

Netherlands Helsinki Committee
Essay Contest

Conference on the Future of Human Rights in Europe
The Hague University of Applied Science
25 January 2013

*Corporate Power and
the Protection of Human Rights
in Equilibrium*

Author
Wasima Khan

Word count
incl. footnotes: 3.362
excl. footnotes: 2.522

Corporate Power and the Protection of Human Rights in Equilibrium

Business needs human rights and
human rights needs business

*Mary Robinson, (former) UN High
Commissioner for Human Rights*

Nil magnum nisi bonum

(No greatness without goodness)

In: *Life of Pi*

by Yann Martel

Corporate power *versus* human rights

Multinational corporations are the empowered leaders of financial markets on a global scale. To an increasing degree, we have become aware that corporations have also taken over control of society in the course of time along gradual lines.¹ Nowadays, corporate power reaches beyond land-frontiers and holds sway over the lives of billions of individuals throughout communities and living environments all over the world. Regrettably, this power is not always exercised in a responsible manner when we look at the amount of violations of human rights in which corporations have been involved through their international business affairs.² In order to prevent abuse of corporate authority to the detriment of human rights, the impact of corporate power should be balanced with a matching responsibility towards all members of society. Corporate power and the protection of human rights need to be in equilibrium.

¹ See e.g., J.E. Parkinson, *Corporate Power and Responsibility*, Clarendon Press 1995, and C. Handy, *Beyond Certainty: The Changing World of Organizations*, Harvard Business Press 1996.

² Human rights organizations are increasingly making efforts to raise acute public awareness on such human rights violations, see e.g. Amnesty International's humanitarian work on the issue of business and human rights: <<http://www.amnestyusa.org/our-work/issues/business-and-human-rights>>. Other

According to international law, state governments have a duty to protect against human rights abuse by third parties, including business enterprises, within their territories or jurisdictions.³ Yet, one of the most important issues in the current discussion on business and human rights is not primarily about the primacy of the states' duty to protect human rights. Rather, the question which remains to be considered concerns the potential scope for a duty on the level of business enterprises, i.e. the question whether corporations – in their capacity of non-state actors – can or should actually be required to protect human rights while carrying out their commercial activities apart from the state governments' duty.⁴ Can corporations be held responsible and accountable in an effective manner for the negative consequences their activities may have in the lives of human beings all over the world? This question can be approached from a moral viewpoint as well as a legal perspective.⁵ The socially acceptable answer would undoubtedly be: yes. Unfortunately, in the context of law, the quest for an undisputed answer is more complex. There are numerous examples in practice providing a clear indication that matters of business and society do not necessarily run parallel to each other. Rather, the two (interdependent) superpowers of business and society clash because the goals to be pursued are often of a different and contradictory kind.

organizations promoting human rights include the United Nations Global Compact and the Business Leaders Initiative on Human Rights.

³ UN Special Representative of the Secretary General, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, (April 2008), available at: <<http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2008>>.

⁴ See e.g., P.T. Muchlinski, Human rights and multinationals: is there a problem? 71 *International Affairs* 1 (2001), pp. 31-47.

⁵ For recent handbooks and studies related to the business and human rights debate from the viewpoint of law, see e.g., W. Cragg (ed.), *Business and Human Rights*, Edward Elgar Publishing 2012, S. Joseph, *Corporations and Transnational Human Rights Litigation*, Hart Publishing 2004, R. Sullivan, *Business and Human Rights: Dilemmas and Solutions*, Greenleaf Publishing 2003, S. Deva, *Regulating Corporate Human Rights Violations: Humanizing Business*, Routledge 2012, and L.F.H. Enneking, *Foreign direct liability and beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability*, Eleven International Publishing 2012.

Corporations use their power to realize the goal of satisfying their self-interest along with the interest of their shareholders in a financially profitable manner, while society is concerned with the broader goal of preserving a safe living environment where the rights of all individual human beings can be maintained.⁶ This clash becomes apparent in practice when looking at the deals that have been struck between multinational corporations and state governments in which governments have agreed to indemnify corporations against the cost of any legal reforms in the country, including reforms that improve human rights.⁷ In the past, this practice has led to conflict situations such as the case of a European mining firm seeking financial compensation from South Africa's government because it was required to employ a certain number of black employees under the black economic empowerment law.⁸ This situation exemplifies that corporations have a calculative mind-set linked to their financial self-interest and are not inclined to promote human rights on a voluntary basis when costs are involved. As a consequence, it is interesting to determine to what extent corporate law and best practices are able to exert influence on corporations to pay attention to the relationship between business and human rights.

