

**Corporate Decision Making in the Human Rights Context:  
Using Proportionality as a Supplement to the *Guiding Principles***

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## **Abstract**

Proportionality is a conceptual framework through which we seek to attain an appropriate relationship between human rights (and other interests) and other considerations that may justify limitations on the former. This article explores whether, on both normative and practical levels, the principle of proportionality can justifiably be used as a supplement to the UN *Guiding Principles on Business and Human Rights* in guiding corporate decision making and its impacts on human rights. This article concludes that proportionality, due to compelling conceptual and practical limitations, cannot stand alone as the sole source of guidance in corporate decision making; proportionality can, however, serve as a useful supplement to the *Guiding Principles*, providing an analytical framework that gives structure to the discussion, and as a moral “litmus test” for any corporate act or omission affecting human rights and interests.

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## INTRODUCTION

The principle of proportionality has emerged as an organizing idea in contemporary human rights law. In its public law context, the principle of proportionality seeks to limit abuses of power and infringements of individual rights by the state. The seminal Supreme Court of Canada decision in *R v Oakes*<sup>1</sup> established proportionality as a fundamental pillar of Canadian constitutional law, invoking proportionality as a guiding framework in applying section 1 of the *Charter*.<sup>2</sup> Similarly, international human rights law has adopted proportionality, though the precise formulations of the principle vary. While proportionality has become firmly entrenched in public law, its application in the private law context is comparatively scarce and controversial.

Nonetheless, the methodological approach of proportionality may serve as a valuable guide in a place outside of the courts: the corporate boardroom. The central purpose of this article is to explore whether, on both normative and practical levels, the principle of proportionality can justifiably be used as a supplement to the UN *Guiding Principles on Business and Human Rights*<sup>3</sup> in guiding corporate<sup>4</sup> decision making and its impacts on human rights. In doing so, I draw upon domestic and international legal principles, ethical and moral philosophy, political thought, and management theories. The importance of the research question is evident in the vastness of corporate power; those powers must be exercised in a manner that accords with prevailing expectations. I conclude that proportionality, due to compelling conceptual and practical limitations, cannot stand alone as the sole source of guidance in corporate decision making; proportionality can, however, serve as a useful supplement to the *Guiding Principles*, providing an analytical framework that gives structure to the discussion, and as a moral “litmus test” for any corporate act or omission.

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<sup>1</sup> *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes* cited to SCR].

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>3</sup> Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc A/HRC/17/31 (21 March 2011) [*Guiding Principles*].

<sup>4</sup> I use the term “corporation” as shorthand for any type of business enterprise, including both national and transnational.

I am in agreement with Erika George when she asserts that constructive change in the area of business and human rights “will require more than law. It will require that we cultivate ethical business cultures through ensuring that human rights are incorporated into business strategy as a matter of routine daily decision-making.”<sup>5</sup> I see proportionality as a constructive addition to the business and human rights dialogue, building on the foundation established by the *Guiding Principles*. My proposal aims not at establishing a new *legal* duty on corporations, but rather at articulating a *moral* responsibility and analytical framework that incorporates human rights into routine corporate decision making and cultivates a more ethical business culture.

Part I traces the key historical turning points leading to the *Guiding Principles* and outlines the core elements of the *Guiding Principles*. Part II describes the principle of proportionality. Drawing upon academic commentary and legal principles, this Part seeks to delineate the contours of proportionality and to describe how proportionality can supplement the dominant business and human rights framework, the *Guiding Principles*. Part III provides a detailed illustration of proportionality through a hypothetical scenario. This Part serves to demonstrate the practical application (and difficulties) of proportionality, as well as proportionality’s “value added” to the *Guiding Principles*. Part IV makes the case for the use of proportionality as a moral (rather than legal) threshold for corporate acts or omissions and discusses third-party monitoring. Part V raises several compelling critiques of proportionality and responds to these critiques. Part VI provides closing remarks.

## **I. THE UN *GUIDING PRINCIPLES***

The *Guiding Principles*, which were endorsed by the UN Human Rights Council in June 2011, marked a revolution in the business and human rights landscape. In the words of one report,

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<sup>5</sup> Erika George, “Incorporating Rights: Making the Most of the Meantime” (29 January 2015) (blog), online: James G Stewart Personal Blog <[jamesgstewart.com/incorporating-rights-making-the-most-of-the-meantime/](http://jamesgstewart.com/incorporating-rights-making-the-most-of-the-meantime/)>.

“The modern international human rights framework was created by governments, for governments.”<sup>6</sup> The adoption of the *Guiding Principles* signalled a broader recognition that the international human rights framework must grow and evolve to respond to contemporary realities. The scope and nature of the corporate entity has evolved considerably since the inception of the Universal Declaration of Human Rights; accordingly, the law has struggled to keep up with the pace of change. We can track the proliferation of initiatives seeking to formulate codes of conduct for businesses with respect to their impact on human rights. Early initiatives included the Guidelines for Multinational Enterprises issued by the Organisation for Economic Co-operation and Development (OECD) in 1976, the efforts by the Fair Labor Association to improve working conditions in factories in 1999, and the Voluntary Principles on Security and Human Rights published in 2000 aimed at extractive companies.<sup>7</sup> The UN, however, for many years failed to promulgate a set of comprehensive, authoritative, and universal principles.<sup>8</sup>

The UN *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (the *Norms*)<sup>9</sup> can be understood as the UN’s first major attempt to formulate a comprehensive set of principles respecting business and human rights. The *Norms*, moreover, served in many respects as the predecessor to the *Guiding Principles*. The *Norms* set out to “promote universal respect for, and observance of, human rights and fundamental freedoms”.<sup>10</sup> The *Norms* set out the proposition—controversial to many—that “even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society,

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<sup>6</sup> Kenan Institute for Ethics, *The U.N. Guiding Principles on Business and Human Rights: Analysis and Implementation* (Duke University, February 2012) at 4, online: <<https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf>> [“Kenan Report”].

<sup>7</sup> See *ibid.*

<sup>8</sup> See *ibid.*

<sup>9</sup> *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003), online: <[www1.umn.edu/humanrts/business/norms-Aug2003.html](http://www1.umn.edu/humanrts/business/norms-Aug2003.html)> [*Norms*].

<sup>10</sup> *Ibid.*, preamble.

are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights”.<sup>11</sup> As noted by the Kenan Institute for Ethics, the *Norms* received sharp criticism, particularly from the corporate world.<sup>12</sup> For example, the International Chamber of Commerce and International Organization of Employers disparaged the *Norms* as being “counterproductive”.<sup>13</sup> The core criticism launched at the *Norms* was that these weighty responsibilities properly rest on the shoulders of the state, not the corporation. Accordingly, while some NGOs such as Amnesty International expressed support for the *Norms*, the instrument was widely opposed.<sup>14</sup>

The next step came in 2005, when the UN Commission on Human Rights requested that a Special Representative be appointed to “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with respect to human rights”.<sup>15</sup> Consequently, in 2008, Professor John Ruggie presented to the UN Human Rights Council—the entity that in 2006 replaced the Commission on Human Rights—the “Protect, Respect and Remedy” framework, which was designed to guide businesses and other actors in navigating their responsibilities with respect to human rights.<sup>16</sup> After having considered Professor Ruggie’s model framework, the Human Rights Council passed a resolution “welcoming the framework and gave Professor Ruggie a new three-year mandate to develop more practical guidance.”<sup>17</sup> As a result,

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<sup>11</sup> *Ibid.*

<sup>12</sup> “Kenan Report”, *supra* note 6 at 4.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Office of the High Commissioner for Human Rights, “Human Rights and Transnational Corporations and Other Business Enterprises: Human Rights Resolution 2005/69”, online: <[www.business-humanrights.org/Updates/Archive/SpecialRepresentativeMandate](http://www.business-humanrights.org/Updates/Archive/SpecialRepresentativeMandate)>. See “Kenan Report”, *supra* note 6 at 5.

<sup>16</sup> See *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*, UNHRC, 8th Sess, UN Doc A/HRC/8/5 (2008) [“Protect, Respect and Remedy Framework”]. See “Kenan Report”, *supra* note 6 at 5.

<sup>17</sup> *Ibid* [citations omitted].

in June 2011, the UN *Guiding Principles* were born.<sup>18</sup>

Today, the *Guiding Principles* constitute the dominant business and human rights framework, consisting of a non-binding set of standards applicable to all “business enterprises”.<sup>19</sup> As Professor Ruggie describes, “The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.”<sup>20</sup> The “Protect, Respect and Remedy” framework rests on three pillars: “the State duty to protect against human rights abuses by third parties, including business through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, meaning essentially not to infringe on the rights of others; and greater access by victims to effective remedy, both judicial and non-judicial.”<sup>21</sup>

But what is the precise nature of the corporate responsibility to respect human rights? As an initial observation, the *Guiding Principles* do not explicitly hold out proportionality as a

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<sup>18</sup> Shortly after its adoption of the *Guiding Principles*, the UN Human Rights Commission established a three-year working group consisting of five experts with a mandate to, among other things, promote “effective and comprehensive dissemination and implementation of the Guiding Principles”: *Human Rights Council Res 17/4, Human Rights and Transnational Corporations and Other Business Enterprises*, 17th Sess, UN Doc A/HRC/17/L.17/Rev.1 (2011) at para 6(a).

<sup>19</sup> The principles applying to business enterprises can be summarized as follows, as adapted from a report presented to the UK House of Commons: comply with all applicable laws and respect internationally recognized human rights; seeks ways to honour the principles of internationally recognized human rights when faced with conflicting requirements; treat the risk of causing or contributing to human rights abuses as a legal compliance issue; adopt appropriate due diligence policies to identify, prevent, and mitigate human rights risks; monitor and evaluate implementation of corporate policies; consult people who may be affected by corporate action; emphasize the importance of compliance with the *Guiding Principles* throughout the supply chain; adopt or participate in effective grievance mechanisms; be transparent about policies, activities, and impacts; and report on human rights issues and risks. See UK, House of Commons Parliamentary Papers, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, CM 8695 (September 2013) at 13, online: <parlipapers.chadwyck.com/home.do>.

<sup>20</sup> John G Ruggie, “Presentation of Report to United Nations Human Rights Council” (30 May 2011) at 2, online: <www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011\_Remarks\_Final\_JR.pdf> [Ruggie, “Presentation of Report”].

<sup>21</sup> *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, UNHRC, 11th Sess, UN Doc A/HRC/11/13/Add.1 (2009) at 8, online: <www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.Add.1.pdf>.

responsibility of corporations.<sup>22</sup> Rather, broadly speaking, the *Guiding Principles* demand that business enterprises act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they have involvement. The *Guiding Principles* recognize that, in order to create the conditions for robust protection of human rights, a multi-stakeholder approach is required. The *Guiding Principles* do not, however, impose on corporations the same degree of responsibility for ensuring the protection of human rights as that imposed on states.<sup>23</sup> Put simply, it is a responsibility to “respect”.<sup>24</sup>

But still, how do we clearly differentiate between the corporation’s responsibility to respect and the state’s duty to protect? Specifically, how do we deal with the “fuzziness” around the nature and scope of the corporation’s responsibility to “respect”? It is critical to understand that the “Protect, Respect and Remedy Framework” rests on “differentiated but complementary responsibilities.”<sup>25</sup> The state’s duty to “protect” human rights is, some argue, uncontroversial.<sup>26</sup> This duty includes both legal and policy dimensions.<sup>27</sup> This state’s duty to protect encompasses, *inter alia*, a “duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their

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<sup>22</sup> The *Guiding Principles* do make reference to proportionality, such as the commentary stating that “[t]he means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size”: *Guiding Principles*, *supra* note 3 at 14. There is also a strong indication of proportionality considerations in the commentary accompanying Principle 11: “Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation”: *ibid* at 13. These commentaries give the sense that the precise implementation of the *Guiding Principles* is contingent on context and competing concerns, which are foundational concepts of proportionality analyses. I do not, however, assert that this amounts to an implicit adoption of proportionality as a responsibility of business. To be clear, the *Guiding Principles* stop short of telling a corporation to act proportionately.

