

THE HUMAN RIGHTS & BUSINESS PROJECT

Defining the Scope of Business Responsibility for Human Rights Abroad

THE CONFEDERATION OF DANISH INDUSTRIES
THE DANISH CENTRE FOR HUMAN RIGHTS
THE INDUSTRIALIZATION FUND FOR DEVELOPING COUNTRIES

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of the dispute over the key policy questions on the agenda. Despite the shortcomings, the conference was hailed as a success by most of the

organizations in attendance. It marked a conscious effort to further the discussion beyond the formal speeches of the political leaders in Geneva.

Human Rights Campaigners March on ABC Headquarters

In a dramatic new escalation of their campaign against *ABC inc*, human rights groups demonstrated outside the Company's headquarters in Copenhagen yesterday morning. *ABC* has been the subject of widespread criticism for its operations in Congo, and has recently become the main target of the Free Congo Campaign, organised by a coalition of five Danish NGOs last year. In a speech to the assembled demonstrators, Kirsten Svendsen, spokesperson of Free Congo, criticised *ABC* for its 'blatant attempt to distance itself from its human rights responsibilities'. Ms Svendsen maintained that '*ABC inc* benefits from Congolese society, just as it exercises immense influence over that society and its government... it should, accordingly, 'manage' its

influence *vis-à-vis* human rights with the same degree of care and responsibility that it manages its other income-making activities in that society'.

In a statement issued this morning, the company responded to the criticisms of the human rights groups: '*ABC inc* strictly abides by the laws of Congo, and the Company makes a concrete contribution to the region through the creation of jobs and the promotion of economic stability and infrastructure ... but, in the end, the human rights campaigners must remember that *ABC inc* is a business, not a political organisation, and it would be both dangerous, and most likely ineffective, for the company to specifically take up the human rights cause in Congo'.

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Parliament Debates Immigration Policy

The steps of the Parliament building were lined with immigrants and onlookers late last night in the run-up to today's

Parliamentary meeting to discuss the rules governing immigration into the country. Immigrants are currently classed in five

There is probably more agreement in the previous case than either adversary would care to admit. Both *ABC inc* and the human rights group would recognise that *ABC*, as a business, is a member of every society in which it operates, and as such, it is expected to play a positive role in that society. Both would also agree that role includes taking issues of human welfare seriously. It is the finer points of human welfare, and the extent to which these can be formulated in the language of 'human rights', that gives rise to the dispute. Despite the fact that business obligations towards human rights are so frequently the subject of news coverage, popular debate and of consumer and NGO campaigns, they still lack definition. We are still left with two basic questions that lie at the heart of the dispute between *ABC inc* and the Human Rights group:

- What defines businesses' human rights obligations?
- How far do these extend?

Without answers to these questions businesses and human rights organisations will continually come into conflict. The conflict will almost always be costly for the company, both in terms of its reputation, and the success of its future operations abroad.

The present article in this series of brochures offered by the Human Rights & Business Project presents a framework for viewing business obligations towards human rights, in the hope that it will provide both business and human rights groups a common point of reference for discussing these obligations.

The Overall Context: When is it 'fair' to criticize business?

One immediate distinction which limits the scope of business responsibility is the distinction between 'immediate responsibility' and 'collective responsibility'. *Immediate responsibility* is the responsibility which stems from the activities of a particular business, such as a factory using child labour. The concept of *collective responsibility* arises from the participation of businesses, as a collectivity, in an inequitable global economic system which engenders severe disadvantages for many groups and societies.

It is the role of governments to address and regulate macro-economic or wider social problems that arise from the collective activities of business. In most cases, asking individual businesses to solve 'collective' problems which belong to the global market as a whole is unreasonable and effectively asks them to commit commercial suicide. Accordingly, this article and the *Human Rights & Business Project* as a whole, restricts itself to what it deems to be a 'fair' sphere of business responsibility for human rights, that is, the immediate level only.

Defining business obligations - using human rights law

Human rights often come under the misconceived heading of ‘all things good for human beings’. This is, however, a mis-perception, and one that must be dispelled before we can expect businesses to address human rights issues without fear of opening a Pandora’s box of well-meant aspirations.

