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Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?

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Abstract

It is no longer a revelation that companies have some responsibility to uphold human rights. However, delineating the boundaries of the relationship between business and human rights is more vexed. What is it that we are asking corporations to assume responsibility for and how far does that responsibility extend? This article focuses on the extent to which economic, social and cultural rights fall within a corporation's sphere of responsibility. It then analyses how corporations may be held accountable for violations of such rights. Specifically, the article considers the use of soft law as a protective mechanism; it also details how victims of harmful corporate behaviour are using litigation (pursuant to ATCA and common law domestic causes of action) to seek redress and recognition of the harms they have directly or indirectly experienced. The article concludes with an analysis of Professor Ruggie's (the United Nations Special Representative on the issue of transnational corporations and human rights) 2008 and 2009 Reports in which it is suggested that a respect-based framework must be interpreted as imposing proactive requirements on companies to prevent the infringement of human rights. Future efforts must also be directed towards the recognition of a specialised complementary corporate responsibility to protect human rights.

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ABSTRACT. It is no longer a revelation that companies have some responsibility to uphold human rights. However, delineating the boundaries of the relationship between business and human rights is more vexed. What is it that we are asking corporations to assume responsibility for and how far does that responsibility extend? This article focuses on the extent to which economic, social and cultural rights fall within a corporation's sphere of responsibility. It then analyses how corporations may be held accountable for violations of such rights. Specifically, the article considers the use of soft law as a protective mechanism; it also details how victims of harmful corporate behaviour are using litigation (pursuant to ATCA and common law domestic causes of action) to seek redress and recognition of the harms they have directly or indirectly experienced. The article concludes with an analysis of Professor Ruggie's (the United Nations Special Representative on the issue of transnational corporations and human rights) 2008 and 2009 Reports in which it is suggested that a respect-based framework must be interpreted as imposing proactive requirements on companies to prevent the infringement of human rights. Future efforts must also be directed towards the recognition of a specialised complementary corporate responsibility to protect human rights.

KEY WORDS: corporate responsibility, human rights, economic social and cultural rights, sphere of influence, sphere of responsibility, due diligence

Introduction

It is no longer a revelation that companies have some responsibility to uphold human rights. The more pertinent issues are which rights and to what extent companies should be held to account. Recognition of the relationship between business and human rights is one thing; delineating its boundaries is another. In seeking an answer to the recurring question of how, in practice, corporate compliance with international human rights standards can be improved, one must begin by clarifying the boundaries of corporate responsibility for human rights. What is it that we are asking corporations to assume responsibility for and how far does that responsibility extend? This article focuses on the extent to which economic, social and cultural (ESC) rights fall within the ambit of a corporation's sphere of responsibility, given the distinct nexus between that corpus of rights and business. It then analyses the related (and arguably more important) question of how corporations may be held accountable for violations of such rights.

The article begins from the premise that no principled reason exists for enabling corporations to escape legal liability for human rights infringements. The hoary debate as to whether corporations are bearers of rights or bearers of obligations is myopically binary (Raz, 1986). International and national laws have long recognised that non-State actors, including individuals, corporations *qua* individuals and international organisations, are subjects of international law and bearers of responsibilities as well as rights.¹ While the Nuremberg trials did not involve the prosecution of corporations, they are authority for the emerging principle that corporations can be held responsible for their actions at the

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international level.² The attribution of legal personhood at the national level has enabled corporations to be sued in tort and contract and, in certain scenarios, to be held criminally liable (Australian Law Reform Commission, 2003). Consequently, a positivist approach that asks why corporations should not be held responsible for human rights abuses is taken (Roth, 2004, 64). The issue, then, is not developing new human rights, but rather identifying new duty-holders.

The absence of international law dealing with the human rights responsibilities of transnational corporations (TNCs)³, particularly those operating outside of their State of incorporation, the often insurmountable substantive and procedural difficulties facing plaintiffs in domestic legal regimes, and the problem of parent corporation liability – in particular, their ‘vertically integrated command structure’ (Anderson, 2002) – has given rise to suites of litigation based on statutory and common law causes of action and a multitude of (primarily ‘soft law’) initiatives focused on preventing and remedying corporate human rights abuses. While these soft law initiatives have had the effect of gradually legitimising the inclusion of ESC rights within the ambit of a corporation’s ‘sphere of responsibility’, such classification has limited value without the provision of adequate means of redress. Soft law instruments which, unlike hard law such as domestic legislation, are generally considered to be non-binding, have been heavily relied on developing the precepts of corporate responsibility for human rights. The use of soft law is attractive because it often contains inspirational goals and aspirations that aim for the best possible scenario (although the language in certain soft law documents can be contradictory). Soft law can serve as a testing ground for the development of new mechanisms of accountability; it also functions as a useful and necessary tool for the development of ensuing hard law that legally binds parties to their commitments. It should be noted, though, that characterising soft law as non-binding is accurate only in the strict legal sense. Soft law reflects varying norms and societal expectations concerning corporations and their responsibilities; while a company may choose to ignore these standards, doing so may impact on the its social licence to operate. For this reason, a significant, if still small, proportion of corporations are

increasingly adopting a consequentialist approach to human rights issues, which recognises that moral liability can have an impact equal to that of legal liability.

The past two decades have seen a proliferation of codes of conduct and voluntary standards of behaviour designed to encourage corporate social responsibility. The United Nations (UN) Sub-Commission on the Protection and Promotion of Human Rights has recognised the inadequacy of a purely State-centric focus in the sphere of human rights, leading to the drafting of the (now largely defunct) *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (Norms).⁴ In 2005, the Secretary-General of the UN appointed Professor John Ruggie as a Special Representative on the issue of transnational corporations and human rights (SRSG). In April 2008, the SRSG released his third major report, outlining a tripartite framework for dealing with corporate human rights issues (Ruggie, 2008). In 2009, a further report expanded on the mechanisms for operationalising this framework (Ruggie, 2009). The continued use of such a variety of soft and hard law mechanisms is indicative of the fact that there is no ‘silver bullet’ mechanism to hold corporations accountable for violating human rights.

The content of ESC rights

The focus of this article is on ESC rights (as codified in international law) because of the almost unparalleled capacity of TNCs to infringe such rights (Anderson, 2002, 403; Scott, 2001); a capacity borne of the exponential growth in foreign direct investment by TNCs (Amnesty International and Pax Christi International, 2000; Kinley and Nolan, 2008) and the frequent lack of regulation by host State governments (*Maastricht Guidelines*, para 2; Ratner, 2001, 462). This regulatory (and remedial) lacuna is particularly pronounced in the context of ESC rights given historical and extant antipathy towards the recognition of these so-called second and third generation rights as substantive guarantees of protection (Eide, 2001). The general descriptor ‘ESC rights’ covers a wide spectrum of human rights, including some of the most fundamental and basic rights that have a clear connection to business.

