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THE PROPER "SPHERE OF INFLUENCE" IN RELATION TO CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS

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A Research Report submitted to the Faculty of Humanities, University of the Witwatersrand, Johannesburg, in fulfilment of the requirements of the degree of Master of Arts.

Johannesburg, 2009

ABSTRACT

In this research report, I address the question: “What is the proper sphere of influence of a corporation in relation to its moral obligations to support and respect human rights?”

I take for granted that corporations have positive duties to help protect human rights. Referring to recent reports on sphere of influence by the UN Special Representative, I consider the question of whom it is that a corporation is obliged to help. I assert that the predominant spatial metaphor provides an implausible account of sphere of influence and propose an alternative approach, adopting principles of respect for the freedom and autonomy of others, with specific reference to a corporation’s concrete set of social, economic, political and historical relations with other actors.

I attempt to demonstrate that the proposed approach more plausibly defines the beneficiaries of a duty to aid in relation to human rights than either a spatial metaphor or the Special Representative’s principle of a duty to respect human rights.

DECLARATION

I declare that this is my own unaided work. It is submitted for the degree of Master of Arts in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

André Johann van Niekerk

14 July 2009.

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CONTENTS

ABSTRACT…… 1.

DECLARATION…… 2.

ACKNOWLEDGMENTS…… 3.

CONTENTS

1. Introduction…… 5.
2. Part 1…… 12.
3. Part 2…… 20.
4. Part 3…… 30.
5. Part 4…… 35.
6. Conclusion…… 43.

BIBLIOGRAPHY…… 44.

Introduction

Twenty years ago, in one of the first works to explore business ethics in a global environment, Thomas Donaldson proposed a set of human rights standards that he suggested were morally binding on multi-national enterprises (MNE's).[1] The idea was controversial - one of the theories of business ethics predominant then denied that business had any social responsibility other than maximising profits for the benefit of stockholders, without harming others or violating negative duties.[2] Nowadays, the idea that MNE's are positively obligated to others in relation to human rights is less contentious.[3] There also appears to be broad consensus on a moral currency common to corporations and other actors, including governments, in the form of key international human rights instruments. For example, over 100 major corporations specifically acknowledge the Universal

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[1] Donaldson, T., *The Ethics of International Business* (New York: Oxford University Press, 1989). Donaldson's minima include freedom of association, free speech, physical security, non-discrimination and rights to property and movement.

[2] At the time, the leading exponent of stockholder theory was Milton Friedman - see Friedman, Milton, "The Social Responsibility of Business is to Increase its Profits", *New York Times Magazine*, 13 September 1970.

[3] There is a vast literature on this topic. See, for example, Bowie, Norman E., "Relativism and the Moral Obligations of Multi-national Corporations," in Tom L. Beauchamp and Norman E. Bowie, eds., *Ethical Theory and Business*, 7th ed., (Upper Saddle River, NJ: Pearson Prentice Hall, 2004), p. 538, and Leisinger, Klaus M., "On Corporate Responsibility for Human Rights", (Basel, April 2006), accessed at htpp://www.reports-and-materials.org/Leisinger-on-Corporate-Responsibility -for-Human- Rights.

Declaration on Human Rights (UDHR) as a benchmark for corporate conduct. [4] In a recent and significant development, over 4700 corporations have committed themselves to observe the principles established by the UN Global Compact.[5] The Global Compact was launched in July 2000, and invites subscribing enterprises voluntarily to comply with 10 principles in the areas of human rights, labour standards, the environment and corruption. The Compact asks corporations, *within their sphere of influence*, to support and respect the protection of internationally proclaimed human rights and not to be complicit in human rights abuses.[6]

The human rights instruments that form the basis of the Compact were, of course, conceived as legal obligations enforceable by citizens against the state. The words "sphere of influence" acknowledge a discrete realm of responsibility for corporations, and thus recognise that governments remain responsible to support and respect human rights, and to sanction those who commit human rights abuses. But the concept of sphere of influence also does the work of the defining the scope of a corporation's positive obligation to support and respect human rights, both in relation to the human rights impact of its business activities and in responding to human rights abuses by others.

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[4] Chandler, G., "Business and Human Rights: Reflections on Progress made and Challenges Ahead", address to Business and Human Rights Resource Centre, London, 4 December 2007, accessed at htpp://www.business-humanrights/org/Documents/Chandler4Dec2007.
[5] UN Global Compact, accessed at www.unglobalcompact.org. htpp://www.unglobalcompact.org./AboutTheGC/index.html
[6] Principle I of the Global Compact.

The most recent attempt to give content to the concept of sphere of influence is John Ruggie's project, undertaken under the auspices of the UN. Ruggie was appointed to identify and clarify standards of corporate responsibility with regard to human rights, and also to research and clarify the implications for transnational corporations of the concept of sphere of influence.[7] Kofi Annan, then General-Secretary of the UN, appointed Ruggie as a Special Representative following an impasse in discussions on the draft Norms, a proposed set of human rights standards that sought to impose legal obligations on corporations.[8] The scope of Ruggie's work extended beyond the legal realm to include sources of corporate responsibility (i.e. the role of social norms, moral considerations and strategic behaviour),[9] and his observations and conclusions are therefore relevant to any attempt to define a proper sphere of influence in relation to a corporation's moral obligations to support and respect human rights.

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[7] United Nations General Assembly document A/HRC/4/035 (9 February 2007) "Report of the Special Representative of the Secretary General (SRSG) on the Issue of Human Rights and Transactional Corporations and Other Business Enterprises", referred to as "Ruggie Final Report".

[8] The Norms, adopting the language of the Global Compact, required corporations, within their sphere of influence, to support and respect human rights, on threat of legal sanction. See United Nations Economic and Social Council, Commission on Human rights, sub-Commission on the Promotion and Protection of Human Rights, document E/CN.4?Sub.2/2003/12/Rev.2 (adopted 13 August 2003) "Economic, Social and Cultural Rights Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights".

[9] Remarks by John G. Ruggie, Business and Human Rights seminar, Old Billingsgate, London, 8 December 2005, accessed at htpp://www.business-humanrights.org/Links/Repository/987023.

