsibility (Kutz 2002).

Clearly, businesses of all kinds are deeply enmeshed in institutional relationships of an enormous variety. To illustrate how dynamics of institutional mediation operate in practice to both extend and constrain business influence over human rights outcomes, I briefly consider some of the most common types of institutional channels through which businesses influence human rights outcomes.

First, one very widely analysed category of institutional relationships through which business enterprises sometimes influence human rights indirectly consists of the legal, financial and managerial links between businesses that are organised within decentralised structures of enterprise association, typically in the form of a corporate group or joint venture. Such relationships may facilitate and constrain indirect control in differing ways. Institutional relationships of this kind have raised particular concern due to their tendency to impede the legal liability of individual business actors in many jurisdictions (Human Rights Council 2008a).

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8 For example, dynamics of ‘path dependency’ and ‘lock in’ effects enable outcomes to be shaped by events and decisions in previous time periods, giving rise to significant constraints on the exercise of transformative agency within ‘current’ contexts of decision making.
Second, attention is increasingly being attracted by the ways in which many business enterprises are able to exercise institutionally mediated influence over human rights outcomes via their participation in business networks and supply chains. In some cases, these networks are structured around long term contractual relationships; in others, the economic relationships may be constituted and coordinated via more arms length market relationships, in which dynamics of control are substantially influenced by the economic importance of each business enterprise in relation to its suppliers or purchasers (Ratner 2001).

One very common form of network organisation within a wide range of manufacturing, horticultural and agricultural industries takes the form of buyer-driven supply chains, in which transnational systems of production are coordinated and controlled primarily by large retailers and branded merchandisers based in industrialised countries; for example, these are ‘brands’ and retailers in garment and footwear sectors and roasting companies in the coffee industry. Acting via these networked chains of relationships, leading firms within such buyer-driven supply chains are able to influence a wide range of human rights outcomes among workers, producers and communities connected to these chains.

The scope and limits of this form of influence vary significantly within and between industries. For example, in the garment industry, the line of control from retailers to production sites is generally quite direct. Direct sourcing relationships are also common in specialty coffee chains, accounting for around 10% of global coffee trade. In contrast, distributions of control within those supply chains sourcing commodity grade coffee are much more diffuse; while trade remains dominated by roasters, these are separated from producers via often lengthy, intermediate trading chains through which producers sell to exporters – either directly via extensive networks of collection centres in coffee producing regions, or indirectly via additional intermediaries. The market oriented coordination mechanisms dominating such conventional chains play an important role in diffusing control over resultant outcomes.

While such institutional relationships facilitate important forms of indirect control, they also give rise to important forms of constraint on the influence of lead firms within such supply chain systems. For example, while large retailers are able to exercise significant influence over factory conditions via the terms of the contracts they set with suppliers, they lack control over day to day management practices that also contribute to determining workplace conditions. On large-scale Nicaraguan coffee plantations, for instance, permanent workers generally live on farm property and provision for their housing, food, health care and other forms of social infrastructure is at the discretion of farm owners and managers, as are most other working conditions. In the garment industry, while variables influencing wages and conditions such as overtime (such as price, quality and delivery schedules) are controlled

\[9\text{Within these ‘buyer-driven’ chains, northern brands and retailers are able to control marketing and design activities, which in turn enables them to wield extensive power over decision making throughout the global chain (Gereffi 1999).}\]

\[10\text{In some sectors of the industry, especially in the higher volume sections of the market, intermediary trading companies also play an important role.}\]
more directly by actors higher up the supply chain, many other working conditions remain controlled by decision makers at the factory level.

In those sectors in which coordination is dominated by arms length market relations, dynamics of institutional mediation often place particularly strong constraints on the capacity of business to influence human rights outcomes, as a result of the diffusion of control among a long chain of supply chain intermediaries. For example, those companies purchasing conventional green coffee beans via the major market exchanges typically exercise only very limited short term control over production processes. In purchasing coffee, buyers choose its basic characteristics, differentiated on the exchange on the basis of origin and quality class; and second, they negotiate details of price and delivery (Fitter and Kaplinsky 2001, p.16; Gibbon 2001). However, such buyers have limited ability to control broader social and environmental features of the production process within their supply chains. Buyers also have limited control over farm-gate prices; the lack of both traceability and price transparency within intermediated supply chains means that it is generally only when roasters purchase coffee directly from farmers that they have the ability to ensure that any payment of higher prices by roasters will end up being passed on to farmers.

