Vesting Transnational Corporate Responsibility in *Natural Persons v. Legal Persons* – What Matters Today?

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Abstract

The author asks whether transnational corporate responsibility today ought to be vested in legal or natural persons. Three stylized points of view are considered: the welfare economist; the corporate counsel; and the human rights victim. With these actors in mind, the author addresses several aspects of corporate law and human rights from a transverse perspective: the tension between corporate law's fiduciary duty and tort law's duty of care; the coexistence of parent control and subsidiary autonomy in the global firm; the troubling unintended effects for human rights victims of the wholly controlled yet autonomous subsidiary; the historical shift from the mono-corporate system to the poly-corporate system and the subsequent transformation of the flesh-and-blood shareholder's governance responsibility*;* the ability of today's companies to transfer or assign legal liability for wrongful acts through corporate reorganization, mergers and acquisitions; and the depersonalization of responsibility in the today's poly corporate enterprise. The author argues that the ethical and political accountability of decision makers cannot be avoided by technical legal fixes that aim to shift responsibility from one entity to another. The author shows how today's global governance "gap" is not a missing piece in the puzzle, but a constitutive element of the legal order itself. To illustrate this idea, the author reconfigures the global governance "gap" as the void that runs through a toroid (a life buoy). The author concludes that corporate responsibility today--as the ethical responsibility of flesh-and-blood decision makers--runs from the lowest-level subsidiary to the apex of the multinational corporate group.

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Introduction

Today's demands for corporate responsibility are often joined with the call for multinational enterprises to be accountable for their human rights impacts around the world. Most prominently, the United Nations Guiding Principles on Business and Human Rights state that respecting human rights is a "corporate responsibility."[1] Rather than asking what it means for a legal entity "to respect" human rights, the chapter examines closely the sense of the term "corporate responsibility" and considers its ethical significance for the corporate decision maker and the human rights victim alike. The chapter describes how today's transnational legal order does not adequately capture human rights in legal terms as an aspect of corporate responsibility; indeed, the legal order tends very often to leave the human rights victim facing an accountability void.[2]

[1] *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNHRC, 17th Sess, UN Doc A/HRC/17/31 (2011) (the corporate responsibility to respect human rights is "a global standard of expected conduct for all businesses" at 13).

[2] Writing in 2001, I observed, "While the global economy has evolved very rapidly to support business investment in developing countries, it remains virtually impossible to trace moral and legal accountability for industrial harms back to home-country courts. A perplexing and at times alarming divide is evolving in law and ethics in the new economy." Malcolm Rogge, "Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua, and Aguinda" (2001) 36 Tex Intl LJ 36 299 at 317 [Rogge, "Towards Transnational Corporate Accountability"].

The global governance "gap," as this void is often called today, is shown here to be constitutive of the global legal order, rather than something absent from it.[3] Given the persistence of this lamentable state of affairs, it is argued that primacy be given to natural persons over legal persons in how we conceptualize corporate responsibility today. As ethical responsibility, the corporate responsibility for human rights is vested in the natural persons who govern the corporate entity, rather than in the abstract corporate entity. This conclusion does not detract from multipronged efforts by victims and their advocates to hold multinational corporations legally accountable for violations of human rights; as a complement to such efforts, it provides reasons for reflective corporate decision makers to choose to govern the legal entities that they control in ways that uphold human rights rather than circumvent them.

The starting point for this examination is to fracture the familiar compound term "corporate responsibility" into its component parts: "corporate" and "responsibility." The contrast between these unique terms could not be more absolute: the former has a precise legal meaning, while the latter's meaning is truly amorphous. While the corporation is a well-defined legal construct, the notion of responsibility has broad legal and ethical meanings, neither of which dominates completely our ordinary understanding of the term. In a world of multinational enterprises, the nominally autonomous corporation takes its place within complex corporate group structures that transcend national boundaries — it is in this sense that the loosely used term "transnational corporation" has gained traction

[3] As I noted in 2001 (*ibid*), "Any effort to make transnational corporations more accountable in domestic law for harms caused by their operations abroad will benefit from an understanding of how elements of the common law do precisely the opposite" (at 314).

around the world. But what of "responsibility"? In a world of multinational enterprises, are the contours of corporate responsibility jurisdictionally bound, or do they expand with the extensive reach of responsibility as understood in its ethical sense? This chapter traces a route to understanding the transnational dimension of corporate responsibility as the ethical responsibility of natural persons, in particular as it relates to concerns that fall within the ambit of human rights.

The route begins by reflecting on a question: what *entity* or what *person* ought to be regarded as responsible for human rights violations that a multinational enterprise is alleged to have caused or contributed to?[4] From whom should the victims seek justice? The usual answers given, as we shall see, depend on one's position in relation to the matter at hand. Let us consider three very loosely stylized points of view and how they diverge and overlap: the value-maximizing welfare economist; the corporate counsel; and the human rights victim (often referred to as the rights-holder).

The Value-maximizing Welfare Economist

The welfare economist who gives priority to shareholder value begins by examining whether the impugned outcomes are correctly characterized as negative externalities (i.e., pollution, lower property values, habitat loss and so on) and, if so, the appropriate brake on the harm is thought to lie in state regulation. Here, the socially responsible corporation might be regarded as one that duly follows the rules of the game (including state

[4] I adopt the language of "cause or contribute" from the UN Guiding Principles on Business and Human Rights, *supra* note 1, Principle 17.

regulations and local ethical customs) while seeking to maximize profit.[5] By this familiar credo, overall social welfare is thought to increase as profit increases,[6] while those who might be left worse off (the human rights victims) are potentially compensated through redistributive tax and transfer policies as well as other compensation mechanisms, such as tort law.

