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Commerce and human rights

Introduction

In the year of this book's publication, the worst corporate calamity of modern times will mark its twenty-fifth anniversary. Around midnight on 2–3 December 1984, a dense cloud of 40 tons of highly poisonous methyl isocyanate (MIC) gas drenched the Indian city of Bhopal, after a catastrophic chemical reaction occurred in a holding tank at the nearby pesticide plant operated by the Indian subsidiary of the US firm Union Carbide. More than 3,000 people died in the immediate aftermath, according to official figures (though many civil society organisations put the figure at almost three times that number), and more than 50,000 people were permanently disabled. In the following weeks a further 15,000 died as a direct consequence of the leak, and it has been estimated that since then approximately the same number have died for reasons that included exposure to the gas, drinking contaminated water or consuming produce from contaminated soil.[1] Recent reports on the medical consequences of the disaster show an intergenerational impact with clear evidence of birth and developmental abnormalities that correlate to those who, though exposed to the gas, survived, and have since had children.[2]

Despite the intense worldwide media interest in the tragedy, and the string of court cases it spawned, it remains unclear precisely what caused the water to enter the holding tank that set off the chain of events leading to the gas leak, but many believe it was due to the chronic disrepair

1 See Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On* (London: Amnesty International UK, 2004).

2 Nishant Ranjan, Satinath Sarangi, V. T. Padmanabhan, Steve Holleran, Rajasekhar Ramakrishnan and Daya Varma, 'Methyl Isocyanate Exposure and Growth Patterns of Adolescents in Bhopal' (2003) 290(14) *Journal of the American Medical Association* 1856, at 1857, and Randeep Ramesh, 'Bhopal Gas Victims Are Still Being Born', *Guardian Weekly*, 9 May 2008, p. 10. In fact, owing to the lack of thorough follow-up medical research (the curtailment of which is itself the matter of enormous controversy), it is difficult to ascertain the full extent of consequences throughout the local population.

of the plant's infrastructure, while the company claims it might have been the work of a saboteur. What cannot be disputed, however, are the many public notices and reports that document the long-term deterioration of safety standards at the plant, including in respect of installations, management procedures and staff training. The relevant holding tank, for example, was filled with MIC to between 73 and 87 per cent of capacity on the night of the accident, despite safety regulations stipulating that tanks be filled to no more than 50 per cent capacity in order to allow sufficient space to accommodate the adding of dilutants in emergencies. Accusations abound over Union Carbide's cost-cutting carelessness regarding safety, and the double standards tolerated by the US parent company in respect of the poor operational and safety protocols being followed (or not followed) at its Indian subsidiary.[3] Even if not all of these claims were accurate, the company's categorical rebuttal of them was overblown (for example, its claim that safety at Union Carbide 'was a deeply ingrained commitment that involved every employee worldwide'),[4] and compromised, as evidenced by it own admissions and actions in the litigation that ensued.

Allegations as to negligence regarding safety procedures, and the responsibilities under civil and criminal law that flow therefrom, constituted the basis of the actions pursued in both the American and the Indian courts. The Indian Government initially sought unspecified damages against Union Carbide in a negligence suit filed in the Federal Court in New York, but the company successfully argued in its defence that the court was not the appropriate jurisdiction in which to hear the dispute (that is, *forum non conveniens*), and the case was dismissed.[5] Clearly, New York was not the forum in which the incident occurred, and the operating corporation was indeed Union Carbide India Ltd (UCIL), not the defendant Union Carbine Corporation (US) (UCC), but the plaintiffs had argued that through the latter's 51 per cent ownership of the former, it maintained effective control of, and therefore responsibility for, operations at Bhopal. The court's dismissal was, however, conditional on the

3 See, for example, Alfred de Grazia, *A Cloud over Bhopal* (Bombay: Kalos Foundation, 1985), pp. 65–102.

4 As stated by Jackson Browning, Union Carbide's former Vice-President of Health, Safety and Environmental Programs, 'Union Carbide: Disaster at Bhopal', in Jack Gottshalck (ed.), *Crisis Response: Inside Stories on Managing Image under Siege* (Detroit: Visible Ink Press, 1993), p. 367.