Human rights are in fact defined almost as tightly as any other legal area: not just in the numerous ‘bills of rights’ expressed in constitutions which inform the decisions of courts throughout the world, but also in international treaty laws and conventions. For example, *The Universal Declaration of Human Rights* (1948), *The International Covenant on Economic, Social and Cultural Rights* (1966), and *The International Covenant on Civil and Political Rights* (1966) set down and define human rights standards. In addition to these universal documents, there are numerous other instruments, some which relate to specific rights, like *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984); others which are limited geographically such as *The American Convention on Human Rights* (1969). These documents comprise and inform a highly detailed and intricate human rights system which operates at the international level, some with the force of law, which contain enforcement measures; others with a lesser, recommendatory status.

The vast resource of human rights law is often overlooked by business because the laws are written for governments, not companies. But there is much which recommends them for use, helping businesses to conceptualise and frame their responsibilities. The laws are ‘tried and tested’, having proved their practical, as well as theoretical, worth in the political realm. They have been drafted for an international forum, and accordingly are able to reflect the particular cultural perceptions of rights in individual countries (such as the vastly differing perceptions of women’s rights in many cultures). With existing human rights laws at once so reliable and flexible, we recommend that businesses use these as the central platform of their individual policies.

Identifying how far business obligations extend - using the legal concept of 'duty'

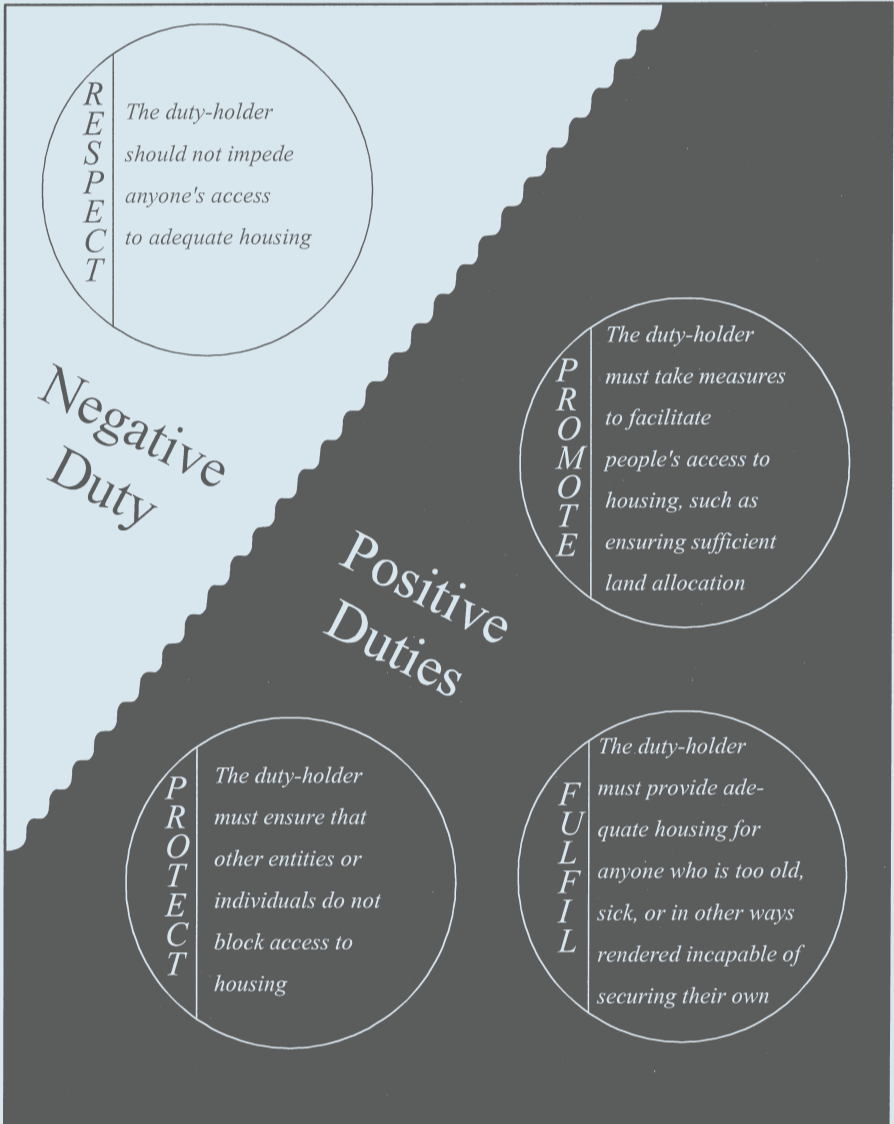
It is a fundamental principle that a 'right' created for one person gives rise to a corresponding 'duty' for someone else. In the first instance, the duties imposed by international human rights law fall to governments and it is their responsibility to uphold and protect rights. Governments are required to act in accordance with human rights themselves, and to ensure that other members of society do likewise. For example, international human rights law stipulates that people have a 'right to free speech'. The government must respect that right when enacting censorship or related policies. It also must set out laws which prohibit others in society from abrogating that right - such as prohibiting powerful individuals or businesses from forming media monopolies. In this manner, non-state entities - including businesses - become duty-holders as well.

