Introduction

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1 Overview

What has the law to do with corporate social responsibility? Corporate social responsibility (CSR) is generally defined as voluntary business action, i.e. action not mandated by law. In 2001 the EU Commission defined the concept of CSR as 'essentially a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment'.[1] Other definitions, however, take a more inclusive approach to CSR and law, suggesting that CSR need not only be action beyond the requirements of law.[2] Indeed, Archie B. Carroll's oft-cited 1979 definition of CSR considers compliance with law as being part of CSR.[3] Carroll and Mark Schwartz have expanded this idea to cover not only action in accordance with the letter of the law but also at least some types of action in accordance with the law's (current or future) spirit.[4]

Increasingly CSR takes on a legal character that necessarily reflects on management decisions: more and more European and other governments, most recently those of the United Kingdom and Denmark, have taken to imposing legal requirements on businesses to prepare non-financial reports

[1] Commission of the European Commission (2001) *Promoting a European Framework for Corporate Social Responsibility*, EU Doc. COM(2001) 366, paragraph 8 compare para. 20.
[2] For example, Blowfield, Michael and Jedrzej George Frynas (2005) Setting new agendas: critical perspectives on corporate social responsibility in the developing world. *International Affairs*, Vol. 81, No. 3: 499–513, at 503; Ward, Halina (2004) *Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock*. Washington DC: The World Bank Group: 3; compare also Zerk, Jennifer A. (2006) *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*. Cambridge: Cambridge University Press.
[3] Carroll, Archie B. (1979) A three-dimensional conceptual model of corporate performance. *The Academy of Management Review*, Vol. 4: 497–505, at 500.
[4] Schwartz, Mark S. and Archie B. Carroll (2003) Corporate social responsibility: a three-domain approach. *Business Ethics Quarterly*, Vol. 13, No. 4: 503–530.

of their impact on society and environment. In Europe, the US and elsewhere civil society and individuals increasingly resort to litigation to hold corporations accountable for alleged violations of their human, labour or environmental rights.

This book seeks to take up the challenges that emergent juridification of CSR poses to conventional conceptions of CSR developed in a management context. In particular, the book sheds light on areas of convergence and divergence, complementarities and differences between management and legal perspectives on CSR. The book also explores the emerging institutionalization of business responsibilities for human rights as a distinct part of the general CSR paradigm. In this chapter, we address this challenge from the point of view that the boundaries between conventional law and CSR and between management practices and institutionalizing processes that drive management action to meet societal expectations seem to be softening.

The purpose of this book is to take a step towards bringing management and legal perspectives of CSR together and to test some approaches towards integrating law in the ongoing promotion of CSR. We have noticed that managers and students are trying to understand connections between law and CSR, and to understand what relationships there may be between law, CSR and business responsibilities for human rights. We believe that the process of integrating CSR and law will continue, and we want to try to investigate this process through the collection of articles in this book.

This ambition was born out of our interest in human rights as a part of CSR and in human rights responsibilities for corporations as an emerging discourse of its own. To make the distinction clear between the general CSR discourse and the emerging specific discourse on business responsibilities for human rights, we propose to adopt the acronym BRHR for business responsibilities for human rights. The general CSR discourse embraces social and environmental issues, including climate issues. However, in the current CSR debate, climate tends to dominate. We want to focus on human rights as the key social area within the CSR debate. The CSR debate remains business-centred. We want to explore further the significance of state obligations for human rights problems that also feature in CSR discourse. Even though business has created many social problems, action by companies has also been a driver for the development of human rights as a part of CSR commitment and the work of the UN in this area. We want to explore some implications of the state role to provide the framework for business action.

This chapter sets out some lines of thought that have motivated the book and the collection of articles in the subsequent chapters. In Section 2 we discuss business responsibilities for human rights as a part of CSR and as a line of normative thinking that increasingly takes shape as a discourse of its own. We refer to that discourse as BRHR, to distinguish it from CSR and from human rights responsibilities discussed as part of CSR. The emerging distinction has become particularly clear with the work of the UN Secretary

General's Special Representative on Human Rights and Business (commonly referred to as the 'SRSG'). In fact, the publication of the SRSG's final report from his first mandate term (2005–2008) was decisive for the theme and timing of the conference from which most of the chapters in this book were first prepared. Section 2 discusses some benefits that may result from the distinction between CSR and BRHR. It sketches some aspects of law as a source of norms, legal conflicts including human rights conflicts related to climate degradation, and the insistence among many business leaders and academics that CSR is and should only be 'voluntary'.

Section 3 goes further into the debate on law and CSR, arguing that law and CSR are less distinct than is often claimed in CSR contexts. This section explains that the state-centred character of international human rights law has done much to shield businesses from being held accountable for abuse of human rights. CSR and – perhaps to a lesser extent – BRHR indicate a blurring of boundaries between corporate voluntary action and the law. Opening a debate that we return to at the end of the chapter, we argue that some aspects of law, including process-oriented legal theories, may provide valuable insight into the development of CSR and BRHR norms.

Section 4 addresses global legal and management perspectives of CSR and BRHR. In this section, we introduce the main points of the subsequent chapters of the book.

Section 5 addresses the institutionalization of corporate integration of CSR from a managerial perspective. It discusses the phenomenon of corporate isomorphism and its effects on corporate CSR decisions.

Finally, Section 6 returns to the relationship between law and management in relation to CSR and BRHR. This section argues that the theory of reflexive law may contribute to an understanding of the blurring of boundaries between corporate voluntary action and the law. As a regulatory technique, reflexive law promotes organizational learning and self-regulation. It leaves organizations the choice to determine their own norms but assists them in understanding the concerns and needs of other social actors. The final part of the introduction argues that this particular process-oriented regulatory theory may therefore offer a medium for communication and understanding for law and management to meet in the discussion and solution of CSR and BRHR issues.