The Corporate Counsel

The technically minded corporate counsel might opine that corporate responsibility and accountability are synonymous with positive legal liability. From this perspective, a legal entity's responsibility generally arises in three ways: by the demands of state regulation (including criminal, environmental and labour laws); by the expectations created in the duty of care in tort[7]; or by obligations that arise from the company's contracts. By this view, the question of whether a business is responsible for something or not can be resolved deductively (more or less). Where doubts remain, the conflicting parties might call upon courts or arbitrators to settle the matter. But, as we shall see, when it comes to human rights, focusing narrowly on avoiding liability misses the forest for the trees. In today's multinational enterprise, legal counsel plays a critical role in shaping the

[5] See generally Milton Friedman, "The Social Responsibility of Business is to Increase its Profits", *The New York Times Magazine* (13 September 1970) 32.
[6] See e.g. Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 3rd ed (Oxford: Oxford University Press, 2017) (the "most appropriate" interpretation of the shareholder value maximization norm reflects the view that "focusing principally on the maximization of shareholder returns is, in general, the best means by which corporate law can serve the broader goal of advancing overall social welfare" at 23).
[7] See John CP Goldberg, "Tort Law and Responsibility" in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014) (tort law is "a law of responsibility….It allows for persons to be held responsible (or accountable) for having wrongfully injured others" at 17).

organization's ethical culture, including its disposition toward the vexing question of human rights responsibility.[8]

The Human Rights Victim

The aggrieved human rights victim's perspective on corporate responsibility is much broader than either of those considered above. While the economist is concerned with valuing negative or positive externalities, one would be hard pressed to fix a market price for the injustice that the human rights victim is forced to bear.[9] For the victim, the matter of a corporation's liability is just one of many aspects of corporate responsibility. Pursuing justice, the victim may attempt to seek an injunction or constitutional ámparo to stop the offending activity altogether; failing that, the cause could be taken to the court of public opinion by organizing vigorous protests on the ground.[10] The problem here is that the human rights victim so often discovers that the search for the vindication of rights leads to a dead end — the age-old problem of limited "access to justice." At scale, we find that this common enigma is a global one. Together, many victims stand at the edge

[8] See e.g. Ben Heineman, "Implementing Human Rights in Global Business — High Performance with High Integrity" in Dorothée Baumann-Pauly & Justine Nolan, eds, *Business and Human Rights: From Principles to Practice* (London, UK: Routledge, 2016) 98. See also John F. Sherman III, *Rights Respecting Corporate Culture*, Shift Project, 2019.

[9] Human rights are "non-tradeable" goods. See Lewis A Kornhauser, "Wealth Maximization" in Peter Newman, ed, *The New Palgrave Dictionary of Economics and the Law*, 3rd ed (London, UK: Palgrave Macmillan, 1998) 679 ("many goods, such as environmental goods and rights to bodily integrity, do not trade on well-developed markets if they trade at all" at 680).

[10] See generally Malcolm Rogge, "Ecuador's Oil Region: Developing Community Legal Resources in a National Security Zone" (1997) 14 Third World Legal Stud 233 (describing community lawyering efforts within a growing social movement in Ecuador that is putting pressure on the government and transnational oil corporations to respect human rights and protect the environment); Malcolm Rogge, "How to Make Them Hear: Challenging International Oil Interests in Ecuador's Amazon Region" (1997) 16:3 Refuge 32 (describing how environmental and human rights organizations work with local communities to counter threats to human rights and the environment that are linked to the operations of national and transnational oil corporations).

of what some have come to call the "global governance gap."[11] A novel way to visualize how this "gap" represents the presence of law, rather than its absence, will be introduced below.

The Disjointed Relationship of Liability to Corporate Responsibility

Corporate liability and corporate responsibility are sometimes viewed synonymously, yet it is critical to understand the ways that they diverge. The separation is most apparent when differentiating the view within the corporation from the view of the wider world. As much as a firm's decision makers seek to grow value, they seek also to avoid liability. In the extremely rare instance where it is necessary to defend a multinational company against allegations of human rights violations in court, the lawyer will draw on a familiar line of defences, including the common law doctrine of forum non-conveniens (sending the case to what is regarded as the more appropriate court) and separate legal personality.[12] In the more proactive mode, a lawyer might advise corporate decision makers about how to operationalize a human rights policy across a firm's global operations. The proactive mode is concerned with both avoiding liability and growing

[11] See e.g. Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (London, UK: Routledge, 2014). *Research Paper* 04-07 (2003); Gagnon, Georgette, Audrey Macklin, and Penelope C. Simons. *Deconstructing engagement* University of Toronto, Public Law Research Paper 04-07 (2003). The term first appeared in John Ruggie's scholarly writing with reference to the UN Global Compact. John G Ruggie, "global_governance.net: The Global Compact as Learning Network" (2001) 7:4 Global Governance 371 at 377.

[12] See Ashton Phillips, "Transnational Business, the Right to Safe Working Conditions, and the Rana Plaza Building Collapse" in Jena Martin & Karen E Bravo, eds, *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge, UK: Cambridge University Press, 2016) (on "*forum non conveniens* as a hurdle to transnational tort claims" at 488); see also Rogge, "Towards Transnational Corporate Accountability", *supra* note 2.

value over the long run by reducing human rights risks to the business and generating goodwill. Yet this is no straightforward tick-the-box exercise. In describing efforts to implement a global human rights policy at a major extractive industry firm, Sybil Veenman, then general counsel of Barrick Gold, acknowledged: "The issues you face are unpredictable."[13] One of the reasons that some issues are unpredictable is that in the wider world (i.e., beyond the immediate concern of the corporate counsel or manager), corporate legal liability is just one aspect of the broader ethical and political demands for corporate responsibility and accountability. In this wider, expanded sense, the public's demand for redress is expressed in often unforeseeable ways.[14] Take, for example, the case of farmers who face irregular and potentially violent removal from their land to make way for a mining project. For the aggrieved human rights victims, the search for justice may demand that the government and the company abandon their plans to evict and resettle the entire village.[15] It might demand that the company respect the results of a community-led plebiscite over whether or not to permit mining in the region,[16] even while the government and the company contest the legality of the referendum itself.[17] For