Economic rights involve the right to work (*Universal Declaration of Human Rights* (UDHR) art 23; *International Covenant on Economic, Social and Cultural Rights* (ICESCR) art 6) and the right to social security (UDHR arts 22, 25; ICESCR art 9). These rights are often inextricably linked to social rights such as the right to an adequate standard of living (UDHR art 25; ICESCR art 11; Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 15*), the right to food (ICESCR art 11), and the right to housing (ICESCR art 11). Cultural rights involve the right to take part in cultural life, the right to enjoy the benefits of scientific progress and the right to benefit from the protection of moral and artistic rights derived from production of literary or artistic works or other forms of cultural knowledge (UDHR art 27; ICESCR art 15). The right to education (UDHR art 26; ICESCR arts 13, 14) can be seen as a cultural right as well as an economic right because of the associated ability to earn a living; it may also be seen as a social right in the sense that it is a means of and for social participation and community benefit.

While the UDHR and ICESCR are the most recognised sources of ESC rights, a number of other international treaties confirm the sanctity of ESC rights in specific ways. Protection of labour rights, the rights with perhaps the clearest *nexus* to business, has generated the most voluminous suite of international conventions, primarily through the work of the International Labour Organization (ILO). Labour rights are taxonomically interesting because certain rights associated with labour protection can be conceptualised as either ESC or civil and political (CP) rights – or both. For example, while freedom of association is expressly recognised in article 22 of the *International Covenant on Civil and Political Rights* (ICCPR), it is also within the ambit of article 8 of ICESCR (see also *ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise*). In the employment context, the right is inextricably linked with the right to bargain collectively, because it ‘enables workers to negotiate better working conditions, such as safe and healthy working environments and living wages’ (Kinley and Tadaki, 2003–2004, 975).

The right to a healthy environment provides another interesting example because of its absence, at least directly, in the International Bill of Rights

(which comprises the UDHR, the ICESCR and the ICCPR and its two Optional Protocols). While environmental damage has the potential to impact on CP rights such as life (Committee on Civil and Political Rights (CCPR), *General Comment 6*, para 6), liberty and security of person, and ESC rights concerned with minorities, health, adequate food and standards of living, ‘it is far from clear whether the interrelationship of environmental norms with human rights gives rise to a separate distinctive right to a healthy environment, as opposed to one that is adjectival or constitutive of another right’ (Kinley and Tadaki, 2003–2004, 984). A number of non-binding international declarations affirm the existence of the right to a healthy environment (*Stockholm Declaration on the Human Environment* (1972); *Rio Declaration on Environment and Development* (1992)); yet it would seem that it remains a derivative right,⁵ most commonly linked to the right to health under article 12 of ICESCR (Handl, 2001, 306–307; Kinley and Tadaki, 2003–2004, 984), as confirmed by the CESCR in *General Comment 14: The right to the highest attainable standard of health*.

The so-called ‘third generation rights’, such as the right to development and environmental protection (as a stand-alone category), go beyond the traditional human rights norms set out in the International Bill of Rights. While they are not easily classified as either exclusively ESC or CP rights, they seem increasingly likely to be bundled with ESC rights. The concept and classification of human rights are progressive (Eide and Rosas, 2001) and the fact that these ‘newer’ rights are not expressly defined in international human rights treaties does not make them any less relevant.

Status of ESC rights at international law

Following the passage of the UDHR, ‘[m]any in the West went so far as to deny the very legitimacy of ESC issues as rights’ (Roth, 2004, 64). While the UN General Assembly (GA) initially expressed support for a single international covenant including CP and ESC rights (UN GA, *Draft International Covenant* 1950), concern over the supposedly prescriptive nature of ESC rights and their justiciability led to the eventual bifurcation of the single proposed covenant into the ICCPR and the ICESCR. It is

increasingly recognised, though, that a normative hierarchy of rights does not adequately address the problem of human rights infringements,⁶ whether they are committed by State or non-State actors. The *Vienna Declaration and Programme of Action* stresses the ‘universal, indivisible and interdependent and interrelated’ nature of human rights (World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 1993, para 5). The trend in treaties entering into force since the International Bill of Rights has been towards ‘greater integration between the different sets of rights’ (Eide, 2001, 11; *Convention on the Rights of the Child* 1989; *Convention on the Elimination of All Forms of Racial Discrimination* 1965). The involvement of human rights organisations (such as Human Rights Watch) in ESC rights protection is also demonstrably greater than ever before. Notwithstanding these developments, it is clear that the core CP rights retain a superior position at the international (and national) level (though a number of States refuse to ratify both the ICCPR and ICESCR). The inferior status attached to ESC rights and the lack of accountability for violations of these rights naturally impact on the level of respect given to them by business. The *Alien Tort Claims Act*, 28 USC §1350 (1789) (ATCA) is perhaps the clearest example of this, since its recognition of the law of nations as a basis for a claim in US courts necessarily excludes ESC rights – an example of the interaction of national and international laws collectively reinforcing the prioritisation of CP rights.⁷ The historical (and lingering) antipathy towards ESC rights can be loosely tied to two fundamental misconceptions. First, that ESC rights are necessarily (and solely) prescriptive. This of course carries the binary assumption that CP rights are proscriptive. Second, the nature of ESC rights renders them non-justiciable. Both of these arguments have implications for developing greater corporate accountability for ESC rights.

The allegedly prescriptive nature of ESC rights is one of the most enduring objections to their recognition and enforcement. It is said that because ESC rights cast positive duties on States (and non-State actors), they require active steps for their realisation and, therefore, fulfilment is fundamentally a matter of social and government policy and ought not to be considered the domain of the courts (Sunstein, 1996; *contra* Tushnet, 2008; Liebenberg,

2001). On the other hand, CP rights are viewed as proscriptive in the sense of constituting negative commandments prohibiting infringements of, for instance, the right to life and freedom of conscience and religion. In this respect, they are seen as amenable to judicial supervision and enforcement because their contravention involves actions readily conceivable as ‘wrongs’.⁸ This argument is conceptually and practically flawed. All rights have social policy implications and the state duty to respect ESC and CP rights extends not only to refraining from actions infringing rights but to positive actions to uphold rights (Liebenberg, 2005, 60).

Regarding the justiciability of ESC rights, it should be noted that no inherent jurisprudential reason exists for denying the justiciability of *any* human right. A decision that certain rights ought not to be subject to judicial oversight and intervention is a political decision; this is recognised by article 8 of the UDHR, which provides that everyone has the right to an effective remedy. Further, decisions of courts in various national and regional fora delineate the fallacy that only CP rights are, or ought to be, justiciable. Decisions in South Africa, since the passage of the *Constitution of the Republic of South Africa, 1996*, have ‘perhaps contributed the most to a growing international awareness of the means by which the ESC rights can be rendered justiciable’ (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa, 1996*; Langford and Thiele, 2005, 3; *Minister of Health v Treatment Action Campaign, 2002*; *Republic of South Africa v Grootboom, 2001* (*Grootboom*)).