2 Business responsibilities for human rights

Business and its impact on human rights is an area within CSR that has been subjected to intense debate, ranging from whether business should consider human rights at all to arguments that business entities should be subjected to international and national regulation and enforceable human rights obligations. Since the 1990s, the issue of business responsibilities for human rights has been put on the agenda of international organizations with a

regulatory purpose, especially within the UN. This resulted in the 2003 draft UN Norms on business and human rights[5] and has culminated, so far, in the final report from the 2005–2008 mandate of the SRSG. The 2008 report,[6] which was unanimously 'welcomed' by the UN Human Rights Council, presented the *Protect, Respect, Remedy* framework. This three-pronged framework, which has since come to be known as the 'UN Framework', presents a combination of the state's duty to protect individuals against human rights violations by others (such as companies), a business responsibility to respect human rights through due diligence and other measures, and the need for better access to remedies both within a business sphere and within conventional as well as possibly new public remedial institutions (such as courts or an international ombudsman). The report led to the Human Rights Council extending the SRSG's mandate until 2011, with a request to the SRSG to operationalize the three-pronged framework proposed in 2008 and to continue his coalition building style, which employs a high degree of multi-stakeholder consultations.

The SRSG's work during the first term of his mandate, however, also makes it clear that increasingly, the discourse on BRHR travels on a path distinct from that of CSR.[7] The emerging discourse on BRHR has increasingly come to be a discourse on the state duty to protect. This came out clearly in the *Protect, Respect, Remedy* framework in the SRSG's 2008 report, from which several chapters in this book take their point of departure. In addition to that crucial difference, the corporate responsibility to respect as defined by the SRSG also entails a stronger compliance element than is assumed by the conventional CSR discourse.[8]

[5] United Nations Sub-Commission on the Promotion and Protection of Human Rights. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights 2003* (UN doc. E/CN.4/Sub.2/2003/12/Rev.2). The document was considered by the Human Rights Commission to contain 'useful elements and ideas' but was not accepted as a document with legal standing.

[6] SRSG (2008) *Protect, Respect and Remedy: A Framework for Business and Human Rights*. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. UN Doc. A/HRC/8/5 (2008).

[7] On the distinction between CSR and Human Rights, see also Zerk (2006) *supra* note 2; Buhmann, Karin (2007) Corporate social responsibility and human rights responsibilities of business. Introductory chapter in *Nordic Journal on Human Rights*, No. 4: 331–352 special issue on Corporate Social Responsibility and Human Rights; and Buhmann, Karin (2009) Regulating corporate social and human rights responsibilities at the UN plane: institutionalising new forms of law and law-making approaches? *Nordic Journal of International Law*, Vol. 78, No. 1: 1–52.

[8] The SRSG's 'Respect, Protect, Remedy' framework is described in SRSG (2008) *Protect, Respect and Remedy*, *supra* note 6. According to the SRSG's framework, the corporate responsibility to respect entails ensuring compliance with national laws as well as managing the risk of human rights harm with a view to avoiding it (see paras. 51–81, esp. paras. 54–56).

In our view, the emerging distinction between the notions of CSR and BRHR deserves to be noted. They differ in their approach to state and corporate legal obligations and societal expectations. First, the CSR concept also encompasses many other issues besides human rights. Second, the general CSR discourse remains focused on corporate voluntary action. BRHR is narrower than the CSR discourse in that BRHR specifically deals with human rights. Second, the BRHR discourse gives much more attention to state obligations as obligations of (international human rights) law than does the CSR discourse. BRHR discourse, especially as developed by the SRSG, has become highly informed by the legal discourse of obligations, compliance and liability, whereas the CSR discourse continues along a path informed by 'softer' forms of responsibility, self-regulation, 'voluntary action', and sustainability. Further, the development of the BRHR discourse as an independent discourse also has an impact on CSR and on societal expectations of companies. For example, BRHR's increased emphasis on the obligations or responsibilities of states may decrease legal pressure or societal expectations on companies.

This is not to say there are no overlaps. As the 2007 and 2008 reports of the SRSG indicate, social expectations are perceived as an important link to emerging soft law which may in due time lead to harder national or international law. Corporate codes of conduct, corporate voluntarism and corporate economic interest in risk management are important factors in the emergence of the normative expectations on which the SRSG has based his framework. And although the BRHR discourse stresses state obligations based on international human rights law, it retains the idea that corporations bear responsibilities for human rights.

Whereas BRHR may come to be defined – perhaps during the second term of the SRSG – as a relatively precise notion, CSR remains a relatively open term. Scholars continue to debate whether a definitive definition of CSR should be sought, or whether the term should be left open and flexible, within an overall understanding of businesses taking responsibility for their impact on society, including the environment.[9] For many reasons, including the possible social and economic benefits that may result from more room for companies to innovate within an open notion of CSR, CSR may well be

[9] See for example Newell, Peter and Jedrzej George Frynas (2007) Beyond CSR? Business, poverty and social justice: an introduction. *Third World Quarterly*, Vol. 28: 669–681, 673; Crane, Andrew, Dirk Matten and Laura J. Spence (2008) *Corporate Social Responsibility*. New York: Routledge: 4–7; Hopkins, Michael (2006) Commentary: what is corporate social responsibility all about? *Journal of Public Affairs*, Vol. 6: 298–306; Wan Saiful, Wan-Jan (2006) Defining corporate social responsibility. *Journal of Public Affairs*, Vol. 6: 176–184.

left as that, an open notion. With a hardening of BRHR, at least the risks posed to human rights protection by leaving CSR relatively undefined may be contained.

In this book, CSR is understood broadly as a concept that requires companies to take responsibility as they engage with society, especially on human rights, labour rights and the environment. In relation to CSR, human rights have typically been addressed as part of the 'people' dimension of the triple bottom line (*People, Planet, Profit*). They are sometimes referred to in terms of international human or labour rights. In other contexts, they are referred to in more general terms. Human rights are not an isolated part of CSR: Whether approached from a legal, organizational or other specific management perspective, human rights relate to working conditions and other workers' rights, community relations, corruption, and interaction with states and state bodies in home and host states, to mention just a few examples. As the SRSG's research indicates, companies may violate a wide range of human rights – not just economic or work-related rights. With particular relevance to the growing concern with greenhouse gas emissions, human rights relate at a very basic level to the living conditions of individual workers, management, suppliers, buyers and communities in which businesses operate. Climate degradation may have severe effects on access to land, water, wood and natural energy resources for individuals as well as companies. It may have severe effects on related social and economic human rights. It may cause more countries to fall into poverty, and those which are already poor to become even poorer. Past experience in understanding and regulating business and human rights in a CSR context may therefore hold important lessons for ongoing and future efforts to handle business impact on climate in a CSR context as well as beyond.

