**IGWG Oral Submission 2: The Nature of Corporate Obligations**

A company policy provides that it has a right to gain access to all information that flows through the laptops it provides to employees or its computer network. The company reasons that the laptops and network are its property and, moreover, the company feels entitled to ensure its network is not utilized for illegal purposes. Employees argue that this policy is extremely intrusive and violates their right to privacy. Does the company’s behavior violate the fundamental rights of the employees?

I start with this example as it provides a real-life case that illustrates the complexity of determining corporate obligations in relation to fundamental rights. Yesterday, I argued that there are good reasons for moving beyond a paradigm that focuses exclusively on the obligations of states in international law. However, if a treaty is to recognize that corporations have obligations, how are we to determine what those obligations are? And specifically, what kind of provisions should a treaty include in that regard? How do we address countervailing interests in determining corporate obligations? And do corporations only have an obligation to avoid harming rights (a duty to respect) or also duties to protect and fulfil fundamental rights? These questions, of course, inform the more specific legal rules that will develop in relation to civil, administrative and criminal liability and hence I focus upon them.

In addressing this question, it is important to recognise that what is being sought is not a full specification in the treaty of the obligations of corporations in relation to every specific human right.[[1]](#footnote-1) Such a goal would be impossible to achieve within a framework instrument such as a treaty. Instead, the goal for the relevant treaty provision should be to provide an analytical framework that provides some guidance as to how these obligations can be determined in a particular context. Concrete obligations can later be specified in more detail by treaty bodies or domestic courts on a case by case basis.

Indeed, I consider this issue one of the important arguments for a treaty in the first place: there is significant uncertainty surrounding the nature and content of corporate obligations and the creation of a provision in a treaty together with mechanisms for the interpretation thereof (through General Comments, for instance) will be a method of clarifying these obligations and establishing common universal standards as has occurred in relation to state obligations in other treaties. My presentation is based on a chapter in a forthcoming book edited with Surya Deva which invites leading academics from around the world to consider the contours of a new treaty. The book will be published by Cambridge University Press in the middle of next year. A side event run by the Centre for Human Rights, University of Pretoria, tomorrow during lunch will explore in more detail my work and that of others in the book.[[2]](#footnote-2) In this presentation, I will present one approach to addressing this vital question which I term a ‘constitutional law model’.

An analogue of the debate being conducted at the international level has occurred in the realm of domestic constitutional law where, in the drafting of recent constitutions, the question has arisen as to whether and how to impose obligations upon non-state actors. South Africa’s Constitution, for instance, includes a provision which envisages the direct application of constitutional rights to private bodies. This provision identifies two criteria for determining the obligations of private actors: the nature of the right and the nature of any duty imposed by the right. I will focus mostly on the former issue in this presentation and address the latter issue either in question time or at tomorrow’s side event.

The Constitutional Court of South Africa has outlined three factors which are of importance in determining whether the nature of the rights render them applicable to private parties. In a leading case (*Khumalo v Holomisa*), the Constitutional Court was faced with a defamation claim between two sets of private parties (one of which was a major media publishing house which claimed that a leading politician was a robber): it was thus required to consider whether the right to freedom of expression could be applied directly between two private parties. First, it mentioned that a court needs to consider ‘the intensity of the right’.[[3]](#footnote-3) This factor would seem to require an understanding of the right’s importance within the wider constitutional order as well as the reasons lying behind its protection. Second, the court considers the potential invasion of the right by persons other than the state. This seems to place the impact of a corporation on a human right squarely in focus. Finally, the court considered the nature of the parties before it and whether the right has a particular significance in relation to their role within the broader society. This factor thus involves what may be termed ‘agent-relative’ considerations and recognizes that obligations may vary with particular agents and their nature. [[4]](#footnote-4)

All these elements seem to be normatively relevant and provide an attractive rubric for determining corporate obligations. Yet, one of the problems that arises in this regard is that the factors pull in differing directions. The potential impact upon the beneficiary of a right may support the imposition of a strong obligation; on the other hand, the particular nature of an entity, may push towards no obligation being recognized or the attenuation thereof. Consider the example above about company access to information on its laptops: the privacy interests of employees supports their claim that the policy is a violation of rights; on the other hand, the corporate interests and nature of the agent supports their right to access such information. How do we make a decision as to whether the policy is in fact acceptable or not from a human rights point of view?