[13] See Nien-hê Hsieh & Rebecca Henderson, "Putting the Guiding Principles into Action: Human Rights at Barrick Gold (A) and (B)" (2016) Harvard Business School Teaching Note 317-015 at 5.
[14] See Matthew Murphy & Jordi Vives, "Perceptions of Justice and the Human Rights Protect, Respect, and Remedy Framework" (2013) 116:4 J Business Ethics 781 (in their case study from Guatemala, the authors describe the "wide gulf" that separates the community members' perception of justice from that of the company, at 792).
[15] See e.g. Cecilia Jamasmie, "Community opposition forces Newmont to abandon Conga project in Peru" (18 April 2016), online: *Mining.com* <www.mining.com/community-opposition-forces-newmont-abandon-conga-project-peru/>.
[16] See Mariana Walter & Leire Urkidi, "Community mining consultations in Latin America (2002–2012): The contested emergence of a hybrid institution for participation" (2017) 84 Geoforum 265 (over a 10-year period, the authors tracked 68 community referenda).
[17] For example, a local judge in Ecuador suspended a pending municipal referendum on whether to prohibit mining; days later, the National Elections Council overruled the decision and the referendum was reinstated. See "Judge stops local mining referendum", *CuencaHighLife* (14 March 2019); "Mining referendum reinstated in Girón", *CuencaHighLife* (17 March 2019).

the lawyers and managers concerned with a firm's corporate responsibility in the face of these calls for justice, fixating on legal liability is myopic. Many business leaders themselves are critical of such shortsightedness. For instance, Newmont Mining Corporation Chief Executive Officer Gary J. Goldberg warns against taking overly legalistic approaches in addressing conflicts with communities. "Don't depend on the law," he counsels, "…get down and listen to the people and understand what their concerns are — that's critical."[18] The business decision maker's concern with liability is primarily about minimizing roughly estimable legal risks to the business. The wider world is concerned about natural persons taking responsibility, and about people being accountable for the propriety and consequences of judgments made and decisions taken.

As seen from within the corporation, responsibility has both internally oriented and externally oriented aspects. Traditionally, corporate law is concerned with regulating internally oriented responsibility. By imposing a fiduciary duty on natural persons who hold positions of power within the business organization, corporate law seeks to inculcate within them the values of good faith and loyalty in their dealings with other corporate constituents.[19] These duties are not owed at all to persons who have no formal connection to the firm, such as people who live in the surrounding community who may be impacted negatively or positively by its activities.[20] In showing their fidelity to the corporation and

[18] Gary J Goldberg, speech delivered at the UN Forum on Business and Human Rights, Opening Plenary (New York, 26 November 2018).
[19] See generally David Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law* (Cambridge, UK: Cambridge University Press, 2018).
[20] It remains a matter of debate whether or not the corporate fiduciary duty ought to be extended to allow fiduciaries to consider the interests of outside "constituencies." On the rise and fall of anti-takeover "constituency statutes" in the United States, see Nathan E Standley, "Lessons learned from the capitulation of the constituency statute" (2011) 4 Elon L Rev 209. In the United Kingdom, under the reformed

its shareholders, corporate decision makers may assume a highly adversarial stance toward anyone who makes claims about the company's allegedly harmful external impacts. This tendency was cited by John Sherman, former deputy general counsel of National Grid and legal adviser to the United Nations Special Representative on Business and Human Rights John Ruggie, who regretted that, all too often, "[i]n community conflict, lawyers show up and communicate to the other side that they regard the community as a legal liability."[21]

Quite apart from the internally oriented demands of fidelity that are placed on natural persons within the corporation, tort law creates externally oriented duties to people outside the corporation. These externally oriented duties fall on both legal and natural persons, although in practice, liability tends to fall on the corporation itself. Every corporation owes a duty of care to proximate third parties where certain harms are foreseeable.[22] To avoid liability, it is not enough for companies to comply with regulations; decision makers must also take steps to foresee potential risks of harm to third parties, and they must take reasonable steps to mitigate or prevent such risks to people.[23] Tort law has shown some promise for mending the accountability gaps

Companies Act, directors may "have regard" to other constituencies, including "the community and the environment," insofar as doing so promotes the "success of the company." *Companies Act 2006* (UK), c 46, s 172(1) (duty to promote the success of the company).

[21] John F. Sherman III, remarks at the Inaugural Business and Human Rights Symposium panel discussion on "Developments in Business and Human Rights Governance" (Harvard Law School, 13 April 2018) (notes on file with the author).

[22] See e.g. *Donoghue v Stevenson* [1932] UKHL 100.

[23] In technical literature on human rights risk management, the uncertainty of outcomes for "rights holders" is given the term "risk to people." See e.g. Deanna Kemp, Sandy Worden & John R Owen, "Differentiated social risk: Rebound dynamics and sustainability performance in mining" (2016) 50 Resources Policy 19 at 24.

mentioned earlier, but it has serious limitations, especially with regard to multinational enterprises. Such limitations will be considered further below.

So how do the demands of internally oriented fiduciary duties interact with the externally oriented demands of the duty of care in tort law?[24] The nature of such interactions depends, in part, on how the fiduciary duty of loyalty is construed. On this point, opinions often collide between the proponents of shareholder and stakeholder capitalism.[25] Consider the perspective of the hypothetical value-maximizing economist. In a strict shareholder-centric interpretation of the duty of loyalty, characterized by some as calling for "shareholder primacy" or "value maximization," management's role is to take steps to prevent or mitigate harm to third parties, insofar as the value of the company (and, by extension, shareholder value) may be adversely impacted by rebound effects. By this view, the foreseeable risk of harm to people outside the corporation is regarded instrumentally inasmuch as it may converge with a risk to the business.[26] Such strictly instrumentalist interpretations create a moral hazard — after all, preventing harm to third parties is not the sole means by which management can reduce material risk.[27] The

[24] The duty of care in tort law is distinct from the corporate duty of care; however, they have common origins. See Robert J Rhee, "The Tort Foundation of Duty of Care and Business Judgment" (2012) 88 Notre Dame L Rev 1139.

[25] On debates over the corporate fiduciary duty as construed within the "property" or "social entity" theory of the corporation, see William T Allen, "Our Schizophrenic Conception of the Business Corporation" (1992) 14 Cardozo L Rev 281; see also Lynn A Stout, "Why we should stop teaching Dodge v. Ford" (2008) 3 Va L & Bus Rev 163. I provide a detailed account of the shareholder versus stakeholder debate in Malcolm Rogge, *Bringing Corporate Governance Down-to-Earth, from Culmination Outcomes to Comprehensive Outcomes in Shareholder and Stakeholder Capitalism,* Corporate Responsibility Initiative Working Paper No. 72, April 2020.