Prevention and resolution of legal conflicts touching on BRHR or CSR are becoming new practice areas for law firms across the globe. At the same time, the notion that CSR is only action not mandated by law is put under pressure by a transnationalization of corporate self-regulation based on codes of conduct that are integrated into contracts with suppliers, which become legally binding as private law arrangements. While we may claim from an academic perspective that CSR and BRHR are distinct, the mere fact that efforts are underway at the level of the United Nations to define human rights responsibilities of business under international law adds to the pressure on the concept of CSR as being only 'voluntary' action. CSR and BRHR may be distinct in terms of attention given to obligations or responsibilities of governments and companies respectively, but the notions and informing discourses also feed into each other.

While human rights form an integrated part of CSR in many contexts, human rights responsibilities of business are taking on a conceptual and legal character of their own with increased focus on a need for public regulation to ensure protection of human rights and accountability. CSR and

BRHR are not only interrelated in several ways as set out above. They are also related in terms of debates on the voluntary or enforceable character of CSR and BRHR, the processes that create CSR and BRHR norms, and through the turn to international law as a source of both.

The legal character of CSR and BRHR is a recurrent theme in many chapters in this book. As elaborated at the end of this chapter, law is not just 'black-letter' enforceable rules. Law may also be understood as theory and practice of the institutionalization of norms of conduct. From this perspective, multi-stakeholder initiatives launched at intergovernmental level to promote and support business self-regulation on CSR through discursive development of norms on CSR and BRHR may be understood as law. Their legal character lies in the process of creating common understanding or agreement on norms of conduct. The consultative SRSG process is one example, the UN Global Compact another. The European Multi-Stakeholder Forum (MSF) on CSR is a third. Although it takes place outside a formal governmental or intergovernmental framework, the ISO 26000 formulation process, which is coming to an end as this chapter is being written, is arguably a fourth example of a legally relevant process leading to an institutionalization of behavioural norms. This is a different way of perceiving law from that which mainly characterizes the alleged 'voluntary-mandatory' dichotomy of CSR and law. It is oriented towards process and co-regulation rather than towards top-down formal regulation issued by governments and the enforcement of such regulation. It may hold benefits for corporate self-regulation but make enforcement and accountability more difficult.

3 The 'Law vs. CSR' debate

CSR is often seen as opposed to mandatory law. This perception probably owes a great deal to the way Western liberal democracies conceive of law. According to the legal theory that underpins the legal systems of liberal democracies in the West, generally known as liberal legal theory, law is a system of social control, which entails the essentially political task of establishing organs authorized with law-applying and law-enforcement powers. Once created, law is then viewed as an autonomous repository of normative standards that creates an objective normative order that is binding on the same individuals who participated in its creation and which rules out the invocation of subjective opinions to escape law's constraining force.[10] In the world of liberal legal theory, talk about business's legal responsibility for human rights becomes intelligible only if one can identify a set of rules, duly adopted according to the rules that apply to lawmaking, which imposes

[10] Koskenniemi, M. (1989) *From Apology to Utopia: The Structure of International Legal Argument*. Helsinki: Finnish Lawyers' Publishing Company: 409–410.

specific mandatory obligations on businesses with regards to some specified natural and/or legal person(s). These rules invest the legal subject with rights that can be enforced in the legal system. If the legal order is found not to contain any valid rules about business responsibilities for human rights, these responsibilities are viewed as completely voluntary undertakings, subject only to the whims of management and the market.

Public international law has been and continues to be heavily influenced by Western liberal democratic theories of law. This influence is seen in the positivist approach to international law, which is focused on states as the only proper subjects of international law and as the only proper law-making actors in international law. Thus, human rights in international law were originally conceived as rights held by individuals against the state. This approach to the international law of human rights has done much to shield businesses from being held accountable for activities that, if they had been performed by a state, would amount to violations of human rights. The CSR and BRHR movements challenge these assumptions about the law and the protection of human rights by asking: is the protection of human rights the exclusive domain of states, leaving businesses free to seek their profits solely on the basis of the legal rules of states or do human rights constitute a normative order from which businesses cannot claim exemption on the basis of inadequate state protection of human rights?

However, as several contributions in this book demonstrate, CSR and law are not necessarily as separate or distinct as they may appear when viewed through the lens of liberal legal theory. Nor does CSR always gain from being separated from law. This does not by necessity imply that CSR should be subjected to law, or that CSR is only action which is not required by law. Process-oriented theories of law, such as reflexive law, suggest that law need not only consist of specific rules which require action, but it may also be understood as constituting a theory and a method of institutionalization of norms of conduct. From this perspective, legal theories about regulatory strategies and modalities for institutionalization of norms of conduct could provide valuable insight into the development of CSR and BRHR norms. We return to this perspective at the end of the current chapter.

4 Global legal and management perspectives of CSR and BRHR

Chapters in this book indicate that CSR and BRHR connect to both law and management through a variety of organizational and institutional channels. In his article on international framework agreements, Dominique Bé suggests human rights-oriented codes of conduct may influence the internal regulation and management decisions of multinational enterprises with regard to the terms and coverage of their international framework agreements. From political science and legal perspectives based in practical experience in Africa, Latin America and Austral-Asia, Wambui Kimathi,

Cecilia Anicama and Chris Sidoti demonstrate that CSR and business responsibility for human rights are not just a luxury phenomenon to be invoked by consumers, workers, communities, companies or indeed states in industrialized countries. Both CSR and BRHR are very much pressing realities for individuals as well as states in the less wealthy and developing parts of the world. From varying legal perspectives, Surya Deva, Sara Seck and Ruth Nielsen suggest that regulation of business responsibilities for human rights can come in a range of forms and degrees of binding character, emanating from national as well as supranational and international law-making bodies. Andreas Rasche, on the other hand, taking an organizational and business ethics perspective, suggests that the concern with legislative and enforcement measures should be widened to consider institutional arrangements like the UN Global Compact which provides a learning forum for business, civil society and governments to exchange views and experience. Karin Buhmann argues that some such arrangements which function as reflexive law should be examined in regard to strengthening the representation of weaker actors to achieve a process and normative result perceived as legitimate. Lauren Caplan suggests that greater uniformity in the application of CSR standards and legislative requirements will increase possibilities for investors and others in their efforts to support or promote CSR. Drawing on the example of EU policy efforts and a set of United States guidelines directed at judges when assessing criminal acts committed by corporations, Jacob Dahl Rendtorff argues that business ethics and the capacity of corporations to act as moral citizens may be strengthened by public interventions. Jette Steen Knudsen, on the other hand, takes the perspective of corporate management and in particular the role of boards.