<sup>23</sup> This more restrained approach is, at least in part, a product of the failure of the *Norms*. In the words of FASTERLING and DEMUIJNCK, “The approach taken is one of ‘principled pragmatism’ . . . meaning that feasibility guides efforts to better address business-related human rights challenges”: Björn FASTERLING & Geert DEMUIJNCK, “Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights” (2013) 116:4 J Bus Ethics 799 at 800.

<sup>24</sup> As noted by one academic, the plain meaning of responsibility suggests a “moral obligation to behave correctly or a thing that one is required to do, rather than a duty to which an actor is legally bound” and, although the *Guiding Principles* do not make explicit that “responsibility” is distinct from a “duty” or “obligation”, the difference is implied in the separate usage of those terms: Robert C BLITT, “Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance” (2012) 48:1 Texas Int’l LJ 33 at 44, n 65. Professor Ruggie has asserted that “‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps”. See “Protect, Respect and Remedy Framework”, *supra* note 16 at para 55.

<sup>25</sup> “Protect, Respect and Remedy Framework”, *supra* note 16 at para 9.

<sup>26</sup> See e.g. Surya Deva, “Guiding Principles on Business and Human Rights: Implications for Companies” (2012) 9:2 European Company Law 101 at 103.

<sup>27</sup> See “Protect, Respect and Remedy Framework”, *supra* note 16 at para 18.

territory or jurisdiction.”<sup>28</sup> Such a duty cannot rightly be imposed on corporations.

The corporation’s responsibility is, at its core, to “do no harm.”<sup>29</sup> We can separate the corporation’s responsibility to respect into two branches. First, “companies should avoid causing or contributing to adverse human rights impacts through their *own activities* and address such impacts when they occur.”<sup>30</sup> The notion of “activities” includes both actions and omissions, though commentators have underscored the lack of clarity as to whether this would include responsibility for a subsidiary’s conduct.<sup>31</sup> Second, “companies should seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by their *business relationships*, even if they have not contributed to those impacts.”<sup>32</sup> This is a more sweeping (and controversial) responsibility. Deva summarizes this branch of responsibility as the expectation that companies will “take steps to dissuade their business partners (i.e., suppliers, contractors and linked public sector undertakings) from indulging in human rights abuses.”<sup>33</sup>

There are thus principled distinctions we can draw between the state duty to protect and the corporate responsibility to respect. Nevertheless, the lines blur between the duties and responsibilities of the state and those of the corporation. For example, the “Protect, Respect and Remedy Framework” acknowledges that corporations have “additional responsibilities” when they, for example, “perform certain public functions” or have “undertaken additional commitments voluntarily.”<sup>34</sup> These words raise ambiguities that leave one wondering: What constitutes a public function? What might these “additional responsibilities” entail, and who gets to decide? How does one identify when a corporation has “voluntarily” taken on additional commitments? In short, we need a way to structure the analysis around these points—a means by which stakeholders can discuss

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* at para 24.

<sup>30</sup> Deva, *supra* note 26 at 105.

<sup>31</sup> See *ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> “Protect, Respect and Remedy Framework”, *supra* note 16 at para 24.

and debate these points using a common parlance and shared analytical framework. As I will argue below, proportionality can serve a crucial role in this respect.

Overall, however, in the words of the Kenan Institute for Ethics, “[the approach adopted by the *Guiding Principles*] was welcomed by business, which felt that the Norms and the corporate social responsibility field more generally absolved governments of their responsibilities; by human rights advocates, who saw both governments and companies as equally important players; and by states, some of whom had questioned the implied suggestion of the Norms that companies assume some of their responsibilities.” Despite a groundswell of public support for the proposition that the *Guiding Principles* constituted a significant improvement over the *Norms*, many human rights advocates and academics have expressed disappointment over the *Guiding Principles*, arguing that they set the bar too low and fail to provide for more substantial human rights commitments.<sup>35</sup>

But on what basis did the *Guiding Principles* find this “responsibility to respect” on corporations? The answer, in fact, forms a key conceptual foundation to the overall proposition offered in this article. The commentary accompanying the *Guiding Principles* states that “[t]he responsibility to respect human rights is a *global standard of expected conduct* for all business enterprises wherever they operate.”<sup>36</sup> Relatedly, Professor Ruggie wrote that “[a]s a well established and institutionalized social norm, the corporate responsibility to respect exists independently of State duties and variations in national law. There may be situations in which companies have additional responsibilities. But the responsibility to respect is the baseline norm for all companies in all

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<sup>35</sup> See e.g. Festerling & Demuijnck, *supra* note 23 at 800; Nicola Jägers, “UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?” (2011) 29:2 *Nethl QHR* 159; International Federation for Human Rights “UN Human Rights Council Adopts Guiding Principle on Business Conduct, Yet Victims Still Waiting for Effective Remedies” (17 June 2011), online: <<https://www.fidh.org>>; Human Rights Watch, “UN Human Rights Council: Weak Stance on Business Standards” (16 June 2011), online: <[www.hrw.org](http://www.hrw.org)>; Blitt, *supra* note 24 at 35 (arguing that the *Guiding Principles* “set a minimal-expectation bar for businesses, promulgating non-binding ‘lowest common denominator’ recommendations that arguably neglect a more complex reality” [citations omitted]).

<sup>36</sup> *Guiding Principles*, *supra* note 3 at 13 [emphasis added].

situations.”<sup>37</sup> It is, I argue, from this very same source that the corporation’s moral responsibility to act proportionately arises. As will be discussed, there is a compelling case to be made that proportionality can reasonably serve as a global standard of expected conduct for all businesses. In short, my argument flows from a social and moral normative expectation, not a legal one. Hence, the conceptual foundation for the corporation’s responsibility to act proportionately sits in harmony with the conceptual underpinning of the *Guiding Principles* themselves. To be clear, I do not assert that proportionality is a binding principle of customary international law—far from it. Instead, I find a more compelling justificatory foundation lies in the global standards of expected moral conduct.

The *Guiding Principles* acknowledge that, at present, international human rights law imposes no direct legal obligation on corporations to respect human rights, though international law principles may be reflected in domestic legal systems.<sup>38</sup> This does not mean, however, that global standards of expected conduct cannot inform the responsibilities resting on corporations. In fact, it seems almost self-evident to reason that corporations have a responsibility to act in accordance with global expectations. The question, as alluded to above, is whether proportionality can rightly be put forth as such an expectation.

The *Guiding Principles* go a long way towards creating a more robust framework for companies when navigating potential and actual impacts on human rights. I see proportionality as the next step in improving that framework.<sup>39</sup> Having briefly traced the historical roots of the *Guiding Principles*, as well as having discussed the general framework and purpose of the *Guiding Principles*, I turn to a concept that is fundamental to the thesis of this article: proportionality.

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<sup>37</sup> *Business and Human Rights: Towards operationalizing the “protect, respect and remedy” framework: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UNHRC, 11th Sess, UN Doc A/HRC/11/13 (2009) at para 48, online: <[www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf)>.

<sup>38</sup> See “Kenan Report”, *supra* note 6 at 7.

<sup>39</sup> In his closing address to the Human Rights Council following the endorsement of the *Guiding Principles*, Professor Ruggie stated: “I am under no illusion that the conclusion of my mandate will bring all business and human rights challenges to an end. But Council endorsement of the *Guiding Principles* will mark the end of the beginning”: Ruggie, “Presentation of Report”, *supra* note 20. This article seeks to contribute to the scholarship in this next stage of the process.

## II. WHAT IS THE PRINCIPLE OF PROPORTIONALITY?

### A. *Tracing the Roots and Analyzing the Varying Conceptions of Proportionality*

As a philosophical concept, proportionality can be traced back to the ancient Golden Rule of “that which is hateful to you, do not do to your fellow.”<sup>40</sup> As a common-sense concept, it also warns us that one “should not use a sledgehammer to crack a nut”.<sup>41</sup> As a legal concept, proportionality emerged in the nineteenth century in Prussian law, imposing constraints on police who infringed an individual’s liberty or property.<sup>42</sup> The concept quickly spread and found expression in both national constitutions and international documents.<sup>43</sup> Indeed, proportionality “exhibits a viral quality, spreading relatively quickly from one jurisdiction to another.”<sup>44</sup> The fact that proportionality has found a voice in legal instruments the world over suggests that the proportionality principle may well constitute a “global expectation” in certain circumstances.

Proportionality is a conceptual framework through which we seek to attain an appropriate relationship between human rights (and other interests) and other considerations that may justify

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<sup>40</sup> See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge, UK: Cambridge University Press, 2012) at 175.

<sup>41</sup> See Jeremy Kirk, “Constitutional Guarantees, Characterisation and the Concept of Proportionality” (1997) 21:1 Melbourne U L Rev 1 at 1. This aphorism greatly simplifies what is, in truth, an eminently complex concept.

<sup>42</sup> See Pnina Alon-Shenker & Guy Davidov, “Applying the Principle of Proportionality in Employment and Labour Law Contexts” (2013) 59:2 McGill LJ 375 at 377.

<sup>43</sup> See e.g. *Charter of Fundamental Rights of the European Union*, [2007] OJ C 303/01, which uses the principle of proportionality to justify limits on fundamental rights and freedoms. It is significant, however, that the United States has actively resisted the adoption of “proportionality” in its constitutional jurisprudence. For commentary on US jurisprudence, cultural norms, conceptions of the state, and principles of autonomy supporting an “absolute” approach to rights rather than a proportionality-based approach, see Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (New York: Cambridge University Press, 2013) at 14-16, 52-63. See also Lorraine E Weinrib, “The Postwar Paradigm and American Exceptionality” in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge, UK: Cambridge University Press, 2006) 84. The leading assault on “balancing” was launched in T Alexander Aleinikoff, “Constitutional Law in the Age of Balancing”, (1987) 96:5 Yale LJ 943. Nonetheless, some commentators have pointed out that even the United States has embraced the concept of proportionality in its legal architecture. See e.g. Bernhard Schlink, “Proportionality in Constitutional Law: Why Everywhere But Here?” (2012) 22:2 DJCIL 291 at 297 (“[w]henver American courts review limitations and intrusions with strict scrutiny or a middle tier of scrutiny, or even with a requirement of mere rationality, theirs is a means-end analysis that is a more-or-less thorough proportionality analysis” [citations omitted]). See also *ibid* at 302 (“[proportionality] comes to the surface sooner or later—everywhere and even in [the United States]”).

<sup>44</sup> Alec Stone Sweet and Jud Mathews, “Proportionality, Balancing and Global Constitutionalism” (2008) 47:1 Colum J Transnat’l L 72 at 162.

limitations on the former. It is both an analytical doctrine and a legal construction.<sup>45</sup> It recognizes that rights and interests are not always absolute; at the same time, it affirms that the limitations themselves have limits. It is not a value; it is a relationship between values. It is found in ancient maxims: *suum cuique* (to each according to his or her merits) and *iustitia distributiva* (to everybody their fair share).<sup>46</sup> Finally, it arises through Aristotle's *doctrine of the mean*, which calls for virtue through moderation—behaviour that is excessive (or deficient) is to be avoided.