A third important form of institutional interaction through which companies exercise indirect influence over human rights outcomes is via the relationships that transnational businesses form with governments and other social actors within host countries. Most obviously, such relationships often take the form of both direct and indirect forms of political engagement with host country governments. In some cases, influence may also be exercised via engagement with non-state organisations and networks through which formal or informal rules governing business activity in a particular sector or location are shaped.

Social and governmental institutions within host countries also operate sometimes as important constraints on the capacity of transnational business enterprises to control human rights outcomes among those with whom these enterprises engage in institutional relationships. The institutional environments in which businesses operate are shaped by a variety of local actors, norms and historically entrenched patterns of social privilege. Practices such as the denial of social and economic rights to landless agricultural workers, and the persistence of child labour in many agricultural and manufacturing sectors, are often entrenched via social institutions of these kinds. In other cases, business influence is importantly constrained by the practices of host country governments, such as the barriers to freedom of association created by government policy and practice (together with wider social influences) in countries such as China or Vietnam.

*The limits of ‘responsibility to respect’*

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11 These will most obviously include labour and product market dynamics at the local level as well as distributions of assets and infrastructure and prevailing configurations of hierarchical and exclusionary social relations.
The exercise of business agency over human rights outcomes in these institutionally mediated ways presents a significant challenge to the ‘responsibility to respect’ framework, making it very difficult – both conceptually and empirically – to distinguish meaningfully between human rights non-fulfilment resulting from the ‘negative’ engagement of business in damaging forms of institutional engagement, versus the failure of business to ‘positively’ engage in more favourable forms of institutional action. That is, the complex institutional processes mediating the actions of individual businesses leads to a break down of the distinction between what individual businesses themselves do, as opposed to what they merely fail to prevent. This ambiguity reflects the way in which the seemingly natural understanding of agency on which the negative/positive distinction is based (placing greater weight on individual versus group actions, and on near as opposed to remote effects) can be compromised when action is mediated through institutions.\(^{12}\)

Because the framework of a business ‘responsibility to respect’ human rights relies so heavily on the negative/positive distinction (and the agent-relative assumptions and intuitions that underpin it), the practical importance of such complex institutional dynamics presents serious challenges to this framework.

Two challenges are of particular importance. The first is a problem of indeterminacy: in those cases where human rights outcomes are influenced significantly by institutionally mediated dynamics, the negative/positive distinction – and thus also the ‘respect’ framework – ceases to offer a clear practical basis for defining and bounding business responsibility. The blurred boundaries of the business ‘responsibility to respect’ then tend in practice to translate into a further problem of excessively restrictive scope: to the extent that the influence of institutionally mediated action cannot straightforwardly be understood as ‘negative’ in a given context, the tendency is for such forms of influence simply to be excluded from the scope of a business’s ‘responsibility to respect’. Therefore, this second problem substantially limits the capacity of this framework to address those elements of the prevailing governance gap that result from institutionally mediated action, as opposed to directly wrongful or negligent acts on the part of individual businesses.

As discussed briefly above, the ‘governance gap’ that is widely believed to exist in the domain of transnational business and human rights has often been characterised as essentially involving shortfalls of regulative capacity to sanction individual companies for such wrongful or negligent acts. It is certainly true that functions of enforcement and remedy oriented towards individual acts of transgressive corporate conduct play an important role in any system of business regulation; however, it is widely recognised that regulatory systems also perform broader coordinating functions.\(^{13}\) Governments deploy a broad range of regulatory

\(^{12}\) This is particularly true when these institutional systems are ‘stretched’ through time and space under conditions of globalisation (Marion Young 2004; Scheffler 2001).