[26] For an insightful discussion about such convergence, see John F Sherman III & Amy K Lehr, "Human Rights Due Diligence: Is It Too Risky?" (2010) CSR Journal.

[27] See Björn Fasterling, "Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk" (2017) 2:2 Business & Human Rights J 225 (suggesting that companies that "excel in social risk management could — *in extremis* — increase risks to right-holders" at 243).

company might choose to move operations into jurisdictions where there is less likelihood of facing a tort claim.[28] Litigation avoidance is never likely to be the sole reason for moving operations; nonetheless, in some sectors, concerns over liability are seen to play an important role.[29] The first point to be taken here is that the broad notion of corporate responsibility has asymmetrical internal and external dimensions,[30] and that these dimensions are, at times, in tension with one another. The second point is that the corporate fiduciary duty concerns solely the responsibility of natural persons, while the duty of care in tort law concerns the responsibility of both legal persons (corporations) and natural ones.

The Global Governance Gap as a Constitutive Element of the Legal Order

Consider now the very significant limitations of tort law for addressing today's much lamented global governance gap. The history of transnational tort litigation over human rights violations involving parent companies in Canada, the Netherlands, the United Kingdom and the United States has been well documented by others and will not be

[28] See Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Oxford University Press, 2007) (arguing that the multinational enterprise is structured to minimize "regulatory burdens" and "maximize operational flexibility" at 52).
[29] As Henry Hansmann and Reinier Kraakman noted almost two decades ago: "Already, strong empirical evidence indicates that increasing exposure to tort liability has led to the widespread reorganization of business firms to exploit limited liability to evade damage claims." Henry Hansmann & Reinier Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts" (1991) Yale LJ 1879 at 1881.
[30] Using similar language, Tara Van Ho calls for an "externalised locus" (i.e., a focus on the interests of people who are external to the corporation) in human rights due diligence. Tara Van Ho, "'Due Diligence' in 'Transitional Justice States': An Obligation for Greater Transparency?" in Jernej Letnar Cernic & Tara Van Ho, eds, *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Wolf Legal Publishers, 2013) at 232.

repeated here.[31] There have been some qualified successes for human rights victims, and yet a sober assessment of the global jurisprudence shows that transnational tort lawsuits are extremely difficult to bring to a satisfactory conclusion and take a heavy toll on the victims and their advocates. Significant advances are often followed by retreats.[32] Long odds aside, the victim may nonetheless decide to bring a lawsuit against a parent company in the home state as part of a wider campaign for corporate accountability.[33] The evident shortcomings of tort law as a human rights remedy provide further motivation for the wider world's call for corporate responsibility to extend beyond what the law actually requires. And yet, from the perspective of our hypothetical corporate counsel, who considers that value seeking goes hand in hand with liability avoidance, the overwhelming difficulties faced by the tort claimants might be regarded as evidence of legal "success" for the enterprises involved.

[31] For excellent surveys of transnational tort cases and the great challenges that litigants face, see Gwynne Skinner, Robert McCorquodale & Oliver De Schutter (with case studies by Andie Lambe), *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (Brussels & London, UK: International Corporate Accountability Roundtable, CORE & European Coalition for Corporate Justice, 2013); Michael D Goldhaber, "Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard" (2013) 3 UC Irvine L Rev 127; Francois Larocque, "Recent Developments in Transnational Human Rights Litigation: A Postscript to Torture as Tort" (2008) 46:3 Osgoode Hall LJ 6; Judith Schrempf-Stirling & Florian Wettstein, "Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies" 145:3 J Business Ethics 545; Audrey Mocle & Yousuf Aftab, "Business and Human Rights as Law: Towards Justiciability of Rights, Involvement and Remedy" (2019) LexisNexus Canada 19. A substantial database of current cases is produced by the Business and Human Rights Resource Centre.

[32] In a February 2020 decision widely heralded as a significant advance, the Supreme Court of Canada held that customary international law's prohibitions against slavery, forced labour, crimes against humanity and cruel, inhuman and degrading treatment are automatically adopted into Canadian law and "potentially apply" to the defendant corporation. See *Nevsun Resources Ltd v Araya*, 2020 SCC 5, at para 116 (). Nonetheless, the court's decision pertained to a preliminary motion only, leaving much uncertainty for all parties as the various points of law will be worked out in continuing litigation.

[33] For two notable cases from Canada, see *Choc v Hudbay Minerals Inc* 2013 ONSC 1414 [*Choc v Hudbay*] (allegations of violent attacks by company security); *Garcia v Tahoe Resources Inc*, 2017 BCCA 39 (settled in 2019) (allegations of violent repression of protesters by company security).

For the human rights victims and their advocates, the formidable barriers to obtaining remedy are seen as prime instances of the global governance gap; for defending enterprises, such barriers represent the legal order functioning precisely as it should. Using the basic building blocks of corporate law to shield one related entity from another, the corporation, with the help of its lawyers, is able to erect robust architectural defences against liability.[34] The use of such defensive structures is scaled across the global corporate system.[35] The champions of today's corporate law regard its "entity shielding" function as economically and socially efficient.[36] Its critics argue that existing law increasingly gives licence to corporate irresponsibility.[37] The two positions seem irreconcilable. Yet there is another way to depict this impasse that accommodates both points of view. This picture is drawn by the impartial spectator[38] who characterizes the global governance gap as the void in a toroid (for example, the hole in a lifebuoy), rather than a missing piece in a puzzle.

[34] See Penelope Simons, *International law's invisible hand and the future of corporate accountability for violations of human rights*, Journal of Human Rights and the Environment 3.1 (2012): 5-43 ("Under domestic corporate/company laws, corporate actors may legitimately use a subsidiary in order to shelter the parent company and other members of a corporate group from activities that may attract legal liability" at 32). See also Simons and Macklin, *supra* note 11, at 8.

