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Human Rights as a Critique of Instrumental CSR: Corporate Responsibility Beyond the Business Case

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Abstract: In his widely influential human rights framework, the former special representative for business and human rights, John Ruggie, establishes a responsibility to respect human rights for all corporations. He does so based on an instrumental account of corporate responsibility. In this paper I will systematically explore and expose the conceptual flaws underlying such instrumental arguments, specifically when invoked in connection with human rights responsibility. I will outline four relevant situations, which stake out the scope of such business case arguments in the context of human rights. Based on the analysis of those four situations, I will argue that Ruggie's instrumental defense of the corporate responsibility to respect human rights fails. While a genuinely moral argument in favor of corporate human rights responsibility would be more plausible, it implies corporate responsibilities beyond merely respecting human rights and thus challenges the framework's rigid division of responsibility between corporation and state.

Keywords: Instrumental CSR, Business and human rights, UN Framework, Responsibility to respect.

Introduction: Instrumental CSR and Corporate Human Rights Responsibility

In 2008, UN Special Representative for Business and Human Rights (SRSG), John Ruggie, presented the "Protect, Respect and Remedy" framework (UN Framework), which outlines the distribution of human rights responsibilities between governments and corporations (see UN, 2008). Three years later, in the Summer of 2011, Ruggie concluded his mandate as the SRSG with the publication of the Guiding Principles for business and human rights. The Guiding Principles are based on the conceptual groundwork of the UN Framework (See UN, 2011). When Ruggie took over as the SRSG in 2005, his aim was to provide a much needed "authoritative focal point" (UN, 2008: 4) for the business and human rights debate. This goal has no doubt been achieved. Ruggie's work as the SRSG has since become the new standard and reference point, that is, the state of the art in and for the discussion on business and human rights (Wettstein, 2012b).

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By and large, Ruggie follows the traditional human rights discourse in regard to assigning primary responsibility for human rights to governments. However, he departs from it decisively in regard to the human rights responsibilities of companies. While traditionally, companies have not been regarded as direct responsibility bearers in regard to human rights (Muchlinski, 2001: 32; 2012: 151), the UN Framework establishes a responsibility to respect human rights also for corporations. This corporate responsibility to respect human rights is spelled out in more detail in the Guiding Principles. The SRSG's conclusion that corporations ought to respect all human rights is neither surprising nor objectionable. However, the argument with which he defends and justifies this responsibility warrants scrutiny. Specifically, the UN Framework presents and justifies the imperative to respect human rights primarily in economic terms. Moral reflection, on the other hand, is strangely absent in Ruggie's argumentation. The SRSG's reports in general contain little substance regarding the justification and foundation of human rights responsibilities of companies. The implication of the reports is that the actual reason why companies ought to respect human rights is that the "failure to meet this responsibility can subject companies to the courts of public opinion […]" (UN, 2008: 17) and subsequently affect their reputation or their very "licence to operate" (UN, 2008: 18). Thus, Ruggie finds the justification for corporate human rights responsibility not in the inherent ethical value of human rights as moral entitlements, but in their instrumental value for the advancement of corporate interests. In other words, Ruggie is concerned predominantly with making a business case for corporate human rights responsibility, rather than with advancing a sound ethical argument.

With this contribution, I would like to add to recent criticism of Ruggie's lacking focus on and interest in the ethical perspective (see, e.g., Arnold, 2010; Cragg, 2012), by systematically subjecting his instrumental argument to critique specifically as it relates to human rights as fundamental moral entitlements. While instrumental CSR has been critiqued both from an empirical and a general normative perspective, such critique has rarely been formulated specifically from the perspective of human rights. In fact, human rights have been perceived as the one context in which a business case for corporate responsibility appears to be most plausible (Paine, 2000: 324). However, I will argue that precisely in this context that seems most conducive to formulating a business case for corporate responsibility, the conceptual flaws of instrumental CSR are exposed most decisively. This holds particularly for the corporate *responsibility to respect* human rights as promoted and outlined in the UN Framework and the Guiding Principles.