CSR and BRHR are often perceived, at least in the West and North, as related to problems that are particularly acute in developing states. SRSG John Ruggie developed his *Protect, Respect, Remedy* framework with special regard to countries which suffer from what he refers to as 'governance gaps'. The chapters by Nielsen and Sidoti demonstrate that CSR and BRHR are relevant to developed societies too. These chapters show that CSR and BRHR problems may also be encountered in states with well-functioning legal systems, the rule of law, and few governance gaps. This underscores the importance, for companies and legal professionals in all societies, of being attentive to CSR and BRHR challenges in their own organizations, communities, countries and in their transnational relations, and to regard CSR and BRHR as aspects not only of corporate but also of public governance.

The chapters in this book were originally prepared for the International Conference on Business Responsibility and Human Rights which took place in Copenhagen on 5–6 November 2008 organized by the University of Copenhagen and Copenhagen Business School. The conference stimulated debate on the important issues of the blurring of boundaries between company voluntary action on human rights and the law, and on ways in

which law and organizational studies may complement each other with regard to better understanding and cooperation on CSR and related topics.

In the CSR and BRHR fields, the terms of obligations, responsibilities and duties often converge and are used somewhat interchangeably, without necessarily intending concretely to indicate the same level of obligation. In this book, we seek to strive towards a uniform use of the terms 'responsibilities', 'duties' and 'obligations', with the following meanings:

- Obligations are legally binding. They may or may not be enforceable, depending on the legal context.
- Responsibilities are not legally binding. From the perspective of law, they may be seen as politically or morally binding.
- We try to avoid the term 'duties' but use it to designate a sense of duty which cannot at this stage be clarified as either legally binding or not legally binding.[11]

Like the conference, several of the chapters take their point of departure from the work of the United Nations Secretary General's Special Representative (SRSG) on Business and Human Rights that culminated in June 2008 with the presentation of the report of the SRSG after his first mandate 2005–2008. The aim of the book is not to assess the SRSG's policy framework, but to take this as a timely point of departure for a multi-disciplinary discussion on the subjects of CSR, business and human rights, and their interaction, differences and complementary character. This book aims to provide theoretical and empirically based perspectives on the understanding and inter-relationship of CSR and business responsibilities for human rights from scholars representing different regions of the world. The book is informed by a desire to establish a globally legitimate understanding of CSR and business responsibilities for human rights, and by the need for legal and management scholars and practitioners to work more closely together to address public sector as well as business needs in relation to the role of business in a globalized society.

This complex subject is addressed through articles organized into three parts. Part I sets the stage for the on-going debate on CSR, business responsibilities for human rights, law and management. Part II provides regional perspectives from Africa, Asia, Australasia, Europe and Latin America. Drawing on additional regional perspectives, Part III offers suggestions for combining law and management in relation to corporate social and human rights responsibilities.

[11] On this terminology, see also Solomon, Margot E., Arne Tostesen, and Wouter Vanderhole (2007) Human Rights, development and new duty-bearers, in Solomon, Margot, Arne Tostesen, and Wouter Vandenhole (eds) *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*. Antwerp: Intersentia Publishing: 3–24, at 17.

Taking the work of the SRSG as her point of departure, Sara Seck discusses the home State duty to protect human rights. Seck examines the scope of the permissibility of home State regulation under the public international law of jurisdiction and proposes that the preliminary justification for home State regulation should be rooted in the territoriality principle. Thus, she argues for a different approach from that which considers home State regulation of corporate human rights duties as an exercise of extraterritorial jurisdiction. Seck discusses whether the home State duty to protect should be interpreted to mandate the exercise of home State jurisdiction over transnational corporate conduct in order to both prevent and remedy human rights harms. Seck evaluates her preliminary findings from the perspective of Third World Approaches to International Law (TWAIL). She concludes that the state duty to protect includes a state duty (or obligation) to structure their institutions so as to both facilitate corporate compliance with the responsibility to respect rights, and facilitate access to remedies by victims of human rights abuses. This also includes state regulation of such structures, such as export credit agencies, stock exchanges and financial institutions, and to actively consider the use of corporate laws to bring about compliance with the state duty to protect.

In his chapter, Surya Deva critically discusses the *Respect, Protect and Remedy* framework set out in the SRSG's 2008 report. Noting the background for the appointment of the SRSG and his mandate, Deva recognizes the value of the efforts made by the SRSG and that he deserves credit for bringing attention to a number of important points. These include paying attention to developing countries' lack of capacity or sometimes will to regulate TNC activities, extraterritorial regulation of TNCs activities as a legitimate option, and suggestions that governments should work to change the corporate culture to become responsible. Deva argues that the framework, however, suffers from a serious omission in its failure to address the role that international financial institutions and other international organizations such as the WTO could play in ensuring that business complies with human rights. Deva also argues that the SRSG's suggestion that 'governance gaps' created by globalization are the root cause of business and human rights predicaments is simplistic and fails to consider the background for the development of the international human rights law regime and that of corporate law in relation to the interests to be served. Deva finds that the framework would be stronger if it suggested which human rights are most relevant to be considered for corporate human rights responsibilities. He also argues that the framework's conceptualization of the corporate responsibility to respect human rights could be more specific in promoting corporate human rights responsibility. Deva concludes that a consensus is needed on why corporations have human rights responsibilities, what these are, how they could be implemented and enforced and that such consensus requires not only states and international organizations but also business leaders and civil society

to act beyond their own interests and to think beyond what is politically feasible here and now.

Andreas Rasche discusses the UN Global Compact from an organizational and business ethics perspective. His chapter takes issue with what he considers to be common misconceptions of what the Global Compact is. The Global Compact has been criticized for being toothless, a 'blue-washing' instrument for companies, and generally too weak in terms of enforcement. Rasche argues that the Global Compact does not have to be legally binding, but is a supplement, indeed a necessary one, to other ways of regulating company action in a context of global governance. It has the capacity to assist mutual learning and the development of a set of shared values. Rasche argues that the Global Compact must be understood and appreciated in the context of its underlying mandate and supplementary nature with regard to state and non-state regulation. In addition, its dynamic and flexible multi-stakeholder and network-based governance structure can promote necessary reform of the UN system from within.