Ruggie ultimately concludes that the concept of sphere of influence is implausible. Instead, he proposes the idea of a "scope of due diligence" to demarcate responsibilities around the principles "protect, respect and remedy" – i.e., the state's duty to protect human rights against abuses by others, corporate responsibility to respect human rights, and the need for more effective access to remedies.[10] The scope of due diligence (and in particular the scope of a principle of respect) is not clear as to whom a corporation is obligated to aid, but appears to limit the category of beneficiaries to those with whom the corporation has some form of contractual tie, or who are related by geographic proximity.

The observations that Ruggie makes in relation to the concept of sphere of influence, if only to point out its limitations, have implications for any consideration of the moral scope of corporate obligation in relation to human rights. Not least, corporations that subscribe to the Global Compact ought to understand the nature and extent of the obligations incurred by them, establishing, as the Compact does, obligations within the sphere of influence.

In this paper, I consider the concept of sphere of influence from a business ethics perspective. I take for granted that a proper sphere of influence supports both constraints that are both negative (requiring corporations to refrain from harming others) and goals that are positive, requiring corporations to help protect human

[10] Ruggie Final Report, at paragraph 9.

rights. The content of a positive duty to aid incorporates, amongst others,[11] the question of who should be the beneficiaries of aid. I agree with Ruggie that the value of the prevailing spatial metaphor for sphere of influence is implausible: it assumes *a priori* a set of relationships, a defined distance between the corporation and the stakeholder concerned, and an orderly diminishing of obligation from one relationship to the next.[12] The spatial metaphor thus fails plausibly to specify the content of a corporation's positive obligation with regard to whom should be the object of aid. The thesis I defend is that sphere of influence, with respect to Richard Lippke's account of moral responsibility,[13] accounts for the relationships that define the beneficiaries of a duty to aid.

First, in part one, I set out the background to a consideration of an MNE's proper sphere of influence in relation to human rights. In part two, I present two arguments: first, I spell out why the predominant spatial model of sphere of influence is implausible; secondly, I argue that Ruggie's principle of respect (an integral component of the scope of due diligence) similarly fails to account for whom should be the beneficiaries of a duty to aid. To establish a conceptual basis for my assertions on the nature and extent of an MNE's obligations in relation to human rights, I then explore the scope of corporate moral obligation in

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[11] Other questions might include, for example, how much a positive duty to aid requires of a corporation, and what it obligates a corporation to do.
[12] These arguments are drawn from Reader, Soran, "Distance, Relationship and Moral Obligation", *The Monist* 86 (2003): 367-381.
[13] Lippke, Richard L., "Setting the Terms of the Business Responsibility Debate", *Social Theory and Practice* 11 (1985): 355-370.

relation to whom one has a duty to aid. I draw on Lippke's social niche approach (SNA) to support the arguments that I develop in part three. The SNA disavows any abstract conception of persons in attempting to define their moral responsibilities and suggests instead that each person has a social niche, in the form of a set of concrete social, economic, political and historical relations to other persons that tailors moral responsibilities. [14] I argue that these ideas, linking as they do relationship, power and ability, provide an appropriate basis for establishing a typology regarding situations in which corporations are obligated to act positively to support and respect human rights and in particular, to determine the beneficiaries of the duty to aid.

In part three, I apply Reader's relationship-based account of obligation and the SNA to the concept of sphere of influence, and consider how a corporation's relationships and social niche might operate to determine the beneficiaries of a duty to aid. Finally, in part four, I consider briefly the objections that the conception of sphere of influence that I advance imposes inappropriate and unduly onerous burdens on corporations and whether relationship should really matter in determining whom to aid. I reply to these objections before concluding the paper.

In developing my argument, I make a number of assumptions about the nature and extent of corporate entities. Specifically, I assume that corporations

[14] Ibid at p.360.

themselves (i.e. as distinct from their individual members or certain of them) have moral personality and that they constitute moral agents. I also assume that as moral agents, corporations have moral obligations in relation to basic human rights (such as those referred to in the Global Compact) in respect of a defined category of recipient, that the definition of this category is itself a moral issue and that corporations are morally accountable for the effects of their actions.[15] The concept of complicity, in terms of which a corporation might within its sphere of influence be held accountable or share responsibility with third parties for any human rights abuses, is beyond the scope of this paper. To be clear, I am also not concerned with the Global Compact or any other instrument and its relation to international law. The extent to which private actors (and corporations in particular) are subject to international law obligations in relation to human rights on the basis of its actions, omissions and complicity with others is a separate, extensive and controversial debate. [16]

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[15] These are obviously not uncontested propositions. For a review of the debate on the moral agency of corporations, see Werhane, Patricia H. and Freeman, R. Edward, "Business Ethics", in. Frey, R.G. and Wellman, Christopher Heath, eds., A *Companion to Applied Ethics* (Oxford: Blackwell, 2005): 537-551.

[16] The legal obligation of corporations in relation to human rights and the enforcement of those obligations is the subject of a number of recent cases, notably *Doe v Unocal* 41 ILM 1367 (2002), and closer to home, *Lubbe v Cape Plc* [2000] 4 All ER 268. In the latter case, the House of Lords sanctioned the bringing of a personal injury claim in the United Kingdom by a group of employees who claimed damages because of their exposure to asbestos and asbestos related products while employed in the company's operations in South Africa. In *Unocal*, an American court held that corporations could be directly liable for certain actions e.g. genocide, slavery and war crimes, without there being any need for state action. See Bilchitz, David, "Project on Business and Human Rights: Baseline Report", prepared by the South African Institute for Advanced Constitutional, Public, Human Rights & International Law (Johannesburg: 2008), for a comprehensive overview of the legal debate and

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The rise of the MNE is the most visible manifestation of globalisation - estimates are that some 70 000 corporations, with 700 000 subsidiaries and millions of suppliers, span the globe.[17] The economic transformation that globalisation has brought about has focused attention on the economic power and influence that MNE's exercise and on the public role that they play. MNE's have the capacity to take actions that harm persons and have resources in excess of what some national states hold. Klaus Schwab recently identified the factors at play in the era of the shrinking of state power and the widening of the sphere of influence of business:

> The intensified pace of globalization due to advances in technology is the most significant factor in the weakening influence of the state. Fast transportation links and the speedy flow of information have negated the relevance of geographic borders. Whether it is poverty in Africa or the haze over Southeast Asia, an increasing number of problems require

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the application of the South African Constitution to the question of an MNE's liability for human rights abuses in national and international law.