Recent jurisprudence from the European Court of Human Rights (ECtHR) goes a step further insofar as corporations are concerned. In cases brought against Spain and Italy, the ECtHR indirectly upheld the plaintiffs’ ESC rights through findings that their CP rights under the *European Convention on Human Rights* (ECHR) had been infringed (*Lopez-Ostra v Spain*; *Guerra v Italy*). These cases demonstrate the point made by the CESCR that no principled reason exists for upholding the justiciability of CP rights over ESC rights. Rather, as the South African Constitutional Court noted in *Grootboom*, such rights are based on the fundamental principles of equality, freedom and respect amongst human beings (*Grootboom*, para 43–44; Liebenberg, 2005). While the prescriptive nature of certain ESC

rights might require a nuanced approach when brought before a court, it is to be hoped that the emerging recognition of the justiciability of ESC rights will in time engender a commensurate body of referable jurisprudence that will also be applicable to corporations.

Corporate accountability and the international human rights law framework: accountability for ESC rights violations

The traditional view of international human rights law is that it focuses on and binds only States, since States have long been viewed as the principal protagonists in human rights abuses. This focus on States as the bearers of human rights responsibilities has meant that TNCs have been able to operate largely in a legal vacuum, devoid of obligations at the international level (Kinley and Tadaki, 2003–2004, 944–947). Articles 29 and 30 of the UDHR indirectly include corporate entities by providing that ‘everyone has duties to the community’ and by prohibiting ‘any State, group or person’ from undermining the rights contained therein. However, as a declaration, the most fundamental of human rights documents is non-binding on State and non-State actors.

There are presently very few legal obligations dealing with human rights that bind corporations operating transnationally. This lack of clear legal liability does impact for some upon the legitimacy of including (particularly) ESC rights in a corporation’s sphere of responsibility. What is more, those few obligations that do exist are very limited in scope and are in fact merely domestic laws that happen to have extraterritorial (that is, international) application. Compounding the problem is the crucially unresolved legal issue of whether a State’s obligations that may flow from international human rights law apply generally and extraterritorially to protect against corporate related human rights abuses. In a report by the SRSG submitted to the UN Human Rights Council in 2007, the SRSG suggests that international human rights law is ambiguous in this regard (Ruggie, 2007, section I). The Report suggests that while human rights treaties do not require States to exercise extra-territorial jurisdiction over corporate human rights abuses, they most certainly do not prohibit a State from doing so (Ruggie, 2007, para

15). However, the basis for exercising such jurisdiction and the nature of the subject matter which might justify such action (for example, is protection justified for all corporate human rights abuses?) is still a matter of debate. It is this ambiguity which is central to the creation of the permissive international ‘human rights free’ environment in which some corporations seem to now operate (De Schutter, 2006).

Soft law as a protective mechanism

In the absence of ‘hard law’ (such as an international treaty) dictating a protective regime to directly prevent corporate abuses of human rights, a plethora of ‘soft law’ has emerged in the guise of codes of conducts, international guidelines and ethical principles based on the quasi moral/legal argument that corporations have some level of responsibility for rights that (at the very least) have a strong *nexus* with their operations. For example, the UN Global Compact asks businesses to ‘support and respect the protection of internationally proclaimed human rights’ within their spheres of influence. The Norms posit that States have the primary responsibility to protect rights but that corporations also have a protection obligation ‘within their respective spheres of activity and influence’ (Norms, para A, 1). Crucially, neither instrument defines what is meant by a corporation’s sphere of influence. Professor Ruggie’s original mandate calls on him to clarify the concept of corporate ‘spheres of influence’, but it is terminology with which the SRSG is clearly dissatisfied. The SRSG sees the sphere of influence concept as a ‘useful metaphor for companies in thinking about their human rights impacts beyond the workplace and in identifying opportunities to support human rights’ but prefers his proposed ‘due diligence’ framework to define the parameters of a company’s responsibility to respect (Ruggie, 2008, para 67). Lehr and Jenkins rightly argue that ‘because the aim is to delineate the sphere within which companies have human rights responsibilities, rather than simply where they have influence, perhaps we should begin by reframing the concept itself as “corporate spheres of responsibility”’ (2007).

In a practical sense, the concept of corporations assuming a sphere of responsibility for certain human

rights predates this discussion. Some companies, under public pressure, have gradually begun to accept (willingly or not) a more encompassing view of the human rights within their purview. In 1995, when Ken Saro-Wiwa and eight others were executed in Nigeria – after a trial that violated international fair trial standards and dealt with alleged offences arising out of their campaign against environmental damage by oil companies, including Shell – Shell refused to criticise the trial. A Shell executive commented at the time, ‘Nigeria makes its rules and it is not for private companies like us to comment on such processes’ (Amnesty International, 2000, 1). The public criticism that followed subsequently resulted in Shell embarking on the development of new human rights policies that embraced a much broader notion of human rights issues relevant to its business. Shell’s recent settlement of the suite of lawsuits brought against it in relation to its Nigerian operations involved an express denial of any wrongdoing on the part of the company. Nevertheless, the fact that a settlement was reached was acknowledgement and ‘victory’ enough for the plaintiffs and, despite Shell’s statements to the contrary, implicitly concedes some degree of responsibility for the involvement of the company in the wrongdoings of the Nigerian government (Kahn, 2009).

The development of corporate codes and multi-lateral soft law standards has been particularly important for ESC rights because of their focus on social, environmental and labour-related issues and their implicit acceptance of the inherent *nexus* (some) ESC rights have with business. However, the inadequacy of a system based almost entirely on public pressure and corporate awareness (and arguably acceptance) of corporations’ ‘moral’ responsibility with respect to human rights is progressively apparent (Gordon and Miyake, 2000). With ‘the increasing centrality of the role played by corporations in driving global commerce, trade and development’ (Kinley and Nolan, 2008, 355) and the capacity of corporations to affect communities and individuals in ways that would potentially be recognised as breaches of international human rights if committed by States, this issue is becoming increasingly pressing. This is particularly so in the case of ESC rights (Scott, 2001, 564). One need only consider the role of Union Carbide in the Bhopal

gas disaster in India (Amnesty International, 2004), the environmental practices of Texaco in Ecuador (International Network for Economic, Social and Cultural Rights Corporate Accountability Working Group, 2005), BHP’s actions at Ok Tedi in Papua New Guinea (Gao et al., 2002), or Occidental Petroleum’s (Oxy) practices in Peru (EarthRights International et al., 2007) to make this point.

The harms caused by those TNCs can readily be conceived of as breaches of core human rights norms concerning health, standards of living, culture, property and development. However, since international law provides no means of direct redress against TNCs that infringe ESC rights, the value of conceptualising harms within the framework of international human rights law might be questioned. It is suggested that classifying catastrophic pollution and other such wrongs as breaches of international human rights law is worthwhile because of the moral gravitas attached to the use of such language. Of commensurate or possibly greater importance is the fact that international human rights norms provide a universal point of reference transcending national legal regimes, thereby enabling all stakeholders⁹ to work within a common legal and conceptual framework. This is likely to have increasing relevance in the future as the human rights responsibilities of TNCs are progressively acknowledged and national legislatures incorporate human rights norms dealing with State and non-State actors into their legal regimes, thereby acknowledging that human rights, in particular ESC rights, may indeed fall within the sphere of responsibility of a corporation. Characterising miscreant corporate activity within the nomenclature of international human rights law also lends support to the ongoing attempt to formulate an international charter of responsibilities directed towards TNCs and other business enterprises. An international charter of responsibilities that acknowledges the rights encapsulated in the International Bill of Rights as a baseline standard to which all States must ensure protection strengthens rather than weakens the hands of government ‘by giving them clear standards to which they can refer in dealing with powerful corporations’ (Weissbrodt, 2008, 386). Such a charter should also delineate what such protection entails, that protection can and should operate extraterritorially and, if consistency with the SRSR’s tripartite framework is preferred

(that is, if pragmatism is to trump ambition), then also the distinct duties that corporations assume with regard to respecting (or in certain circumstances protecting) human rights, including a recommendation that States legally mandate the concept of corporate human rights due diligence (see ‘Corporate responsibility to (only) respect (all) human rights’ section).