This kind of problem of balancing competing interests is, however, very well-known in Constitutional Law. Many countries have adopted a two-stage approach to rights adjudication: the first stage involves interpreting the rights which requires understanding their underlying justification and the interests they protect. A determination is then made as to whether certain conduct (or an omission) is a prima facie infringement of that right.

The second stage then involves considering whether that infringement is justifiable or not. Usually, this involves what may be termed a proportionality enquiry which itself has various components: these include a consideration of the purpose of any infringement and whether there are measures that could achieve the purpose but are less harmful to the right.

I contend that this approach offers a promising analytical framework for inclusion in a future BHR treaty and provides a well-known rubric for balancing two key important issues. The first is the focus on those whose rights are affected, what I term ‘beneficiary-focused’ considerations. The fact that there may be a prima facie infringement of an interest of a beneficiary is not determinative, however. There may be good reasons why that interest cannot be realised; moreover, there may be reasons why a particular agent may lack the obligation to protect that interest in question.

The second-stage of the enquiry is helpful, particularly, in determining when a particular agent such as a corporation has an obligation or not and can help take into account the particular nature of corporations and their obligations. The proportionality frame allows also for a balancing of interests and for wider considerations of fairness to enter into the picture in terms of determining corporate obligations.

I have mentioned the ‘nature of a corporate agent’ as helping to determine its obligations and I would like to say briefly how I believe such an agent should be conceived. Corporations are creations of legislative bodies. As such, they are not formed simply to create profit for individuals but because they have benefits for society. The separate legal personality of a corporation limits the liability of those who invest in it and thus encourages . individuals to take more risks which in turn enhances innovation and, indeed, economic growth. All these activities can increase the ability of individuals to gain access to various human rights through increased employment, improved technology and much else. Thus, there is a social purpose underlying the creation of corporation.

At the same time, the corporate form is a medium through which individuals are able to advance their own personal interests. The complex idea behind the creation of this form of business entity is to enable individuals to act in a self-interested manner optimally; in so doing, the thinking is that they will often create a range of benefits for the society (such as employment etc) which include the advancement of human rights. An understanding of the nature of corporate actors thus involves recognising that they have a dual aspect: they are meant to operate both in the self-interest of their shareholders and also advance a range of social benefits which includes advancing human rights. That dual aspect means that private autonomy and profit is not the only interest to be considered in developing an understanding of corporate obligations; it is necessary also to consider whether the underlying social purposes behind the creation of the form are being realised.

Given that corporations are meant to create social benefits, they should not of course create major social harms, such as violations of fundamental rights. I have focused in this presentation on the employee laptop examplewhich relates to the potential harm a corporation can cause in relation to a fundamental right. The example, however, shows the normative insufficiency of the Guiding Principles on Business and Human Rights which is simplistic in the way it attempts to capture corporate responsibilities. It states that they have a responsibility to respect rights: however, this document fails to recognise that there may be reasons why, at times corporations may legitimately impact upon rights and it does not provide any mechanism for adjudicating such instances. A treaty on business and human rights must provide a framework for addressing this issue: I suggest a proportionality framework for doing so.

A second problem with the existing Guiding Principles is the focus only on a responsibility to avoid harm to rights. A further key question that is raised in the context of corporate obligations concerns whether they also have positive obligations to assist in the fulfilment of fundamental rights. This raises the question of the nature of the duties of corporations. I believe that the analytical framework in a treaty should recognise the possibility of positive obligations and have proposals as to how this can be done and limiting principles. [Unfortunately, time does not allow an elaboration upon this but I would be happy to address this in question time.]

I have attempted to highlight in this presentation the key question of determining the nature of corporate obligations. It would highly desirable for international law to provide guidance on this issue: doing so, will be of importance to business in clarifying its own obligations but also, most importantly, to individuals and governments in ensuring that they have certainty as to what they may legitimately require of corporate actors.