[17] United Nations General Assembly document A/HRC/4/035 (22 February 2006) "Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transactional Corporations and Other Business Enterprises", referred to as "Ruggie Interim Report", at paragraph 11.

> bilateral, regional, or global solutions and, in many cases, the mobilization of more resources than any single government can marshal.[18]

Schwab suggests that corporations have become integral to the survival of governments and the political stability of nations and regions. As a consequence of the decline in state power and the sharp rise in the influence of corporations on communities, communities and citizens increasingly look to corporations with "requests for help and criticism for wrongdoing".[19] This is particularly so in those areas where MNE's conduct business in an environment that might be hostile to commercial operations, for example, in weak governance zones.

MNE's face the challenge to conduct business operations consistent with internationally accepted norms relating to human rights. The tensions and trends that underlie this challenge, particularly acute since the 1990's, are well described by Tom Sorell. He argues that states are not the only protectors and violators of human rights. In the category of protectors of human rights, campaigning NGO's and others play a significant role. In the category of human rights violators, one might encounter warlords, political organisations and traffickers in people and drugs.[20] Businesses, Sorell suggests, arguably belong to both categories, i.e., human rights respecting non-state actors and human rights

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[18] Schwab Klaus., "Corporate Global Citizenship", *Foreign Affairs* 87 (2008): 107 – 118.
[19] Ibid, at p.109.
[20] Sorell T., "Business and Human Rights", in Campbell, T. and Miller, S., (eds)., *Human Rights and the Moral Responsibility of Corporate and Public Sector Organisations* (Dordrecht-Boston-London: Kluwer, 2004).

violating non-state actors. As the concentration of moral responsibility in the state has waned and obligations in relation to human rights have increasingly been ascribed to non-state actors (including corporations), international human rights instruments have assumed the status of a moral benchmark for the conduct of business. [21] Tom Campbell makes this point particularly powerfully:

> Human rights have come to represent the moral dimension of globalisation: the affirmation of universal standards to which we can look for guidance for the humanisation of capitalism, the revitalisation of democratic control and the protection of the values that give meaning and importance to life. More particularly, in their affirmation of the equal worth and supreme value of every human being, human rights set the parameters and goals for any legitimate human organisation. It therefore seems appropriate to see human rights as a source of ideas for determining the normative ordering of global capitalism and its governmental structures.[22]

Governments are clearly required to respect and enforce human rights standards within the limits of their legal jurisdiction. But if internationally proclaimed human rights standards are to serve as norms for the conduct of business in a global market (as I maintain they are), and corporations (unlike governments) have

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[21] Ibid, at p. 136.
[22] Campbell T., "Moral Dimensions of Human Rights", in Campbell, T. and Miller, S., eds., (supra), at p.11.

neither defined territorial jurisdiction nor citizens, to whom do they owe a positive duty to aid?

The Global Compact does not spell out the nature and extent of the scope of corporate responsibility - it calls on corporations to "embrace, support and enact, within their sphere of influence a set of core values in the areas of human rights, labour standards, the environment and anti-corruption". [23] Neither the Global Compact, nor any other international human rights instrument, defines "sphere of influence"; it was left to Ruggie to research and bring some definition and meaning to the concept.

In his interim report tabled in February 2006, Ruggie notes that the concept of sphere of influence has "productive practical applicability" especially as far as company policies are concerned, but that its meaning remains elusive.[24] In his final report, submitted in April 2008, Ruggie presents an alternative conceptual and policy framework to anchor the debate on corporate obligations in relation to

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[23] This wording is mirrored in the ill-fated Draft Norms adopted by the UN Commission on Human Rights in August 2003, see United Nations Economic and Social Council, Commission on Human rights, sub-Commission on the Promotion and Protection of Human Rights, document E/CN.4?Sub.2/2003/12/Rev.2 (adopted 13 August 2003) "Economic, Social and Cultural Rights Norms on the Responsibilities of Transnational corporations and other business enterprises with regard to human rights". The Norms represent the first non-voluntary initiative to establish responsibilities on the part of MNE's in relation to human rights. The Draft Norms required that "within their respective spheres of activity and influence", MNE's had the obligation to promote, secure the fulfilment of, respect, and ensure respect of human rights recognised in international as well as national law (see paragraph A of the Norms).

[24] Ruggie Interim Report, at paragraph 67.

human rights. The framework comprises three principles: the duty of the state to protect against human rights abuses by other actors, including business; the responsibility of corporations to respect human rights; and the need for effective access to remedies by victims of human rights abuse. [25]

In relation to the second principle (the principle with which this paper is concerned) Ruggie asserts that to respect rights essentially means not to infringe on the rights of others, or, put another way, to do no harm.[26] Although some companies may have additional responsibilities, e.g., if they perform public functions or voluntarily undertake additional commitments, "the responsibility to respect is the baseline expectation of companies in all situations."[27] Ruggie acknowledges that the requirement to do no harm may entail positive steps but he regards these obligations as limited and, it would seem, admits only those positive duties necessary to discharge negative obligations.[28] For example, an obligation not to deprive workers of a safe and healthy work environment necessarily entails that a corporation take positive steps to ensure that protective clothing and safety-related training are provided.

Critical to the notion of the responsibility to respect human rights is the concept of due diligence. Here, Ruggie refers to the process in terms of which corporations

[25] Ruggie Final Report, at paragraph 9.
[26] Ibid, at paragraph 24.
[27] Ibid, at paragraph 54.
[28] Ibid, at paragraph 55.

become aware of, prevent and address human rights impacts.[29] The scope of the due diligence process, Ruggie suggests, should be determined by three sets of factors. The first is the "country context" in which business activities take place; this may serve to highlight any specific human rights challenges they may pose. So, for example, a corporation deciding to invest in West Africa will be faced with more immediate and obvious human rights challenges than an investment in Western Europe. The second factor is the human rights impacts of a corporation's activities within a specific country context. Here, Ruggie refers to the impacts of a corporation's own activities – as producers, service providers, employers and neighbours. The third factor is the prospect of a corporation contributing to human rights abuse through relationships connected to its activities, e.g., relationships with business partners, suppliers and state agencies and other non-state actors.[30] How far or how deep this due diligence process must go, Ruggie asserts, "will depend on the circumstances".[31]

In relation to sphere of influence more specifically, Ruggie notes that the concept of sphere of influence was introduced into human rights discourse as a spatial metaphor, expressed in concentric circles with the company's operations at the core, moving outward, with the assumption that influence (and therefore responsibility) declines from one circle to the next. Ruggie regards this as a useful model to identify opportunities to support human rights beyond the

[29] Ibid, at paragraph 57.
[30] Ibid, at paragraph 57.
[31] Ibid.

workplace, but argues that a more rigorous approach is required "to define the parameters of the responsibility to respect and its due diligence component."[32] Ruggie's conclusion (i.e. that the spatial model of sphere of influence is implausible) is easily justified, as I shall demonstrate in the next part.