Corporate accountability is a process of progressive realisation and while ‘[c]orporate codes of conduct and policies addressing human rights have proliferated in recent years’, it is also clear that such initiatives ‘have been unable to stem the flow of human rights violations by TNCs’ (Kinley and Chambers, 2006, 491). This should not be taken as an indication that such measures are altogether devoid of merit. Soft law codes and guidelines play a vital role in internalising human rights norms within corporations (Ratner, 2001, 531) and solidifying the notion that corporations have duties with respect to shareholders and stakeholders alike – a process that in time ‘can shape the standards of care that are legally expected of business’ (International Institute for Environment and Development, 2003, iii; Steinhardt, 2007–2008, 936). Nevertheless, current practice clearly shows that while soft law is useful in establishing that ESC rights are legitimate rights that fall within a corporation’s purview, soft law alone is insufficient to deal with breaches of these rights.

Litigation using ATCA

In terms of available litigious mechanisms to hold corporations accountable for human rights abuses, ATCA is globally unique (Stephens, 2002). It is a US statute that provides that ‘the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’. The first requirement – that the plaintiff is an alien alleging a tort – is not controversial insofar as bringing a case before the courts is concerned (Hsu, 2004). It is the latter limb requiring a plaintiff to prove a ‘violation of the law of nations or a treaty of the United States’ that has proven to be a greater obstacle for plaintiffs. This has the effect of almost wholly excluding ESC rights from the purview of ATCA (Kinley and Tadaki, 2003–2004, 944–947).

In 1997, Burmese plaintiffs brought suit under ATCA against Unocal in the Central District California Court alleging numerous human rights abuses, including forced labour, forced relocations, torture, rape and murder in the process of constructing the Yadana oil pipeline (*Doe v Unocal*). Judge Paez held that actions against corporations are within the scope of ATCA, but dismissed the case on the basis that the plaintiffs failed to demonstrate that Unocal ordered the military to engage in the impugned conduct. On appeal, the Ninth Circuit upheld Judge Paez’s finding concerning the ambit of ATCA. The Court noted that while international law traditionally applies to States only, decisions of international tribunals such as that established at Nuremberg indicate that individuals and corporations are legitimate subjects of international law and may accordingly be held liable (*Doe v Unocal*, 948). In 2005, following *Sosa v Alvarez-Machain* (*Sosa*), Unocal (now owned by Chevron) settled with the claimants out of court (EarthRights International, *Doe v Unocal* Settlement, 2005).

In *Sosa*, the US Supreme Court considered ATCA for the first time.¹⁰ The Supreme Court confirmed the ability of plaintiffs to bring suits in US courts under ATCA for a ‘narrow set’ of human rights infringements based on violations of customary international law (*Sosa*, 2756). The Supreme Court noted that the cause of action in question must be sufficiently definite in terms of its status as part of the *jus cogens* (*Sosa*, 2765). The Supreme Court’s finding is critical for the future of ATCA litigation because of its clarification that the second limb of the statute concerning the basis upon which a claim may be brought requires proof of a breach of a clear element of customary international law as that corpus of law stands at the time of the claim. This is important in the context of potential claims involving ESC rights because those rights do not yet constitute international custom (*Flores v Southern Peru Copper Corp* (*Flores*)). In this respect, the Supreme Court vindicated the finding of the Court of Appeal for the Second Circuit in *Flores*, where the Court dismissed the plaintiffs’ claim under ATCA because it was not satisfied that intrastate environmental damage is prohibited under customary international law (see also *Beanal v Freeport-McMoran Inc*). The Court in *Flores* noted that while such harm can be conceptualised as prohibited under article 12 of ICESCR, the US has not ratified that treaty,

meaning that under the dictates of ATCA, a breach of the law of nations needed to be shown. In addition to the claim concerning intra-national pollution, the plaintiffs asserted that rights to life and health are customary norms of international law. This, however, was rejected on the basis that such rights are vague and aspirational, rather than concrete and definite (*Flores*, 70).

The findings in *Flores* and *Sosa* present a serious barrier to claims based on corporate misfeasance dealing with wrongs falling within the rubric of ESC rights.¹¹ The restrictive ambit of ATCA in terms of its requirement that claims are based on breaches of the law of nations was recently confirmed in the *Agent Orange* litigation brought by Vietnamese citizens who were harmed by the use of the chemical during the Vietnam War. The District Court found that the provision of the chemical to the US Government was not a violation of international law (*In re Agent Orange Product Liability Litigation*). This was sufficient to dispose of the ATCA claim (*Vietnam Association for Victims of Agent Orange/Dioxin v Dow Chemical Co*).

Home state civil law

ATCA's restricted ambit means that victims of corporate ESC rights infringements must look elsewhere for judicial remedies. In this context, the use of civil law in home States is crucial to an understanding of the means of redress open to victims of human rights infringements by TNCs in the context of ESC rights.¹² It is important to note that the argument at this point is not that domestic courts are invoking international law norms; rather, the point is that the types of harm experienced by victims and the actions of (allegedly) responsible corporations can be conceptualised using extant international law rights and obligations and that this process contributes to the development of an expansive notion of the corporate responsibility to respect and protect.

Civil litigation in the United States

One of the most infamous and complex litigation matters brought in the US courts alleging corporate liability for ESC rights infringements is the series of cases brought against Union Carbide for its role in the Bhopal gas disaster in India. On 3 December

1984, over 40 tonnes of lethal gas leaked into the air surrounding Union Carbide's factory in the city of Bhopal. Over 5,000 people were killed instantly and the current death toll is estimated to exceed 22,000 (Amnesty International, 2004). While the most obvious violation is the right to life enshrined in article 6 of the ICCPR, the continuing effects of the disaster constitute infringements of rights to adequate standards, respectively, of living and health, recognised in articles 11 and 12 of the ICESCR. Derivative rights to an adequate water supply and a healthy environment have also been infringed as a result of the leak.