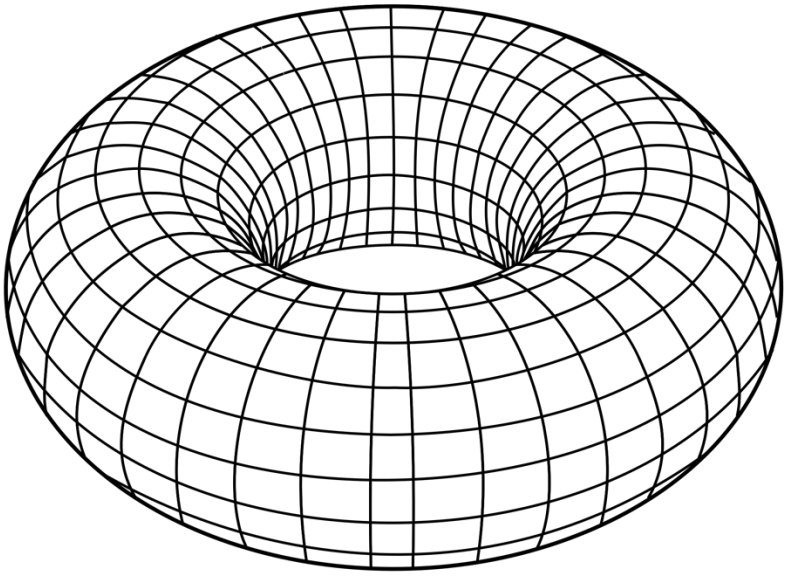
[35] In 1932, Adolf Berle and Gardiner Means observed the emergence of a "corporate system" in America: "The corporation has, in fact, become both a method of property tenure and a *means of organizing economic life*. Grown to tremendous proportions, there may be said to have evolved a 'corporate system' — as there was once a feudal system — which has attracted to itself a combination of attributes and powers, and has attained a degree of prominence entitling it to be dealt with as a major social institution." Adolf A Berle & Gardiner C Means, *The Modern Corporation and Private Property* (New York: MacMillan, 1932) at 10.

[36] On the essential role of "entity shielding" in corporate law, see Henry Hansmann, Reinier Kraakman & Richard Squire, "Law and the Rise of the Firm" (2005) 119:5 Harv L Rev 1333 at 1335; see also Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2000) 89 Geo LJ 439 (arguing that a global convergence toward the efficient shareholder primacy model is observable and will persist).

[37] On how corporate law rules are increasingly used for liability avoidance, see Lynn M LoPucki, "The Death of Liability" (1996) 106:1 Yale LJ 1.

[38] I borrow the term "impartial spectator" from Adam Smith's *Theory of Moral Sentiments* (1759).

Figure 1: The Governance "Gap"



Source: YassineMrabet (Wikimedia Commons, CC BY-SA).

Figure 1: The unbroken lines of the grid trace the contours of a coherent, intact and predictable "Weberian" logical rational legal order. The global governance gap is shown as the void that runs through the centre of the lifebuoy. The gap is not a missing piece in the grid; rather, it is a constitutive element of the legal order itself. The global governance gap is instantiated by the presence of law rather than its absence.

In this characterization, the unbroken grid that runs along the toroidal surface of the lifebuoy represents the seamless and rational legal order: limited liability, separate legal personality and the doctrine of forum non-conveniens are just a few of its well-oiled components.[39] For the lawyer who represents a multinational enterprise, the grid represents a coherent, intact and predictable system of law that may be used creatively to

[39] On Max Weber's (much contested) notion of a logical rational legal order as complete system of law, see Duncan Kennedy, "The Disenchantment of Logically Formal Legal Rationality, or: Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought" (2003) 55:5 Hastings LJ 1031.

shield the parent entity from its subsidiary's liabilities, but not to commit a fraud or merely as a sham.[40] This reasonably stable and predictable legal order has been replicated around the globe to undergird the development of market economies. The system lends distinct advantages and disadvantages to different actors depending on where they are situated: the corporations and their shareholders are firmly fixed to the toroid's grid, while the human rights victims drift in the void that runs through it. Politically speaking, reforming the legal order is not so easily achieved, if it means creating more litigation risk and legal uncertainty for businesses and shareholders. This is because truly transformative initiatives will be met with resistance from those players who find advantage in maintaining the status quo.[41] Recognizing this challenge does not mean that efforts to reshape the legal order so that human rights victims are brought out of the void should be abandoned.[42] Inventive and bold proposals and actions for transformation are needed today. The purpose of this chapter is not to spell out a defined program for reform; rather, it is to contribute to our growing understanding of the transnational, global, structural and systemic character of the barriers that human rights victims face.[43]

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[40] LoPucki, *supra* note 39, argues that such efforts have led to the "death of liability."

[41] For example, Simons discusses how lobbyists succeeded in thwarting legal reform efforts in Canada aimed at increasing corporate accountability for extraterritorial harms. See Simons, *supra* note 34, at 31. See also Simons and Macklin, *supra* note 11, at 260-270 (on failed legislative initiatives in Canada, U.S., Australia and U.K.).

[42] One proposed reform is that courts recognize "a common law duty of care of business to exercise human rights due diligence." See Douglass Cassel, "Outlining the case for a common law duty of care of business to exercise human rights due diligence" (2016) 1:2 Business & Human Rights J 179 (in presenting his case for the responsibility to conduct human rights due diligence, the author argues that "parent companies should exercise [human rights] due diligence with regard to all entities in the 'enterprise' or 'enterprise group,' including their subsidiaries" at 186).

[43] In a similar vein, Simons draws on Third World Approaches to International Law (TWAIL) and feminist critiques of international law to expose the 'structural' aspect of the global governance gap, concluding that, "…one of the most significant impediments to corporate human rights accountability is the structure of the international legal system itself." *Supra* note 34, at 11-12. On 'systemic' approaches to addressing the governance gap, see Simons and Macklin, *supra* note 11, at 13-15.

The following section considers several of the corporate law aspects of such barriers in more detail.