In my argument I will first outline the logic and rationale of instrumental CSR and address the normative and empirical critique that has frequently been voiced against it. After a short section on the current resurgence of instrumental CSR in the human rights context, I will then add a new strand of critique, which is predominantly epistemological in nature and deals specifically with the application of the business case logic to the domain of human rights. My critique will be based on the analysis of initially three situations which represent different ways of interpreting a business case for the responsibility to respect human rights. A fourth situation, which will not

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be directly connected to the SRSG's Framework, derives from the critique of the first three and will be briefly addressed in the concluding remarks of this paper.

Instrumental CSR and its Critics

Instrumental CSR emphasizes the value of CSR as a tool or instrument for the advancement of economic interests of the company. Responsible conduct, such is the underlying belief, makes sense also economically. Ethics and financial success are regarded to go hand in hand, rather than being two conflicting ideals. This is what Paine (2000: 319) described as the "friendship model" between ethics and economics. It rests on the belief in the convergence between economic and social values. Its goal is to formulate an economic rationale, that is, a *business case* for CSR. Instrumental CSR as a way of thinking is nothing new. What is new and has been identified as a characteristic element of the CSR discourse from the 1990s onwards (see, e.g., Paine, 2000; Vogel, 2005; Gond, Palazzo, and Basu, 2009), however, is its widespread adoption both in practice and academia.

The economic perspective on CSR comes in two basic shapes, which are commonly referred to as the negative and the positive business case for CSR (see Paine, 2000). The *negative dimension* of the business case stresses the destructive potential that irresponsible business practices may have on economic value. It runs on the assumption that irresponsible practices will sooner or later be both found out and condemned by those stakeholder groups of the company that are relevant for its economic success. Thus, corporate responsibility is seen to serve the function of risk management: it can prevent companies from having to pay large fines, losing sales and revenues, or suffering from damage to their reputation when misconduct is revealed to the public. It may also prevent more rigid and expensive regulation from being put in place (Paine, 2000: 320). Furthermore, a culture of integrity, responsibility, and trust reduces monitoring, coordination, and transaction cost; it encourages cooperation, reduces conflicts and makes contracting processes more efficient (Paine, 2000: 320).

The *positive dimension* of the business case, on the other hand, emphasizes CSR's potential for added benefit. For example, responsible business conduct may not only prevent reputation losses, but lead to actual reputation gains. A reputation based on responsibility, reliability, and trust may help the company to attract talent on the job market, increase customer loyalty and boost the confidence of investors. Also, a culture of integrity and trust may not only reduce cost, but lead to increased productivity and innovation (Paine, 2000: 320).

Generally, there are two main strands of research and thinking on the business case for corporate responsibility. One is empirical, the other one is normative. Empirical research on the business case for CSR attempts to show a (positive) correlation between a corporation's responsible business conduct and its economic success. For example, Orlitzky, Schmitt and Reynes (2003) published a meta-study covering 52 research-studies over the span of 30 years about the statistical

association of corporate social performance and corporate financial performance. They concluded from their findings that "corporate virtue in the form of social responsibility and, to a lesser extent, environmental responsibility is likely to pay off[…]" (Orlitzky, Schmitt, and Reynes, 2003: 403). In other words, they found that there is indeed a positive association between the social and the financial performance of a company across industries and study contexts (Orlitzky, Schmitt, and Reynes, 2003: 423). However, empirical research on the link or correlation between social responsibility and financial performance has always come with a fair amount of criticism and skepticism. The authors of the above study have themselves pointed to the moderation of their findings by the problem of operationalization of social and financial performance (Orlitzky, Schmitt, and Reynes, 2003: 403). Other studies have raised similar questions about the measurement problem in regard to the social responsibility of companies (see, e.g., Waddock and Graves, 1997: 304; Vogel, 2005: 29-33; Thielemann and Wettstein, 2008). Therefore, as Lynn Paine concludes:

> While ethics and economics are mutually supportive in many respects, the economic case for corporate ethics goes only so far. It is wishful thinking to suppose otherwise. Even when cast in general tendencies rather than axiomatic truths, the case leaves wide berth for divergence between what is good and what is profitable (Paine, 2000: 324-325).