Cases were brought as early as 1985 in US courts but were repeatedly vacated to India on the basis of *forum non conveniens* (FNC) (*In re Union Carbide Corp Gas Plant Disaster*; Muchlinski, 1987). In 1989, the Supreme Court of India ordered a settlement of the claims against Union Carbide for US\$470million. These funds were transmitted to the Government of India for subsequent distribution but by 2004 only US\$140million had been dispersed. In 1999, plaintiffs again sought redress in the US courts, launching a class action complaint against Union Carbide under ATCA. In 2000, the plaintiffs amended their claim and added claims under New York common law alleging environmental pollution. Following a series of cases that went back and forth between the District Court for the Southern District of New York and the Second Circuit Court of Appeal, it was ultimately found that Union Carbide could be ordered to clean up properties if the Indian authorities made such an order (*Bano v Union Carbide*, 2004). The Government of India eventually submitted a statement of acquiescence to the Court of Appeal, meaning that Union Carbide could be ordered to clean the relevant sites made subject to the claim (*Bano v Union Carbide*, 2006). The decision of the Second Circuit is important in the context of home State civil litigation, because it recognises that environmental harms in a host State can ground a claim in US courts. While the case did not invoke the language of human rights since the environmental claim was pleaded under New York common law, the case can, in a broader sense, be viewed as an affirmation of the corporate responsibility to respect the right to a healthy environment, the right to health generally, and ultimately the right to life (see also *Sequihua v Texaco, Inc*; *Aguinda v Texaco, Inc*).

In settlement terms, one of the more successful cases for victims was *Dow Chemicals Co v Castro-Alfaro*. In that case, agricultural workers from several nations who suffered health problems as a result of exposure to the pesticide DBCP sued the corporations involved on the basis of negligence in selling a product they were aware was harmful (in human rights terms akin to invoking infringements of the right to life (ICCPR, art 6) and to adequate standards of living (ICESCR, art 12)). A motion to dismiss by Dow and Shell was denied on the basis that Texas had statutorily abolished the FNC doctrine.¹³ While the case never went to trial, it still indicates the potential benefits of litigation given that Dow and Shell settled in 1992 for approximately US\$20million. Following this, lawsuits were later filed by 26,000 plaintiffs from 11 countries against Dow, Shell and other companies, also in Texas. These were settled in 1998 for approximately US\$45million (EarthRights International, 2006, 16).

One of the most recent cases brought in the US concerning alleged ESC rights infringements is *Tomas Maynas Carijano v Occidental Petroleum Corp*, brought on behalf of a group of Indigenous Achuar Peruvians. While the claim did not directly invoke the language of ESC rights or international human rights law, it is clear that if the damage alleged by EarthRights and the Achuar people is, in fact, the responsibility of Oxy, the corporation has contravened the human rights of the Achuar people in several ways, in particular, articles 11 and 12 of the ICESCR, along with the derivative right to water (CESCR, *General Comment 15*). It could also be argued that Oxy's alleged practices contravene the right to development (United Nations, *Declaration on the Right to Development* (1986)). While the scope and content of this right remains unclear, it is suggested that potentially irreversible environmental harm fundamentally inhibits the development potential of communities.

In April 2008, the District Court for the Central District of California dismissed the claim on the basis of FNC and international comity. Interestingly, it may be that the Achuar stand a better chance of success in Peru, in spite of originally bringing the claim in the US. Amazon Watch argues that the recent developments in the case against Chevron in Ecuador bode well for the Peruvian litigants (*Latin Business Chronicle*, 2008). In addition, it is clear that

Oxy's alleged practices in Peru, if proven, violate a number of rights recognised in the *Constitution of the Republic of Peru*, including the right to life, physical, psychological and moral integrity, free fulfilment and well-being (art 2.1); the right to a balanced and suitable environment adequate for life development (art 2.22); and the right to protection of health, family environment and community (art 7). Further, Peruvian General Health Law prohibits the endangering or damaging of the health of third parties; it also requires the use of appropriate practices to prevent the spread of environmental contamination. The dumping of waste or contaminants without appropriate protective measures is also outlawed. In addition, the 1993 Regulation for Environmental Protection for Hydrocarbon Activities establishes regulations and obligations for those operating in extractive industries. EarthRights and Amazon Watch claim that Oxy 'systematically violated the regulations related to the management and storage of hydrocarbons through the use of open, unlined oil storage pits and the lack of drainage systems' (EarthRights International et al., 2007, 42). It remains to be seen whether a claim will in fact be brought. The US courts are, at present, reluctant to fully embrace and legitimize ESC rights as international human rights or as a basis for judicial intervention. This has repercussions in terms of the manner in which US corporations view such rights, ascribing to them a lesser (if any) level of responsibility.

*Civil litigation outside the US*¹⁴

Courts in the United Kingdom (UK) and Australia have demonstrated a much more accommodating approach to claims against TNCs based on harm suffered in host States. However, the cases have largely settled without the substance of the rights at stake being debated. In *Connelly v RTZ (Connelly)*, a case brought in the UK, the plaintiff alleged that the defendant was liable, as his former employer, to compensate him for its role in his development of throat cancer given that the plaintiff had for a number of years mined uranium in Namibia. The case was eventually struck out on limitation grounds (Meeran, 2003) meaning that precise details concerning the defendant's alleged contribution to the plaintiff's sickness are not available. However, at the most abstract level, it is clear that allowing an

employee to work in an environment that could potentially cause life-threatening illness can be seen as an infringement of article 7 of the ICESCR concerning the provision of a safe and healthy working environment and article 4.2 of *ILO Convention No 155 concerning Occupational Safety and Health Convention*, 1981 (ILO Convention No 155), both of which specifically recognise rights to safe working environments. Article 12 of the ICESCR is also relevant because it provides that persons have the right to the highest attainable standard of health, particularly concerning the 'prevention, treatment and control of epidemic, endemic, occupational and other disease' (see also CESCR, *General Comment 14*). It should be noted that the claim itself in *Connelly* relied on an established (domestic) cause of action (tort) rather than international human rights law. Nevertheless, it is suggested that conceptualising the harm complained of and RTZ's (alleged) causative role through the lens of international human rights law reinforces the moral obligations of TNCs (and companies generally) and strengthens the notion of corporate spheres of responsibility in respect of ESC (and CP) rights.

The leading case in the UK concerning the liability of TNCs incorporated in the UK for their actions overseas is *Lubbe v Cape plc (Lubbe)*, which dealt with a claim by over 3,000 alleged victims of asbestos exposure in South Africa. Once again, while the claim was brought on the basis of UK tort law, the nature of the harms involved makes the case relevant to a consideration of corporate liability for human rights infringements. In respect of employees, articles 7 and 12 of the ICESCR and article 4.2 of ILO Convention No 155 are applicable, while article 12 of the ICESCR is applicable in respect of non-employees because of the inherent requirement of a healthy environment (CESCR, *General Comment 14* para 4). The merits of the case itself were never litigated as the defendants settled out of court prior to the trial (Frynas, 2004). Notwithstanding, the case represents an important milestone in corporate accountability for ESC rights infringements because of the House of Lords' recognition that such claims are indeed legitimate and that procedural objections cannot be arbitrarily used as a means to avoid liability.¹⁵

The leading Australian case dealing with the liability of a TNC for actions taken in a host State is