Ruggie then asserts that influence as impact (a situation where an MNE's activities directly or indirectly cause harm) falls squarely within the responsibility to respect human rights, but that any obligation to exercise influence as leverage (i.e. influence a corporation may have over other actors) is limited, if it exists at all. Specifically, Ruggie stipulates that corporations are not required to act whenever they have influence, especially over governments.[33]

Ruggie objects to any responsibility to respect human rights being anchored in the concept of "influence as leverage" on the basis that to do so would hold corporations responsible for the human rights impacts of every entity over which they may have some influence, including cases where the corporation was not a causal agent, neither directly or indirectly causing the harm in question.[34] Nor is it desirable, Ruggie argues, to have companies act whenever they have influence, especially over governments – to do so would imply that "can implies ought":

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[32] Ibid, at paragraph 67.
[33] Ibid, at paragraph 69.
[34] Ibid.

> [A]sking companies to support human rights voluntarily where they have influence is one thing; but attaching responsibility to them on that basis is another.[35]

Ruggie's conclusion (i.e., that the scope of due diligence required to meet corporate responsibility to respect human rights is neither a fixed sphere nor based on influence but is dependent rather on impacts resulting from business activities and relationships)[36] seriously calls into question the value of the concept of "sphere of influence" in relation to human rights obligations. But Ruggie's alternative model, the scope of due diligence (including the obligation to respect human rights) fails clearly to address whom a corporation might be obligated to aid, beyond those it has harmed or promised to help.

The concrete challenges that the concept of sphere of influence poses for corporations are well articulated by Klaus Leisinger, who in his recent paper on corporate responsibility for human rights, poses the following questions:

> But where exactly a company's "sphere of influence" begins and where it ends remains a subject of controversy. Does it refer "only" to the areas behind the factory fence, as this is the area where a company is fully able to apply its corporate rules and regulations? Do the company's business partners and suppliers also fall within this sphere? And what about the

[35] Ibid.
[36] Ibid, at paragraph 72.

> communities in which the company operates or from which it recruits its employees? Does even the entire host country fall within this sphere, because one could argue that those who pay taxes in a country where human rights are abused are providing support to those directly responsible? … Ultimately, such questions have to be answered by the company itself.[37]

These questions may conceal a lack of clarity about what the sphere of influence is – they suggest that sphere of influence at once constitutes both a universe within which a corporation's moral responsibility extends in the sense of being responsible for the acts of others (e.g., its suppliers) and whom a corporation might itself be obligated to aid (e.g., local communities). In the next two parts, I develop the argument that the work properly done by sphere of influence is to give content to the positive obligation to protect human rights, and in particular, to define the beneficiaries of this duty.

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In this part, I argue that both the prevailing spatial metaphor of sphere of influence and Ruggie's principle of respect are implausible accounts of sphere of influence, and then lay the conceptual foundation for an alternative approach

[37] Leisinger, Klaus M., "On Corporate Responsibility for Human Rights", (Basel, April 2006), available at www.reports-and-materials.org/Leisinger-on-Corporate-Responsibility-for-Human- Rights, at p.13.

based on relationships that are the subject of a capacity to make decisions that affect the freedom and autonomy of others.

Current interpretations proffered by the UN supervisory bodies and others for sphere of influence locate the concept in a spatial metaphor depicting a series of concentric circles, each representing a particular relationship, the assumption being that influence (and therefore responsibility) declines as one moves outward from one circle to the next, i.e., from the core to the periphery. The Briefing Paper prepared jointly by the Office of the UN High Commissioner for Human Rights, the Global Compact and Business Leaders Initiative on Human Rights, referring specifically to the Global Compact, states:

> Understanding a company's sphere of influence can be accomplished by mapping the stakeholder groups affected by a business' operations. A key stakeholder group that will normally lie at the centre of any company's sphere of influence will be employees. Other groups, such as business partners, suppliers, trade unions, local communities, and customers will follow. The final group will usually be government and the wider society.[38]

The predominance of the spatial metaphor of sphere of influence is apparent from the advice of the Office of the Global Compact itself. The Office

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[38] "*Guide for Integrating Human Rights into Business Management*", a joint publication of BLIHR, UN Global Compact Office and the Office of the UN High Commissioner for Human Rights, (Geneva: May 2006), at p.4.

acknowledges that some corporations may wish to increase their leverage or sphere of influence by collaborating with other actors, and suggests:

> The concept of "sphere of influence" can help map the scope of a company's opportunities to support human rights and make the greatest positive impact. While these opportunities may be greatest with respect to a company's own operations and workers, the ability to act gradually declines as consideration moves outward to the supply chain, to local communities, and beyond.[39]

Sphere of influence presented thus as a spatial metaphor ought to be familiar to stakeholder theorists, who typically identify shareholders, employees, suppliers, customers, local communities as persons having a stake in the corporation,[40] often crafting similar models of concentric circles to indicate those relationships closest to the core of the business and those more far removed. It should not be surprising then that this model has been adapted on a large scale by corporations seeking a conception of how to promote human rights practices beyond the workplace itself. In his interim report, Ruggie notes that nine out of ten respondents in a survey that he conducted of the *Fortune* Global 500 (the world's largest corporations) reported that their human rights policies

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[39] United Nations Global Compact "The Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises", accessed at htpp://www.unglobalcompact.org/Issues/human_rights

[40] Rossouw, Deon, with Van Vuuren, Leon, *Business Ethics*, 3rd ed., (Cape Town: Oxford University Press, 2004).

encompassed suppliers, contractors, distributors, joint venture partners and others in the value chain.[41]

The difference of course, is that in stakeholder theory, the spatial model indicates whom should be regarded as stakeholders, and what relative weight should be attached to their respective interests and claims on the corporation. In relation to sphere of influence, the spatial model is used variously to identify those relationships that are morally obligating, the intensity of that obligation, those actors on whom influence can be brought to bear for human rights-related purposes, and the beneficiaries of a duty to aid.