It cannot be said, however, that proportionality is a uniform doctrine. Across a spectrum of varied contexts and cultures, there is a range of understandings of proportionality. As Georg Nolte asserts, “in international law we cannot assume that our specific sense or intuition of proportionality is shared by others”.<sup>47</sup> What remains constant is that few moral and political debates concerning human rights escape proportionality analysis. In each case, the debate centers around achieving a “pleasing relation” between two objectives, principles, or interests that are in tension.<sup>48</sup> Even if we could all agree on a uniform conception of proportionality, numerous scholars have observed that proportionality is by no means a panacea. As Martin Luterán puts it, “proportionality cannot meet the many expectations lavished on it; the genie is an illusion.”<sup>49</sup>

In Canada, the formulation of the *Oakes* test marked the judiciary's full embrace of proportionality in constitutional law.<sup>50</sup> At the heart of the *Oakes* test is a recognition that the government is permitted under section 1 of the *Charter* to limit constitutional rights and freedoms to

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<sup>45</sup> See Aharon Barak, “Proportionality and Principled Balancing” (2010) 4:1 *Law & Ethics of Human Rights* 1 at 5.

<sup>46</sup> See Georg Nolte, “Thin or Thick? The Principle of Proportionality and International Humanitarian Law” (2010) 4:2 *Law & Ethics of Human Rights* 245 at 245.

<sup>47</sup> *Ibid* at 250.

<sup>48</sup> See Kirk, *supra* note 41 at 4.

<sup>49</sup> Martin Luterán, “The Lost Meaning of Proportionality” in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 21 at 22.

<sup>50</sup> Cohen-Eliya & Porat note that the *Oakes* formulation of proportionality has “almost exactly the same structure” as that of European constitutional law: Moshe Cohen-Eliya & Iddo Porat, “The Hidden Foreign Law Debate in *Heller*: The Proportionality Approach in American Constitutional Law” (2009) 46:2 *San Diego L Rev* 367 at 383 [Cohen-Eliya & Porat, “Foreign Law Debate”].

the extent that it is reasonably justified in a free and democratic society.<sup>51</sup> The Supreme Court of Canada developed a two-step test. First, the law's objective must "relate to concerns which are pressing and substantial in a free and democratic society."<sup>52</sup> Second, the legislation must satisfy a three-part proportionality test: (1) the means chosen must be rationally connected to achieving the objective; (2) the measures must impair the right or freedom as little as possible; and (3) the effects of the measures must be proportional to the identified objective.<sup>53</sup> The Supreme Court clarified in *Dagenais v Canadian Broadcasting Corp*<sup>54</sup> that the third step looks to the *actual* "salutary effects" weighed against the *actual* "deleterious effects"; it is not an entirely abstract inquiry focused on the importance of the objectives.

Proportionality, no matter how it is articulated, is not synonymous with balancing. Balancing "involves a broad brush, and sometimes opaque, analysis aimed at a resolution of the interests and rights involved".<sup>55</sup> Proportionality, as exemplified through *Oakes*, only involves balancing at the final stage (proportionality *stricto sensu*). We can illustrate this through a simple example. A corporation is faced with selecting one of two suppliers who will provide materials at equivalent cost and quality. The only factor differentiating the two suppliers is that the first uses child labour and the second does

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<sup>51</sup> I do not purport to argue in favour of imposing *Charter* obligations on private parties.

<sup>52</sup> *Oakes*, *supra* note 1 at 138-139.

<sup>53</sup> See *ibid* at 139. Scholars often refer to the final stage of proportionality as "proportionality *stricto sensu*". Robert Alexy calls this the "Law of Balancing": "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other": Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002) at 102.

<sup>54</sup> [1994] 3 SCR 835 at 887-90, 120 DLR (4th) 12.

<sup>55</sup> Benjamin Goold, Liora Lazarus & Gabriel Swiney, "Public Protection, Proportionality, and the Search for Balance" (UK Ministry of Justice Research Paper) (2007) at i. See also Schlink, *supra* note 43 at 294 ("[i]n jurisprudence as well as in legal literature, we find balancing used both as the last step of proportionality analysis and as the framework for proportionality analysis. This can be confusing. But it only means that, as happens often, one and the same problem can be tackled from different angles"); Cohen-Eliya & Porat, "Foreign Law Debate", *supra* note 50 at 385 ("[c]onceptually, balancing and proportionality seem to be distinct doctrines with different connotations. Proportionality seems to set out by first considering one object and then asking whether another object is proportional to that first object. Balancing, in contrast, seems to lack any similar sense of a starting point; rather, it compares two objects without according any preference to either one. However, this conceptual difference is of minor practical import because the two doctrines involve very similar thought processes: both assess the extent of rights infringement and the relative necessity of the infringement for realizing state interests." [citations omitted]).

not. Here, balancing does not enter the picture. The “minimal impairment” stage of proportionality directs the corporation to select the second supplier.

As mentioned above, proportionality is by no means a uniquely Canadian phenomenon. For example, proportionality “is a central theme of German public law” and “has been recognised as a principle of [European Union] law since the 1950s.”<sup>56</sup> The European Court of Justice articulated its understanding of the principle of proportionality in the seminal 1970 case of *Internationale Handelsgesellschaft*.<sup>57</sup> Deriving proportionality from the rule of law, the Court held that “the individual should not have his freedom of action limited beyond the degree necessary in the public interest.”<sup>58</sup> As Herwig and Serdarevic summarize, “The Court considered the proportionality principle so fundamental and apparent that its presence in the Community (Union) legal order was deemed to be self-evident and it did not need further clarification.”<sup>59</sup> The concept has since been refined and elaborated upon. An insightful example is the articulation of proportionality by the European Court of Justice in the 1990 case of *R v Minister of Agriculture, Fisheries and Food ex parte Fedesa*:

The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.<sup>60</sup>

Proportionality also assumes a central role in Australian constitutional law. In *Commonwealth*

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<sup>56</sup> Damian Chalmers et al, *European Union Law: Text and Materials* (Cambridge, UK: Cambridge University Press, 2006) at 448.

<sup>57</sup> Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125 [*Internationale Handelsgesellschaft*]. See Chalmers et al, *supra* note 56 at 448.

<sup>58</sup> *Internationale Handelsgesellschaft*, *ibid* at 1147.

<sup>59</sup> Alexia Herwig & Asja Serdarevic, “Standard of Review for Necessity and Proportionality Analysis in EU and WTO Law: Why Differences in Standards of Review are Legitimate” in Lukasz Gruszczynski & Wouter Werner, eds, *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford, UK: Oxford University Press, 2014) 209 at 211 [footnotes omitted].

<sup>60</sup> Case C-331/88 *R v Minister of Agriculture, Fisheries and Food ex parte Fedesa* [1990] ECR I-4023 at para 13. See also Chalmers et al, *supra* note 56 at 448-49.

*v Tasmania*,<sup>61</sup> the influence of the jurisprudence of the European Court of Justice and the European Court of Human Rights lead to the High Court of Australia to embrace proportionality and to sculpt its conception of the principle as comprising suitability, necessity, and balancing.<sup>62</sup> The ubiquitous nature of proportionality in rights discourse has led scholars such as David Beatty to declare that proportionality is the “ultimate rule of law”.<sup>63</sup>

Bernhard Schlink, a German legal scholar, has argued persuasively that proportionality has taken hold as a nearly global phenomenon. Schlink’s understanding of proportionality sits in harmony with my own. In Schlink’s words, “[p]roportionality analysis is about means and ends, and whenever there is no law [such as moral law], specifically commanding, prohibiting, or allowing action, we justify or condemn the action based on the legitimacy of the end pursued and on the helpfulness, necessity, and appropriateness of the action as a means to that end.”<sup>64</sup> This notion of proportionality “stepping in” to fill a legal lacuna is highly apt to the present circumstances because, as discussed above, the *Guiding Principles* acknowledge that international law imposes no direct legal obligation on corporations to respect human rights. Schlink emphasizes that, beginning in the second half of the twentieth century, “constitutional courts from most European countries as well as Israel, Canada, and South Africa, made the principle of proportionality the cornerstone of their rights’ and freedoms’ jurisprudence.”<sup>65</sup> Schlink further holds out proportionality as a “response to a

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<sup>61</sup> *Commonwealth v Tasmania* (1983), 158 CLR 1 at 259-61, 46 ALR 625.

<sup>62</sup> See Alon-Shenker & Davidov, *supra* note 42 at 416, n 160. See also *Minister for Resources v Dover Fisheries Pty Ltd* (1993), 116 ALR 54 at 65, Gummow J (asserting that “the proportionality doctrine has taken root and, indeed, extended its reach into the heartland of federal constitutional law”).

<sup>63</sup> David M Beatty, *The Ultimate Rule of Law* (New York: Oxford University Press, 2004) at 160. Beatty’s near-unconditional praise of proportionality overlooks some of the compelling critiques of the principle.

<sup>64</sup> Schlink, *supra* note 43 at 292.

<sup>65</sup> *Ibid* at 296 [citations omitted]. See also *ibid* at 298 (“in the last decades of the last century the principle of proportionality spread around the world. In European countries lacking constitutionally protected rights and freedoms or constitutional review, implementation of the European Convention on Human Rights into the national legal system leads also to implementation of the principle of proportionality into the national jurisprudence. The European Court of Justice, the European Court of Human Rights, and the Panels and the Appellate Body of the World Trade Organization all operate under the principle of proportionality” [citations omitted]). See also Cohen-Eliya & Porat, “Foreign Law Debate”, *supra* note 50 at 369 (“Proportionality ... is arguably the most dominant doctrine in constitutional adjudication worldwide. Since the 1970s, it has expanded to almost every democracy across the globe” [citations omitted]). Cohen-Eliya & Porat list numerous countries of various legal systems that have embraced proportionality, including Ireland, South Africa,

universal legal problem.”<sup>66</sup> In short, proportionality is a universal principle that, as I will argue, can extend beyond the public and constitutional realm and can be usefully implemented whenever one must reconcile scenarios in which, as Schlink puts it, “an authority’s reach is extensive but also limited, without the limits being specified”.<sup>67</sup> As Schlink describes, “the universal legal problem and the principle of proportionality as a response to that problem are not restricted to conflicts of state versus citizen and citizen versus citizen.”<sup>68</sup>

### *B. The Value Added: Proportionality Vis-à-Vis the Guiding Principles*

Having traced the roots and analyzed varying conceptions of proportionality, the core question remains: does proportionality offer added value beyond that provided by the *Guiding Principles*?

Proportionality can supplement (rather than supplant) the *Guiding Principles* in several ways: proportionality can (1) enhance due diligence, (2) focus and guide stakeholder dialogue, and (3) provide a standard for justification and an opportunity for companies to go “above and beyond” their competitors. First, the *Guiding Principles* rely heavily on “due diligence”. Principle 17, which describes the process and parameters of due diligence, sets out the following: “The [due diligence] process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”<sup>69</sup> Here, many questions are left unanswered. What does it mean to “assess” human rights impacts? How does a corporation “integrate” findings? And so on. These broad principles are, of course, designed to provide flexibility and room for corporations to tailor the *Guiding Principles* to fit their operations. Here, proportionality can serve as a pragmatic supplement, as it gives more precise meaning to these

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Canada, Israel, Germany, Australia, New Zealand, Brazil, and South Korea: *ibid* at 380-82. For an in-depth discussion of the spread of proportionality globally, see Stone Sweet & Mathews, *supra* note 44.