Dagi v BHP (Dagi). In that case, the plaintiffs sued BHP for polluting the Ok Tedi River and adjacent land in Papua New Guinea. It was alleged that this infringed the plaintiffs' enjoyment of the waters and lands in that area. In the same way as the harms suffered by the claimants in the *Bano* cases and *Maynas* can be seen as indirectly involving claims based on international human rights, the claim in *Dagi*, though brought as an action primarily in tort, can be conceptualised as dealing with violations of the right to an adequate standard of living and the right to health, along with rights to water, a healthy environment and development.¹⁶ The case was settled after a preliminary hearing. However, as with *Lubbe*, *Dagi* is important for its recognition that claims dealing with harms which can be conceptualised as ESC rights violations at international law are potentially justiciable in Australian courts using domestic civil causes of action. It is suggested that this process implicitly legitimises the notion that ESC rights fall squarely within a corporation's sphere of responsibility.¹⁷

Corporate responsibility to (only) respect (all) human rights

The SRSG's 2008 Report proposes a tripartite strategy comprising the State duty to protect against human rights abuses by third parties, the corporate responsibility to respect human rights and the need for more effective access to remedies. It shies away from any suggestion of a movement towards developing hard international law that might speak directly to corporations of their human rights responsibilities. Such a possibility bubbled nervously to the surface in 2003 with the (then) UN Commission on Human Rights' consideration of the Norms. While the SRSG's explicit separation of the State duty to *protect* and the corporate responsibility to *respect* is a deliberate shift away from the more expansive (but perhaps unattainable) vision of corporate responsibility in the Norms, it is questionable whether this distinction is quite as clear-cut as it appears. At first glance, the respect branch advanced by the SRSG in his 2008 Report arguably adds little to the principles already in existence. The SRSG refers to the responsibility to respect as 'the baseline expectation for all companies in all situations' and

argues that ‘to respect rights essentially means not to infringe on the rights of others – put simply, to do no harm’ (Ruggie, 2008, para 24).¹⁸ This use of ‘do no harm’ language has caused most attention to be focused on how companies can avoid violations notwithstanding the Report’s important stipulation that ‘doing no harm’ is not merely a passive responsibility (Ruggie, 2008, para 55). In contrast, the State duty to protect human rights – which requires States to ensure human rights, that is defend, shield and shelter such rights against interference from any party, including companies, who may attempt to impede or negate these rights – appears to place a far more onerous burden on States (CCPR, *General Comment 31*, para 8). However, both obligations – to respect and protect human rights – involve negative and positive requirements. The corporate responsibility to respect human rights is open to a broader interpretation than the ‘do no harm’ language might otherwise imply. For example, it places a proactive obligation on companies to develop and implement a code of conduct, conduct country-level risk assessments, monitor production throughout their supply chain and remedy non-compliance or violations. In his 2009 Report, the SRSG keenly emphasises several positive aspects of the corporate responsibility to respect rights.

Due diligence obligations

In support of the ‘responsibility to (only) respect (all rights)’ approach, the SRSG relies on the positive obligation of a company to conduct due diligence as the primary means for ensuring that corporations ‘discharge the responsibility to respect’ (Ruggie, 2008, para 56). The due diligence framework proposed suggests that companies ‘internalise’ the process, including devising measures to avoid any deleterious impact on rights. In order to be effective, due diligence should be a transparent process that involves both internal and external stakeholders. It is not simply a pre-transactional practice but a continuing obligation. The principles raised by the SRSG in his 2007 Report on human rights impact assessments (Ruggie, 2007), including the need for transparency, inclusion of external stakeholders, consultation and the identification of key areas of risk, are all elements essential to an effective and

ongoing due diligence process. Whether and how human rights due diligence is conducted should not be a matter solely at the discretion of corporations but should be mandated by legislation (as part of the State’s fulfilment of its duty to protect human rights). The extent of such due diligence obligations should be consistent across jurisdictions and, as such, the parameters should be set out in an international Charter of Responsibilities establishing a baseline standard for referral to by governments.

Without this, due diligence that is conducted at the discretion of business may be little more than a continuance of some of the soft law self ‘regulatory’ mechanisms that promote selective corporate responsibility over corporate accountability. Such voluntary systems are often initiated with an inherent conflict of interest. The need for human rights compliance stems in part from the process whereby global companies seek out or find themselves operating in countries where national legal systems and laws protecting people and the environment are weak or not implemented, enabling certain TNCs to act with minimum regulation. In order to suggest that the same companies that have refuge from regulation will at the same time reimpose it on themselves has come to be seriously questioned in the last decade (Collingsworth, 2008). The SRSG’s initial due diligence framework is significant in its focus on all rights but any continued reliance on voluntarism and corporate led responsibility will provide fodder for the old adage of the fox guarding the henhouse.

Beyond respect? Respect (plus)

The SRSG’s 2009 Report notes that in at least two situations, additional positive requirements beyond the baseline responsibility to respect rights may be imposed on companies. This approach, which we call the ‘respect (plus)’ scenario, highlights the tenuous and murky distinction between protecting and respecting human rights and is likely to be somewhat perplexing to companies in search of clarity around their responsibilities. The 2009 Report notes that ‘more than respect may be required when companies perform certain public functions’ but does not clarify the limits of such responsibility (which remains a matter under discussion) (Ruggie, 2009, paras

63–65). In a situation where, for example, a company is exercising elements of governmental authority, or where it is acting under the instructions, direction or control of the State, it is acting in a quasi-governmental role (McCorquodale and Simons, 2007). In such a situation, it should assume a parallel and complementary obligation (along with the State) to protect rights. In a situation where a company is essentially acting as and for the State, it assumes duties to not only respect but also protect human rights.

In a second example of the respect (plus) scenario, the SRSG notes that ‘operating conditions may impose additional requirements on companies, for example, the need to protect employees in conflict affected areas ... but this is more appropriately considered a specific operationalisation of the responsibility to respect, and not a separate responsibility altogether’ (Ruggie, 2009, para 63). While recognising the role business can play in filling the governance gaps in conflict zones, the 2009 Report does not explicitly take the subsequent step of placing a supplementary responsibility on the corporation to protect human rights where the State, in such circumstances, is unable or unwilling to do so. It does not follow that assigning a portion of responsibility to corporations with regard to human rights results in a corresponding reduction of the State’s obligations to protect such rights. The obligations of companies should supplement and not replace State obligations; in such a situation corporations and States can and should assume a responsibility to protect, not simply respect, human rights. The question is whether the difference between the duty to protect and the responsibility to respect (plus) is more a terminological distinction than a practical one. Corporations can and should assume (at least in these two identified situations) a duty to protect human rights and we should not shy away from assigning business complementary duties to protect human rights in these circumstances.

Lessons learned

The SRSG’s most recent reports pointedly avoid making any substantive reference to the Norms. In his 2008 Report, the SRSG instead propounds the Organisation for Economic Co-Operation and

Development’s *Guidelines for Multinational Enterprises* (OECD Guidelines) as ‘the most widely applicable set of government-endorsed standards related to corporate responsibility and human rights’ (Ruggie, 2008, para 46). This is troubling in the context of ESC rights because of the lack of substantive protection afforded to ESC rights in the OECD Guidelines. The SRSG’s current pragmatic approach to respect all rights assists in cementing the legitimacy of ESC rights as the equal of CP rights, but substantive protection for both CP and ESC rights remains limited. This is particularly troubling for ESC rights because of their non-justiciability under ATCA and their limited inclusion in regional human rights treaties such as the ECHR. While the authors of this article question the utility of the OECD Guidelines insofar as ESC rights are concerned, they are and remain the only corporate responsibility instrument formally adopted by State governments (Letner Cerbic, 2008). Importantly, the OECD Guidelines operate extraterritorially, in the sense that endorsing countries have obligations with respect to corporations that are incorporated in a State even where the impugned actions or operations of a TNC occurred in areas outside of that State’s ordinary territorial jurisdiction. However, it must be remembered that the OECD Guidelines ‘represent supplementary principles and standards of behaviour of a non-legal character’ (OECD Guidelines Commentary, 2000, para 2).