Moreover, even empirical research on the business case is not entirely free of normativity. After all, the "claim that some firms may benefit financially from being more responsible", as David Vogel (2005: 34) argues, "does not satisfy CSR advocates. The reason they have placed so much importance on 'proving' that CSR pays, is because they want to demonstrate, first, that behaving more responsibly is in the self-interest of all firms, and second, that CSR always makes business sense". In other words, their goal is to promote economic benefit as an actual *reason* why companies ought to behave socially responsible. It is this normative dimension of instrumental CSR that has raised severe concern and opposition among ethicists. Again, it was Lynn Paine (2000: 327), who addressed the problem head on. If businesses operate responsibly based on the assertion that ethics pays, as she asked, then "what if it didn't?" What the problem comes down to, as Paine elaborates, is the following:

> The intellectual currents propelling the "ethics pays" argument conceal a dangerous undertow. On the surface, ethics appears to be gaining importance as a basis for reasoning and justification. At a deeper level, however, it is being undermined. For implicit in the appeal to economics as a justification for ethics is acceptance of economics as the more authoritative rationale. Rather than being a domain of rationality capable of challenging economics, ethics is conceived only as a tool of economics (Paine, 2000: 327).

Both criticisms – empirical and normative – can be addressed also to Ruggie's account of corporate human rights responsibility. However, after a short section on the current resurgence of instrumental CSR, I will address the application of the business case logic to the domain of human rights in a more specific and conceptual way. The first two situations of my critique will specifically address the negative and the positive business case as outlined in this section. The third and fourth situation will adopt a more general perspective.

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The resurgence of instrumental CSR in the human rights context

Criticism of instrumental CSR abound, one could argue that a business case for corporate responsibility might indeed be most plausible in connection with basic human rights (see, e.g., Paine, 2000: 324). Thus, it is little surprising that business case thinking seems to experience somewhat of a resurgence with the entering of the human rights focus into the CSR discourse. The UN Framework which now serves as the focal point in the business and human rights debate can be seen as not only symptomatic but perhaps as representative for this development. Indeed, the heightened public sensitivity toward corporate misdeeds combined with readily available and shared information have greatly raised the stakes for corporations to engage in irresponsible activity in general. However, this may be particularly so with regard to "big ticket misdeeds" (Paine, 2000: 320) in connection with basic human rights. The long-term reputational ramifications of a company being implicated in egregious human rights violations can be severe. Nestlé, whose failed baby formula marketing campaign in the developing world in the 1970s had devastating consequences for countless children in terms of malnourishment and exposure to contaminated water, is still paying the price for it today.

Companies like Apple, which rely heavily on their brand, are well aware of such risks. Apple's push for improved working conditions at the factories of its Chinese supplier Foxconn can serve as an illustrative example in this regard. The company suffered a growing public backlash due to highly publicized reports on employee suicides and dismal working conditions at Foxconn's factories. After some hesitation, Apple joined the Fair Labor Association in March 2012 and asked the group to conduct extensive investigations at Foxconn plants manufacturing Apple products. In response to the resulting reports, Foxconn, who produces 40 percent of the world's electronic products, committed to tangible goals regarding the improvement of working conditions and pay at their factories – a deal, which is widely believed to initiate a lasting transformation of the manufacturing landscape in China (for more information, see, e.g., Duhigg and Greenhouse, 2012).