<sup>66</sup> Schlink, *supra* note 43 at 296.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Guiding Principles*, *supra* note 3.

terms. For example, to “assess” through the lens of proportionality is to take four concrete steps: (1) identify a compelling objective(s), (2) establish a rational connection between the means and the end, (3) ensure minimal impairment to affected rights and interests, and (4) “calculate” through balancing whether the overall salutary effects outweigh the deleterious effects. In addition to structuring the *process* of due diligence, the *results* of due diligence can be used as inputs in the proportionality assessment. Second, due diligence requires the business enterprise to be “prepared to communicate” how it will address human rights impacts and to be prepared to “report formally” on human rights impacts.<sup>70</sup> Proportionality can add value to this process by structuring the discussion.<sup>71</sup> It provides discrete points of inquiry that can be debated between stakeholders (e.g., “Were the means chosen by the corporation to produce clothing minimally intrusive on labour rights in Bangladesh?”). Proportionality also instructs corporations as to how the communication and reporting process should be carried out. Third, the corporation must make clear *why* it considers its objective(s) so pressing and substantial, and it must consult and report on how it reaches this conclusion. Furthermore, the corporation must justify its decision by marshaling evidence on the grounds of rational connection, minimal impairment, and salutary versus deleterious effects. The justificatory and analytical tool of proportionality can thus be used to distinguish high-performing companies from the “rest of the pack”.

In particular, proportionality adds value in that a corporation’s full embrace of proportionality would be a key step in outperforming the competition with respect to Principle 15 of the *Guiding Principles*, which states that “business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (a) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due diligence process to identify, prevent,

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<sup>70</sup> *Ibid*, Principle 21.

<sup>71</sup> See Schlink, *supra* note 43 at 301 (“[t]he principle of proportionality is not a simple principle, easily applied and easily yielding answers. It is a complex principle, allowing for different interpretations and modifications. But it structures our reasoning and guides us on our difficult path to find answers.”)

mitigate and account for how they address their impacts on human rights; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”<sup>72</sup> Corporations seeking to be forerunners in terms of their human rights policies, their due diligence processes, and their remediation policies would be wise to adopt proportionality as a structuring framework within which to make decisions and justify their actions. Although it could be argued that such a framework is too abstract and unwieldy to provide adequate guidance, such a critique lacks persuasive force. Corporate policies and commitments must of necessity be cast in broad, open-ended language. Proportionality, in fact, lends greater specificity and concreteness to corporate policies, and it signals a commitment to a precise method of reasoning and decision making that consists of discrete, tangible stages. Of course, it cannot be said *a priori* what will be proportionate. Rather, it can only be said that acting proportionately demonstrates a commitment to a particular conceptual framework, one that leads to enhanced outcomes in terms of human rights protection.

The next step is to illustrate the application of proportionality in practice, making note of how proportionality interacts with the foundation laid by the *Guiding Principles*. Following this illustration, we will be better placed to take a critical look at the nuances and potential pitfalls of proportionality.

### **III. AN ILLUSTRATION: WHAT WOULD PROPORTIONALITY LOOK LIKE IN PRACTICE?**

To illustrate how proportionality can be a valuable supplement to the *Guiding Principles*, consider a fictional corporation, MineCo. MineCo is headquartered in Canada and is considering starting up a mining operation through its subsidiary in Peru. The local community, composed predominately of indigenous populations, cherishes their cultural traditions, which emphasize respect for and connection to their land, ancient ways of living such as reliance on subsistence farming, and a

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<sup>72</sup> *Supra* note 3.

rejection of Western-style property rights in favour of village-based ownership and sharing of resources.

MineCo is facing a difficult choice. Its shareholders have been exerting substantial pressure on the company to increase profits, since revenues have been slipping for the past six years. The opportunities for mineral extraction in Peru are highly lucrative, yet to engage in this project would almost guarantee that MineCo would force the local indigenous community to fundamentally change their way of living. The villagers' traditional houses would have to be destroyed and the villagers would be permanently displaced. Important cultural sites would be transformed into industrial sites with little hope of being restored. Community relationships and local governance structures would be dramatically altered in order to accommodate MineCo's presence. On the other hand, many villagers have expressed great excitement about the prospect of economic prosperity brought about by the project, as well as the opportunity to benefit from improved education, health care, and infrastructure.

The "just" and "proportionate" outcome in MineCo's case cannot be determined in the abstract; a full analysis must take into account all circumstances and facts underlying the decision. MineCo would require information far more detailed than what is set out above. Nonetheless, several observations can be made with regard to MineCo's proportionality analysis. As an initial reflection, the *Guiding Principles*—as MineCo's starting foundation—direct MineCo to respect human rights and, in conducting due diligence to "identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships."<sup>73</sup> To give life to these words, we can turn to proportionality. MineCo must gather information on how the local Peruvian population will be affected by displacement, what the precise impacts on health will be, what the local working conditions will look like, what the economic and cultural costs of this project might be, the approximate impact on MineCo's public

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<sup>73</sup> *Guiding Principles*, *supra* note 3, Principle 18.

image, and so on. It must then assign weights to these impacts, considering the likelihood and severity of each impact. These “inputs”, which include consideration of both human rights and other interests, are then embedded into a proportionality analysis. Hence, the corporation starts from the foundation of the *Guiding Principles* and then builds upon that foundation through proportionality.

The first step in proportionality is to examine whether there exists a pressing and substantial, or at least “legitimate”, objective. This stage is fundamentally contingent on how we define the corporate “objective” or, more accurately, “objectives”. This is no easy task. Of course, the objective should be particularized to the decision. The question corporations must ask is this: are the means sought to be employed rationally connected to the objective of *this specific decision*? The second, “rational connection” stage is intertwined with the first step in MineCo’s case. The “rational connection” requirement demands there be a rational connection between MineCo’s objective and the means by which it seeks to achieve its objective—namely, the profitable exploitation of mineral resources in Peru. We see here an important “value added” element of proportionality: it fills a gap in the *Guiding Principles*, which do not explicitly direct the corporation to consider its *objectives* vis-à-vis its human rights impacts. Whereas the *Guiding Principles* seek to guide corporations through negative duties (i.e., “do no harm”), proportionality goes deeper and engages the corporation in self-reflection and debate around its role and impact. This “search within” embedded in proportionality can also inform the “policy commitment” outlined in Principle 19 of the *Guiding Principles*, which asks corporations to describe publicly its responsibilities, commitments, and expectations. In sum, proportionality supplements the external-impact-focused *Guiding Principles* with a thorough consideration of internal ambitions.

The corporation must grapple with what it sees as its role in society. Should it reach a conclusion that is at odds with what society views as the role of the corporation, MineCo would

rightfully be subject to public criticism.<sup>74</sup> MineCo might, for example, view its primary objective as profit maximization, in line with the Milton Friedman-esque, narrow view of the corporation's purpose. This objective would no doubt be rationally connected to pursuing the Peru project, as it offers a highly lucrative opportunity. Adherents of Friedman's conception of the corporation, which views the sole social responsibility of business as the pursuit of profits,<sup>75</sup> would not appreciate proportionality infiltrating the corporate boardroom. In Friedman's view, corporate management should not waste time and money seeking to ensure they are "morally justified" on a proportionality basis; rather, they should simply follow the letter of the law and leave it to the courts to "rein in" the corporation when strictly necessary. This is a defensible position. To rationalize the Peru investment on these grounds, however, we would have to accept that profit maximization is justifiable as the sole (or at least primary) purpose of the corporation. For many, the corporation's responsibilities extend far beyond the mere pursuit of profit.

By contrast to the "profit maximization" conception of the corporation, MineCo may see "value maximization" as its primary objective. The concept of "value" is broad and embraces not only economic gain, but also value in other senses: cultural, social, environmental, etc. This complicates the matter, as there may be no rational connection between means and end because the Peru project would be seen by many as generating a staggering decrease in overall societal value, even though the economic value flowing to the company is increased. This sort of reasoning is in greater alignment with stakeholder theory, as advanced by Edward Freeman.<sup>76</sup> Freeman's well-known theory posits that the corporation has responsibilities to other parties, requiring managers to

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<sup>74</sup> Although the rational connection stage of proportionality does not concern itself with the *legitimacy* of the corporate objective, the remainder of the test demands that the objective itself be of sufficient importance so as to satisfy the overall test. But see Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" (2009) 7:3 Int'l J Const L 468 (arguing that one shortcoming of proportionality is its inability to filter out illegitimate interests).

<sup>75</sup> See Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962). See also Elisabet Garriga & Domènec Melé, "Corporate Social Responsibility Theories: Mapping the Territory" (2004) 53:1/2 Journal of Business Ethics 51 at 53 (characterizing Friedman's view as representative of "instrumental theories", which treat corporations primarily as vehicles for wealth creation).

<sup>76</sup> See Edward R Freeman, *Strategic Management: A Stakeholder Approach* (Boston, Mass: Pitman, 1984).

carefully calculate the impacts of the corporation in accordance with a greater societal orientation. As illustrated above, the outcome at each stage of the proportionality analysis depends not only on the specific circumstances of the decision, but also on the philosophical beliefs of the decision maker.

The “minimal impairment” stage is perhaps the most useful element of proportionality. It guides decision makers to develop novel solutions to thorny issues. It directs them to think in a flexible and stakeholder-oriented manner. This builds upon the responsibility to “mitigate” human rights impacts articulated in the *Guiding Principles*.<sup>77</sup> The disruption of the indigenous population’s cultural traditions is a profound interference with human rights and interests. The *Guiding Principles* assert that serious infringements must be avoided. The question, then, is whether there are means by which MineCo can achieve its objective in a way that minimally impairs local traditions and cultural heritage. Minimal impairment also reminds decision makers that the decision is not a rigid dichotomy between “yes” and “no”. Rather, the decision can be broken down to reveal shades in between a binary decision. For example, is there a way to partner with local NGOs to ensure that local indigenous traditions are not unreasonably interfered with? Can the Peru project be implemented on a scale that refrains from unreasonable environmental degradation but still ensures profitability? Could the project remain profitable if MineCo scales back its operations to take place only in areas that would not upset cultural traditions? These inquiries spur decision makers to tailor the decision to the circumstances.

We then reach the final and most complex stage. The weighing of salutary and deleterious effects constitutes a robust “cost–benefit” analysis. Consider, for example, the salutary effects on the local population: to what extent will “development” raise their standards of living? Might investment and the creation of jobs build a more robust infrastructure and local government that can support the community? Just how much will MineCo’s presence benefit local villagers in terms of improved

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<sup>77</sup> See *Guiding Principles*, *supra* note 3, Principle 15.

education and health care? MineCo might assign a significant weight to these benefits, particularly if, in carrying out due diligence under the *Guiding Principles*, MineCo’s consultations with the local population reveal strong support. On the other hand, the deleterious effects—which are a product of the *magnitude* of impact and the *importance* of the interests affected<sup>78</sup>—are manifold: to what extent will the land be irreversibly harmed? Will “development” cause irreparable damage to cultural traditions, a harm which is impossible to quantify? What is the probability and potential cost of a mining disaster? Furthermore, the analysis should not be limited to the effects on the local indigenous population. What might prospective and current employees think of the decision to strip indigenous peoples of their cultural traditions? Might institutional and private investors—who are both increasingly focused on the Corporate Social Responsibility (CSR)<sup>79</sup> policies and practices of corporations and any concomitant “material risks”—hesitate to invest in MineCo based on its decision? Finally, the costs and benefits must be contextualized: a given objective cost (benefit) will have a far worse (greater) effect when imposed upon a disadvantaged and vulnerable group as compared to a privileged and powerful group. This takes into account Aristotelian concerns for distributive justice.