The OECD Guidelines attempt to incorporate a measure of enforceability through the National Contact Point (NCP) system, which obliges States to set up departments to promote the principles espoused in the OECD Guidelines and enable persons affected by corporate behaviour to lodge complaints with their home State NCP. If the relevant NCP decides to investigate a complaint and if *both* parties consent, the NCP may act as a mediator to resolve the issue. The record of NCPs globally is somewhat inconsistent and demonstrates an occasional preference for form over substance; nevertheless, such bodies have the potential to play an important role in providing access to remedies for human rights violations in the absence of enforceable norms of international law.

The primary criticism of the OECD Guidelines put forth in this article is its adoption of a weak passive, ‘responsibility to respect’ framework that

simply obliges corporations to have regard to, inter alia, sustainable development and 'economic, social and cultural progress' without any State-based sanctions in the event of non-compliance. This passive interpretation of the responsibility to respect differs from the current and potentially more proactive approach of the SRSG. From an ESC rights perspective, it is apparent that while the OECD Guidelines incorporate a section dealing with environmental protection, the bulk of the document is oriented towards CP rights and issues such as consumer interests and taxation that are perhaps better left to domestic legislatures. This criticism is bolstered by the fact that the cases which have arisen under the NCP system have tended to deal with issues that would be classified as dealing with CP rights infringements if couched in the language of international law.

While there can be little doubt that the Norms are, as the SRSG has declared, dead, they played a valuable role in propelling 'the dialogue on the human rights implications of TNC conduct to the forefront of global debate' (McCorquodale and Simons, 2007, 620). While the Norms proposed a model of corporate responsibility comprising the duty to respect *and protect* all rights, the SRSG distinguishes his approach by separating the State duty to protect from the corporate responsibility to respect (with an addendum allowing for a respect (plus) approach which, we would argue, is more akin to a protection regime applicable in particular circumstances). Crucially, both approaches incorporate ESC rights as primary rights and sources of obligation. Both approaches are consistent with paragraph 18 of the *Maastricht Guidelines on violations of Economic, Social and Cultural Rights*, which notes that the State obligation to protect 'includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights'.

It was the Norms' assertion that corporations may be held directly accountable in international fora (rather than relying solely on the horizontal application of the Norms by States) for human rights infringements that was evidently a step too far. While international law has progressively recognised the human rights responsibilities of individuals and

non-State actors, and while theoretically such direct accountability is possible, pragmatically and politically this approach is a bridge too far at present. So where does this leave us? The tripartite framework proposed by the SRSG is a useful approach to delineating responsibilities for rights but we must also acknowledge its limitations. A State's obligation to protect rights will naturally be influenced by its international treaty obligations. For a State such as the United States (the home to thousands of TNCs), which has not ratified the ICESCR, the acceptance and therefore protection of ESC rights remains somewhat in limbo in its jurisdiction and territory. An international Charter of Responsibilities affirming that the rights set out in the International Bill of Rights are the standards which govern the conduct of international business would be a useful step in clarifying the human rights standards that apply to *all* business activities, not just to those companies who opt into a particular set of voluntary guidelines. Such a Charter, which at this point in time should be declaratory rather than binding (that is, soft law that may assist in the development of hard law), should also provide States with guidance on the interpretation of their duty to protect, including an affirmation that such duties may extend to extraterritorial protection of human rights. A State's duty to protect human rights must be underpinned by domestic legislation which, for example, legally mandates human rights due diligence by companies. A Charter would be an appropriate instrument to provide concrete guidance to business on what constitutes effective due diligence for companies to ensure consistency across jurisdictions. Voluntarism has its limits and without State-based legal obligations to 'concretise' this aspect of the corporate responsibility to respect, due diligence is likely to simply become 'a tool for the willing' (Amnesty International, 2008, 6). A Charter must also acknowledge the limitations of relying on State-based duties to protect rights and that, in specific circumstances, companies may also have responsibilities in relation to the protection of human rights, a responsibility that supplements those already assumed, if not enacted by the State.

The development of any such Charter of Responsibilities should be viewed as a positive contribution to the existing landscape of human rights law and policy, rather than a development

to be treated with suspicion. Useful models that combine both national enforcement (including extraterritorial enforcement) and international standard-setting already exist in areas such as corruption (albeit in the form of a treaty) and a model should be formulated to more broadly protect all human rights from infringement by corporations. For some, it may be a step backward from the Norms and for others, too giant a leap forward, but a declaratory Charter will benefit all stakeholders, not only by affirming the primacy of human rights as a framework relevant to business but by providing an internationally agreed road map for the respect *and protection* of human rights.

Conclusion

The ultimate goal of measures dealing with human rights infringements by corporations must be the prevention of harmful behaviour in the first place. Failing that, it is imperative that victims' claims are heard by appropriate courts, that adequate remedies are provided and that commensurate sanctions are imposed. International human rights law can and ought to play a central role in this process by enumerating the human rights roles and responsibilities of both business and States and affirming that each should be held accountable for infringements of ESC rights. However, it has not yet been able to fulfil this function because of residual concern over the imposition of positive obligations on corporations and the usurpation of the role of the State in upholding human rights. Suites of voluntary codes, guidelines and reporting measures have consequently arisen to encourage socially, ethically and environmentally responsible behaviour and highlight breaches of accepted standards when they occur. This has been particularly important in consolidating the inherent legitimacy of ESC rights and reinforcing the fact that corporate duties should extend beyond a mere responsibility to refrain from engaging in abuses of CP rights. Nevertheless, the catalogue of human rights infringements by corporations canvassed in this article and the absence of enforceable State-based legislative measures directed towards corporations' human rights responsibilities collectively bear testament to the paramount need for an international instrument 'aimed at clarifying, and

where necessary at extending, the obligations of States to protect human rights against any violations of these rights originating in the activities of transnational corporations' (De Schutter, 2006, 51). Any such instrument must also involve a concomitant recognition that corporations, in addition to bearing responsibility for respecting human rights, may in certain circumstances bear duties of protection in respect of human rights. Future efforts to ensure corporate compliance with international human rights must also recognise the equality of ESC and CP rights and acknowledge the continual development of human rights, including in particular rights pertaining to health, the environment, development and traditional culture. While the proliferation of soft and, more occasionally, hard law mechanisms to hold corporations accountable for violations of ESC rights have been incrementally effective in legitimizing the inclusion of such rights within a company's sphere of responsibility, accountability for the violation of such rights remains limited.