\(^{13}\) Regulatory scholars also highlight the limits on the extent to which states can effectively perform such responsibilities within the complexity of a late modern economy, especially in the context of globalisation (Braithwaite 2005; Parker 2004; Teubner 1983), and even within the context of national regulatory processes the
instruments intended to overcome problems of collective action and coordination, by seeking to structure actors’ capacities and incentives and coordinate their interactions in ways that support and promote specified public values and goals. From this viewpoint, regulation can be recognised not only as a means of addressing individual violations one by one, but also as a powerful tool with broader policy and coordination functions. In other words, business regulation within well functioning systems of national governance serves also to steer the ways in which individual businesses interact within overlapping systems of social institutions.

To the extent that transnational business is able to operate beyond the reach of national systems of regulation, we must therefore recognise the resulting ‘governance gap’ as encompassing more than simply a weakness in the regulative capacity to sanction individual businesses whose wrongful or negligent conduct directly violates human rights. Rather, this gap also reflects a deficit in the capacity of public institutions to structure and coordinate processes of interaction between businesses so as to govern more complex, institutionally mediated processes and human rights outcomes. For this reason, an account of business responsibility that fails to incorporate some account of business responsibility for institutionally mediated impacts on human rights will be unable effectively to plug this important dimension of the governance gap.

‘Spheres of influence’ as an account of institutionally mediated harms

An alternative account of business responsibility that has also attracted widespread attention and debate in recent years has been what I refer to as the ‘spheres of influence’ framework, which was outlined briefly in both the Global Compact and the UN Norms. The framework’s central proposition is that businesses should be obliged to both ‘support and respect’ human rights within their ‘spheres of influence’.

While the ‘responsibility to respect’ framework rests importantly on an appeal to the ‘negative/positive’ distinction, the ‘spheres of influence’ approach appeals instead to an image of multiple spheres of indirect as well as direct influence over human rights. Because this approach emphasises indirect as well as direct channels of influence, it seems to provide a strong foundation for an account of the responsibility of business for institutionally mediated contributions to human rights violations. However, two aspects of the ‘spheres of influence’ framework have been widely criticised, each of which is discussed below.

The first aspect of the ‘spheres of influence’ metaphor that has been widely criticised is its simplistic empirical assumptions, which are based on the image of concentric circles of need for diffuse responsibility within self-organising processes is emphasised. However, such points highlight governance gaps of a distinctly different kind to that on which this paper focuses.

14 These include constitutive policy tools at the enterprise level (such as company law), constitutive and regulatory tools at the level of markets (such as competition policy or policies of registration, certification or standard setting) and facilitation or administration of collective institutions at the sectoral or policy levels (Ahdieh 2009 unpublished; Scherer et al. 2005).
stakeholders radiating out from each company. As initially envisaged in the Global Compact and UN Norms (Human Rights Council 2008a, p.19), the concept of spheres of influence

“was intended as a spatial metaphor: the sphere was expressed in concentric circles with company operations at the core, moving outward to suppliers, the community and beyond with the assumption that the influence and thus presumably the responsibility of the company declines from one circle to the next.”

Such a tidy and symmetrical empirical image stands in stark contrast to the configurations of institutional agency that we observe within the ‘partially joined up world’ of the contemporary global political economy. These configurations are much more heterogeneous, overlapping and complex in form than suggested by the imagery of neatly nested concentric circles. As several commentators have observed, the metaphor of ‘webs’ of relationships seems to capture the messy empirical reality more accurately than that of circles radiating out from a central point.

Another important criticism that has been levelled at the ‘spheres of influence’ framework as it was represented in the UN Global Compact and in the UN Norms is that of normative ambiguity or incoherence: the charge that it “lumped together too many disparate dimensions related to the notion of influence”, including leverage, impact on others, capacity and benefit (Lehr and Jenkins 2007) (Human Rights Council 2008a, p.19). It is certainly possible to imagine an account of ‘spheres of influence’ that could justify consideration of a broad range of criteria associated with ‘influence’, encompassing benefit and capacity as well as impact on others. For example, the ‘spheres of influence’ framework could be interpreted as an element of a broader account of what some political theorists have referred to as ‘interaction-dependent’ or ‘relational’ accounts of global distributive justice (Pogge and Bleisch 2002).

Given that such an account has been neither articulated nor defended, however, it seems clear that the ‘spheres of influence’ framework as articulated in these contexts is at least guilty of being underspecified.