Finally, the corporate decision-making process must not be seen as ending once the initial decision is made. As suggested in the *Guiding Principles*, corporations should continually re-assess and monitor their decision and thereby “track the effectiveness of their response”.<sup>80</sup> Ensuring proportionality is an ongoing responsibility.

#### **IV. THE CASE FOR USING PROPORTIONALITY AS A MORAL THRESHOLD IN CORPORATE DECISION MAKING**

##### *A. Proportionality as a Moral Responsibility, Rather than Legal Duty*

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<sup>78</sup> See Kirk, *supra* note 41 at 8.

<sup>79</sup> The basic notion of corporate social responsibility is that corporations are in some sense moral actors that have obligations and responsibilities.

<sup>80</sup> See *Guiding Principles*, *supra* note 3, Principle 20.

Proportionality is best seen as a moral responsibility rather than a legal duty. Although imposing a legal duty of proportionality would be a bold step towards enhancing true accountability for corporate acts and omissions, it would be a step that is too audacious given the current landscape of human rights duties on corporations. There is a lack of clarity around the scope of extraterritorial liability facing corporations, which raises the spectre of indeterminate liability and serious chilling effects on corporate activity. The scope of what is included within “human rights”, moreover, remains subject to debate. I am particularly concerned that deviating from the model advanced by the *Guiding Principles* would introduce an unduly heavy onus on corporations. It must be remembered that the *Guiding Principles* contain a non-binding set of standards. It would be inconsistent to argue that proportionality, which I offer as a supplement to the *Guiding Principles*, should be given greater binding status than the foundation upon which it rests. Given current conditions, the better view is that proportionality should be seen as a *moral responsibility*, rather than a *legal duty*.

Despite my position, there is a compelling critique that proportionality would be more useful not as a moral responsibility, but merely an analytical tool. That is, perhaps I am asking too much of proportionality. Proportionality holds significant promise as an analytical tool that can structure discussion among stakeholders and lend greater clarity to the *Guiding Principles* by making more concrete questions such as “What does it mean to fulfil the corporation’s responsibility to protect?” and “How does a corporation demonstrate that it has undertaken proper due diligence?” The further assertion that proportionality is not only an analytical tool, but also a moral threshold, is more controversial. I argue, however, that proportionality can (and should) serve both roles (i.e., as an analytical tool and a moral threshold). To leave proportionality merely as an analytical tool, without seeing it as a normative standard as well, would be to fail to provide adequate protection to human rights and to fail to acknowledge the growing consensus that proportionality constitutes a moral obligation of corporations, a point discussed further below. Moreover, analytical tools that are based

on normative standards would naturally have greater success in terms of observance than analytical tools without such normative underpinnings.

With this established, the next question is why corporations should be held to such an exacting moral responsibility.

### *B. The Normative Justifications for Holding Corporations to a High Moral Standard*

The human rights duties on corporations at international law arise from customary international law, treaty obligations, soft-law codes of conduct, guidelines, and compacts. Although the legal (or quasi-legal) duties imposed on corporations have some potential authority, they remain ill-defined, ambiguous, and ineffective.<sup>81</sup> This article focuses not on constructing a more robust legal framework, but rather on articulating a moral threshold and shared analytical framework for corporate acts or omissions.<sup>82</sup> I submit that corporate decision makers must make decisions according to a proportionality analysis in order to be morally justified, even if they are legally justified in doing otherwise. The first task, then, is to build a persuasive case for using proportionality as a moral compass in the corporate context.

It is beyond question that many modern corporations—both national and transnational—have an equal or greater impact on human rights than many modern states. Furthermore, the corporation's relationship with the citizenry may bear some resemblance to the relationship between the state and the citizen.<sup>83</sup> Broadly speaking, both corporations and states are parties to implied social contracts conferring rights and legitimate expectations, though the terms of these respective contracts vary.<sup>84</sup>

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<sup>81</sup> See David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44:4 Va J Int'l L 931 at 944-53.

<sup>82</sup> Clearly, some corporate acts and omissions will be egregious violations of human rights that cannot be justified on any ground. This article deals not with these cases, but rather with instances where reasonable people may disagree on whether the corporate decision is morally justified.

<sup>83</sup> In some cases, the corporation may entirely supplant the state in its role. This may occur, for example, in cases where health care, social security, education, and other goods and services are provided by the corporation either through CSR efforts or by necessity due to a corrupt or otherwise defective local government.

<sup>84</sup> See Thomas Donaldson, *Corporations and Morality* (Englewood Cliff, NJ: Prentice-Hall, 1982) (articulating the view that the business and society relationship arises from a social contract, a concept with philosophical roots in the observations of Locke.)

Accordingly, can (and should) we demand that corporations adhere to the principle of proportionality in any decision impacting human rights? Is it appropriate to extend a typically “public law” requirement of proportionality—most often invoked in constitutional law—to private corporations? To some, requiring proportionality of private actors might appear like human rights “privatization”. Without doubt, the argument that the extension of a responsibility of proportionality to private actors—even if it takes the form of a moral responsibility, rather than a legal duty—is highly controversial. This importation of proportionality does appear to be a shift from a “vertical” conception of rights to a more “horizontal” one. The question is then this: Does this improperly hold the corporation out as a state? No. Even if the line between state and corporation is somewhat blurred, there are still meaningful differences between corporate and state duties in relation to human rights. For example, as embodied in the *Guiding Principles*, the corporation is to *respect* human rights; the state, by contrast, is to *protect* human rights. Nor does the “borrowing” of proportionality from public or constitutional law amount to the creation of individual constitutional rights vis-à-vis corporations; rather, it amounts to the borrowing of a *structure of analysis* and a corporate commitment that guides corporations towards morally justified behaviour.

If applying proportionality means blurring the line between the public and the private, such an action is justified. First, a compelling justification for demanding a high moral standard is that corporations have *power*.<sup>85</sup> This reasoning constitutes a form of corporate constitutionalism, a concept articulated by Keith Davis, which holds that business is a social institution and as such must use power responsibly; corporate social responsibilities arise from the amount of social power they

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<sup>85</sup> See Blitt, *supra* note 24 at 37 (reporting that studies estimate that transnational corporations compose one-third to one-half of the world’s 100 largest economic entities). See also Celia Wells & Juanita Elias, “Catching the Conscience of the King: Corporate Players on the International Stage” in Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford, UK: Oxford University Press, 2005) 141 at 142 (stating that transnational corporations “have the resources and power both to perpetrate and to escape responsibility” for human rights abuses).

wield.<sup>86</sup> A second justification is that imposing a high moral standard on corporations would provide more robust protection for human rights and interests. It reinforces the notion that important human rights and interests should not be disproportionately impacted by *any* actor, be it public or private. Third, corporations are vehicles for advancing public interests and values. They are legal constructions meant to facilitate the creation of wealth—both in an economic and societal sense—and as such must be tasked with a high expectation of morality. Fourth, proportionality, as mentioned above, is useful in scenarios where the limits of an authority’s power are not clearly defined. Given that international law does not impose any direct legal limitations on corporations to respect human rights, and in light of the corporation’s vast yet undefined scope of power and authority, the case for seeing corporations as subject to a moral responsibility of proportionality is strong. Fifth, legal scholars have observed that proportionality already forms a part of private law jurisprudence. For example, Alon-Shenker and Davidov assert that “a survey of employment and labour decisions by courts and other adjudicators in Canada reveals that the principle of proportionality is already being used in certain contexts. Sometimes the application is explicit, even if incomplete . . . . But more often, the application is implicit.”<sup>87</sup> My argument can be seen as a theoretical extension of an argument advanced by Alon-Shenker and Davidov, who discuss proportionality in the private labour and employment context: “The default rule is that the employer is free to make any managerial decision, so the principle of proportionality does not generally intervene in business judgments and choices. The exception is that society insists on a degree of respect for the rights and interests of employees.”<sup>88</sup> There is no reason why society more broadly would be any less justified in expecting

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<sup>86</sup> See Keith Davis, “Can Business Afford to Ignore Corporate Social Responsibilities?” (1960) 2:3 California Management Review 70; see also Keith Davis, “Understanding the Social Responsibility Puzzle” (1967) 10:4 Business Horizons 45 at 48.

<sup>87</sup> Alon-Shenker & Davidov, *supra* note 42 at 380. Alon-Shenker & Davidov list numerous circumstances in which proportionality is invoked in the private sphere, including restrictive covenants, workplace discrimination, picketing, unfair labour practices, privacy, disciplinary procedure, and just cause cases. See also *ibid* at 413 (“[i]n the European Union, the principle of proportionality applies in various private spheres”).

<sup>88</sup> *Ibid* at 410-11.

that businesses show equal respect for human rights. Proportionality, which is already firmly embedded either implicitly or explicitly in human rights and constitutional contexts, should be made more explicit in the context of the *Guiding Principles* and the corporation's responsibility to respect human rights.

On the other hand, there are persuasive arguments against expecting corporations to satisfy the (perhaps onerous) moral responsibility of proportionality. Alon-Shenker and Davidov raise the most fundamental objection. Market economies are based on self-interest, and actors are allowed to (and, in fact, presumed to) act in their own interests.<sup>89</sup> It is theorized that by allowing self-interested parties to negotiate terms as they see fit, the resulting agreement will benefit both parties and, indirectly, benefit society as a whole.<sup>90</sup> As a consequence, the default rule is that the law stops short of requiring private actors to consider the interests of others with whom they contract or the interests of society more broadly.<sup>91</sup> Of course, these observations concern what the *law* demands, not what is morally justified. Alon-Shenker and Davidov also advance a form of "social contract" reasoning, acknowledging the argument that, since government represents the citizenry as a whole and makes decisions on its behalf, individuals rightly expect that the government will consider their interests and act accordingly.<sup>92</sup> Since the corporation does not have the same broad societal representative character, we might reason that corporations should have a substantially lower degree of responsibility to uphold societal expectations. These reasons are compelling. Nonetheless, I find they are less persuasive than the arguments in favour of asking corporations to act proportionately. Simply put, at least in my view, asking corporations to refrain from disproportionate action is justified, even if it means potentially blurring the line between the public and private spheres.

### *C. Proportionality as Moral Justification*

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<sup>89</sup> See *ibid* at 407.

<sup>90</sup> See *ibid*.

<sup>91</sup> See *ibid*.

<sup>92</sup> *Ibid*.

If an elevated moral standard is justified, why should proportionality, rather than some alternative approach, be a compass for justification? One compelling reason is that, on a close examination, the law already holds out proportionality (or something close to it) as a relevant standard in justifiable corporate decision making. The law mandates that harms to others should be minimized; such legal limitations are not foreign to corporations. For example, anti-trust laws prohibit corporations from consolidating their powers to establish monopolies that harm the public interest. Moreover, consumer protection laws attempt to strike a balance—in light of the importance of the interests at stake—between free market principles and other concerns such as public safety. Are these laws so different from a requirement that the corporation exercise its power according to the principle of proportionality? At the very least, the corporation is tasked with an obligation to pursue its own objectives in a manner that does not disproportionately harm other important interests. Proportionality, therefore, reflects some already-established expectations of corporations.