Corporate law and human rights

⁶ Managers have to weigh the conflicting interests of shareholders, employees and customers in everyday decision-making procedures. The efforts to strike a balance between these different stakeholders do not always pan out in favor of safeguarding human rights in an international context, even if corporations claim to do so. For example, early 2012 Apple was once again accused of breaching its own Supplier Code of Conduct as Chinese workers in one of Apple's supply chain companies are alleged to work under poor human conditions to produce products for Western markets, see *In China, Human Costs Are Built Into an iPad*, New York Times, 26 January 2012. Yet, public outrage and the importance of a good corporate reputation seem to have led to the implementation of reforms, see *Signs of Changes Taking Hold in Electronics Factories in China*, New York Times, 26 December 2012.

⁷ *Beyond the "genocide Olympics"*, The Economist, 24 April 2008.

⁸ *Beyond the "genocide Olympics"*, The Economist, 24 April 2008.

The relationship between corporate law and human rights has recently become a more significant part of broad public debate, largely due to the findings from an extensive research carried out by the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, as part of the Corporate Law Project. The Corporate Law Project of the UN Special Representative of the Secretary-General – carried out in 2009 and 2010 – aimed to identify the existing standards and practices regarding business and human rights worldwide. After conducting a groundbreaking survey in over 40 individual jurisdictions⁹, the efforts were carried onto a further level and eventually resulted in the Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council in April 2011. For business corporations, the Guiding Principles include the corporate responsibility to respect human rights, which means that ‘business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved’.¹⁰ This principle may prove to be an influential tool for change management as it strongly appeals to corporations to take initiatives in the avoidance of human rights violation while carrying out their business activities. Such a triumphant milestone in the area of business and human rights may be especially helpful for vulnerable countries with emerging or underdeveloped markets which often seem to be overpowered by foreign multinational corporations.

⁹ UN Special Representative of the Secretary General, *Corporate Law Project: Overarching Trends and Observations* (July 2010), available at: <<http://www.reports-and-materials.org/Ruggie-corporate-law-project-Jul-2010.pdf>>. The research carried out by the UN Special Representative of the Secretary General about the link between business and human rights on such a large and international scale is

unprecedented. In the report, it is claimed that “this project is the first in-depth, multi-jurisdictional

exploration of the links between corporate and securities law and human rights.”

¹⁰ UN Special Representative of the Secretary General, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (March 2011),

The Guiding Principles have established an encouraging global guideline for corporations to take human rights into account. Yet, the Guiding Principles embrace a form of self-regulation and do not have the effect of a binding legal duty. Corporations are merely burdened with the responsibility – referring to corporate integrity, moral commitments and societal expectations – to *respect* human rights. This implies that corporations as yet are still not confronted with a legal obligation to *ensure* that human rights are protected. The effectiveness of a voluntary regime is questionable because of the lack of independent monitoring on corporate behavior with regard to human rights. Corporations may choose to remain obscure and to merely mention the Guiding Principles for purposes of public relations as part of their self-organized corporate social responsibility programs. Consequently, the question remains how a corporate responsibility toward human rights could be translated to enforceable legal norms. International law provides no basis as yet for direct liability of corporations when they breach obligations with regard to human rights. On a domestic level, tort law can play an important role for victims to hold the parent company of a multinational corporation accountable in the country it is seated for violation of human rights by means of foreign direct liability cases, when victims are not able to take the matter against a subsidiary to court in the state where they live in and the alleged violation has actually occurred.¹¹ Might corporate law be able to bridge this gap any further?

A relevant aspect in corporate law – also mentioned in the UN Corporate Law Project – to be considered in this regard is the potential of reforms to corporate directors’ duties with regard

available at: <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>>.

¹¹ L.F.H. Enneking, *Foreign direct liability and beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability*, Eleven International Publishing 2012.