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15 (Shue 1988, p.691) makes a very similar point in more general terms: “An almost irresistible naturally seeming image dominates much thinking about duties. We often see our duties from the point of view of a pebble dropped into a pond: I am the pebble and the world is the pond I have been dropped into. I am at the centre of a system of concentric circles that become fainter as they spread. The first circle immediately around me is strong, and each successive circle is weaker. My duties are exactly like the concentric ripples around the pebble: strongest at the centre and rapidly diminishing toward the periphery. My primary duties are to those immediately around me, my secondary duties are to those next nearest, and so on.”

16 The web metaphor has been involved in a number of contexts. (Human Rights Council 2008b, p.6) states that “it is not proximity that determines whether or not a human rights impact falls within the responsibility to respect, but rather the company’s web of activities and relationships”. In his influential analysis of human rights duties (written in the 1980s), (Shue 1988, p.693) similarly observed that “Perhaps the nearest thing to an accurate representation of the real circumstances now is one of those irregular spider webs with some very short strands and some very long strands, such that if something touches one strand it may send a shock to the farthest side of the web, while if it touches a different strand its effect may quickly fade away.”

17 According to such accounts, the scope and content of social obligations and entitlements are linked importantly to empirical features of the social interactions in which individuals and groups participate (Armstrong 2009; Maffettone 2009; Sangiovanni 2008).
However, the ‘spheres of influence’ framework can be reinterpreted more narrowly, as an account of business responsibility for institutionally mediated harm. Such an account would continue to build on a restrictive normative view of the grounds of responsibility – linking responsibility closely to the exercise of moral agency, and thereby restricting responsibility to those cases of human rights non-fulfilment to which individual companies have actively contributed. Such an account could thereby avoid the charge of normative under-specification or incoherence. This more restrictive normative interpretation of spheres of influence could then be combined with a more complex and multi-dimensional empirical account of the kinds of actually existing institutional relations that activate narrowly construed agent-relative responsibilities.

An account of spheres of influence understood in this way would serve to complement rather than to challenge the narrower account of corporate responsibility to ‘respect’ human rights related to direct impacts. The ‘responsibility to respect’ framework already offers an important means of holding businesses responsible for their direct impacts on human rights. A modified account of ‘spheres of influence’ – understood as business responsibility for institutionally mediated harm – could operate alongside this to provide a means of also allocating responsibility for harms resulting from the coordinated or uncoordinated actions of multiple businesses (often interacting also with state and non-state actors of other kinds). By integrating key insights from the responsibility to respect framework with a modified version of the ‘spheres of influence’ approach, we arrive at a framework that encompasses business responsibility for both direct and institutionally mediated impacts on human rights; I refer to such a framework as a ‘spheres of responsibility’ approach. An account of ‘spheres of responsibility’ understood in this way would operate in practice as a multi-level account of business responsibility, capable of accommodating the plural and heterogeneous configurations of institutional relationships in which businesses participate.

**Operationalising ‘spheres of responsibility’: from simple to complex forms of negative responsibility**

What might such a multi-level account of business ‘spheres of responsibility’ look like in practice? Such an account requires that responsibility is differentially allocated between businesses in accordance with the distinct channels – both direct and institutionally mediated – through which they impact on human rights outcomes. A spheres of responsibility approach orient its empirical focus towards analysis of multiple channels of both indirect and direct business influences over human rights. Accordingly, it can identify a broad range of duties, encompassing not only what could be called ‘simple negative duties’, but also ‘complex negative duties’. As I describe in more detail below, ‘complex negative duties’ encompass both derivative positive duties, and distributed negative duties.

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18 On this account, leverage a business may have over an entity engaging in exerting harm would not count as relevant to responsibility unless the exercise of leverage was in fact contributing to the form and extent of the harm – either directly, or indirectly by sustaining other relevant dimensions of institutional relationships contributing to the harm.
Such an expanded account of complex negative duties retains the restrictive normative view of responsibility in which the appeal of the ‘responsibility to respect’ framework is grounded. However, it also offers a means of disaggregating responsibilities between relevant decision makers, as well as means of coordinating those decision making processes that impact interdependently on relevant human rights outcomes. In those cases where business agency is constrained as a result of the institutional dynamics through which it is exercised, an account of complex negative duties also offers an account of business responsibility for supporting processes of institutional change.