The comeback of business case thinking in the human rights domain makes sense also conceptually. Traditionally, the debate on CSR has taken little notice of the human rights discourse (Wettstein, 2012b). From a legal and political perspective, the protection of human rights has been perceived as of exclusive concern of governments. Corporations, as a consequence, have commonly been regarded as not having any direct human rights obligations beyond what is laid down in local laws. Thus, the human rights discourse rarely adopted a specific focus on the respective responsibility of corporations. Similarly, the discourse on corporate responsibility has lacked a strong focus on human rights. This, I believe, has something to do with how corporate responsibility has traditionally been defined. CSR has long been regarded as being "fundamentally about voluntary business behaviour" (Commission of the European Communities, 2006: 2). That is, it has been perceived as the responsibility that companies adopt on a voluntary basis beyond their mere compliance with the law. Human rights, on the other hand, are the most fundamental moral entitlements of

human beings, which correspond to equally fundamental moral obligations. This fundamental moral imperative, which is inherent to human rights, evidently, is at odds with the discretionary moral responsibility which seems to characterize conventional understandings of CSR. Only recently, the discourse on CSR has decidedly moved beyond the "paradigm" of voluntariness (e.g. European Commission, 2011) and, not surprisingly, human rights have started to play a much more prominent role within it. Thus, the perceived normative mismatch between human rights as fundamental ethical imperatives and the voluntariness assumption underlying conventional understandings of CSR has increased the appeal of instrumental arguments for corporate human rights responsibility. The replacement of the strong and binding language of moral obligation with that of economic incentives has allowed for addressing human rights concerns without giving up on the voluntariness assumption. Businesses that fail to address human rights concerns voluntarily, such is the argument, will do so at their own (financial) loss.

Nevertheless, my argument here is that despite this intuitive plausibility, it is precisely in the context of human rights in which the flaws of instrumental CSR are exposed most decidedly. I will now proceed to exposing those flaws with reference to four specific "situations".

Situation 1: critiquing the negative business case for the responsibility to respect human rights

In this section, I aim at exposing the conceptual flaws of defending a *negative* business case for the responsibility to respect human rights as it is promoted and defended in the UN Framework. A negative business case for the responsibility to respect human rights stresses the potential public backlash resulting from the violation of human rights by companies and, hence, the reputational losses and the negative impact on the company's license to operate that derive from it. I will critique three different interpretations of this first situation, which I will call "business case *premium*", "business case *classic*", and "business case *light*".

Business case "premium": this purely conceptual scenario is based on the assumption that any negative business case necessarily must refer to the concept of moral blame. After all, if customers did not blame the company for its irresponsible practices, they would not have a reason not to continue to buy the company's products; if the public did not blame the company, it would not suffer from reputational losses; and if investors did not blame the company, they would hardly stop to invest their money with it. Thus, costs and risks deriving from irresponsible business practices only occur for the corporation if blame is attached them. As a consequence, also the argument supporting a negative business case for the responsibility to respect human rights can only be construed around moral blame voiced, as Ruggie puts it, in and through "the courts of public opinion" (UN, 2008: 16). Generally, blame is preceded by a certain amount of moral outrage. Furthermore, we commonly blame people if we believe that our outrage about their behavior is

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justified, for if there is no sense of justification, moral outrage and indeed moral consciousness becomes impossible (Tugendhat, 1992: 315). Thus, we blame people if we believe they are indeed *blameworthy* and we commonly hold that they are blameworthy if their actions or omissions can be said to be morally wrong (see, e.g., Smith, 1983)[1]. In the words of Bernard Williams: "[Focussed] blame, then, involves treating the person who is blamed like someone who had a reason to do the right thing but did not do it" (Williams, 1995: 42). Thus, we blame people if they *ought* to have behaved differently, that is, if they had an actual moral responsibility or obligation to act differently. Therefore, blameworthiness presupposes responsibility, for one cannot be blamed for a certain behavior, if that behavior derived from a morally discretionary choice. Blame, as Bernard Williams summarizes, "is the characteristic reaction of the morality system" if we fail to meet our obligations (1985: 177).