This risk of conceptual confusion aside, Ruggie's observation that sphere of influence as a spatial metaphor has limited value is easily justified. The metaphor assumes that influence and therefore the intensity of obligation is necessarily directly related to proximity. The problem with this conception of sphere of influence is well captured by Reader, who in the context of her discussion on impartialism and the problem of distance, offers the following objection:

> The "expanding circle of sympathy" picture of relationship and obligation is sometimes used by partialists in an attempt to deal with the problem of distance …Intuitive circles start with the family and shade outwards to the whole universe, with relationships like colleague, comrade, citizen, fellow

[41] Ruggie Interim Report, at paragraph 36.

> resident of temperate Europe, fellow resident of the biosphere, determining progressively weaker moral obligations in between. The problem with this kind of view is that obligations do not seem to diminish in any orderly way that can be captured *a priori*… Obligations can be powerful even in rudimentary relationships like encounters. When needing others loom large here and now, they place considerable moral obligations on an agent.[42]

The analogy with business activities is obvious. The range of proper beneficiaries of aid should not be pre-defined in relation to a corporation's "centre", their needs and the powerfulness of obligations to them is not fixed by particular business activities or relationships, nor do they necessarily diminish incrementally from the core to the periphery of a corporation's business activities. The needs of a local community in which a corporation has business operations who are without access to an adequate standard of living will, for example, inevitably be greater than those of well-heeled employees from corporate headquarters. Intuitively, the claims of the more distant local community on the corporation would therefore be greater than those of the employees.

Ruggie is therefore correct to regard the spatial metaphor of sphere of influence as implausible. But the alternative principle of respect elaborated by Ruggie similarly fails, I suggest, to provide adequate guidance as to the class of persons

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[42] Reader (supra), at p. 376.

to whom a corporation may owe positive duties to support and respect human rights. The principle of respect is expressed first in terms of impact in relation to the capacities in which a corporation might variously act (Ruggie gives the examples of corporate activities as producer, service provider, employer and neighbour),[43] thus assuming obligations only in respect of a class of parties specifically and previously defined by contractual relationships or, at most, by geographic proximity. Applying Ruggie's principle to his example, the principle of respect as a component of the due diligence requirement would be limited to business impacts in relation respectively to consumers, clients, employees and neighbours.

By limiting the principle of respect to the impacts of a corporation's business activities, Ruggie's formulation of the principle excludes, for example, members of the general population of a region or country with whom a corporation has no specific business relationship or connection, and on whom a company's business activities have no impact.

In so far as Ruggie's principle of respect requires a consideration of whether a corporation might contribute to abuse through relationships connected with business activities, this similarly presupposes obligations only in respect of a class of persons with whom a relationship established through business activity already exists. Ruggie gives the examples of business partners, suppliers, state

[43] Ruggie Final Report, at paragraph 57.

agencies, and other non-state actors, suggesting that relationships with these and similar actors ought to be scrutinised for contributory abuse, or even complicity.

Again, the assumption here is that it is only relationships based on contractual obligation, engagement with regulatory bodies and other forms of business activity that are significant, and that only in relationships thus defined does a corporation have any influence over, or at least any responsibility for, harm-causers. Ruggie's principle of respect would, for example, impose no duty to aid on a corporation that does business in a state in which an oppressive regime is in government, where the corporation does no business and thus has no relationship with that government. Surely it would not be too much to expect of a corporation to intervene, for example, on behalf of persons with whom it has a relationship (say, a minority community living in an area in which a corporation conducts business and that is the target of particularly oppressive measures) by using whatever influence over the government that it may have (perhaps the threat of disinvestment, here a positive action), thus coming to the community's aid?

Ruggie's principle of respect for human rights and its due diligence component therefore at once rejects a spatial metaphor for sphere of influence but at the same time, establishes obligations that recall fundamental elements of that model. Although the principle of respect does not posit linear relationships to

define the beneficiaries of moral obligation, it imposes constraints on the basis of impacts and relationships that appear to be inherently aligned with contractual ties and geographic proximity. Prima facie at least, the beneficiaries of a duty to aid may have no contractual dealings with a corporation, nor may they be neighbours. Like the spatial model, the principle of respect therefore constitutes an implausible account of the beneficiaries of a positive duty to aid.

To develop an alternative account of sphere of influence that accounts both for the beneficiaries of aid, I draw on Lippke's SNA. Lippke distinguishes an abstract individual's conception of moral agency (AIA), which conceives of moral agents independently of their concrete social, political and economic relations, from the social contract approach to business ethics, the SCA.[44] He rejects both the AIA and the SCA, the latter on the basis of traditional objections to founding moral obligation in social contracts, i.e., the absence of any actual or implicit contract and the absence of any express or implied consent. Lippke raises the further objection that the SCA necessarily reduces moral responsibility to common denominator terms, and disregards differentials in power, influence and ability.

Some who support the SCA, Lippke suggests, are aware of that many corporations have access to resources, power and technology that any account of business's moral responsibility should not ignore.[45] Latching onto this concern, Lippke develops the SNA as an alternative account of the limits of business

[44] Lippke (supra), at p 360.
[45] Ibid.

moral responsibility. The SNA is based on Kantian notions of respect for the freedom and autonomy of individuals, and recognises that all persons have a social niche, defined as a "set of concrete social, economic, political, and historical relations to other persons."[46] The importance of the SNA for a positive duty to aid other persons is that it recognises differentials in power, influence and ability, and tailors an agent's moral responsibilities accordingly.[47] Lippke summarises the SNA as follows:

> According to the *SNA*, it is usually a mistake to conceive of persons abstractly in attempting to delineate their moral responsibilities. Persons always have a social niche, that is, a set of concrete social, economic, political, and historical relations to other persons. In a variety of ways, and with varying magnitudes, these relations determine persons' abilities to affect others' lives and interests … The *SNA* fastens on relevant differentials in power, influence, and ability, and tailors an agent's moral responsibilities accordingly … In other words, the *SNA* spells out the theoretical underpinnings of the notion that increased power brings with it increased responsibility, but without the grounding that increased responsibility in *consent*. Building on the normative moral principles of the *AIA* (namely, principles requiring respect for the freedom and autonomy of

[46] Ibid.
[47] Ibid.