In fact, as it currently stands the UNSR’s ‘responsibility to respect’ framework already incorporates one important example of complex negative duties: what I refer to as derivative positive duties. Derivative positive duties are derivative from negative duties in the sense that they constitute “those positive measures clearly necessary to effect” recognised negative duties (Ratner 2001, p.516). Such duties, in the form of duties of due diligence, have formed an important element of the UNSR’s framework of ‘responsibility to respect’.

The ‘responsibility to respect’ framework defines business responsibility to engage in processes of due diligence as requiring: “a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it.” Such responsibilities are explicitly presented as involving a positive dimension: “‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps – for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes” (Human Rights Council 2008a, p.17). The extent of the reach of such responsibilities remains somewhat ambiguous within the UNSR’s framework. However, the UNSR clearly states that in addition to business responsibilities for due diligence concerning direct impacts of corporate activities, responsibilities also extend to cases in which businesses “might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, state agencies and other non state actors” (Human Rights Council 2008a).

The ‘spheres of responsibility’ framework that I am proposing here extends ‘complex negative responsibilities’ much further than simply acknowledging duties of due diligence. I am proposing that it should also encompass another important derivative positive duty in the form of a business responsibility for the performance of coordination functions. This provides a means of coordinating those decision making processes that impact interdependently upon relevant human rights outcomes. Obligations to engage in collective actions of various kinds are likely to be particularly important as a basis for regulating the aggregate effects of interactions between large numbers of individual businesses.

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19 Such acknowledgement of the importance of indirect channels of business influence appears to be reflected also in the UNSR’s expressed concern that “If the scope of due diligence were defined by control and causation this could imply, for example, that companies were not required to consider the human rights impacts of suppliers they do not legally control or situations where their own actions might not directly cause harm but indirectly contribute to abuse” (Human Rights Council 2008b, p.6).
In some cases, such responsibilities for engaging in coordinated activity may be discharged by the voluntary formation of inter-organisational networks as means of both negotiating shares of responsibility, and coordinating contributions. For example, some corporate responsibility initiatives in the coffee industry have acknowledged obligations to wider ‘coffee growing communities’ that are indirectly affected by their purchasing practices, and in a few cases some attempts have been made to coordinate these initiatives with other non-state actors and/or with government agencies. For example in Nicaragua, Starbucks and large exporting firms with which it works have sometimes formed strategic alliances with development NGOs to support wider education or health programs in local communities. The fair trade system has also contributed in some instances to supporting organisational strengthening among local groups such as the agricultural workers union (ATC) representing landless coffee workers.20

However, while there are some limited examples of businesses engaging in such collaborative activities on a voluntary basis, the incentives for businesses to do so are typically very weak. Instituting responsibilities of this kind on a broader basis would almost certainly require some means of developing and deploying innovative legal instruments in order to strengthen corporate incentives to comply with responsibilities of this kind. One possible suggestion regarding how such innovation might proceed is outlined by (Teubner 2000), who advances a notion of ‘interface liability’ as a potential means of compelling businesses to take responsibility for those forms of external risk or damage created by inadequate coordination among network participants, by imposing duties of coordination directly on each network participant.21

As foreshadowed above, another form of positive duty that is derivative from the negative duty not to indirectly harm human rights is a business responsibility for institutional change. This involves responsibility for (contributing to) transforming institutions that constrain the realisation of human rights. In many contexts of institutional action, multiple businesses (often together with other social actors) contribute to sustaining institutional environments in which human rights are violated. To the extent that such institutions operate to constrain business agency in specific contexts of action, it makes sense to think about the responsibility of businesses for supporting processes of institutional change. In some contexts businesses may be able to support institutional change via changes in the way they conduct their individual relationships: for example, by modifying their bargaining strategies with suppliers, their strategic engagement with competitors or their political engagement with governmental and relevant non-state actors. More commonly, bringing about meaningful

20 There are also some ways in which processes of learning or knowledge diffusion may inadvertently lead to positive spillovers among local communities, although these are distinct from the kind of principled coordination at stake here.
21 By way of illustration, (Teubner 2000) refers to a decentralised solution to such coordination problems, in which (under some special circumstances in the health and social security sector), French law now imposes a duty of coordination on each network node involved, and sanctions a breach of these duties with responsabilité solidaire. He points similarly to a directive of the European Union which orders network participants to install a central coordinator with contractually defined responsibilities and to establish a coordinating body with employee participation.
change also requires at least some degree of coordinated action together with other business, state and/or non-state actors (thereby also invoking responsibilities for performance of coordination functions, as discussed above).