Corporate Responsibility in a Poly-corporate System

Today's corporate system is comprised of vast constellations of separately incorporated entities that are organized into poly-corporate groups.[44] The answer to the question of whether corporate responsibility vests in natural or legal persons within this complex system is muddled by the coexistence of parent control and subsidiary autonomy with respect to each of the legally separate corporate entities within a corporate group. What does it mean to say that control and autonomy coexist in related entities? In their 1972 study on multinational enterprises, John Stopford and L. T. Wells concluded that the need "for control over decisions in foreign subsidiaries is the common element that has led certain kinds of firms to prefer to conduct their overseas operations through wholly owned entities."[45] Typically, the parent company in the home country (the domicile of the parent company) will be shielded from liability by several layers of intermediary subsidiaries that are domiciled in yet another jurisdiction (often in tax havens such as Bermuda or the Cayman Islands). The precise structures vary almost infintely in their details.[46] Each limited liability company in the group plays a function within the larger

[44] José Engrácia Antunes distinguishes today's poly-corporate group enterprises from the mono-corporate entities that existed prior to legal reforms of the late nineteenth century. José Engrácia Antunes, *Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law: An International and Comparative Perspective* (New York: Springer, 1994).
[45] John M Stopford & LT Wells Jr, *Managing the Multinational Enterprise: Organization of the Firm and Ownership of the Subsidiary* (New York: Basic Books, 1972) at 123.
[46] For example, in 2007, the Boeing Company had 282 subsidiaries incorporated in dozens of jurisdictions, including the British West Indies, China, Delaware, Manitoba and the Netherlands. In 2009, Deutsche Bank

whole. To the outsider, it may seem paradoxical that the law treats the subsidiary corporations within the group as autonomous entities, but for corporate counsel and management, this picture is very natural. The parent company exerts central control over the enterprise as an economic entity, while the subsidiaries retain legal and operational autonomy within the bounds of the policies and strategies that are set from above. While every firm's structure is unique, some degree of central control is essential for fulfilling its economic function as a vehicle for investment. In a multinational enterprise, the economic gain structure must be protected against threats that occur within and across national jurisdictions; the firm addresses such problems through its enterprise risk management strategy.[47] The troubling effects of the wholly controlled yet autonomous subsidiary come to light when people entirely outside the corporation are harmed by one or more of the entities within the corporate group. This is because a degree of legal autonomy may be given to each subsidiary entity by the controlling parent — a strategic and defensive separation of powers and liabilities among legal persons occurs. The outsiders who are harmed soon find that the subsidiary's seemingly paradoxical wholly

AG operated in 56 countries, with 1,954 subsidiaries. In 2011, Newmont Mining Corporation had 206 subsidiaries incorporated in more than 30 jurisdictions, including Bermuda, Delaware, Guinea, Honduras, Jersey, Papua New Guinea and Peru.

[47] See Latin American Companies Circle, *Corporate Governance Recommendations for Company Groups— Based on Experiences from the Latin American Companies Circle* (Latin American Companies Circle, with the Organisation for Economic Co-operation and Development, IFC World Bank & Swiss Confederation, 2014) (containing the following recommendations regarding group-wide (enterprise) risk management: "Based on best practice, for a conglomerate-wide risk oversight a Board of Directors of a holding company should at least (*i*) conduct ongoing mapping and monitoring of risks across all group companies; (*ii*) establish risk appetite for the entire corporate group; and (*iii*) ensure an effective risk management system has been implemented across the conglomerate. Should a Board deem it convenient, it could delegate these functions in a Board-level risk management committee" at 6).

controlled autonomy is just one more cryptogram to be solved in their quest for corporate responsibility.[48]

Today, the human rights victims who clamour for corporate accountability strive to hold the multinational enterprise responsible as a unified whole, as a unified brand. Facing such clamour, firms frequently use the defensive strategy of keeping the conflict geographically and legally local. In practice, this means that decision makers in the parent company and in the intermediary subsidiaries avoid becoming directly involved in the local dramas as they unfold — they are counselled to focus on policy matters while delegating decision making about operational matters to managers who are working "on the ground."[49] Such delegation serves to maintain the formal separateness of the many related legal entities that comprise the corporate group. The advantage in keeping a dispute legally local is one among many reasons why the parent grants the wholly owned subsidiary such autonomy. But there may be unintended consequences to this formalistic division of labour in decision making. The victims may begin to see the enterprise as an organization that thrives in contradiction. Unimpressed by the local subsidiary's status as a separate legal entity, the outsiders demand accountability from the parent company and its shareholders, regardless of where they are based. The formalities of legal separateness have little salience for the human rights victim who demands ethical and political

[48] On the issue of control and autonomy with regard to harms alleged to have been caused by Royal Dutch Shell's subsidiaries operating in Nigeria, see Sheldon Leader et al, "Corporate Liability in a New Setting: Shell & the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta" (2011) Essex Business and Human Rights Project, University of Essex.

[49] See Martin Lipton, Sabastian V Niles & Marshall L Miller, "Risk Management and the Board of Directors", Harvard Law School Forum on Corporate Governance (28 July 2015).

accountability from the natural person or persons whom they regard as responsible for the harm.

So, what changed? How is corporate responsibility in today's poly-corporate system different from the way it used to be? The difference lies in the changed relationship of the legal person — the corporate entity — to the natural persons who were traditionally responsible for it. The storied joint-stock charter companies of the pre-modern era were mono-corporate entities (the East India Company and the Hudson's Bay Company were sole entities); in contrast, today's multinational enterprises are poly-corporate structures.[50] The modern poly-corporate structures were introduced in the late 1800s when the State of New Jersey became the first jurisdiction in the world to allow a corporation to own shares in another corporation.[51] In short order, "parent" corporations became the sole or controlling shareholders of their "daughter" and "granddaughter" corporations (what we now refer to as subsidiaries). New Jersey lawyers set out to devise complex "holding company" structures. This legal innovation was quickly adopted in neighbouring US states and eventually worldwide, giving rise to the multinational enterprises that are now ubiquitous.