The proportionality standard itself has been explicitly applied to corporate directors in domestic law. A prominent example is the Delaware Supreme Court case of *Unocal v Mesa Petroleum*.<sup>93</sup> In *Unocal*, the Court set out a two-pronged test to determine what actions, undertaken by directors to prevent takeover attempts, fell within the scope of the business judgment rule. This two-pronged test, known as the “proportionality review”, places the onus on directors to prove (1) that their defensive actions were taken in response to a reasonably perceived threat to the corporation or its shareholders and (2) that their response was *proportionate* to that threat.<sup>94</sup> In sum, I submit that these legal materials suggest that corporations are, in certain contexts, expected to act proportionately. My proposal extends the concept to the human rights context in the form of a moral responsibility.

A persuasive reason for relying on proportionality, rather than alternative frameworks or

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<sup>93</sup> *Unocal v Mesa Petroleum*, 493 A.2d 946 (Del 1985).

<sup>94</sup> See *ibid* at 955.

principles, is that it ensures that human rights and interests are respected while minimizing intervention in business decisions. The proportionality analysis, which involves balancing the interests of *all* parties affected by corporate decisions, both (1) affirms that corporations can in theory make any business decision and pursue any legitimate goal as it sees fit and (2) requires that the corporation act in alignment with justifiable corporate aims, choose means that impose minimal harm on human rights, and ensure the decision does not impact rights in a manner disproportionate to the expected “benefit”—defined broadly—flowing from the decision.

Proportionality would also provide corporate decision makers with a more concrete and structured framework within which to analyze decisions, as demonstrated in the MineCo illustration above in Part III. Corporate codes of conduct<sup>95</sup> asserting that decisions will be made in accordance with “good corporate citizenship” are vacuous platitudes that offer no real guidance. Proportionality forces corporations to break down the elements at play and to grapple with the full suite of interests affected by their decisions. This structured, step-by-step approach will lead to better outcomes.<sup>96</sup>

It would be naïve and idealistic to think that *every* corporation will adopt this more rigorous method of decision making as a supplement to the *Guiding Principles*. I do not suggest that corporations *must* embrace proportionality as its CSR moral compass; rather, I submit that corporate acts and omissions are only *morally justified* when the decision accords with proportionality. Corporations are free to act immorally; that is within their scope of autonomy. But they do so at their peril. Relatedly, although I do not offer proportionality as a binding legal standard, it is not necessarily the case that proportionality should be seen as entirely voluntary. While commitments to CSR, to the *Guiding Principles*, and to other standards of conduct (such as proportionality) may be

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<sup>95</sup> Proportionality may already be an operating principle in some corporate and other codes and standards. My proposal is to make proportionality more explicit and to use it to structure discussion.

<sup>96</sup> Academic commentators have, for several reasons, lauded proportionality as a useful structuring mechanism for decision making. See e.g. Cohen-Eliya & Porat, “Foreign Law Debate”, *supra* note 50 at 380 (“the [proportionality] model’s appeal is most likely attributable to its clear and systematic analytical formation, its combined flexibility and structure, and its seeming ability to capture the generic features of rights jurisprudence—including both means-ends analysis and balancing.”)

seen as mere “soft law” norms or voluntary commitments, these can become benchmarks for litigation, and soft law is manifestly capable of hardening into legally enforceable rules.<sup>97</sup> Put differently, though proportionality may begin as merely “good corporate practice” or a “helpful analytical tool”, it is not unreasonable to think that it could develop over time into a binding standard. Moreover, the fact that some companies may make decisions that fail to satisfy the proportionality principle does not mean that we cannot demand such a standard and expect better outcomes.

The argument that applying proportionality in the corporate context would lead to better outcomes provides a *utilitarian* justification for my position. Proportionality is equally justified on procedure. In recent years, moral philosophers have turned their attention to non-utilitarian theories emphasizing the *process* of arriving at outcomes, in addition to the outcome itself.<sup>98</sup> Proportionality, as a non-arbitrary process of structured reasoning, provides a sophisticated and robust mechanism for decision making. Hence, importing proportionality into corporate boardrooms fulfills both the utilitarian goal of achieving the “greatest good” and the Kantian concern of proper process.<sup>99</sup>

#### *D. Third-Party Monitoring and Proportionality in the Public Eye*

Is it enough that corporations *privately* grapple with proportionality, or should we expect them to *publicly explain* how they reached their purportedly proportionate conclusion? Put differently, to what extent should corporations make their assessments *transparent*. On one hand, full transparency asks too much of the corporation by forcing it to divulge sensitive information. To be truly transparent, the corporation would have to open up its books, disclose all assumptions and data upon which its decision rests, and invite the ire of related parties and suppliers by subjecting them to public scrutiny as well. On the other hand, what is the point of asking corporations to act

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<sup>97</sup> A prime example of the “hardening” process of soft law comes from the ongoing case of *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414. See also Justine Nolan, “The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?” in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Oxford, UK: Cambridge University Press, 2013) 138.

<sup>98</sup> See Gene R Laczniak, “Framework for Analyzing Marketing Ethics” (1983) 3:1 *Journal of Macromarketing* 7 at 10-11.

<sup>99</sup> See *ibid* at 12.

proportionately if the public remains blind to how the decision was reached and what factors were weighed?

The solution rests in reasonableness. The corporation must make its proportionality analysis reasonably transparent such that the morality of its decision can be assessed. Where it fails this reasonableness test, the decision itself is morally unjustified. This conclusion is supported by Principle 21 of the *Guiding Principles*, which directs companies to “provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved” and “not to pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.”<sup>100</sup> Reasonable transparency demonstrates respect for individuals affected by the decision, furthers corporate accountability, provides for discourse and exchange, and fosters trust between stakeholders and the corporation. Transparency also aligns with “integrative theories” of CSR, which focus on the detection and scanning of, and response to, social demands in order to achieve social legitimacy, acceptance, and prestige.<sup>101</sup>

This brings to light a very important issue: who should monitor corporations’ proportionality analyses, and who determines what constitutes “reasonable” transparency? The use of proportionality as a supplement to the *Guiding Principles* will only be effective if it has teeth. Leaving it to market forces or voluntarily adopted codes to guide corporations towards virtuous and transparent behaviour is an inadequate approach. The key to achieving oversight and transparency is to rely on third-party monitors to engage in a thorough review of corporate decision making. Such third-party monitors must themselves be transparent and independent of the corporation under review, as well as independent of government. These monitors must also be knowledgeable about the issues in question, and the social, cultural, and political context in which the business is operating in order to accurately assess the proportionality of decisions. One model for third-party monitoring is found in the UN

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<sup>100</sup> *Guiding Principles*, *supra* note 3.

<sup>101</sup> Garriga & Melé, *supra* note 75 at 58.

*Norms*, which specifically provide for a form of transparent, independent monitoring of a corporation’s application of the *Norms* “by United Nations, other international and national mechanisms already in existence or yet to be created”.<sup>102</sup> I must concede that it is not clear what entity possesses the requisite expertise to review corporate decisions for proportionality.<sup>103</sup> The answer may simply be that no such entity exists, and that we must rely on a coalition of institutions and experts that, collectively, offers a robust solution. Nonetheless, third-party monitors can serve as a “check” on the proportionality processes and outcomes reached by corporations. Such monitors can also ensure that corporations do not arbitrarily or unjustly assign “weights” to interests that do not reflect their true importance. That is, independent third parties examine and challenge corporate assessments and demand reasonable transparency. As noted above, disclosure is a vexing issue. Third parties would need access to confidential corporate documents in order to satisfactorily carry out their function of review. The compromise I propose is to permit corporations to withhold confidential documents where it deems appropriate, in full recognition that it may face consequences in the third party’s report and the public’s response.

Yet, why not leave the task of oversight to governments? At least three reasons dictate that third parties, rather than home or host governments, must be the providers of oversight. First, to the extent that government and corporate interest may align, a government’s examination of proportionality may be skewed. Second, the fact that third parties are *independent* gives this model a significant advantage over monitoring by governments, who may have their own agendas or relationships with either the corporation or the parties affected by the corporation. Third, third parties

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<sup>102</sup> *Norms*, *supra* note 9.

<sup>103</sup> We might also consider the use of National Contact Points (NCPs), though they would not provide the sort of ongoing, general oversight that I believe is required. NCPs established under the OECD Guidelines for Multinational Enterprises are entities whose “main role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that arise from the alleged non-observance of the guidelines in specific instances”: OECD, “National Contact Points”, online: <<https://mneguidelines.oecd.org/ncps/>>. Relying on NCPs, however, would be insufficient. A complaint would have to be brought to the attention of the NCP, and thus NCPs are more of a reactive mechanism than an ongoing oversight body.

can act as mediators between governments, NGOs, corporations, and local communities to discuss what a “proportionate” outcome would look like. A government, being one of the stakeholders at the table, cannot serve as an effective mediator.

Mattias Kumm makes insightful observations that can be extended to the notion of public engagement and transparency. Kumm argues that proportionality gives rise to “Socratic contestation”, which Kumm characterizes as a process that “forces a certain type of enquiry onto others”.<sup>104</sup> Kumm sees application of proportionality by the courts as a means of “compel[ling] public authorities into a process of reasoned engagement.”<sup>105</sup> The role of proportionality is not to elaborate answers, but rather to examination reasons, ask questions, and assess the coherence of answers.<sup>106</sup>

Kumm’s reasoning can be applied *mutatis mutandis* to the relationship between the corporation and third-party monitors, as well as the monitoring public. Kumm implicitly asserts that the purpose of the judiciary’s application of proportionality is not to reach a precise “answer” to what is proportionate, but rather to spur public authorities to engage in a process of justifiable and proportionate reasoning. That is, the end goal of proportionality as employed by the court is to spur *the decision maker itself* to grapple with proportionality. Turning to the corporate context, the moral requirement of reasonable transparency furthers the “Socratic contestation” carried out by the third-party monitor and the public at large. It affirms that corporation decision making should represent a process of reasoned engagement. This procedural demand is rooted in a “culture of justification”, a culture in which the exercise of power must be morally justified. The monitor can challenge the corporation on the weights ascribed to the inputs in its analyses and, it is hoped, influence the corporation’s decisions in favour of an optimum social outcome.

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<sup>104</sup> Mattias Kumm, “The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review” (2010) 4:2 Law and Ethics of Human Rights 142 at 154. Kumm sees courts as being particularly well suited to the task of Socratic contestation.

<sup>105</sup> *Ibid* at 154.

<sup>106</sup> See Francisco J Urbina, “A Critique of Proportionality” (2012) 57:1 Am J Juris 49 at 67.

## V. CRITIQUES OF PROPORTIONALITY AND ITS USE IN THE CORPORATE CONTEXT

Applying proportionality in the corporate context is not without flaw. I do not argue that proportionality should be *the* guiding force behind corporate decision making. The position I take is moderated: proportionality, due to its pitfalls, must remain as a *supplement* to the *Guiding Principles*, as well as a moral litmus test. This Part raises and responds to several arguments, organized under six heads, demonstrating the dangers of proportionality.