In practice, however, it is often extremely challenging to specify the reasonable limits of business responsibility for institutional change. Commonly, businesses experience certain features of their relationships with state and social actors in host countries as serious constraints on their capacity to ensure that activities with which they are associated are not resulting in human rights violations. It is therefore frequently unclear under what conditions existing constraints should count as ‘indemnities’ from responsibility (on the grounds that ‘ought implies can’), or under what conditions businesses can instead reasonably be understood to hold responsibilities for engaging in processes of capacity building and institutional change. At the very least there appears to be a need for clearer process and progress standards to define the reasonable limits of business responsibility for supporting (both individually and collaboratively) progressive processes of capacity building and organisational change in the presence of ingrained but surmountable external constraints.

The examples of ‘complex negative duties’ discussed above have all been examples of ‘derivative positive duties’. Another important category of complex negative duty (overlapping in some cases with categories discussed above) may be described as distributed negative duties. Such duties provide a basis for disaggregating responsibilities between businesses in cases where individual business enterprises contribute to human rights violations (in the sense of initiating, facilitating or sustaining a causal sequence leading to the problem (Barry 2005)), without exercising complete control over outcomes. As described earlier in this paper, the diffusion and sharing of influence over human rights outcomes is particularly important within production systems organised around diffuse network and market structures, across a range of transnational industries.

In those cases where it may be impossible to meaningfully distinguish individual contributions to particular human rights outcomes, an account of distributed negative duties would need to be complemented by some account of shared responsibilities, in the sense of each constituent actor being individually responsible even though individual roles cannot in practice be isolated and identified (Ashford 2006; Marion Young 2004). The extent to which responsibility would need to be distributed and shared would in practice vary significantly depending on the range of actors and institutional systems interacting to determine outcomes in any specific case; as illustrated in the examples above, such dynamics vary significantly between industries.

Some such concept of distributed and/or shared liability could provide a means of distributing liability in contexts where multiple businesses contribute to harms resulting from the operation of a supply chain institutional system. For example, (Teubner 2000) suggests that a new regime of ‘network share liability’ (analogous to market share liability) could govern situations where causation of damage is clearly attributable to the network itself but cannot be traced back to individual network participants. He suggests that this could involve a pro-rata-
liability of participants according to their share in the network as a whole. Such an approach could provide a means of legally regulating those decentralised markets and networks in which control and responsibility are distributed between multiple actors.  

Operationalising such a notion of distributed and shared liability would require further development of criteria through which the relative magnitudes of distinct contributions could be assessed. Several authors have suggested criteria that may be drawn from existing sources of liability law, many of which focus on various managerial and financial indicators of control. In cases where influence is distributed via systems of contractual and market relations, it may be important also to consider additional indicators related to market and bargaining powers of various kinds. For example, relevant considerations may include criteria concerning the relative percentages of outputs and/or purchases represented by a given transaction from the perspectives of both buyers and sellers; the extent to which contracting or sourcing relations involve the provision of finance; control over strategic material, organisational or financial resources; differentials in risk preferences or holding or delay capacity; and asymmetric distributions of information regarding supply and demand ‘schedules’ of other buyers and sellers.

In all of these ways, a framework of business ‘spheres of responsibility’ that encompasses a broader range of ‘complex’ as well as ‘simple’ negative duties could play an important role in helping to overcome the problem of indeterminacy in relation to the responsibilities of businesses for the institutional dynamics in which they participate. Consequently, such a framework could also address the problem of excessively restrictive scope, by providing a clearer, practicable basis on which business responsibility for indirect as well as direct forms of influence over human rights outcomes could be assigned and enforced. Such an approach would therefore be more capable of confronting the governance gap that currently afflicts the regulation of transnational business activity and its impact on human rights.