Karin Buhmann discusses some differences in outcomes between the Global Compact and the EU's efforts to develop a normative framework on CSR through the MSF. Based on differences between the Global Compact and the MSF as regards stakeholder composition, the procedures of adoption, and the impact of international human rights law on the final normative result, Buhmann argues that the Global Compact and the MSF offer instructive lessons on the importance of balancing power disparities between actors in reflexive regulatory processes. Buhmann proposes that Habermasian theory on deliberative law-making, transposed to the intergovernmental level, may provide qualitative normative guidance for dealing with reflexive law theory's failure to address the issue of how to deal with power disparities. While not offering a blueprint solution, Habermasian theory takes the qualitative aspect of the reflexive regulatory process a step further to provide for participation by representative stakeholders. The theory may provide qualitative guidance for the management and design of reflexive regulatory fora to provide participants with an actual say. Based on the perspectives offered by reflexive law and Habermasian theory on deliberative law-making, Buhmann also argues that a stronger integration of legal theory – understood as a theory of institutionalization of behavioural norms – into cross-disciplinary work on CSR may enrich the development and implementation of CSR. The chapter addresses business and human rights only from the CSR perspective. However, similar observations to those made in the chapter may be made with regard to balancing power disparities in multi-stakeholder initiatives on BRHR and work to promote the development and implementation of BRHR.

Addressing the business impact on human rights and the CSR discourse from an African perspective, Wambui Kimathi argues that both debates must aim at making business take greater responsibility for human rights. Kimathi argues from a political science perspective, which is informed by

her experience as Commissioner at the Kenyan Human Rights Commission, that poverty in most of Sub-Saharan Africa serves as a trigger for the social engagement of African business. Businesses participate in social and economic services, but unless this is to be just a fig leaf, there needs to be more complementarity between business action, communities' expectations and national development plans. There is a need to change approach in order to make CSR a pathway towards greater realization of human rights. Both the CSR debate and that on business and human rights should be directed towards ensuring an alignment of commercial and societal concerns. These should not be separated but re-embedded in discussion on sustainable development. Kimathi concludes that greater focus by businesses on respecting human rights would enable business to play a greater role in poverty reduction as well as in the general protection of human rights, and would generate increased societal value. National human rights institutions have a role to play in the promotion of CSR and BRHR and they should accept it. Like Chris Sidoti, Kimathi argues that the debates on CSR and BRHR must place stronger emphasis on empowering the individuals for whom human rights and CSR generally are crucial concerns.

Chris Sidoti draws on his background as a human rights activist and former Human Rights Commissioner of Australia to discuss how the process of regulating and enforcing CSR could attain a higher degree of inclusiveness. The profit-seeking aim of business is a legitimate aim. However, business and the rest of society need to recognize that all business activity has or can have human rights dimensions. Based on cases from the Australasian region, Sidoti demonstrates several examples of how people and their human rights are affected by business. These effects may be positive, but many are negative. Sidoti argues that because business affects human rights, it has responsibilities that should be subject to law. Victims of human rights violations by business and others whose human rights are most affected by business are the ones best qualified and most entitled to participate in discussing how to regulate and enforce human rights responsibilities of business. As international law is dynamic, Sidoti argues that it should respond affirmatively to the need to include legal regulation of business and human rights and to the need for inclusion of those whose human rights are the most affected by business.

Ruth Nielsen approaches the SRSG's *Respect, Protect and Remedy* framework from the perspective of the interaction of international labour law and EU law on free movement and public procurement. Including international trade law in her discussion, she argues that CSR and the BRHR paradigm may act as a soft law bridge between international trade law and labour law but that there is need for more hard law in this area. She argues that some of the points raised by the report of the SRSG in relation to human rights and business such as access to remedies are also relevant in a more general EU context.

Cecilia Anicama's chapter reflects a human rights law approach to business and human rights in Latin America. She argues that BRHR is a topic of emerging legal relevance in Latin America. This is evident, inter alia, in the case law of the Inter-American Human Rights Commission and Court. CSR does not necessarily comprise a human rights based approach, and indeed in many countries, businesses engage in CSR without doing so in a framework that could determine the impact activities could have on human rights. Companies' CSR policies therefore do not necessarily indicate that the companies understand or reflect upon their human rights responsibilities in this regard. Anicama proposes that a specific human rights approach should be taken by companies. She argues that a human rights approach to businesses and their impact on society has already been demonstrated by emerging Inter-American human rights case law, which emphasizes the state duty to protect individuals against human rights violations by non-state actors.

Dominique Bé assesses International Framework Agreements (IFAs) as a form of company level governance. Their primary aim is the protection of minimum labour rights. Through an analysis of the extent of reference to international labour standards and human rights in various IFAs, Bé compares IFAs with CSR codes of multinational corporations. Offering a practically as well as research oriented conclusion, Bé finds that a multinational corporation's CSR code tends to reflect the contents of the same multinational corporation's international framework agreements in terms of the issues and stakeholders covered.

Jacob Dahl Rendtorff discusses what he refers to as the moralization of the firm from a perspective in which he integrates elements of business ethics, philanthropy, law and economics. He argues that to understand the ongoing moralization of the firm we need a holistic view of organizations as open systems representing broader values and cultures that cannot be explained sufficiently in terms of individual maximizing and formal contracts. Such relations must be approached with help from a broader view of institutions as expressions of moral relations and culture, different stakeholder claims and conceptions of meanings that are projected on to the organization as an open system responding to different external and internal expectations. What is needed is an interdisciplinary institutional concept of the organization integrating different external and internal value conceptions and views of the goals of the firm. He concludes that the legitimacy of corporations in modern society is founded on the idea of CSR, business ethics or human rights as instruments of social management.