Corrupt or weak governments may, however, fail either to recognise their own primary responsibility to respect international human rights law or to undertake measures which delegate that responsibility to other members of society. That does not, however, nullify the existence of these rights, or the necessity that companies operating in such societies respect and uphold their corresponding duties.

The human rights duties of business can be identified using a traditional dissection of human rights law. Most human rights give rise to four complementary duties: respect, protect, promote and fulfil. As an illustration these are applied in the figure on the opposite page to 'the right to adequate housing', set out in Article 11 of *The International Covenant on Economic, Social and Cultural Rights* (1966).

Governments are burdened not only with the passive, 'negative' duty to avoid violating the right (i.e., to respect), but also with the active, 'positive' duties which under certain circumstances require the provision of essential services (i.e., to protect, promote or fulfil). When a Special Rapporteur assigned by the UN Commission on Human Rights or other human rights monitors go into a country to assess whether a government is acting in compliance with its obligations, they will look at all four of these areas.

In contrast to the extensive responsibilities incumbent upon governments, businesses as well as individuals have their human rights duties framed primarily in negative terms; that is, to refrain from violating the rights of others through their activities. With regard to Article 11 in the example opposite, a business or an individual should 'respect' people's right to adequate housing and therefore should not impede access; but neither a business nor an individual has a duty to protect, provide or fulfil the right to adequate housing.



ARTICLE 11 : everyone has the right to adequate housing...

The 'Positive' Duties of Business

What about positive responsibilities: to protect, promote, and fulfil rights? Should businesses have any such obligations? Some human rights activists would certainly claim so, based firstly on the fact that businesses are members of society, and as such should participate positively in that society, and secondly on the immense power of businesses. But there are reasons to challenge both these claims.

Businesses are certainly community members and will often contribute to that community through the provision of community centres, etc. But it is important to define duties in terms of what should be strictly required, not what would be ideal in the perfect society. Other members of society are not burdened - legally, or through social pressure - with positive obligations to actively promote human rights; only to refrain from violating them. Businesses should be subject to no more, and no less, responsibility.

As for the power of businesses: in the modern world it is true that businesses can be more powerful than governments, and are often in a position to exercise immense power over the government. But power does not necessarily imply equivalent responsibility. The natural extension of such an argument would lead one to the very nonsensical position of maintaining that a stronger individual has more duty than a weaker individual, and that a larger company or government has a greater duty than a smaller one. We must not confuse 'can' with 'must'.

Should businesses have *any* positive responsibilities in relation to human rights? In four significant areas, they should.

First, in relation to their workers. Businesses control workers in the sense that they not only have the capacity to exercise authority over workers, but also that the structure of business is such that the authority is routinely exercised. So long as they exercise this level of control, businesses should act like a government in relation to the workers who are, in effect, their 'citizens', and promote, protect and secure their rights. Health and safety regulations are a good example of the application of this concept of fuller duties in relation to employees. For example, under most national legal systems, a business must not only refrain from abusing its workers, but it also has a 'positive' responsibility to make sure a worker is not abused by a co-worker.

Second, businesses have a duty to ensure that their products are not used in the violation of human rights. This comprises responsibility to take reasonable measures to prevent both the *intentional mis-use*, and the *unintentional wrongful use* of the product. For example, a chemical company has a responsibility both to avoid selling toxic chemicals to an oppressive government which is likely to mis-use them *and* to inform users of any safety precautions which must be taken before using their chemicals. Given the ability of human beings to harm other human beings through the ingenious use of any manner of products, this responsibility must be limited. It is suggested that responsibility should only extend to what a businesses could legitimately be expected to foresee as a potential wrongful use or mis-use of its products, to avoid the imposition of unrealistic responsibilities.

Third, a business should assume positive responsibilities in relation to anyone residing on its land. Particularly this applies to indigenous peoples and disenfranchised minorities. The company then has a responsibility to negotiate and to take into account the wishes of the group on whose land it resides. This includes the 'positive' duty to keep the people informed of changes in the plans to use the land, to give the people a voice in those changes, and to ensure that the 'voice' of the people, i.e. their leaders, is actually representative of the majority will.