The shift from the mono-corporate system to the poly-corporate system transformed the nature of the shareholder's governance responsibility. In the pre-modern era, the flesh-and-blood shareholder (a natural person) was given the governance responsibility to cast

[50] See Antunes, *supra* note 46.
[51] See Ralph Nader, Mark J Green & Joel Seligman, *Taming the Giant Corporation* (New York: Norton, 2007) at 43–46.

votes in fundamental corporate decisions, such as electing board members, approving a merger, or changing the corporation's bylaws. In the poly-corporate regime, share voting was transformed into a function that could be carried out by the corporation itself (by the legal person). This, of course, was a highly formalistic innovation. Practically speaking, some natural person had to cause the corporation to cast its votes, so the board of directors took on this role. In today's poly-corporate groups, each operating and intermediary subsidiary corporation might have a sole board member who acts as the entity's legal representative. It is not uncommon that the sole board member of each intermediary subsidiary in a group is the same natural person, who, as it happens, also sits on the board of the ultimate parent company.[52] To maintain the legal separateness of the many subsidiary companies that are combined in this manner, it is essential that administrative formalities such as voting at annual meetings be attended to assiduously.[53] The traditionally human responsibility to vote shares is exercised in poly-corporate groups by what are essentially a series of clerical manoeuvres that cause the many layers of subsidiaries to act in predictable ways.[54] Such manoeuvres are regarded as perfectly normal by the economist, the general counsel and management. But for the human rights victim, a very troubling aspect arises from this regime: while the victim may have a clear sense of the person who ought to be held responsible for a wrongful act, legal liability for that wrongful act may be transferred or assigned through corporate reorganization, mergers and acquisitions. Moreover, by such transactions, the ultimate responsibility for

[52] In some jurisdictions, this individual is known as the subsidiary's "administrator."
[53] On this requirement in Delaware law, see *Sea-Land Services, Inc v The Pepper Source*, 941 F (2d) 519 (7th Cir 1911).
[54] We might call this a form of digitalized responsibility, in contrast to the traditionally analogue function of voting shares by raising one's hand. By clerical manoeuvres, the digitalized vote propagates through the system of separate entities within a corporate group.

governing the firm is shifted from one group of shareholders to another. In poly-corporate groups, these shareholders might be legal entities rather than natural persons. From an ethical point of view, such transfers of responsibility might well be regarded as arbitrary.

When it comes to governance responsibility, a world of difference lies between the human share-voter and the share-voting corporate entity. According to Adolf Berle and Gardiner Means, "The typical business unit of the 19th century…was owned by individuals or small groups; was managed by them or their appointees; and was, in the main, limited by the personal wealth of the individuals in control."[55] In becoming shareholders, these individuals took on the personal responsibility for governing the corporation; they could be held ethically accountable, albeit not legally accountable, for any harms caused by the corporation they governed.[56] While their liability for the corporation's debts was limited, they were nonetheless accountable in the sense that they were participants in the local community and in political life.[57] This marriage of personal and corporate responsibility was short lived, as the corporation underwent a dramatic

[55] See Berle & Means, *supra* note 37 at 2. For the English history of the same period, see Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844* (Cambridge, UK: Cambridge University Press, 2000). See also Faith Stevelman, "Global Finance, Multinationals and Human Rights: With Commentary on Backer's Critique of the 2008 Report by John Ruggie" (2011) 9:1 Santa Clara J Intl L 101 ("The hydra-like structure of holding companies owning subsidiaries, and subsidiaries of subsidiaries-creating compounding layers of bureaucracy and plausible deniability was an organizational impossibility in the first few decades of the twentieth century" at 129).

[56] I refer to civil matters rather than criminal ones, which may attract personal liability. By drawing this distinction between old and new, I do not mean to imply that the sole-entity corporations of the eighteenth and nineteenth centuries were inherently more virtuous than businesses today. They were not.

[57] Berle and Means give the example of the "first important manufacturing enterprise" in the United States that was organized as a corporation: the Boston Manufacturing Company. This company was incorporated in 1813 with 11 shareholders. The number of stockholders increased to 76 by 1830 and to 123 by 1850. In 1842, stock in the Merrimack Corporation (also in Massachusetts), was held by 390 people, including 80 administrators or trustees, 68 females, 52 retired businessmen, 46 merchants, 45 manufacturers and mechanics, 40 clerks, students and unspecified, 23 lawyers, 18 physicians, 15 farmers and three institutions. See Berle & Means, *supra* note 37 at 11–12.

transformation in scale beginning in the mid-nineteenth century. As the number of shareholders grew into the hundreds and then thousands, any sense of personal responsibility and accountability for the corporation's activities was diluted. In many of today's multinational corporate groups, the number of shareholders has expanded by orders of magnitude.

In both public and privately held corporate groups today, one finds multiple intermediary parent-subsidiary relationships — each parent takes on governance responsibility for its subsidiary companies, and so on down the chain. The share-voting parent or intermediary corporation can, in turn, be bought and sold, merged into or out of another firm, or transferred in an almost infinite number of ways. By such transactions, the governance responsibility for a single corporate entity can be shifted in almost any direction. Responsibility *qua* liability can also be transferred or assigned as needed. The point to be taken here is that in a corporation many aspects of responsibility are depersonalized; they rest in the abstract legal entity, rather than in the specific natural persons who make specific decisions on its behalf. Again, this is all very natural from the corporate perspective. In deals involving "sophisticated" parties, be they lenders, suppliers, clients, investors or joint venture partners, shifting responsibility in this way poses little worry. The contracting parties will ensure *ex ante* that appropriate pathways to responsibility *qua* liability are present; such efforts fall within their governance responsibility to conduct due diligence. In a merger or acquisition, the parties to the transaction may stipulate which entity inherits the liability for pending litigation or other specified risk, such as latent environmental liability. By such rules, it is possible that an acquiring firm

may find itself defending a contentious and politically damaging lawsuit for actions that were taken by the predecessor company.[58] While it's perfectly normal to transfer governance responsibility and responsibility *qua* liability among corporate entities this way, the decision maker's ethical responsibility for the choices they make is not normally regarded as transferable or assignable in this sense.[59] One has to live with the decisions one makes, even if one is not, strictly speaking, liable for them.

For consenting parties in a corporate transaction, attributing responsibility *qua* liability is a technical matter; it is a problem that can be solved deductively (more or less). The situation is very different for the non-consenting human rights victim who stands outside such transactions altogether. From the victim's perspective, the attribution of corporate responsibility is not a "merely technical" matter.[60] When it comes to the firm's responsibility to the outside world for human rights violations, the ethical and political accountability of decision makers cannot be avoided by technical legal fixes that aim to shift responsibility from one entity to another.