Lauren Caplan addresses management challenges in relation to CSR from the perspective of varying degrees of state regulation of corporations. As a point of departure, the state makes it easier for individuals to try to create profit-making ventures by limiting the risks to which such individuals are exposed; and in exchange, the owners agree to create something of value

to society, or at least to minimize the risk that its limited liability transfers to society. Caplan argues that corporate social responsibility advocates ought to take advantage of the capital markets' recognition that issues such as human rights, the environment and governance pose direct risks to corporations' long-term viability and profitability. She suggests application of the International Financial Reporting Standards as a global accounting system that could provide globally comparable and verifiable corporate disclosures not only in relation to capital market disclosure regulations but also in relation to social responsibility. The development of these standards and other related trends in the global capital markets may help society and its individual sectors get the most benefits from the dual relationship between societal and market interests through CSR. Application of such standards could also provide better background for risk analysis and investors' considerations of CSR.

Jette Steen Knudsen discusses how firms organize their Corporate Social Responsibility (CSR) initiatives in order to control their business environment. Drawing on two case studies – information technology giant Hewlett Packard (HP) and organic ice cream producer Ben & Jerry's – the chapter analyses how firms link their CSR initiatives to corporate strategy, organize these initiatives and make key CSR decisions. Discussing the two cases from the perspectives of defensive and offensive CSR, the chapter considers the organizational placement of CSR managers and the role of boards. The chapter concludes with a set of recommendations to managers in relation to links between CSR and business strategy, placement of CSR managers, and the role of boards.

5 Institutionalization of corporate integration of CSR: a managerial perspective

Institutional theory provides some help in understanding why companies engage in CSR even though it is not legally binding and there is no legal system to punish those who do not engage in CSR. Institutional forces explain how the voluntary invitation to (for example) CSR in fact disciplines and controls companies and their managers and employees.[12] Through the regulative force of social norms, organizations have a tendency to subscribe to the same ideas, the same agendas and develop the same solutions as everybody else. As a consequence, organizations are often more similar than their

[12] Dimaggio, P. and W.W. Powell (1991) *The New Institutionalism in Organizational Analysis*. Chicago, IL: The University of Chicago Press; Meyer, J.W. and B. Rowan (1977) Institutional organizations: Formal structure as formal myth. *American Journal of Sociology*, Vol. 83: 340–363.

leaders like to believe.[13] Dimaggio and Powell refer to this phenomenon as 'isomorphism' (iso = same; morp = form or shape). Organizations take on similar forms because they want to be recognized as legitimate institutions in society. We find this argument compelling for the case of CSR in particular. Companies compete not only for resources and customers but also for influence and social recognition, and CSR holds promises of legitimacy and social acceptance. In these competitive processes for social recognition, companies often end up imitating each other in spite of differentiation being their competitive ambition.

Meyer and Rowan define the notion of 'ceremonial conformity' to express how companies adapt their structures and norms to signal conformity with societal norms and expectations. First, the state conditions corporate support on particular hierarchical structures (coercive isomorphism). For example, the state encourages – without legislating – companies to take on more social responsibility and imposes more directly legal obligations on companies to, for example, report annually on their CSR activities. Organizational adherence to the same voluntary codes of conduct or ethical norms and cultures can also develop for other reasons. When companies model themselves vis á vis other companies which they regard as being more successful or legitimate, this is what they define as mimetic isomorphism. When Company A observes how Company B improved reputational rankings and social legitimacy as a result of their CSR efforts, Companies A, C and others may want to mimic this endeavour. Finally, as individuals with similar backgrounds share competencies, position, status, orientation and networks across organizations they come to form a certain set of norms and standards to live up to (normative isomorphism). The steadily growing number of CSR networks online as well as offline, private as well as public, is an illustration of this point. According to Dimaggio and Powell, isomorphism makes it easier for organizations to negotiate with other organizations, to attract competent employees, to be recognized as legitimate actors and to fit the administrative categories that are seen as appropriate in order to obtain contracts.

From the perspective of management, corporate social responsibility holds a strong and powerful lever for contributing to a more motivated, integrated, and loyal workforce in the same way as, for example, marketing scholars argue that CSR contributes to improved relations and loyalty among consumers.[14] Interestingly, neither the management literature nor the CSR

[13] Christensen, L.T., M. Morsing, and G. Cheney (2008). *Corporate Communications: Convention, Complexity and Critique*. London: Sage Publications.

[14] Brown, T.J. and P.A. Dacin (1997) The company and the product: corporate associations and consumer product responses. *Journal of Marketing*, Vol. 51, January: 68–84; Sen, S. and C.B. Bhattacharaya (2001) Does doing good always lead to doing better? Consumer reactions to corporate social responsibility. *Journal of Marketing Research*, Vol. XXXVIII, May: 225–243.

literature has paid much attention to how managers and employees relate to CSR. The management literature pays attention to the 'inside' of the corporate body while CSR literature has been much preoccupied with analysing its 'outside' relations. In other words: while management emphasizes the analysis and development of psychological competences and interpersonal skills in the organizational context, CSR literature emphasizes how companies manage their relations with external stakeholders.

A few CSR studies have specifically pointed to the importance of managerial and employee support for the corporate CSR policies to be successfully implemented[15] and a few other studies have pointed to the importance of employee welfare as a major concern for organizational CSR policies.[16] Also, in the Academy of Management's special issue on corporations as social change agents (2007), some authors theorize on how internal processes and motives of organizational members determine how organizations shape action and relate to external stakeholders,[17] and one study explores how certified management standards shape socially desired firm behaviour.[18] A few recent empirical studies have demonstrated how organizational structures and cultural norms are aligned with the CSR strategy[19] and how CSR becomes embedded among managers and employees.[20] Yet while this research draws on theories of organizational culture, organizational justice, institutional theory, and social identity, it does not link CSR to the extensive field of management.

If we are to learn more about how corporate management integrates human rights policies into their organization, we think it is very important to understand how legislated law interacts with self-regulating processes in the organization. How are codes of conduct produced and how do they relate to and influence legal issues confronting the company? What challenges occur between the company's claims to take responsibility on human rights and the company's obligation to live up to the law? It is necessary to study such action and dilemmas at the organizational level to get a clearer

[15] Jenkins, H. (2006) Small business champions for corporate social responsibility. *Journal of Business Ethics*, Vol. 67, No. 3: 241–256.

[16] Spence, L.J. and J.M. Lozano (2000) Communicating about ethics with small firms: experiences from the UK and Spain. *Journal of Business Ethics*, Vol. 27, No. 1: 43–53.