Fourth, companies should incur positive duties when they *de facto* replace the government. Sometimes when a company moves into an area, the government allows it to effectively take over that area. The company will build up the land, create roads and transportation, infrastructure, utilities, etc. The government, particularly one which is unstable or geographically remote, will simply step out of the area, leaving a vacuum of governance there. The company fills that vacuum, thus becoming the only authority in the area. When this happens, the company should take on some of the positive responsibilities of government in respect of human rights. That includes making sure the population in the area is safe, secure and that they have adequate provisions for their livelihood.

Complicity in human rights violations and the company's responsibility to act

It is clear that the four areas of more extensive responsibilities identified previously derive not from the power of businesses *per se*, but rather from the requirement that businesses ensure that the generally more far-reaching effects of their operations do not negatively affect people or communities. These negative effects - or rather, the *proximity* of the company to these effects - should also be of central consideration in determining the degree of responsibility of a company for any particular human right.

The proximity of a company to human rights violations can be viewed on three levels: direct, indirect, and no connection.

'Direct' entails a distinct, clear and unbroken connection between the activity of the company and the human rights violation. Examples include a company discriminating in its hiring practices, or locking the doors on workers to prevent them from running away. In such cases, the company has a straightforward and immediate responsibility to do whatever is necessary to mitigate, or stop the violations.

'Indirect' entails a violation which the company contributes to, but does not directly initiate or perpetrate, by enabling an abusive practice to be established or continued. For example, companies will sometimes buy from suppliers or producers that violate human rights in their operations. Or, a company might undertake a joint venture with an oppressive government. In such cases, the company still has some responsibility to take action to ameliorate the harm, but the action should be proportionate to the nature of the link between the company and the violations.


'No connection' is exactly what it implies. The company has no direct or indirect relationship to the violations, and therefore no responsibility to take action. This category is of the greatest significance where a company is located in a country with an oppressive government. It has been argued, for example, that responsible companies should never operate in China. However, while the company is not facilitating the violations in any way, it is difficult to see why responsibility should be established simply on the grounds of location.

Of the three categories, the most difficult to establish will always be determining what is an 'indirect' connection. In the modern world, the decisions taken by a business can have major implications for lives and communities geographically and culturally remote, so businesses do have to be discerning in identifying their indirect connection to violations. For example, in the early 1990s several international oil companies undertook a joint venture with the Burmese government and the state oil company, *Myanma Oil and Gas Enterprise* (MOGE). MOGE assumed responsibility for providing labour and security for the construction of a gas pipeline for the project. Allegations later emerged that forced labour and child labour were used to construct the pipeline, and that other violations, including torture, and forced relocation, occurred in MOGE's operations to clear the area and provide security. Although the main Western partner, *Unocal*, did not directly carry out these purported violations itself, because of its involvement in the project, its liability for acting in concert with the Burmese government and MOGE in breaching universally recognised human rights standards is now under consideration in the United States District Court of California [*National Coalition Government of the Union of Burma, et al., Plaintiffs, v. Unocal Inc., et al., Defendants*, 176 F.R.D. 329 (D.D.Cal. 1997)]. Businesses must, therefore, be alert to the extent to which they can be indirectly complicit in human rights violations.

Recognising what is Beyond the Call of Duty

In recent years businesses have been the target of consumer action and human rights campaigns to make them more responsive to human rights concerns. Many of these campaigners have targeted the business world because of the immense potential of business to bring about change. While these campaigns have undoubtedly been founded on good motives, sometimes their effects have been destructive, due to unreasonable demands. As a result the real responsibilities have been left unfulfilled in some cases. By defining the minimum responsibilities owed by businesses operating abroad, the *Human Rights & Business Project* aims to go some way towards ensuring that these minimum responsibilities will not be ignored.

Some companies will want to go beyond that minimum - because it's good for public relations, because their customers want them to address these rights, or because they are guided by an ethical, social or religious tradition which demands more of those who have the power to effect change. But we believe that this should be a choice made freely by each business.



This is the second in a series of brochures offered by the *Human Rights & Business Project*, jointly sponsored by The Confederation of Danish Industries, The Danish Centre for Human Rights and The Danish Industrialization Fund for Developing Countries. The three groups have joined forces in a programme designed to provide guidance to Danish businesses faced with human rights issues when operating abroad. Danish businesses play an active role in the research through serving as case-studies and providing constructive feedback on the results.

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The text of this and previous brochures on human rights and business can be obtained from the following websites:

www.di.dk, www.humanrights.dk, www.ifu.dk