### A. Measurability

First, the “balancing” process embedded in proportionality assumes that the rights and interests being balanced can be measured and compared. Arguably, neither is the case. For example, can a corporation accurately measure the “cost”—in both qualitative and quantitative terms—of the destruction of an indigenous community’s traditional mode of life? As Justice Antonin Scalia has rightly noted, balancing or comparing incommensurable<sup>107</sup> interests or values “is more like judging whether a particular line is longer than a particular rock is heavy.”<sup>108</sup> The process of measurement is made all the more difficult by the fact that most important corporate decisions are made in conditions of imperfect information and little certainty.<sup>109</sup> The calculation may even be simple speculation as to what the eventual costs and benefits may be.

Relatedly, can the decision’s “costs” be meaningfully compared to its “benefits”? Both sides of the equation are composed of a bundle of effects that span economic, political, societal, and environmental impacts. A further (and vexing) problem in corporate application of proportionality is

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<sup>107</sup> The concept of “incommensurability” is distinct from “incomparability”. Ruth Chang defines incommensurability as where two goods “cannot be precisely measured by some common scale of units of value” and incomparability as where two goods “cannot be compared”: Ruth Chang, “Introduction” in Ruth Chang, ed, *Incommensurability, Incomparability, and Practical Reasoning* (Cambridge, Mass: Harvard University Press, 1997) 1 at 2. Put simply, incommensurable goods share no common metric along which the goods can be measured; incomparable goods do not lend themselves to ordinal ranking along any particular metric.

<sup>108</sup> *Bendix Autolite v Midwesco Enterprises*, 486 US 888 at 897 (1988).

<sup>109</sup> Schlink references a similar problem in his discussion of the problem of “insufficient or ambiguous information” that is inevitable in proportionality analyses. Schlink writes, “It is sometimes simply impossible to determine whether a means works and whether it is necessary. The fitness and the necessity of a means is an empirical problem, and often science, scholarship, and experience can help in solving it. But often all one has are assumptions, contradictory experiences, and as many expert opinions as there are interests involved”: Schlink, *supra* note 43 at 299.

that human rights and interests do not operate in isolation. They are interconnected and operate “against the backdrop of simultaneously co-existing circumstances”.<sup>110</sup> This presents a situation in which the decision may have a synergistically beneficial—or harmful—effect. Even if it did have a firm grasp on the full panoply of effects, the modern corporation, which is guided by short-term profits and pressures from ravenous shareholders, may prefer to adopt a short-term outlook on the decision, taking into account in the proportionality analysis only those factors having some immediate impact.

Valuations of cost and benefit vary by culture. Can it be said that the “cost” of deforestation perceived by a 33-year-old urbanite in Chicago is the same as that perceived by a 64-year-old forest-dwelling villager in Indonesia? Moreover, there is a real danger that Western conceptions of rights and interests will eclipse alternative conceptions. For example, Westerners tend to highly prize civil and political rights over social, economic, and cultural rights. People living in developing countries, however, may see the latter set of rights as equally if not more important than the former. Clearly, proportionality is a product of culture and history.

These criticisms cannot be dispelled, but their force can be diminished. First, when used in conjunction with the due diligence responsibilities articulated in the *Guiding Principles*, proportionality can at least provide a structure within which the debate about “weights” can occur. That is, even if we cannot perfectly quantify the weights to be assigned to competing rights and interests, proportionality constructs a framework within which stakeholders can discuss their respective views on proportionality. Second, independent third-party monitors provide for more accurate measurement. Corporations need specific guidance as to how to conduct proportionality analyses, and third parties can provide such guidance. If the analysis is left vague and open to corporate discretion, corporations will manipulate the framework to serve their own ends. Third

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<sup>110</sup> Basak Çali, “Balancing Human Rights?: Methodological Problems with Weights, Scales and Proportions” (2007) 29:1 Hum Rts Q 252.

parties can impartially reconcile incommensurable values by mediating between the stakeholders involved and translating their interests to the greatest extent possible.

### *B. Partiality*

Proportionality asks the corporation to conjecture about the costs felt by *other* parties. The corporation is largely pitting its *own* interests against the interests of *others*. The inherent danger is that corporations will hyperbolize the importance of its own initiatives and downplay the rights and interests of others.<sup>111</sup>

Here, independent third-party monitors play a crucial role. Moreover, to the extent that the public disagrees with the corporation's conclusion that a decision's effects are proportionate, we may see the "iron law of social responsibility" in effect: when entities have great power and do not exhibit proportionate social responsibility, they will have their power proportionately diminished.<sup>112</sup> In a sense, this is a burden-of-proof rule, with the onus resting on the corporation to justify its actions.<sup>113</sup> Where a corporation fails to justify its actions, the consequences may encompass not only a plunge in the organization's bottom line, but also the moral disintegration of the corporation itself. In sum, in the event that the corporation fails to reason impartially, third-party monitors and the public will step in and exert pressure on the company, and the market will respond accordingly (here, the "market" includes consumers, governments and regulators, local communities, suppliers, etc.).

### *C. Maximizing Shareholder Value*

The conventionalist ethic posits that private actors should not have to adhere to any principle unless that principle is binding in law. That is, corporations should be free to pursue their goal of

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<sup>111</sup> This problem of subjectivity is also discussed by Schlink, who writes that "while, at least ideally, it is objectively possible to determine whether a means works and is necessary, the balancing of rights, interests, and values entailed in the analysis of appropriateness is unavoidably subjective": Schlink, *supra* note 43 at 299.

<sup>112</sup> See Gene R Laczniak & Patrick E Murphy, "Normative Perspectives for Ethical and Socially Responsible Marketing" (2006) 26:2 *Journal of Macromarketing* 154 at 159. This may come about either through regulatory measures, public outcry, adverse media attention, or some other means.

<sup>113</sup> See Schlink, *supra* note 43 at 299 ("[t]o solve the problem of insufficient or ambiguous information, one can establish a burden-of-proof rule under which it is either the legislature or the affected citizen who has to prove that the means at issue works or doesn't work, is necessary or is not necessary"). This burden-of-proof rule can be applied to the corporation in question.

maximizing shareholder value without limitations, even when that exercise negatively and substantially affects the interests of others, unless one has a legal *right* that limits the exercise of that freedom. Put differently, applying proportionality in the corporate context would threaten corporate autonomy and freedom and their ability to maximize shareholder value.

A potential sub-argument is that corporations as self-interested, profit-maximizing entities should not be required to achieve the “optimization requirement” implicit in proportionality. Proportionality seeks socially optimum outcomes. Here, the distinction between principles and rules is pertinent. Robert Alexy posits that “constitutional rights are principles and that principles are optimization requirements.”<sup>114</sup> Rules, by contrast, are standards that are either fulfilled or not. Put simply, principles are *optimization requirements* whereas rules are *definitive requirements*.<sup>115</sup> Rules invite no assessment of proportionality; principles do. Corporations, being private actors and not governments, cannot be subject to the unreasonable expectation that they must optimize societal outcomes, it is argued. However, to reserve optimization to governments would not only limit corporations’ beneficial impact on society, but also fail to recognize the symbolic value of affirming that powerful institutions must exert their powers in accordance with both rules and principles. These interests, in my view, outweigh concerns over profit maximization. Corporations have responsibilities beyond profit maximization, as affirmed in the *Guiding Principles*, and proportionality is a manifestation of those responsibilities. Finally, it cannot be said that proportionality is incompatible with profit maximization: one can maximize profits in a proportionate manner.

One might argue that corporations should bear no responsibility of proportionality because, in the context of a democratic state, stakeholders can voice their ethical concerns in the political realm and, if successful, spur the enactment of laws and policies giving effect to their ethical values.<sup>116</sup> Put

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<sup>114</sup> *Supra* note 53 at 388.

<sup>115</sup> See Urbina, *supra* note 106 at 52.

<sup>116</sup> See Darryl Reed, “Three Realms of Corporate Responsibility: Distinguishing Legitimacy, Morality and Ethics” (1999) 21:1 *Journal of Business Ethics* 23 at 33.

differently, the corporate realm concerns profit maximization, not politics and ethics. There are two primary flaws in this argument. First, it is premised on a notion of “perfect democracy”. That is, the state is perfectly responsive to the concerns of citizens and acts without friction in passing perfect (enforceable) laws. This does not hold. Furthermore, states may be unable or unwilling to legally constrain corporations, even within their jurisdiction. Second, not all ethical concerns can be addressed through law. Law is a blunt instrument. Some decisions implicating human rights will be shielded from legal scrutiny simply by the nature of the decision. For example, consider a high-tech company seeking to open operations in a country that culturally does not permit women to take on managerial roles. Whichever option is chosen—enter or do not enter—will pass legal muster. Nonetheless, many would see entry as a major step backwards for the right to equality. One might even characterize this as a form of silent complicity. Proportionality not only provides an apt methodological framework to approach the decision, but also fills a “moral gap” left open by the law.

#### *D. Incapability*

Some might argue that even if it were normatively justifiable to task corporations with the Herculean undertaking of proportionality, there is no indication that corporations would have any expertise in the application of broad principles to optimize outcomes, nor are corporations expert in humanitarian considerations. The corporation, put simply, is *incapable* of reasoning through proportionality. Here, reliance on independent third parties may be the strongest response. Third parties can develop expertise in carrying out proportionality analyses and, as monitors, can work with corporations to ensure proportionality. Nonetheless, who *within the organization* might be positioned to undertake the proportionality analysis? I think that, rather than a single individual, the entire corporation must be responsible for ensuring proportionality. This means groups and teams within the organization must combine their expertise; only then can a robust proportionality analysis result.

It must also be remembered that proportionality does not provide corporations with any

answers, let alone “right” answers. That is, it is substantively vacuous.<sup>117</sup> The concerns are analogous to those raised by Taylor, Zandvliet & Farouhar in their discussion of human rights due diligence.<sup>118</sup> Proportionality does not tell the corporation what it must do in substance. There is no recipe for a “correct” corporate decision; rather, there is a spectrum of morality within which different balances may be struck. Proportionality is simply a framework to which inputs must be added. The precise inputs selected and values ascribed to those inputs depend on the case. Therefore, it cannot be said that corporations are incapable of reaching the “right” decision because there is no such thing.

#### *E. Weakening of Rights*

Before addressing the question of whether proportionality undermines the privileged status of rights, we might first ask what constitutes a “right” in this context. We can turn to the *Guiding Principles*. Conventions and other sources that declare “universal fundamental rights”, such as the International Bill of Human Rights,<sup>119</sup> can guide the inquiry.<sup>120</sup> In addition, treaties and covenants can codify, crystallize, or influence customary international law.<sup>121</sup> These human rights instruments “present a clear list of fundamental rights which are consistent with contemporary values.”<sup>122</sup> On the other hand, it would be unwise to attempt to draw up an exhaustive list of rights to be “thrown in the hopper” of the proportionality analysis. It is preferable to recognize that there is marked variation

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<sup>117</sup> See Charles-Maxime Panaccio, “In Defence of Two-Step Balancing and Proportionality in Rights Adjudication” (2011) 24:1 Can JL & Jur 109 at 118. See also Cohen-Eliya & Porat, “Foreign Law Debate”, *supra* note 50 at 371 (“[p]roportionality, after all, is a methodology, or a doctrine; it does not entail a substantive commitment”); Alon-Shenker & Davidov, *supra* note 42 at 410 (“[a]dmittedly, [proportionality] does not offer clear-cut solutions for any given case. Yet the three-stage structure offers a principled way to analyze the problem and promises a degree of determinacy and predictability higher than what can be found in open-ended standards.”)