[17] Terlaak, A. (2007) Order without the law? The role of certified management standards in shaping socially desired firm behaviours. *Academy of Management Review*, Vol. 32, No. 3: 968–985.

[18] Id.

[19] Wit, Monique de, Wade, M. and E. Schouten (2004) Hardwiring and softwiring corporate responsibility: a vital combination. *Corporate Governance*, Vol. 6, No. 4: 491–505.

[20] Morsing, Mette and D. Oswald (2009) Sustainable leadership: management control systems and organizational culture in Novo Nordisk A/S. *Corporate Governance: The International Journal of Business in Society*, Vol. 9, No. 1: 83–99.

picture of how management deals with creating a culture amongst employees to motivate and inspire the production of a 'CSR culture' – and in our case a 'BRHR culture'.

6 Towards an understanding of the blurring of boundaries between corporate voluntary action and the law: reflexive law

As several chapters in this book suggest, corporate isomorphism as a driver for CSR is complemented today by a number of initiatives instigated by public organizations at governmental or intergovernmental level. The public policy interest in CSR and BRHR is increasingly driving authorities at different levels to initiate procedures aimed at inducing corporate self-regulation on CSR. As some of these initiatives are public and refer to international law as a normative source, they challenge both the understanding that CSR is voluntary and the conventional divide between law and CSR.

A theoretical framework is needed to appreciate and analyse the interrelationship between law and CSR, and the emerging discourse on BRHR which is being developed through the multi-stakeholder consultations of the SRSG (2005–2008 and 2008–2011). Much legal theory is normative and output-oriented. As suggested above, CSR research and debate generally relate to law from that perspective. However, legal scholarship also offers theories which are procedural. In the context of business responsibilities as addressed by this book, we propose to draw on the theory of reflexive law to bring about a framework which has the potential to support an increased integration of the concerns of business, civil society, governments and other actors in regard to CSR and BRHR. Reflexive law offers an attractive theoretical perspective for understanding public-private regulation and collaboration on the development of CSR and BRHR, because it is process- and communication-oriented, and because its emphasis is on the exchange of expectations between different social sub-systems (such as economic, political and legal systems). It offers a regulatory strategy which has the capacity to accommodate the views and concerns of many social actors in a common process which may result in business self-regulation and forms of public-private law-making based on insight into the concerns of others.

The background for the development of reflexive law as a regulatory theory was an observation that regulatory strategies employed by welfare states in the 1970s–1980s were ineffective for addressing societal concerns, such as environmental problems, unemployment and social inequalities, which required the cooperation of non-state actors for their solution.[21] Poverty,

[21] Teubner, Gunther (1983) Substantive and reflective elements in modern law. *Law and Society Review*, Vol. 17, No. 2: 239–285; Teubner, Gunther (1986) Introduction, in

inequality, unemployment and environmental degradation and other ecological problems were acute concerns in many welfare states, but states were unable to achieve satisfactory changes through conventional top-down formal and substantive law. This was partly because solutions to the problems required active participation and often a change of conduct among companies and other non-state actors. The concerns which reflexive law addressed for the welfare states of the 1980s in many ways resemble those which global society is facing at the beginning of the twenty-first century. As the BRHR discourse shows, when problems move from the national to the global scale, so does much regulation and other efforts to deal with them.

As a regulatory technique, reflexive law leaves organizations such as companies the freedom and choice to determine their own norms of behaviour discursively. In principle, authorities intervene only by establishing procedures that guide self-reflection, but they may also suggest a substantive normative framework to guide the reflexive process of norm-making. Reflexive law allows public institutions to initiate self-regulation among other societal actors, such as companies, by offering a learning process that enables the latter to reflect on their societal impact and the needs and expectations of other social actors, and to integrate societal needs and demands in their management decisions. In other words, where authorities such as states or intergovernmental organizations such as the UN perceive a need for a change in the behaviour of companies or other social actors, they may set up procedural fora which promote learning and reflection but leave the final regulation to its participants. The process is reflexive in the sense that it promotes reflection at several levels and between different types of actors on mutual and differential concerns and expectations. This leads to an understanding and appreciation of the needs and concerns of other stakeholders and the interests they represent, which in turn leads to an internalization of these interests which results in self-regulation.

By proposing reflexive law as a theoretical framework for understanding CSR and BRHR, we are not claiming to be offering revolutionary ideas. Indeed, reflexive law was related to CSR in early discussions by the author of the theory, Gunther Teubner.[22] Scholars have also applied reflexive law to a range of issues of relevance to CSR, such as to environmental management

Teubner, Gunther (ed.) *Dilemmas of Law in the Welfare State*. Berlin and New York: Walter de Gruyter: 3–11; Teubner, Gunther (1993) *Law as an Autopoietic System*. Oxford: Blackwell.

[22] Teubner, Gunther (1984) Corporate fiduciary duties and their beneficiaries: a functional approach to the legal institutionalization of corporate responsibility, in Hopt, Klaus J. and Gunther Teubner (eds) *Corporate Governance and Directors' Liabilities*. European University Institute, Berlin and New York: Walter de Gruyt: 149–177.

and labeling as self-regulation and auditing,[23] non-financial reporting,[24] globalization of law and transnational private regulation,[25] and labour law.[26] However, such discussions of reflexive law have mainly been made by scholars with a background in law or in subjects closely related to law. What we propose is that the paradigm of reflexive law may offer the sort of medium for common understanding and cooperation which is needed to bring law and management scholarship and practice to work closer together on CSR and BRHR. Because of its emphasis on process, communication, exchange of expectations and self-regulation, the paradigm of reflexive law offers a strategic tool and theoretical framework for the economic, political and legal systems to interact and learn about mutual expectations and needs. This offers business the opportunity to learn about expectations of regulators and civil society and to self-regulate, and it offers regulators and the citizenry which they represent the opportunity to shape CSR and BRHR without resort to formal statutory law. The reflexive law approach, however, does not rule out formal law. It complements formal law, and provides a forum for understanding, cooperation and soft guidance.

While it may offer a medium for learning and understanding, reflexive law is no panacea. Some scholars who have otherwise welcomed the contribution of the theory have identified important weaknesses, including

[23] Orts, E.W. (1995) Reflexive environmental law. *Northwestern University Law Review*, Vol. 89, No. 4: 1227–1339; Orts, E.W. (1995) A reflexive model of environmental regulation. *Business Ethics Quarterly*, Vol. 5, No. 4: 779–794.