It follows from these insights that also instrumental CSR rests on strong moral presuppositions. Any argument invoking a negative business case must, by matter of contradiction, assume that we are, in fact, dealing with a prior moral responsibility. If this is correct, however, it is not the economic, but the ethical reason, which is authoritative in prescribing behavior (Ulrich, 2008: 47, 105-106). As a consequence, businesses ought to respect human rights not because of reputational risks or cost savings, but because they have a prior moral obligation to do so. As a consequence, showing that there is, in fact, a business case for such an obligation is normatively meaningless since moral obligations ought to be met irrespective of any economic payoff. In other words, even if the business case argument failed, the obligation would still have to be met. Hence, the business case argument is rendered moot by the very (moral) presuppositions on which it rests. Evidently, this is precisely the situation as it pertains to human rights. Obligations, which correspond with rights, as Kant (1996: 31-32; see also O'Neill, 1996: 128-141 and even John Stuart Mill, 2001: 49) argued, are perfect obligations. Perfect obligations are fully determined in terms of addressees and the bearers of the obligation as well as of its content. Therefore, such perfect obligations belong to the realm of justice, that is, they can be claimed by the rights-holder and are, as a consequence, morally owed by the obligation-bearers. Owing such obligations, then, is independent of any potential economic payoff resulting from meeting these obligations – they are owed by virtue of justice, rather than utility.

Business case "classic": One could object to the above argument that, practically (rather than purely conceptually), blame and thus a negative business case for human rights responsibility does not presuppose an actual ethical, that is, ethically justifiable obligation. Rather, it presupposes a mere *perception* about the existence of such an obligation for business. The foundation for blame in this case are *de facto* social expectations that people hold regarding the human rights conduct of business. This is what Ruggie (2008: 16-17) has in mind when formulating his argument. "The broader scope of the responsibility to respect", as he explains, "is defined by social expectations – as part of what is sometimes called a company's social license to operate".

However, even if blame is based on social expectations, rather than ethical obligations, Ruggie – and most business case arguments – is trying to make a case for human rights *responsibility* nevertheless. Thus, responsibility, as a moral category, seems to be equated with social expectations in this case. The normative assumption underlying this argumentation is that the (human rights) responsibilities of business are defined by and justified with reference to social expectations. Not meeting these expectations, then, would be a failure to meet a moral responsibility and, from this perspective, be the source for (justified) moral blame. To refer back to my argument above, blame presupposes at least the assumption by the originator that blame is due. Thus, any argument that instrumentalizes blame as a normative force for the regulation of human behavior must at least assume that what people are blamed for is justified, that is, that (the fear of) blame will lead them to do what can be considered "the right thing".

Hence, the problem also in this scenario is not so much that the business case argument is devoid of morality. Rather, the problem is that it relies on a flawed, that is, a conventional or positivist understanding of morality as the foundation of its theses (for a critique of positivist accounts of CSR, see Scherer and Palazzo, 2007: 1099). This is not to say that actual social expectations can never be a good guide for moral conduct. However, they are at best an adequate *reflection* of morality, they cannot, however, be its *foundation*. For example, the context of apartheid South Africa showed very clearly that human rights responsibilities cannot be derived from social expectations alone. Social expectations are not always aligned with and, in fact, often conflict with human rights norms. Generally, *de facto* social expectations cannot be turned into the normative foundation of ethics without committing a naturalistic fallacy. Rather, the legitimacy of social expectations itself must be subject to ethical scrutiny. Hence, the reason for the failure of the business case "classic" argumentation is that, at its core, it relies on a flawed understanding of (ethically) justifiable responsibility. This leaves us with one more scenario for construing a negative business case in the human rights context.

Business case "light": with reference to the business case "classic" scenario above one could object that we do not need to assume a *responsibility* for business to respect human rights. Rather, the business case argument could refer to the mere *act* of respecting human rights. In essence, no assumptions would be made about whether or not respecting human rights is to be considered a responsibility of business or even morally desirable. Thus, the business case argumentation would not be based on any normative presuppositions. Despite such a scenario being highly unrealistic – clearly, the SRSG too assumes that respecting human rights is a more responsible choice, morally, than violating them – let us for a moment assume its relevance for the sake of the argument.

Eliminating all references to moral responsibility from the business case scenario implies that respecting human rights is a "business consideration" like any other, judged only by its financial impact on the bottom line. However, if we are not assuming that respecting human rights is a morally responsible choice and thus ethically desirable, then what is the purpose of the business case rhetoric in the first place? If

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respecting human rights is a purely functional choice, measured and judged only by its financial payoff, then formulating a business case for it would make about as much sense as formulating a business case for marketing strategies or sales activities. That is, the business case argument turns circular (and nonsensical): it would be like formulating an instrumental argument for the business case itself.