> individuals), the *SNA* draws attention to the real world of concretized agents that the *AIA* ignores.[48]

The social niche of agents determines what constraints are applicable to their decisions and actions. This requires an empirical investigation in each case of an agent's social niche, so that responsibility is not determined independently of that niche or by reference, as a social contract- based theory of business ethics would demand, to any lowest common denominator terms.[49]

For example, a corporation might make decisions about when and where to invest or engage in business activity, decisions that profoundly affect indigenous populations. In these circumstances, Lippke suggests that the SNA, requiring as it does consideration of the range of options open to persons affected by the decision as well as their ability to execute rational life-plans, obligates a corporation to support any framework of public policy directed at minimising the adverse effects of a decision that a corporation takes in its self-interest.[50] Similarly, the historical dimensions of a corporation's social niche obligate it, when contemplating the closure of a plant, to take into account the interests of any local community and to consider any symbiotic relationship that may have developed between the corporation and the local community.[51]

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[48] Ibid.
[49] Ibid, at p. 361.
[50] Ibid.
[51] Ibid, at p. 362.

This account of relationship and obligation, drawing attention as it does to social, economic, political and historical relations to other persons, provides a sound conceptual basis for developing an alternative conception of sphere of influence that more plausibly defines the beneficiaries of a positive duty to protect human rights.

3.

I have taken for granted that corporations have negative obligations to do no harm, and positive obligations to protect human rights. In this section, drawing on the SNA, I develop the argument that the beneficiaries of a duty to aid are to be identified by reference to a corporation's social niche – i.e., those with whom it has a set of concrete social, economic, political and historical relations. This implies, in contrast to the *a priori* assumptions made by the spatial metaphor and Ruggie's appeal to the principle of respect within a scope of due diligence, that it is inappropriate to characterise responsibilities in relation to the beneficiaries of a duty to aid independently of an empirical investigation of a corporation's social niche.[52]

What counts is the set of a corporation's relationships within which it has the ability to affect the lives and interests of others. The contours of a positive duty to protect human rights are therefore those relationships in respect of which a

[52] Ibid, at p. 361.

corporation has the capacity to act in a way that affects the freedom and autonomy of others. Beneficiaries of a duty to protect human rights thus defined would obviously include those stakeholders acknowledged by the spatial model and Ruggie's scope of due diligence – there is an obvious overlapping of the beneficiaries that each approach would admit. For example, a corporation clearly has the capacity to act in ways that affect the autonomy and freedom of employees, a group of beneficiaries central to the spatial model and to Ruggie's principle of respect. Similarly, the supporters of all of these approaches would in most cases contend that communities in an area in which a corporation does business ought, in some circumstances at least, to rank as beneficiaries of the duty to aid.

The difference is that an approach rooted in the SNA, such as that developed here, makes no *a priori* assumptions about the nature of relationships or their fullness. Rather, it latches more concretely onto a corporation's position of power and influence and in particular, its capacity to affect the freedom and autonomy of others. It is a corporation's capacity to make decisions about where to invest (or disinvest), for example, that affects a corporation's employees and their security of employment in morally significant ways, rather than merely the contractual ties between them and the corporation. Similarly, given the historical dimensions and symbiotic nature of a relationship with a local community from which employees are recruited, a corporation's decision about investment would materially affect that community, thus qualifying the community as a beneficiary

of the positive duty to aid.[53] Considerations only of neighbourliness, which the spatial model and Ruggie's principle of respect regard as determinative in these circumstances, are an inadequate basis on which to establish a duty to aid since they fail to account for the historical and other dynamics of the relationship between a corporation and communities located in areas where it conducts business activities.

The application of this conception of sphere of influence developed here is best appreciated by further illustrative examples. Given the nature of the relationship that generally pertains between a corporation and persons with whom it contracts for supplies, a corporation has often has the capacity to act in a way that would secure the freedom and autonomy of its suppliers' employees. Corporations typically have power and influence over parties bidding for its business, and are often in a bargaining position that is sufficiently strong to enable them effectively to determine the terms of the contract. In these circumstances, a corporation makes decisions that will affect the freedom and autonomy of the supplier's employees. If the corporation does not insist on contractual terms that require a supplier to guarantee that the conditions of employment of its employees meet international human rights standards, the employees' ability to form and execute rational life plans may be threatened by their resulting conditions of work. A corporation is therefore obligated to ensure, in its contractual arrangements, that

[53] The latter example is drawn from Lippke (supra), at p. 362.

its suppliers treat their employees with internationally accepted human rights standards.[54]

Corporations (and MNE's in particular) often have the capacity to act in ways that may affect the freedom and autonomy of citizens more generally. For example, a corporation may contract with a government in a developing country to undertake a particular project, e.g., to operate a nuclear power station. The corporation has the capacity to act in ways that would affect the freedom and autonomy of persons beyond the immediate community, including the country's citizens, in relation to their rights to a safe environment. Citizens would be therefore be entitled to benefit from a positive duty to aid, at least in the form of safe working practices and the exercise of the required degree of diligence to secure all that is necessary to ensure the safe operation of the facility.

The nuclear power station example is easily capable of extension to future persons. It is self-evident that the autonomy and freedom of future persons would be affected by the acts of a corporation in these circumstances, since their health and life prospects might be impaired depending on whether the corporation acted actively to promote a safe working environment. This is a category of beneficiaries that neither the spatial model nor Ruggie's principle of

[54] An alternative basis for the same constraint is articulated by Denis Arnold and Norman Bowie in Arnold, Denis G., and Bowie, Norman E., "Sweatshops and Respect for Persons", in Tom L. Beauchamp and Norman E. Bowie, eds., *Ethical Theory and Business*, 7th ed., (Upper Saddle River, NJ: Pearson Prentice Hall, 2004), at p. 591.

respect would acknowledge, predicated as they are on contractual relationships and proximity.

Concrete relations with other persons may also give rise to a claim against corporations by third parties who have relationships with those others. For example, a corporation's concrete relations with other employers may give rise to a claim for aid by the employees of those employers. If, for example, two corporations are linked by a set of social and economic relationships (say, through common membership of organisations promoting commercial, trade or employer interests) one corporation may have the capacity to act in ways to promote the freedom and autonomy of the other's employees by lobbying for generally applicable fair labour standards, or seeking to ensure that fair labour standards are applied throughout the sector in which the corporation does business.