[24] Hess, D. (1999) Social reporting: a reflexive law approach to corporate social responsiveness. *Journal of Corporation Law*, Vol. 25, No 1, Fall: 41–84.

[25] Scheuerman, W.E. (2001) Reflexive law and the challenges of globalisation. *The Journal of Political Philosophy*, Vol. 9, No. 1: 81–102.

[26] For example, Wilthagen, Ton (1994) Reflexive rationality in the regulation of occupational safety and health, in Rogowski, Ralf and Wilthagen, Ton (eds) *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation*. Deventer and Boston, MA: Kluwer Law and Taxation Publishers: 345–376; Rogowski, Ralf (1994) Industrial relations, labour conflict resolution and reflexive labour law, in Rogowski, Ralf and Wilthagen, Ton (eds) *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation*. Deventer and Boston, MA: Kluwer Law and Taxation Publishers: 53–93; Rogowski, Ralf (2001) The concept of reflexive labour law: its theoretical background and possible applications, in Priban, J. and David Nelken (eds) *Law's New Boundaries: The Consequences of Legal Autopoiesis*. Aldershot: Ashgate/Dartmouth; Rogowski, Ralf (1998) Autopoietic industrial relations and reflexive labour law, in Wilthagen, Ton (ed.) *Advancing Theory in Labour Law and Industrial Relations in a Global Context*, Amsterdam: North-Holland Press; Deakin, S. and R. Hobbs (2007) False dawn for CSR? Shifts in regulatory policy and the response of the corporate and financial sectors in Britain. *Corporate Governance*, Vol. 15, No. 1: 68–76; Arthurs, Harry (2008) Corporate self-regulation: political economy, state regulation and reflexive labour law, in Bercusson, Brian and Cynthia Estlund (eds) *Regulating Labour in the Wake of Globalisation*. Oxford and Portland, Oregon: Hart: 19–35.

its lack of specificity in explaining how external concerns are to be integrated in internal processes, how to balance them against internal concerns, and how to handle power disparities in general.[27] It is in this light that Buhmann's chapter, as indicated above, proposes that Habermasian theory on deliberative law-making may complement reflexive law in terms of how to balance power disparities by providing qualitative guidance for the management and design of reflexive regulatory fora to provide participants with an actual say.

The reflexive law approach is open to application not only by legal scholars but also by a range of other social scientists, such as management, organizational, communication and political science scholars. The communicative aspects of the interrelationship between management and law which informs CSR and contributes to its on-going development are among the points highlighted by Rasche's chapter on the Global Compact as a necessary supplement to conventional regulation. Assessed from the perspective of reflexive law, the Global Compact need not be seen merely as 'a necessary supplement' to state regulation of company action in a context of global governance. Given its focus on learning, sharing of experience and encouraging business self-regulation based on concerns of other actors (such as the concerns embodied in the international law instruments on human rights, labour, environment and anticorruption which inform the Ten Principles, or the concerns voiced by civil society or participating companies) the Global Compact may be considered an example of reflexive law. This does not mean that the Global Compact is a legal instrument, but it may offer important lessons for future consideration on how governments, business and civil society may interact and communicate with regard to regulation of societal concerns (such as climate change and poverty).

The consultative process of the SRSG during his first mandate is another example of what may be characterized as reflexive law. The process did not result in a regulatory framework (to the extent that the policy framework presented in the 2008 report is not considered soft law, which it may in fact be). The process of consultation did result in business entities and organizations engaging in self-regulation on issues related to human rights and business. In at least one case, it appears to have caused actors who had previously expressed considerable reservations towards the idea that businesses

[27] See Scheuerman, W.E. (2001) *supra* note 25 at 86; Neves, M. (2001) From the autopoiesis to the allopoiesis of law. *Journal of Law and Society*, Vol. 28, No. 2: 242–264, at 263–254; compare also Dalberg-Larsen, Jørgen (1991) *Ret, styring og selvforvaltning*. Aarhus: Juridisk Bogformidling: 15–16, 136. Sand goes as far as characterising Teubner's theory of reflexive law as having a preliminary and un-finished character, see Sand, Inger-Johanne (1996) *Styring av kompleksitet: Rettslige former for statlig rammestyring og desentralisert statsforvaltniing*. Bergen: Fagbokforlaget Vigmostad & Bjørke: 94.

should take responsibility for human rights to change stances.[28] Perhaps most importantly, the consultative approach of the SRSG demonstrates a novel way of making international law, and of including participants hitherto excluded from the formal sphere of international lawmaking. The SRSG process until mid-2008 granted a voice to companies, and invited civil society, including representatives of the concerns of individual persons and victims, into the process. The extended mandate (2008–2011) encourages the SRSG to continue this style of consultations, with increased focus on victims. This may not only be an opportunity to include a wider range of groups including the voices of the individuals to whom Sidoti refers in his article. It may also be an indication that intergovernmental organizations are realizing that to be effective with regard to social concerns, regulation needs to involve those concerned and those to be subjected to resulting norms. These are the lessons which many states have realized with regard to national level regulation of environmental and related concerns, and which essentially build on the theory of reflexive law. While the formal structure and law-making process of international society remains state-centred, intergovernmental type multi-stakeholder fora on CSR and BRHR, such as the Global Compact and the SRSG process, may indicate a gradual course towards including non-state actors to a higher degree than before. This may also allow for better integration of the concerns, objectives and insight of law and management as theory and practice. In addition, a regulatory strategy focusing on firms' internationalization of externalities may contribute to the development of corporate cultures respectful of human rights, a need which has repeatedly been highlighted by the SRSG since the presentation of his 2008 report, the *Protect, Respect, Remedy* UN Framework on business and human rights. Such a strategy need not compete with or replace conventional corporate law. Like other instances of reflexive law, it may complement substantive governmental law and provide parts of a pragmatic solution to national, regional and global concerns on CSR and BRHR.

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[28] For this example of change of stances, see IOE, ICC, BIAC (2006) *Business and human rights: The role of business in weak governance zones: Business proposals for effective ways of addressing dilemma situations in weak governance zones*, Geneva, December 2006.

Part I

Setting the Stage