Situation 2: critiquing the positive business case for the responsibility to respect human rights

In the last section I argued that, conceptually, the argument for a negative business case for the responsibility to respect human rights is flawed, because it necessarily is based on the presupposition of moral obligation. This still leaves the possibility to argue for a positive business case. A positive business case, as defined above, would stress reputational gains, increased sales or productivity as a result of the company behaving responsibly.

In the context of human rights, this argument too is conceptually problematic. Just as the negative business case hinges on blame, the positive business case hinges on praise. While blame presupposes the failure to meet moral obligations, praise refers to acting beyond one's duty and thus to exceeding expectations in terms of moral conduct. We commonly do not praise people for meeting their obligations, unless we had very little trust in them actually living up to their responsibilities at the outset. Under normal circumstances, however, we expect people to honor their obligations and we do not have to be particularly grateful for it. Thus, praise, as a moral concept, belongs to the domain of supererogation, that is, to the domain of moral discretion. Concordantly, *The Stanford Encyclopedia of Philosophy* defines supererogation as "the category of actions that are praiseworthy […] yet at the same time not obligatory"[2]. In other words, we deserve praise if we make responsible action the subject of our autonomous, voluntary choice beyond what can reasonably be expected from us in this regard. Therefore, arguing for a positive business case in the context of human rights would imply that respecting human rights is praiseworthy. Hence it rests on the assumption that there is no fundamental moral obligation for businesses to do so. Implicitly, the positive business case thus associates respect for human rights with the realm of supererogation, rather than with what is morally owed. In other words, it presupposes that respecting human rights is a morally discretionary choice.

Evidently, this perspective on the responsibility to respect stands in sharp contradiction with the very nature of human rights as the most fundamental moral entitlements or claims of human beings. Human rights protect the most fundamental freedoms that define our autonomy as intentional, moral persons. That is, they are the rights that we ought to enjoy for no other reason than us being human (Donnelly, 2003: 1; Griffin, 2008: 2). Therefore, human rights, as moral entitlements, are commonly seen to be universal and equal rights. We all ought to enjoy them irrespective of who we are, where we come from or what we believe in. They define and protect the fundamental equality of all human beings in terms of their moral worth, that is, in

terms of their dignity as moral persons. However, respect of our dignity and thus of our most basic human rights is owed to all of us, unconditionally. Therefore, as pointed out above, it is a matter of justice, rather than of beneficence.

Meeting our most fundamental obligations of justice warrants no praise; it is a basic expectation addressed to all of us. Arguing for a positive business case for the responsibility to respect human rights is thus not only based on a confusion of ethical categories, but it denotes a potential danger to the very concept of human rights. By implying that respecting human rights is a praiseworthy endeavor it obscures the fundamental nature of human rights as ethical imperatives and reduces them to a matter of mere benevolence or moral discretion (Wettstein, 2009b).

Situation 3: business case Darwinism vs. human rights protection

The third situation deals with both the negative and the positive business case. It addresses a flaw which is characteristic for all instrumental argumentation, but which weighs particularly heavy when invoked in connection with human rights responsibility.

Implicitly, any instrumental argumentation of normative pretense invokes a Darwinian logic of favoring the strong over the weak (Thielemann and Wettstein, 2008: 30-34). Since, as David Vogel argued, the aim of instrumental accounts of CSR is to show that responsibility *always* pays, they must, by matter of contradiction, prioritize stakeholders with high potential impact on the bottom line over those of little or no relevance for the company's profit projections, irrespective of any consideration regarding the moral legitimacy and urgency of the respective claims. Groups and individuals at the margins of society, that is, groups who have little power to make their own claims heard and who lack support through advocacy, will be of little potential benefit to the company. As a consequence, they will likely be ignored. At the very least, in case of trade-offs with conflicting claims of other, more potent stakeholder groups, instrumental CSR must per se favor the claims of the more vocal group. Michael Jensen did not mince words when addressing precisely this insight:

> Enlightened value maximization utilizes much of the structure of stakeholder theory but accepts maximization of the long-run value of the firm as the criterion for making the requisite tradeoffs among its stakeholders, and specifies long-term value maximization or value seeking as the firm's objective (Jensen, 2002: 235).