to human rights. In a recent essay, I have stressed the deplorable state of art in current corporate law where Anglo-Saxon countries facilitate the narrow-minded idea of shareholder wealth maximization through directors' duties by allowing corporate directors to act predominantly in the interests of shareholders' interests as shareholders are considered to be the essential risk-bearing financiers of the corporation.¹² In the aftermath of the financial crisis it has become even clearer that society – consisting of billions of individual human beings – is saddled with the heavy social and economic costs of managerial risk-taking in the build-up to economic profits of which the benefits are eventually solely reaped by a select mass of corporate directors and shareholders. The costs of risky business should not bear disproportionately upon the individual rights and the quality of life of powerless by-standing human beings. In order to overcome this alarming state of play, I have argued that the law of corporations needs to be humanized with the aim to bring forth good management practices which are aligned with the needs of society. Elaborating on the theme of corporate law and human rights, I would suggest that corporate directors should be held responsible for the protection of human rights by striving for the expansion of corporate directors' duties towards non-shareholders' interests on a European level. A European agenda¹³ for the protection of human rights supported by corporate law could be considered desirable to upkeep the competitive advantages of a level playing field by ensuring that the enactment of domestic legislation in EU jurisdictions is in line with corresponding regulatory efforts by their

¹² W. Khan, *Humanizing the law of business corporations for good management practices*, essay for the 3rd Global Peter Drucker Forum (Vienna), 3-4 November 2011. Available at SSRN: <<http://ssrn.com/abstract=1992636>>.

¹³ At present there is no strict coherence of EU policies regarding business and human rights. The European Commission has taken up this subject as a future challenge and intends to implement the UN Guiding Principles on a European level. See European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681, 25 October 2011. The European Commission has already published an introductory guide to human rights for small and medium-sized enterprises, as well as a study on the existing legal framework for human rights and the environment applicable to EU companies operating outside the EU and a study on responsible supply chain management issues,

European counterparts. Given the many situations where business activities and human rights intersect and affect each other, corporate directors in Europe should be increasingly forced to grapple with the issue of human rights and include non-shareholders' interests in their decision-making procedures.

Another beneficial role the law in general – besides corporate law – can play in this matter is to provide incentives for corporate directors and corporations, by means of an encouragement to carry out conduct in compliance with human rights. Legal incentives are able to strengthen market-based incentives for good corporate conduct by implementing cost-sensitive measures. An example of such a practice can be found in the United States where the amended U.S. Federal Sentencing Guidelines provide that the fine payable by a corporation found guilty of a federal crime will be substantially reduced if the corporation is equipped with an appropriate compliance and ethics program at the time of the offense.¹⁴ This legal measure serves as a financial incentive for corporations and their directors to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct, also in relation to human rights.

The emergence of social entrepreneurship

Can reforms in law provide a panacea for keeping business and human rights in equilibrium? The law in itself may not be sufficient to spur business leaders towards a sustainable shift in behavior and culture for including the promotion of human rights in corporate decision-making procedures. Cultural and behavioral changes may come from best practices formed outside the legal environment. Consequently, we need to ask ourselves: are there perhaps 'too

all available at: <<http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/>>.

many laws, too few examples'¹⁵? Besides changes in the law, we also need business leaders and entrepreneurs who are able to create best practices which set an example in changing the way we do business. One of such best practices connecting business with the pursuit of societal goals is developing and manifesting itself in business communities in the form of social entrepreneurship.

Social entrepreneurship is a form of business which connects with society by means of social value creation.¹⁶ Social entrepreneurs use business methods to pursue societal goals, thereby diminishing the clash between the powers of business and society. On a European level, social entrepreneurship is encouraged to create a social economy in which social enterprises can contribute to social cohesion, employment and reduction of inequalities.¹⁷ Looking at the rapid developments of this revolutionary business model in the past decade, it seems that social entrepreneurship holds the future. I would like to conclude this essay by highlighting a Dutch example of innovative social entrepreneurship with a case study of a social enterprise which is keeping business and the protection of human rights in equilibrium: the case of Tony's Chokolonly.

Case study: Tony's Chokolonly

¹⁴ Par. 8C2.5.f. 2011 U.S. Federal Sentencing Guidelines.

¹⁵ Louis de Saint-Just (1767-1794). Saint-Just's aphorism can be seen quoted on the front side of a modern building at Davies Street, no. 21 in Mayfair, London.

¹⁶ The European Commission defines social business as an enterprise: a. whose primary objective is to achieve social impact rather than generating profit for owners and shareholders; b. which operates in the market through the production of goods and services in an entrepreneurial and innovative way; c. which uses surpluses mainly to achieve these social goals, and d. which is managed by social entrepreneurs in an accountable and transparent way, in particular by involving workers, customers and stakeholders affected by its business activity.

¹⁷ European Commission, *Social entrepreneurship*, see <http://ec.europa.eu/internal_market/social_business/index_en.htm>.