**Conclusion**

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22 The idea of reconstituting actor incentives via indirect regulatory strategies is further discussed by (Black 1996; Teubner 1983, 1996).

23 For example, (Gasser 2007) derives from case law relating to corporate liability for acts and omissions of subsidiaries criteria such as: profit sharing; contributions towards financing the subsidiary; degrees of oversight and/or joint control; masterminding the venture. He further draws on case law on third party liability in the context of joint ventures to suggest additional criteria such as: shared common interest in the subject matter of the venture; shared profits and losses; and joint control or the joint right of control over the venture. See also (European Coalition for Corporate Justice 2008).

24 The extent of power may be related in complicated ways to the relative size of the buyers and sellers involved: a buyer or seller may be able to exercise market power as a result of their share of sales, or buying power, or value added, or profits or of relative rate of profit (Gibbon 2003; Kaplinsky and Morris 2000).

25 These may involve possession of scarce inputs or strategic assets and resources, a dominant identity or brand, scarce finance capital, or specialised competencies, knowledge or technology that increase capacity for productive efficiency and/or innovation (Gibbon 2003).

26 These can function as important sources of bargaining power, since a significant aversion to risk and/or limited ability to delay transactions (for example, associated with the need for immediate income for survival) can oblige vulnerable actors to participate in economic transactions on highly disadvantageous terms (Harriss-White 1999a, b; White 1993).
The influential framework articulating a business ‘responsibility to respect’ human rights has important potential for creating new international mechanisms to enforce the simple yet immensely important negative duty of business to refrain from inflicting direct harm on human rights outcomes. However, the challenge of defining and bounding business responsibility for human rights has been shown to be much more complicated as it applies to the enmeshment of business activity within complex institutional processes for which businesses are partially but not wholly responsible.

This paper has suggested that the governance challenge we confront within a ‘partially joined up world’ of overlapping institutional spheres demands an account of business responsibility for human rights that goes beyond simply ‘respecting’ rights. To address this need, I have outlined in this paper a framework of business responsibility which provides a broader analysis of institutionally mediated ‘spheres of responsibility’. By illustrating some of the ways in which ‘simple’ negative duties may be extended to encompass also a range of ‘complex’ negative duties, I have sought to demonstrate that this expanded ‘spheres of responsibility’ framework offers a firmer basis than either the spheres of influence or the responsibility to respect frameworks, taken alone. This is because it assigns responsibility not only for the direct impact of business activity on human rights, but also for the important range of indirect, institutionally mediated channels through which transnational business activity influences human rights outcomes around the world.

Despite the strengths of an extended ‘spheres of responsibility’ framework, there remain important domains of business influence over human rights for which even such an expanded framework cannot offer a clear basis for assigning and bounding business responsibility in practice. In particular, the framework outlined here is not equipped to guide appropriate business conduct in the context of overtly political processes of decision making, since it provides no account of how the claims of affected communities to rights of information and/or participation concerning business decision making processes affecting them might legitimately be grounded and delimited. Neither does the framework encompass any theoretical means of delimiting the boundaries of legitimate business influence over the decision making processes of host country governments. Political processes of these kinds are of particular importance in the case of alleged human rights violations for which resolution of claims would involve significant degrees of normative contestation (for example, conflicting rights claims) and/or strategic uncertainty (for example, progressive institutional change). To define business responsibilities in relation to more political obligations of this kind, we would need to develop an even broader and more overtly political account of business responsibility. Such an account would need to place a framework of business responsibility in the context of a broad account of transnational political constituencies and democratic decision making processes. Introducing considerations of this kind would magnify even further the political and theoretical challenges associated with developing a workable framework to define and delimit transnational business responsibility for human rights.

Both normatively and institutionally, the challenge of defining and instituting a clearer account of business ‘spheres of responsibility’ in our unevenly and yet increasingly
globalised world remains daunting. Establishing effective means of distributing and coordinating business responsibility in the presence of significant dynamics of institutionally mediated business action will require significant degrees of theoretical and institutional innovation. Yet if we are to have any hope of avoiding the continuing prospect of widespread violations of the human rights of some of the most vulnerable individuals and communities within a globalising economy, such challenges must be seriously and urgently confronted.

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