**If time, then explain approach as follows:**

As I mentioned, there have been several attempts to distinguish between the duties of corporations and the duties of the state based on the negative/positive distinction. In other words, the state has obligations both to avoid harm to the rights of individuals, to protect individuals against harm from third parties and to actively provide goods to realise the interests of individuals. The corporation, it is argued, on the other hand, only has a duty to avoid harm. This approach has been suggested in some case law of domestic courts (see *Governing Body of Juma-Masjid Primary School v Essay N.O.*,[[5]](#footnote-5)) and influentially has been put forward in the Guiding Principles on Business and Human Rights. The justification for this conception lies in an attempt to recognise the impact private parties can have on human rights but also to avoid too much interference with private autonomy and saddling private parties with the duties of the state.

It should be noted though that the Guiding Principles do not only recognise a responsibility to respect on corporations: corporations also have a responsibility to protect – as it is understood in international human rights law – in their due diligence responsibilities to ensure they do not harm the rights of others through those they have relationships with. Should we go further, however, in recognising corporate obligations to contribute actively to the realisation of fundamental rights?

I think we should and provide several reasons for my view. The first major argument I make goes back to the very nature of the corporate agent I mentioned above. Corporations, as I conceive of them have a ‘public dimension’: they were created as we saw to ensure certain social benefits are achieved in society. At the same time, that social dimension is meant to be achieved through enabling individuals to pursue their self-interest in the business domain without the fear of dire consequences for their personal finances if something happens to the corporation. This dual aspect of the corporation – as an instrument for the expression of individual self-interest and for the creation of social benefits – needs to be borne in mind when determining the positive obligations of corporations.

Given the potential for conflict between individual self-interest and societal interests, the corporate form itself creates various risks that the latter may not be achieved and thus requires careful regulation. Violations of human rights, given their importance in the lives of every individual, are amongst the most central social harms to be avoided by such a form and this provides the basis for the negative obligations of corporations to avoid harming human rights in their businesses in the pursuit of self-interested individual aims.

Positively achieving the realisation of human rights is also amongst the core purposes of any decent legislature and one of the motivations for creating the corporate form: increased jobs and technology no doubt have the power to positively advance fundamental rights. At the same time, there is a clear difference between corporations and governments in this regard: corporations are generally designed to achieve these social benefits indirectly through their ordinary operations whereas all activities of governments must be designed around expressly achieving these goods. The indirect manner in which corporations are meant to advance fundamental rights is key to understanding their positive obligations: on the one hand, corporations cannot be nationalised so as to simply become extensions of the state without losing their core nature; on the other hand, there is a complexity involved in ensuring that corporations actually do advance fundamental rights in the indirect manner theory suggests is required.

In relation to the latter point, there are a number of factors which need to be considered in determining positive corporate obligations here. First, a pure focus on achieving business goals such as maximising profit can inhibit the advancement of fundamental rights. Trying to increase already substantial profits may lead corporations to retrench employees who are not absolutely essential in a context with poor employment prospects. I have given an example of corporations cutting costs in South Africa, for instance, through retrenching workers who for long periods of time have been employed to provide tea within the company. The cost-savings are minimal but the impact on individual lives are huge. This kind of case demonstrates the need to think about the relationship between advancing the business goals of a corporations and the social goods that are created. Importantly, here, there is a need to move beyond the assumption that automatically social benefits such as advances in rights will be achieved through the advancement of individual self-interest. There needs to be obligations placed upon corporate directors and shareholders actively to align these two sets of goals and to ensure that the operations of the corporation can be seen to advance the social goals that lie behind it. Requiring corporate directors actively to promote fundamental rights brings these important considerations into the board-room.

Secondly, these kinds of considerations become particularly strong in contexts where corporations operate in spheres which have a large impact on fundamental rights (such as health and education). Thus, pharmaceutical companies that are involved in the development and production of critical medicines operate within a domain that directly affects the right to health of individuals. Such corporations know they operate within such a context and seek to make profits from the fact that what they produce connects to very basic individual needs. As such, in such contexts, it would be particularly justifiable to ensure that their activities in these spheres actually enhance the rights of individuals. There may, for instance, be a duty to ensure the affordability of any critical medicines they develop to prevent the advancement of their profits whilst effectively excluding many individuals from accessing these drugs.