<sup>118</sup> See Mark B Taylor, Luc Zandvliet & Mitra Forouhar, *Due Diligence for Human Rights: A Risk-Based Approach*, Corporation Social Responsibility Working Paper No 53 (Cambridge, Mass: Harvard University, 2009) at 17 (“Human rights risk assessments are not mechanical processes. It is very difficult to quantify human rights risk . . . . It seems likely that the single most effective way to identify, understand and manage risks are through dialogue processes, such as stakeholder dialogue or the internal company risk workshop”).

<sup>119</sup> The International Bill of Human Rights, as it has been referred to, includes the *Universal Declaration of Human Rights (UDHR)*, the *International Covenant on Civil and Political Rights (ICCPR)* with its two Optional Protocols, and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

<sup>120</sup> Principle 12 of the *Guiding Principles*, *supra* note 3, sets out the responsibility of business enterprises to respect, at a minimum, the internationally recognized human rights set out in the International Bill of Rights and the fundamental rights listed in the International Labour Organization’s *Declaration on Fundamental Principles and Rights at Work*.

<sup>121</sup> See Kirk, *supra* note 41 at 46.

<sup>122</sup> *Ibid* at 46.

between cultural, judicial, and theoretical conceptions of rights. Both the German Constitutional Court and European Court of Justice, for example, recognize general rights to liberty and to equality, opening up nearly any act infringing on the interests of individuals to a human rights challenge.<sup>123</sup> Therefore, corporations must adopt a functional, flexible approach guided by consultation when seeking to identify the interests at stake.

A flexible approach to defining the rights and interests in the proportionality analysis is particularly important in the corporate context because it allows corporations to tailor the analysis to the particular cultural and societal norms prevailing in the communities in which they operate. For example, a corporation would be misguided to attribute an equal cost to the curtailment of property rights in a village society compared to a highly capitalistic society. As John Ruggie has noted, “The issue of business and human rights is complex . . . differences exist among countries in terms of their economic, judicial, and enterprise systems, as well as their historical and cultural backgrounds, which need to be taken into account.”<sup>124</sup> Moreover, the analysis should not be limited to *rights*; corporate decision makers must take interests and values into account as well.

Having discussed the meaning of rights in this context, does proportionality risk creating an impoverished conception of rights? Might it devalue the currency of rights? To a strict human rights theorist, *any* infringement of a human right will be unacceptable;<sup>125</sup> to a utilitarian, such infringements will be acceptable to the extent that they bring about net positive utility. Notably, Principle 19 of the *Guiding Principles* suggests a not-so-absolute conception of rights. Principle 19

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<sup>123</sup> See Kumm, *supra* note 104 at 144. A striking example of how the conception of a “right” varies across culture is found in Germany. In Germany, the right to the “free development of the personality” is interpreted as a general right to liberty understood as the right to do, or not to do, whatever you please. This has been held by the Constitutional Court to include “riding horses through public woods, feeding pigeons on public squares, or the right to trade a particular breed of dogs”: Kumm, *ibid* at 151 [citations omitted].

<sup>124</sup> John G Ruggie, “Closing Plenary Remarks, UN Forum on Business & Human Rights” (3 December 2014) at 5, online: Office of the United Nations Commissioner for Human Rights (OHCHR) <<http://www.ohchr.org/>>.

<sup>125</sup> See e.g. Fasterling & Demuijnck, *supra* note 23 at 802 (“[h]uman rights, understood as fundamental moral rights of humans qua humans, necessarily imply *perfect* duties, i.e. duties admitting no exception in favour of inclination to refrain from acting on it. Perfect duties have to be fulfilled *to the fullest extent possible*” [emphasis in original] [citations omitted]).

outlines the appropriate corporate approach to “prevent and mitigate adverse human rights impacts”. The proper response depends upon (1) the business’s implication in a potential human rights violation (e.g., direct causation, contribution, direct link)<sup>126</sup> and (2) the extent of its leverage in addressing an adverse impact. First, we see the use of “mitigate”, which conveys the sense that there is no absolute duty to avoid all potential impacts on human rights. Second, we see that the *Guiding Principles* do not sternly prescribe a corporate response. Rather than a “cease and desist” order, the *Guiding Principles* adopt a more restrained, pragmatic approach that recognizes that corporations will surely have impacts on human rights—it is an unavoidable fact. In light of society’s interconnectedness in the age of globalization, it would be untenable to expect corporations to refrain from having *any* impact on human rights or interests.

Corporations are morally justified, therefore, when they satisfy proportionality. Proportionality admits that a rights-holder does not have much by virtue of her having a right.<sup>127</sup> Detractors argue that even if we could agree to a set list of “rights” to which an individual is entitled, those rights are mere *prima facie* rights. They are susceptible to being overridden through a subversive “proportionality” doctrine, which allows corporations to don the cloak of a politician and a court to justify their incursions on rights. However, I argue that the strength of rights is in fact protected by the proportionality analysis. Although a right is not an absolute trump, that does not mean a right provides no effective protection. The fact that something is seen as a right gives it a dramatically elevated status in the proportionality analysis, and only when sufficiently compelling competing values are present will corporate actions be morally justified. Moreover, certain rights—such as peremptory norms—might be immune from defeat under any proportionality exercise.<sup>128</sup> Finally, the fact that a right can be curtailed does not undermine the concept of rights. It is well

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<sup>126</sup> The *Guiding Principles* offer little guidance regarding how these terms are to be interpreted. See Fasterling & Demuijnck, *supra* note 23 at 809.

<sup>127</sup> See Kumm, *supra* note 104 at 150.

<sup>128</sup> Examples include torture, inhuman and degrading treatment, slavery, and execution. A most interesting case would arise where the corporation is facing a decision involving two or more conflicting absolute rights.

recognized that rights and duties frequently come into conflict and must be resolved by reasonably limiting their scope.

Relatedly, one may argue that proportionality would downplay the importance of human rights *in the mind of the corporation*. In his strident critique of proportionality, Stavros Tsakyrakis asserts that proportionality perverts decisions around human rights, with the decision maker “no longer ask[ing] what is right or wrong in a human rights case but, instead, try[ing] to investigate whether something is appropriate, adequate, intensive, or far-reaching.”<sup>129</sup> His critique sees proportionality as weakening the decision maker’s resolve to uphold human rights. Proportionality goes against the “justification-blocking function of rights.”<sup>130</sup> I concede that proportionality exhibits a “no absolutes” mindset, but I cannot concede that such a mindset is morally bankrupt. Corporations are still asking what is right or wrong in a given circumstance. Quite frankly, issues touching upon human rights are messy. Corporations must reason flexibly and with a mind to what is morally permissible—moral perfection cannot be attained. The “right vs. wrong” dichotomy is too simplistic. Proportionality does not send a message to corporations that rights are “negotiable”; rather, it affirms the importance of rights and demands that only highly compelling competing interests can justify a decision encroaching upon such rights. Finally, there is a danger that proportionality might be seen not as a *supplement* to the *Guiding Principles*, but rather an *escape hatch*. Corporations may try to skirt the *Guiding Principles* by asserting that they have acted proportionately, despite non-compliance with the *Guiding Principles*. To respond, it must be made clear to corporations that the *Guiding Principles* are a non-negotiable baseline; proportionality is an *additional* responsibility.

#### *F. Incentives*

Beyond simply seeking “moral righteousness”, *why* would a corporation want to embrace proportionality as a supplement to the *Guiding Principles*, and is it in fact helpful? That is, from an

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<sup>129</sup> Tsakyrakis, *supra* note 74 at 487. Tsakyrakis’s comments are made in the context of court adjudication, but I argue that they can be applied to all contexts in which proportionality is used as a method of reasoning.

<sup>130</sup> *Ibid* at 489.

incentives and “business case” perspective, where are the “carrots” and “sticks”? I present five arguments. First, contemporary examples of corporate malfeasance demonstrate that, when the public deems a corporation to be morally unjustified, the ramifications can be severe. One need not look further than the examples of high-profile corporations such as Nike (who faced public backlash over its ties with sweatshop labour), British Petroleum (who experienced major economic sanctions and damage to its corporate brand over the Deepwater Horizon oil spill), and H&M (who has attracted public scrutiny over its connections with child labour). The profoundly damaging effects of these scandals upon the companies involved demonstrate the “stick” that can be brought to bear upon companies that act without moral justification in the eyes of the public. Second, proportionality sends a message throughout the organization (and externally) about the values and commitments of the corporation. To the extent that proportionality is seen as a virtuous mindset by suppliers, prospective and current employees, powerful NGOs, regulators, consumers, and other stakeholders, the corporation will reap the benefits. These “carrots” are powerful. For examples, companies that carry out proportionality analyses signal to investors managerial competence and robust risk management—two factors that will undoubtedly encourage greater investment. Of course, these incentives operate with respect to the adoption of the *Guiding Principles* and voluntary CSR codes. Simply put, proportionality is a further mechanism through which the corporation can signal and demonstrate its commitment to ethical practices—a commitment that benefits not only external stakeholders, but also the company itself. Proportionality is a tool that allows high-performing companies to go “above and beyond” its competitors. Intel has achieved success in this strategy in the context of its supply chain relationships. Moreover, the initial stage of proportionality forces the corporation to grapple with how it views its role in society and its overarching goals. By engaging in this inquiry, the corporation ensures that it does not lose sight of its spirit and purpose. A corporation guided by purpose is a sustainable corporation. Third, the negative effect of “slowing down”

corporate decision making is overstated. It is true that corporations often must strike while the iron is hot. Might proportionality analyses simply be too time-consuming? Corporations must adopt a long-term view. Although quick and dirty decisions will facilitate swift corporate action, a speedy but immoral decision will always be—in the long run—inferior to a rational, well-reasoned decision. The effects of an unjust decision will always catch up with the corporation, and thus it is preferable to take the time up front to filter out morally irresponsible choices. Moreover, although the time-consumption effect will be felt most sharply early on, corporations that are early adopters of proportionality will build competence and expertise in acting proportionately and thereby increase their speed in decision making. This is a powerful competitive advantage. Fourth, proportionality necessitates a process of dialogue and stakeholder engagement. By considering these other perspectives and absorbing the thoughts and ideas of these stakeholders, the corporation again builds a sustainable competitive advantage. The less socially conscious corporations that skip the proportionality analysis, as they are entitled to do, will not reap the rewards of these competitive advantages and will lose market share. Fifth, proportionality advances a facts-based approach to decision making. It leads companies to shift their approach away from mere speculation and towards an attempt to measure—quantitatively and qualitatively—the impacts of their decisions. The “carrot” here lies in the opportunity to build and maintain internal competencies around forecasting and impact assessments.

## **VI. CONCLUSION**

Corporate decisions touching upon human rights are knotty and complex. Corporations are tasked with discerning the interests and values at stake under pressure from governments, consumers, local communities, media, NGOs, and countless other stakeholders. To navigate these decisions, I have argued that proportionality offers a useful supplement to the *Guiding Principles*. Proportionality offers an analytical framework in which to structure decision making, stakeholder dialogue, and

broader debate around corporate decision making. Moreover, it is normatively justifiable to hold corporations to this elevated standard of morality, and third-party monitors play a key role in ensuring this standard is satisfied. Proportionality is not without its critics, and many of the critiques raised against its use in the corporate context are valid. The proper conclusion, however, is that the proportionality offers beneficial guidance that outweighs its pitfalls. Proportionality serves to cultivate an ethical business culture by ensuring that human rights are incorporated into business strategy as a matter of routine daily decision making.