Concrete relations with governments may give rise to a claim for aid by the general population. If, for example, a corporation has an economic or political relationship (or both) with a particular government, and that government engages in acts of human rights abuse against the population generally (say, by engaging in acts of political censorship, or denying freedom of movement) the corporation's capacity to act so as to improve the autonomy and freedom of the general populace (if only by intervening on their behalf or exercising any leverage

it might have against government) would rank the general population as a beneficiary of aid.

While the concept of the social niche gives rise to a greater number of beneficiaries than that contemplated by other approaches, it also draws limits. Where a corporation has no concrete relations with another, it cannot act, in respect of that other, in ways that would give rise to any positive obligation. Assuming that a corporation had no relationship (politically, historically, economically or otherwise) with a government that engaged in human rights abuses nor with any other party that might have a relationship connecting it to the abuse, those oppressed by the abuse would not rank as the beneficiaries of aid. For example, a corporation that does no business in Myanmar, has no relationship with the regime in that country or with any other party that might connect it to that country, is not expected to aid the victims of human rights abuse there – it would be commendable for the corporation to protest against human rights abuse in Myanmar, but it would not owe a positive duty to protect the citizens of that country.

In short, a conception of sphere of influence grounded in those relationships in respect of which a corporation is capable of acting in ways that affect the freedom and autonomy of others, both accounts for concrete relationships between parties and recognises the dynamic nature of relationships between corporations and others. It does not suffer from the implausibility of models

based on *a priori* relationships, nor does it make assumptions about the nature or fullness of those relationships

4.

It might be objected that my conception of a sphere of influence would demand of corporations, in Sorrel's words, to forsake commercial purposes and become "full time warriors in a moral crusade?" [55] The objection, in more specific terms, is that if a corporation were obligated in the terms for which I have argued (i.e., that an obligation to support and respect human rights within a corporation's sphere of influence is dependent on relationships in respect of which a corporation has the capacity to act so as to affect the freedom and autonomy of others), the corporation would go out of business. This objection resonates with Ruggie's concern about the demandingness of positive duties to protect human rights, and his concern, in relation specifically to influence as leverage, that "can implies ought".

To be clear, an objection cast in these terms is not to raise the stockholder argument that it is inappropriate for business managers to utilise corporate resources to pursue social causes – rather, it suggests that while corporations may be obligated to others for human rights purposes, they should not be constrained to act in a way that would cause them to be so overburdened by

[55] Sorrel (supra), at p.129.

moral demands on their time and resources to the extent that their commercial purpose is overwhelmed.

I concede that my conception of sphere of influence identifies a broad range of beneficiaries, and therefore may impose considerable burdens on corporations, especially in locations where there has been a failure of government. However, to ask a corporation to act positively to support and respect human rights within its sphere of influence is not to require that it abandons its commercial purpose or pay any less attention to it, nor to bear burdens that are not shared by others. The moral burdens imposed by a sphere of influence defined in terms of the SNA are no more burdensome than those ordinarily placed on individual persons - it demands that the corporation assume responsibility for human rights in the same way as any private agent.

Further, the conception of sphere of influence for which I have argued does not demand obligations independently of an empirical investigation into the corporation's social niche – the scope of obligation is thus calibrated to account not only for power and influence, but also for ability, where ability is a function of the corporation's need to remain competitive. Lippke recognises this limitation: he concedes that any plausible ethical theory will restrict the range of agents' affirmative duties so as not to overburden them with moral demands on their time, energy and resources.[56] Sphere of influence properly conceived does not require

[56] Lippke (supra), at p.362.

a corporation to meet the challenges posed by all victims of human rights abuse, wherever they might be in the world. The requirements of concrete relationships with others and a capacity to act within that context in ways that affect others, restricts the range of a corporation's affirmative duties and imposes realistic demands.

Secondly, from an empirical perspective, corporations have increasingly integrated support and respect for human rights into their values and business plans. I noted in the Introduction that a significant number of MNE's subscribe to the UDHR, and to initiatives such as the Global Compact. This is a clear indication that MNE's acknowledge obligations to support and respect the human rights of those affected by their activities, and to do so in terms of universal standards. There is also evidence that corporations are engaging increasingly in initiatives to promote the realisation of human rights. The trend is against the objectors. To respect and support human rights within the sphere of influence is not to ask corporations to abandon the business of doing business; rather, positive obligations to aid identified beneficiaries (such as those, in Microsoft's Unlimited Potential initiative who lack access to information technology and technological skills)[57] is very much seen as a part of doing business, and a part of the cost of doing business. In this respect, the positive duty to protect human rights and the demands posed by the beneficiaries of that duty are not unique or

[57] Schwab (supra) at p.115.

any more burdensome than other demands made on a corporation in the normal course of business.

A second objection might go to relationship. It might be objected that the variety of ways in which relationships and the capacity to act to affect the lives of others are of no consequence – what counts is only the power that corporations have over the lives of others, and how corporations use or have the potential to use that power. The beneficiaries of a positive duty to aid, on this account, would extend beyond those persons with whom a corporation has some relationship as conceived by the SNA, to include people who are in most need.

This assertion is commonly made by business ethicists who argue that the notion of corporate global citizenship requires that corporations are citizens of the global society; a theory of citizenship that asserts that to be a "citizen" is both a privilege and a right and typically carries accompanying duties to citizens globally. [58] Some have gone farther to suggest that corporations are quasi-government institutions, and that they have positive and extensive duties to defined beneficiaries, wherever they might be in the world, on that basis. Florian Wettstein, for example, argues that the concept of global citizenship is limited and misleading - the influence of MNE's has shifted from the economic to the political, both on account of specific interaction with citizens (which he argues

[58] Logsdon, Jeanne M. and Donna J. Wood, "Business Citizenship: From Domestic to Global Level of Analysis", *Business Ethics Quarterly* 12 (2002): 155-187.

have taken on a political character) and also on account of MNE's growing representation within international political bodies, which causes them to "tread genuinely political ground". On this basis, Wettstein implies an obligation on corporations to meet claims for a decent world society. This implies that corporations are obliged to aid a broad range of beneficiaries, for example, persons who lack basic shelter and experience shortages of water, food and medicine, wherever they might be in the world.[59] Broadly speaking, these are the same persons who are beneficiaries of the state's duty to protect human rights.