Notes

¹ In *Reparations for Injuries Suffered in the Service of the United Nations* (1949) ICJ Rep 174, the ICJ affirmed that international organisations such as the United Nations (UN) have international legal personality. In addition, the International Law Commission (ILC) in its *Draft Code of Offences Against the Peace and Security of Mankind* rejected an approach to liability for international wrongs such as slavery that restricts its ambit to State actors. See further Jagers (1999).

² The Nuremberg trials established that individuals may be held accountable for violations of international human rights standards, even if they are not government officials or state actors. For example, the US and British Military Tribunals prosecuted German industrialists who profited from the infliction of human rights abuses through the corporations they either owned or worked for. More recent US authority citing the Nuremberg trials is supportive of the notion that corporations may be held liable for international human rights violations: see *Kadic v Karadzic* 70 F 3d 232 (2d Cir 1995); *Iwanowa v Ford Motor Co* 67 F Supp 2d (DNJ 1999); *Presbyterian Church of Sudan v Talisman Energy, Inc* 244 F Supp 2d 322 (SDNY 2003); *In re Agent Orange Product Liability Litigation* 373 F Supp 2d 7 (EDNY 2005).

³ Though susceptible to myriad formulations, this article adopts the definition of TNC in paragraph 20 of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*: 'The term 'transnational corporation' refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively'.

⁴ UN Doc E/CN.4/Sub.2/2003/12/Rev (2003) (Norms). The Norms were first considered by the Commission on Human Rights (CHR) at its 60th session in 2004. While the CHR expressed its appreciation to the Sub-Commission for its work in preparing the draft norms, the CHR explicitly stated that the Norms were not requested by it and as a draft proposal have no legal standing: UN Doc E/CN.4/DEC/2004/116 (2004). This process led to the appointment of Professor Ruggie as the UN's Special Representative on the issue of human rights and transnational corporations and other business enterprises.

⁵ Contra Judge Weeramantry's separate opinion in the *Case concerning the Gabikovo-Nagyymaros Project* (Hungary v Slovakia) 25 September 1997, ICJ Rep 1997, 7, 114: '[e]nvironmental rights are human rights'.

⁶ This is by no means universal. In Australia, the *Human Rights Act 2004* (ACT) expressly incorporates CP rights *only*. The United States has still not ratified the ICESCR and its policy in respect of international financial aid institutions is to channel funds 'towards countries other than those whose governments engage in (1) a pattern of gross violations of internationally recognised human rights, such as torture or cruel, inhumane, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial to life, liberty, and the security of person': *Foreign Relations and Intercourse*, 22 USC § 262d (1994). By inference, those States that abuse ESC rights are not subject to the same qualification.

⁷ One might question why national governments ought to entertain the idea of enforcing ESC rights in the corporate sphere when such rights have not yet attained customary status at the international level. One potential answer is that custom is in part determined by the practice of States, meaning that recognition by States that corporations are responsible for upholding ESC rights contributes to the development of ESC rights as custom.

⁸ O'Neill has pointed out that liberty rights and welfare rights can be seen as asymmetric in the sense that 'when a liberty right is violated, then, whether or not specific institutions have been established, there are

determinate others to whom the violation might be imputed', while in the context of welfare rights there is 'systematic unclarity about whether one can speak of violators, and not just contingent uncertainty about who they might be' (1996, p. 34). In many cases this analysis will prove correct. However, we suggest there is a danger in classifying rights by reference to whether their infringement involves 'violation' by a 'violator'. For example, the infringement of cultural rights is often directly referable to the actions of violators – State-based or otherwise. Similarly, the HRC has noted that serious malnutrition leading to extensive child mortality constitutes non-fulfilment of the right to life – an example of a liberty right being infringed in a situation where no apparent violator is at fault: see *General Comment 6: The right to life* (art. 6): 30/04/82, UN Doc E/1996/22 [5].

⁹ See the definition of stakeholders in Global Reporting Initiative, *G3 Guidelines*, 10.

¹⁰ It should be noted that the Supreme Court did not address the question of corporate liability under ATCA in *Sosa* 542 US 2739 (US S Ct, 2004) because the claim was not brought against a corporate defendant. This means that the finding in *Doe v Unocal*, 963 F Supp 880 (CD Cal 1997) remains valid, though open to challenge.

¹¹ The finding by the Ninth Circuit in *Sarei v Rio Tinto*, 456 F 3d 1069 (9th Cir, 2006) that transnational environmental harm, though not part of the *jus cogens*, is part of customary international law suggests that claimants stand a greater chance of having a case heard if cross-border environmental damage can be proven.

¹² An obvious threshold question presents itself. How does one determine the nationality of a TNC for the purpose of determining the judicial fora in which claims against a TNC may be heard? In the *Barcelona Traction Case* (New Application: 1962) (Belgium v Spain) [1970] ICJ Rep 3 the International Court of Justice held that the nationality of a corporation is to be determined by reference to the State in which the TNC is incorporated. This does not, of course, surmount the problems posed by the separation of legal personality recognised throughout the common law world; nor does it dispense of the procedural issues that arise in transnational claims. It does, however, mean that a corporation incorporated, for example, in Australia can in theory be sued in the courts of Australia based on actions committed in another jurisdiction (the host State).

¹³ Interestingly, Judge Doggett strongly indicated that he would have denied the defendant's FNC application if the doctrine had not been abolished. His Honour stated that '[t]he doctrine of *forum non conveniens* is obsolete in a world in which markets are global and in which ecologists have documented the delicate balance

of all life on this planet': *Castro-Alfaro*, 786 SW 2d 674 (S Ct Texas, 1990) 689.

¹⁴ The focus of this article is on the common law world. However, 'there is no reason why such cases could not be brought in civil law countries such as the Netherlands where jurisdictional hurdles are lower and where a full range of remedies – including damages, injunctions, and declaratory relief – are available against parent companies' (Anderson, 2002, p. 401).

¹⁵ The issue of FNC appears now largely redundant in Europe. Following the adoption of the *Brussels Convention*, the appropriate forum for transnational litigation in Europe (and the UK) is to be determined in accordance with article 2 of the Convention, which provides: 'Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State'.

¹⁶ The defendants in *Dagi* did not seek dismissal on FNC grounds, presumably because of the finding in *Voth v Manildra Flour Mills*(1990) 171 CLR 538 that a case will only be vacated for FNC grounds if it can be shown that Australia is for some reason a clearly inappropriate forum.

¹⁷ Justice Byrne opined that 'it is not at all improbable to suppose that the law imposes a duty of care in favour of persons who may use the water downstream as a food source or for a livelihood': *Dagi* [1995] 1 VR 428, 456.

¹⁸ Professor Ruggie's reluctance to comprehensively extend the responsibility of corporations beyond the obligation to respect suggests a keen awareness of the potentially detrimental economic impact of holding corporations to strict human rights standards, particularly in developing regions. Expanding the duties of corporations necessarily increases their potential legal, social and economic liability. In this respect, future frameworks must recognise the important role that corporate investment can play in global development. We would stress, however, that human rights are not intrinsically antithetical to foreign investment and economic development – the challenge lies in finding an appropriate balance.

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