Thirdly, the structure of the market and dominance of a corporation therein may affect the extent of its duties. If it essentially has a monopoly over the production of a good - such as medicines - that seriously affects fundamental rights, individuals become dependent upon it and it has access to a ready-made market. As such, it seems justifiable to place positive obligations upon it to enhance accessibility and to prevent individuals from being deprived of such goods.

Fourthly, it is important to recognise that there is a connection between corporate behaviour in a market and the government’s own ability to realise rights. Corporations, for instance, affect the labour market and are often able to attract the most talented employees away from the public sector: that, in turn, has an effect on the government’s capacity to realise its own direct obligations to realise rights. This is a complex issue to solve but it points to the need to recognise an obligation upon corporations not to undermine the government’s ability to achieve its goals. These interconnections also mean that corporations have positive obligations to assist in the realisation of rights in order to mitigate the negative impacts that they have simply through operating to achieve their business goals.

The last argument I wish to consider is a consequentialist one based in fact that there are good reasons for why, if we want to improve the well-being of individuals across the world, it is necessary to recognise that corporations have certain positive obligations. In the modern world, corporations are one of the central prongs of the economy and create and accumulate large amounts of social wealth. They are present in and invest in countries around the world and create jobs. They play a central role in the well-being of many individuals who are reliant on them for employment. They have the potential and power to make a major impact on human rights and, in some cases as we saw, their operations affect the capacity of the state to realise such rights. To obviate the need to consider the positive role such major actors can play in the realisation of human rights would be seriously to hamper the achievement of these rights. For purely consequentialist reasons relating to the improvement of the well-being of individuals across the world, the recognition of some positive obligations upon such actors makes sense and is of importance.[[6]](#footnote-6)

Of course, this argument alone also contains some complexity related to the reasoning in the third argument discussed above: if unlimited positive obligations are placed on corporations, they will be effectively nationalised and the core nature thereof undermined. Hence, it is necessary to have limits placed upon the extent of positive obligations for corporations: in my proposal, I suggest a number of limitations on the positive obligations of corporations that can be placed into a treaty.

The upshot of this section has been to argue that the negative/positive obligations distinction is not adequate nor desirable as a basis for the formation of an analytical framework to help determine corporate obligations in a future treaty on business and human rights. As we have seen, the very reasons for the creation of a corporation connect with the social benefits to be achieved thereby: a key dimension thereof is the achievement of fundamental rights. As such, a treaty should not in any way deny that corporations have a role to play in advancing such rights in a positive manner. At the same time, it should be emphasised that none of the arguments outlined above suggest that the positive obligations of corporations should be articulated in a manner that is identical to those of the state. The particular nature of corporations may limit the extent of their positive obligations; it does not, however, exempt them from performing some such obligations

1. There is also an important question that arises as to which rights are the subject of obligations for corporations which cannot be addressed here. [↑](#footnote-ref-1)
2. The proposals in this presentation are drawn from my chapter ‘Corporate Obligations and a Treaty on Business and Human Rights: a Constitutional Law Model?” in S Deva and D Bilchitz Building a Treaty on Business and Human Rights: Context and Contours (Cambridge, University Press, 2017, forthcoming) [↑](#footnote-ref-2)
3. *Ibid*., para 33. [↑](#footnote-ref-3)
4. See K. Macdonald ‘Rethinking ‘Spheres of Responsibility’: Business Responsibility for Indirect Harm’ (2011) 99 *Journal of Business Ethics* 549 at 550 explains that agent-relative accounts of responsibility concur on the central proposition that ‘attributions of responsibility rest solely or at least primarily on facts about agents and their relations to certain harmful or favourable events or states’. [↑](#footnote-ref-4)
5. [2011] ZACC 13. [↑](#footnote-ref-5)
6. I have considered this argument and the potential of corporations to assist in the fight against global poverty in Bilchitz 2013, n. 46, 124-5. [↑](#footnote-ref-6)