Corporations, and especially MNE's, may well have vast assets and wield extensive economic and political power, sometimes exceeding those of some states, and they may well be in a position to aid the broad group of beneficiaries identified by Wettstein. But to require corporations to act as a surrogate for the state in relation to those persons who have legitimate claims against the state, not only permits governments to abrogate their human rights responsibilities, it overvalues the relevance of power and wealth. Sorrel elaborates on three reasons why positive obligations in relation to human rights should not be ascribed to corporations only because they are rich and powerful. First, it is not necessary to be rich and powerful to discharge many human rights obligations. Second, not all corporations run the same risks of violating human rights or are faced with challenges or unpromising environments in the conduct of their

[59] Wettstein, Florian, "From Causality to Capability: Towards a New Understanding of the Multinational Corporations' Enlarged Global Responsibilities", *Journal of Corporate Citizenship* 19 (2005):105-117.

business. Thirdly, a particularly prescient point, corporations that are rich and powerful now can suffer losses and collapse later, and it cannot be said that by doing so, they surrender their human rights obligations.[60] If, as Sorrel demonstrates, positive obligations do not derive merely from wealth and power, the arguments that corporations have human rights obligations to aid wherever people are in most need, if they can, are flawed. Relationship, as envisaged by the sphere of influence, remains a more plausible basis on which to define the beneficiaries of aid.

A third objection might focus on the nature of relationship and suggest that all that is required to establish a positive duty to protect human rights is a existence of what Reader calls a "real connection" i.e., "something between" a corporation and another.[61] In other words, to the extent that my conception of sphere of influence rests on the capacity of corporations to affect the life of another in the context of a concrete relationship with a person who is not that other, it ignores more direct moral obligations that relationships place on moral agents. Why should a corporation not be obligated to employees, for example, simply on account of a connection in the form of presence, or the shared institution of employment? These and other forms of real connection would more easily identify the beneficiaries of aid.

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[60] Sorrel (supra), at p.148.
[61] Reader (supra), at p.370.

I concede that my account of whom should benefit from a positive duty to aid would have difficulty dealing with some connections, notably presence. This is particularly so in the case of urgency – Reader asserts that if someone collapses in front of me, I am obligated to assist by reason of the fact that we are in each other's presence.[62] The SNA, focusing as it does on concrete relationships, may not recognise a duty to aid in those circumstances. This would have implications, for example, in situations where members of a population in an area where a corporation does business were threatened with violence by a local militia.

In most cases, I suggest that the concept of sphere of influence that I have proposed would be capable of identifying those whose lives and safety were threatened as beneficiaries of aid. It is likely that a corporation in these circumstances would have a relationship of some kind (perhaps social, historical or political) with the militia or some higher political authority, and that the corporation would have the capacity to make decisions that would affect the freedom and autonomy of those concerned. This would require the corporation to intervene in some appropriate way, for example, by persuading the militia to cease their actions, or by political intervention at a higher level.

The difficulty with the argument that direct connection establishes moral obligation, of course, is that it cannot account for obligation when the relationship is indirect. I have demonstrated, for example, that it is plausible for a corporation

[62] Ibid, at p. 372.

to ensure in its negotiations with suppliers that they treat their employees' fairly. The supplier's employees have no direct connection to the corporation, and thus on the "direct relationship" approach, would not qualify as beneficiaries of aid. On my conception of sphere of influence, the corporation's concrete economic relationship with the supplier and the corporation's capacity, in the context of that relationship, to affect the lives of the supplier's employees, qualifies them to benefit from a positive duty to aid.

Conclusion

I have taken for granted that corporations have negative obligations to do no harm, and positive obligations to help protect human rights. The positive duty to help protect human rights is a duty that encompasses an obligation to help defined beneficiaries. The concept of sphere of influence was introduced in an attempt to demarcate corporate responsibilities in relation to human rights from those of the state. In the absence of any relationship obviously analogous to that between state and citizen (a relationship that defines the scope of state obligation), the scope of corporate moral obligation (in particular, the beneficiaries of a duty to aid) have not been defined. The spatial metaphor applied to the concept of sphere of influence (a metaphor that resonates strongly with the stakeholder model of business ethics) and Ruggie's more recent elaboration of the principle of respect, both provide limited and ultimately implausible accounts of sphere of influence in relation to whom a corporation is

obligated to aid. The spatial metaphor assumes *a priori* relationships with defined others, and is unclear about whether relationships establish beneficiaries of the duty to aid or obligations to exercise influence in relation to human rights in particular situations, or both. The principle that requires corporations to respect human rights correctly disavows linear relationships with defined beneficiaries as the basis of the duty to aid, but implausibly predicates that duty on the limited criteria of contractual ties and geographic proximity.

I have argued that a more plausible account of a corporation's positive duty to protect human rights requires an empirical investigation of a corporation's social niche, i.e., its social, economic, political and historical relationships with others. The beneficiaries of aid (and the proper sphere of influence in relation to a corporation's responsibility for human rights) are identified by those relationships in respect of which a corporation has the capacity to make decisions that affect the freedom and autonomy of persons. The scope of beneficiaries thus defined would generally include those stakeholders in a linear relationship with a corporation and who are acknowledged as beneficiaries by the concept of sphere of influence as a spatial metaphor, as well as those identified as beneficiaries by the application of Ruggie's principle of respect, i.e. corporation's neighbours and those with whom it has contractual ties. But the proper sphere of influence in relation to corporate responsibility for human rights must necessarily account for positions of power and influence, concrete relationships between corporations and others (all of which are similarly dynamic) and the capacity by a corporation

within the confines of those relationships to affect the freedom and autonomy of others. This does not imply that corporations are morally required to forsake commercial purposes to assist all victims of human rights abuse, nor does it imply that corporations are required to assume obligations that properly ought to remain those of the state. A proper sphere of influence in relation to corporate responsibility for human rights calibrates the scope of a duty to aid by reference to power, influence and ability.

The scope of this paper has necessarily been limited - other dimensions of the duty to aid - for example, what a corporation is obligated to do and how much a corporation is obligated to do to aid beneficiaries (i.e. to what extent is obligation dependent on available remedies and existing capacity?), and which rights are relevant to determining a corporation's duties, (i.e. are there distinctive rights relative to the sphere of operation of a corporation?) are issues that should be explored in further research.

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