However a Darwinian rationale as it necessarily is embedded within the business case logic could not be any more contrary to the purpose and nature of human rights. The very idea underlying human rights is to protect the most fundamental moral claims and entitlements of those at the margins even if, or precisely when, they conflict with utility considerations. In other words, there is a fundamental conceptual mismatch at the heart of the business case argument for human rights responsibility: while instrumental CSR is geared to cater to the powerful, the very purpose of human rights is to protect the powerless. Having it both ways, as Lynn Paine (2000: 323) rightly noted, is "wishful

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thinking". Fundamental rights and utility do not always go hand in hand. It is the very point of a right that in case of conflict, it ought to trump considerations of utility. Thus, the very foundation of the business case logic is in fundamental contradiction to human rights thinking.

In sum, situations 1-3 have shown that instrumental CSR in the realm of human rights is not only normatively or empirically flawed, but also conceptually. Concordantly, rather than justifying human rights responsibility based on strategic considerations we should promote them on genuinely moral grounds. This claim has recently been advanced also by Denis Arnold (2010) and by Wes Cragg (2012). While Arnold is content with providing the missing moral foundation for the UN Framework's duty to respect human rights, Cragg (2012: 32) at least contemplates the possibility that a moral account of human rights responsibility would extend beyond the mere non-violence of human rights. In the next section, I will briefly outline the basic shape of an argument that would support Cragg's insight.

The moral case: human rights responsibility as collaborative responsibility

For any basic right, as Henry Shue (1996: 52) famously argued, there are three types of correlating duties. Those are the duty to avoid depriving, the duty to protect from deprivation, and the duty to aid the deprived. Using the more specific vocabulary of rights, we could restate them as the duty to respect human rights, the duty to protect human rights, and the duty to realize human rights where they have been violated or never been fulfilled. Shue made it clear that in order for a right to be fully honored, all three duties must be fulfilled. Thus, the question is whose duty it is to respect, protect, and to realize such basic rights. Who, in other words, are the duty-bearers who must deliver on human rights?

The (negative) duty to respect human rights provides the least conceptual and normative challenge. It is a universal duty, which means that we all are equally obligated by it. That is, the duty not to violate human rights holds for all of us equally, to the same degree, and at all times. More difficult to determine are the other two categories of duties, that is, the duty to protect and the duty to realize human rights. They both require positive action and are, as such, particular, rather than universal. That is, they obligate some, but not all of us to varying degrees and times. This means, as Shue noted, that honoring such rights requires a "division of moral labor" (Shue, 1988: 689f.). It requires a variety of different actors and institutions to come together and contribute their share to the responsibility puzzle. They all lack the capacity to do it on their own, but they can and ought to leverage their capabilities within targeted collaborative efforts. Thus, honoring human rights in all their dimensions is a deeply collective task.

I have argued elsewhere that corporate responsibility too must increasingly be re-conceptualized with respect to such collective efforts. Therefore, I have called for a reinterpretation of corporate responsibility as collaborative responsibility (See Wettstein, 2012a). A conception of collaborative responsibility crucially extends its

focus beyond a mere perspective on the impact of isolated corporate activity and includes leverage achieved in collaboration with other actors and institutions as a relevant criterion for responsibility, even without prior involvement of the company in bringing a certain problem about. Kenneth Goodpaster (2010: 147) similarly argued that "even if a company does not have a categorical responsibility, a responsibility to resolve the moral challenge on its own, it can still have a qualified responsibility to make an effort – or to participate in the efforts of others in seeking a collaborative resolution". Furthermore, as he argued, "the significance of a given threat to human dignity or justice in the community might raise our reasonable expectations of a corporation's responsibility, even if we acknowledge that, in the end, we are dealing with a *qualified* responsibility" (Goodpaster, 2010: 147). Thus, the plausibility of such responsibility is highest precisely in cases in which the most fundamental human rights of people are at stake.