[58] In *Choc v Hudbay* (*supra* note 35), the allegations brought by the plaintiffs refer to the harmful acts of a predecessor company, Skye Resources. After the lawsuit began, the defendant, Hudbay Minerals Inc., sold the mine site in question (the Fenix mine) to Solway Investment Group, a Swiss company, while retaining liability in the lawsuit.

[59] The point is made clear by analogizing to criminal law — the criminal law does not permit an accused person to transfer potential criminal liability or a conviction to another person.

[60] I adapt the term "merely technical" from Duncan Kennedy's analysis of the "politics of contract technicality." Duncan Kennedy, "The Political Stakes in 'Merely Technical' Issues of Contract Law" (2002) 10 Eur R Priv L 7 at 7.

Conclusion

This brings us back to the original question: what natural person or legal entity in a corporate group ought to be held responsible for human rights violations? The foregoing analysis suggests that the answer depends very much on one's positional point of view: the economist, manager and general counsel will tend to vest corporate responsibility in the legal entity itself, while the human rights victim will tend to regard natural persons who control such entities as ultimately responsible for the injuries they endure. The translation of the demands of responsibility from one positional point of view to the other is not so straightforward; indeed, we might ask whether it is even possible.[61]

What does all of this mean in practice? One hypothesis that can be drawn from the foregoing analysis is that the relative ease of shifting both responsibility *qua* liability and governance responsibility from one person (legal or natural) to another comprises an aggravating factor when human rights are at stake in localized conflicts. For instance, such aggravation may occur when a business that is thought to be responsible for causing or contributing to some human rights harm suddenly changes hands. In a multinational enterprise, the decision to sell is likely made by the parent company or intermediary company, which might be based in another country. For the companies involved, this is an entirely normal business transaction. Yet here the enterprise might appear to the human rights-holder as double-faced. How so? At the same time that the legally separate

[61] On "regime collisions" and the fragmentation of global law, see Andreas Fischer-Lescano & Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" (2004) 25:4 Mich J Intl L 999.

parent company disavows external responsibility (*qua* liability) for any harms that are allegedly caused by the local subsidiary's activities, it fully embraces the internal governance responsibility to direct and control the sale of that subsidiary. This seemingly paradoxical stance arises from the coexistence of control and autonomy discussed earlier. For the human rights victim, the situation may give rise to great uncertainty and serious concern about being left worse off and without any remedy. After all, the acquiring firm might have a less generous view of its social responsibility; it may have little regard for the "corporate responsibility to respect human rights," or for the requirement to conduct human rights due diligence under the UN Guiding Principles on Business and Human Rights.[62] Rightly or wrongly, the human rights-holders may interpret such actions as calculated avoidance of corporate responsibility.

Consider another example: in the course of a delicate and lengthy negotiation between community representatives and mining company representatives, the company involved is well within its legal right to sell its interest in the project without consulting the affected community.[63] Needless to say, we can see how community trust is difficult to earn when, without notice, the foreign parent company simply sells the project and exits the problem altogether. For this reason, some community representatives might refuse to engage in dialogue with the company at all, preferring instead to meet with high

[62] In its 2019 report, the Corporate Human Rights Benchmark found it "particularly alarming" that "nearly half of the companies assessed (49%) score 0 across all indicators related to the process of human rights due diligence." Corporate Human Rights Benchmark, "Key Findings, 2019", online: <corporatebenchmark.org>.

[63] For example, in the middle of a long-standing company-community conflict in Guatemala between Xinka indigenous people and Tahoe Minerals (a Canadian mining company), the parent company sold the mine to another firm, Pan American Silver. See Justice and Corporate Accountability Project, "Request to Investigate Failure to Disclose Material Information", Osgoode Hall Law School (3 January 2019).

government officials — after all, the state is unable to transfer or assign its political responsibility to some other party.[64] At the local level, the rights-holders might be told to take their grievances to a "communities team" or a corporate social responsibility (CSR) committee that operates out of the local subsidiary.[65] But determined local leaders may not be satisfied by these low-level contacts. And this might help to explain why community representatives from host countries such as Ecuador, Guatemala and Papua New Guinea have made the long journey to shareholder meetings in other countries. They travel abroad to demand corporate accountability from the very natural persons they believe are ultimately responsible for the abuses on the ground.

Today's globalized poly-corporate law makes the human rights victim's quest for corporate responsibility exceedingly difficult. This chapter has argued that the global governance "gap" is not a missing piece in the puzzle, but a constitutive element of the legal order itself. Just how to neutralize this detrimental feature of the legal order is a matter of vigorous ongoing debate between those who call for an overarching international treaty on human rights and business,[66] and those who push for greater "policy coherence" through the implementation of the UN Guiding Principles on

[64] For example, in the decades-long company-community conflict that was the subject of the *Copper Mesa Mining Corp v Ecuador* investment arbitration case (PCA 2012-2, UNCITRAL), many community leaders refused to dialogue directly with the Ecuadorean mining exploration company (a local subsidiary held by a Canadian parent), demanding instead to speak with government officials.

[65] It should be noted that a company's local-level CSR *operations* might be transferable to another firm in similar fashion. The role that freely transferable CSR operations may play in aggravating or potentially alleviating company-community conflicts deserves further scrutiny.

[66] See Human Rights Council, Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG), *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, OEIGWG Chairmanship Revised Draft (16 July 2019).

Business and Human Rights by governments and businesses alike.[67] It is far beyond the scope of this chapter to state exactly how to resolve this ongoing debate. Its purpose has been to clarify how the global and transnational dimension of corporate responsibility stands in relation to the legal accountability void that is constitutive of the transnational legal order. Today, corporate responsibility, as the ethical responsibility of flesh-and-blood decision makers, runs all the way from the lowest-level subsidiary to the apex of the multinational corporate group. When all is said and done, it implicates the very people who assert a legal claim to the residual value generated by the enterprise, the flesh-and-blood shareholders and the ultimate investors.

[67] "Access to Remedy" comprises the third pillar of the UN Guiding Principles on Business and Human Rights (*supra* note 1, Principles 25–31).