In 2004, Teun van de Keuken a.k.a. Mr. Tony Chocolonely, became the first Dutchman ever to press criminal charges against himself for committing the crime of eating chocolate. Tony is a Dutch broadcast journalist who became an innovative social entrepreneur a few years ago when he founded Tony's Chocolonely¹⁸, a Dutch fair trade chocolate company on a mission to produce slave-free chocolate bars. Tony Chocolonely's story¹⁹ began more than a decade ago as one man's lonely crusade against child slavery in the cocoa industry. Tony became inspired by Oprah Winfrey's efforts to raise awareness on slavery and he decided to take action starting a year-long probe into slavery in the chocolate industry. In 2003, the lonely hero displayed the results of his research on human rights abuses at cocoa plantations in West Africa on TV. In a Dutch TV consumer advocacy program (*Keuringsdienst van Waarde*), Tony uncovered shocking malpractices in Burkina Faso revealing how child slaves are mistreated and sometimes forced to work up to sixteen hours a day. A matter of bitter irony; many of these children laboring on the cocoa fields had never tasted the sweet goods they were producing until Tony gave them bits of chocolate to try.

When the first waves of shock have ebbed away after seeing and hearing these images and stories, an important question starts to pop up: what next? Change your own life and stop consuming chocolate? Or rather change the lives of thousands of children by putting an end to contemporary child slavery while pushing forward to produce clean chocolate? Tony, eaten up with feelings of guilt, decided to opt for the latter solution. He raised much controversy when he followed up on his idea and handed himself over to the police in Amsterdam claiming he was complicit in slavery as a consumer of chocolate, buying and using products

¹⁸ For Tony's Chocolonely's website, see: <<http://www.tonyschocolonely.com/en/>>.

¹⁹ A compilation of Tony's Chocolonely's story is available on YouTube at: <<http://www.youtube.com/watch?v=kgwYcEabBIs>>.

that were illegally produced. Initially, slavery charges were successfully brought against Tony but the Amsterdam Court eventually withdrew his case in 2007.

In the meantime, Tony hadn't been sitting around doing nothing. Frustrated by the lack of progress in his protest against child slave labor, Tony decided to take the matter in his own hands on the principle 'if you can't beat them, join them'. In 2005, Tony started his very own fair trade chocolate brand and began producing Tony's Chokolonely chocolate bars which became the first on the world market to be labeled slavery-free. It turned out to be a huge success on a national level. Tony's Chokolonely chocolate bars are now sold in stores throughout the Netherlands. In 2006, Tony's factory opened its doors to respond to the enormous demand for Tony's Chokolonely's chocolate bars. In due course, Tony's Chokolonely has changed its slavery-free label. Unfortunately, not every cocoa bean in the production cycle of the chocolate bars can be proven to be slavery-free but Tony's Chokolonely remains committed to its foundational principles with the slogan: "on our way to 100% slavery-free chocolate".

What impact does this social entrepreneur's initiative have on the future of the broader issue of business and human rights? It may be true that the small-scale Dutch business of Tony's Chokolonely is not able as yet to compete with the powerful large commercial chocolate brands operating on a global level. Yet, this does not mean that the social entrepreneur's efforts are in vain, for it seems that Tony is not so Chokolonely anymore in his efforts to end child slavery in the cocoa industry. More recently, CNN's Freedom Project²⁰ has held the spotlights on this contemporary issue as part of their ongoing mission to end modern-day

²⁰ CNN, Chocolate's Child Slaves – The CNN Freedom Project: Ending Modern-Day Slavery, *see*: <<http://thecnnfreedomproject.blogs.cnn.com/category/chocolates-child-slaves/>>.

slavery. The world's largest chocolate makers seem to be responding. Last year, Nestlé²¹, Ferrero²² and Hershey²³ announced their plans to put efforts into cleaning up their supply chain in order to eradicate child labor. A bitter tale with a sweet ending after all...? Only time will tell, but along with Tony Choclonely we are finally getting many steps closer and are well on our way.

²¹ Nestlé, *Nestlé sets out actions to address child labour in response to Fair Labor Association report on the company's cocoa supply chain*, 29 June 2012, see: <<http://www.nestle.com/media/newsandfeatures/fla-report-cocoa>>.

²² Ferrero, *Ferrero Cocoa supply chain*, 12 April 2012, see: <<http://www.ferrero.com/group-news/Ferrero-Cocoa-supply-chain>>.

²³ Hershey, *Hershey Expands Responsible Cocoa Community Programs in West Africa*, 30 January 2012, see: <<http://www.thehersheycompany.com/newsroom/news-release.aspx?id=1653877>>.