There has been a growing debate both about the foundations of such qualified positive responsibility as well as on its limitations. Respective arguments have been advanced, for example, on the basis of social connection (Young, 2003; 2004; 2006), a Rawlsian duty of assistance (Hsieh, 2004), a corporate duty to rescue (Wood, 2012), or the limits of property rights (Bilchitz, 2010). They have been advanced by business ethicists (see, e.g., Santoro, 2009; Hsieh, 2004), moral and political philosophers (e.g. Green, 2005; Miller, 2005), and legal scholars (e.g. Bilchitz, 2010; Wood, 2012; Nolan and Taylor, 2009) alike. They all argue that the "fair share" (Santoro, 2000; 2009) of responsibility increases proportionally to an agent's capabilities (Wettstein, 2009a: 135-139), capacities (Miller, 2005; Campbell, 2006: 260), powers (Young, 2003, 2004; Jonas, 1984: 92ff.; Kobrin, 2009: 350), leverage (Wood, 2012), or their potential to have a positive impact on the situation (Santoro, 2000: 143). It is noteworthy that even John Ruggie has relaxed his stance against non-causal human rights responsibility in the Guiding Principles. While in the UN Framework he argued firmly against any extension of responsibility beyond causal involvement of the company, in the Guiding Principles he states:

> The responsibility to respect human rights requires that business enterprises: […] Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, *even if they have not contributed* to those impacts (United Nations, 2011: 14, emphasis added).

If my claim here is correct, that is, if corporate human rights responsibility indeed extends beyond the negative realm of respecting human rights and includes positive elements based on leverage or influence, then a fourth situation becomes relevant for our analysis of instrumental CSR. This fourth situation addresses the potential of a business case for the protection and realization of human rights. I will address this situation briefly in the concluding remarks of this paper.

Conclusion: a business case for positive human rights responsibility (Situation 4)?

This paper has dealt with the instrumental logic of the business case in connection with Ruggie's responsibility to respect human rights. Both the negative and the

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positive logic underlying the business case argumentation have failed. This leaves one more potential scenario to complete our analysis of the business case logic in the realm of human rights. *Situation 4*, concordantly, deals with a business case for corporations' proactive engagement for the protection and realization of human rights. Corporations which do not only passively respect, but actively engage in the protection and realization of human rights, such would be the instrumental logic, could potentially earn some goodwill from the public and from their customer base, which may well translate into economic benefit.

Since the SRSG exclusively argues for a negative corporate responsibility to respect human rights, this scenario is beyond the scope of the UN Framework and, as a consequence, cannot heal its conceptual shortcomings pointed out above. However, for the sake of completeness of our analysis, let us quickly inquire into this scenario nevertheless. Generally, it is in this fourth scenario that we find the most plausible grounds for the formulation of a business case argument in regard to human rights responsibility. It may well be that companies, which go above and beyond what can be expected of them in terms of the promotion and protection of human rights will earn respect and admiration in return, and this may well result also in a financial payoff. However, the question here is what ought to count as "above and beyond" when it comes to corporations' responsibilities in the protection and realization of human rights. If, as outlined above, corporations do indeed have qualified positive human rights obligations, that is, if their obligations indeed extend beyond the negative realm of doing no harm, then the instrumental argument at least in regard to those circumstances and to the respective extent fails on the same conceptual grounds as outlined in situations 1, 2, and 3.

In sum, advancing an instrumental argument for human rights responsibilities of corporations is per se problematic. A more plausible option, therefore, is to base such responsibilities on moral grounds. This, however, implies an extension of corporate responsibility beyond the mere respect of human rights. As such, the moral alternative to the business case argument fundamentally challenges the UN Framework's rigid division of responsibility between corporation and state.

Notes

[1] However, see Khoury (2011), who argues that we should give up on the proposition that blameworthiness necessarily presupposes wrongness.

[2] http://plato.stanford.edu/entries/supererogation/.

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