5 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal* 634 F.Supp. 842 (SDNY 1986) at 850–1.

company submitting itself to the jurisdiction of the Indian courts, but clearly the loss of the opportunity to argue the case before the American courts, and with it the possibility of obtaining significant damages and setting an important legal precedent in the American courts, was a blow to the victims of the Bhopal disaster. Negligence suits were pursued in the Indian courts and the case was eventually settled out of court in 1989 when UCC agreed to pay $470 million in compensation to the victims. By 2004 only one quarter of that amount had been distributed by the Indian Government which held the compensation fund despite the patent need. Following an enforcement ruling of the Indian Supreme Court the Government has made undertakings to distribute the remainder, though now it is clear that the breadth and depth of the need is much greater than the amount initially settled on.[6] Warren Anderson, the CEO of UCC at the time, was declared a fugitive from justice by a magistrate court in Bhopal in 1992 for failing to appear in court to face charges of manslaughter. Neither the Indian nor the US Government has shown any inclination to activate extradition proceedings against Anderson, who continues to live in the US. The gas plant at Bhopal was abandoned after the disaster and UCIL was sold to another chemical manufacturer in 1994. The site itself and adjoining lands are yet to be properly cleaned up by Dow Chemical Company, which took over UCC in 2001.[7]

The scale of the Bhopal incident together with its legal ramifications represents a watershed in the recent history of business's relations with the community on two fronts. First, the episode graphically exposed the nature of a corporate culture that permitted such horrific consequences and that spurred subsequent efforts to avoid being held responsible. And second, it revealed the inadequacies of the legal regimes that governed the corporation both before and after the disaster; that is, in regulating against its occurrence, and in the provision of remedies for the loss and suffering it caused. As I argue throughout this chapter, these two factors are emblematic of the key concerns that occupy the field of corporate social responsibility as a whole, and the question of human rights responsibilities

6 A further class action suit was filed in the US against Union Carbide in 1999, most of which was dismissed on the same grounds as the 1986 case, save in respect of claimed damage to property which had not been argued before, but these claims too were finally dismissed by the Second Circuit Court of Appeals in New York in 2006; see *Bano v. Union Carbide Corporation* 198 Fed.Appx. 32 (2nd Cir. 2006).

7 For the chronology of the continuing saga, see the Bhopal Information Centre, at www.bhopal.com/chrono.htm.

of corporations in particular. At issue in respect of both the general and the specific is the extent to which law can, should and does have a role to play.

Defining the territory

There is a considerable degree of ecumenicalism within the commerce and human rights relationship, with respect, in particular, to the impact of corporations as the driving force of commercial enterprise. Rights and responsibilities are asserted in legal and non-legal terms (and in respect of the former, in hard and soft law varieties). Allegations of abuses of human rights, as well as proclamations of their advancement, are regularly aired in a wide range of arenas: legal, political, social and economic. Though the human rights themselves are sometimes expressly referred to as such, often they are not, even when their relevance is manifest (as in the case of Bhopal). Instead, one finds that surrogate terms are widely used, such as environmental damage, social consequences, legal breaches and unethical behaviour. The whole gamut of human rights standards are, in fact, relevant: economic, social and cultural rights, as well as civil and political rights. Reflecting on a review of more than 300 reports of alleged human rights abuses by corporations, John Ruggie, the UN Secretary General's Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (henceforth 'SGSR'), has concluded that 'there are few if any internationally recognized rights business cannot impact – or be perceived to impact – in some manner'.[8] That said, the most prevalent are: labour rights (workplace relations, conditions of employment and occupational health and safety); health related rights (especially concerning environmental conditions, access to water and food security); free speech rights (that is both to receive information, as well as to impart it); rights to fair trial and to an effective remedy (that is when individuals or groups are involved in litigation with corporations in home or host states); physical security (concerning, in particular, the actions of law enforcement agencies working for or with corporations); rights to land, housing and living standards (often affected in situations of forced or voluntary relocations); and the rights of

8 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', UN Doc. A/HRC/8/5, 7 April 2008, para. 52.

indigenous peoples (regarding culture, land, movement and non-discrimination).[9]

The circumstances in which corporate abuses of these rights occur, as well as the size, type and format of the corporations involved, are many and varied. Corporations can be large or small; be engaged in just about any type of business (from financial and professional services, through manufacturing and agriculture to extractive industries); be operating in developed or developing states (or both), or in circumstances of peace and order, or conflict and chaos; be subject to heavy or light (or no) legal regulation. The abuses may be caused by ignorance, neglect, carelessness, mendacity or even design. But, at the broadest level, it is possible to see some dominant tendencies and trends emerging from the matrices of these different factors. Major corporations (almost invariably transnational corporations (TNCs)) that have an image or brand to protect are especially heavily scrutinised for transgressions, in particular regarding their operations in developing countries. Together, the extractive industries (oil, gas and minerals), apparel and footwear manufacturing, timber and logging, power generation, protective services, pharmaceutical products, and the financial services sector (notably banks that fund impugned projects), account for the vast majority of human rights claims made against corporations, with the first two mentioned sectors predominating.

Legal regulation is manifold and stringent in most developed states, it is inconsistent and patchy in many developing states, and it is almost non-existent at the level of international law. There is also some cross-over between these categories, as highlighted, for example, by such extra-territorial legal devices as universal jurisdiction in respect of grave criminal offences, legislation with extra-territorial reach (as with certain criminal laws, and the US's *Alien Torts Claims Act*) and *forum non conveniens* disputes. Of the causes of human rights infringements by corporations, carelessness and neglect are by far the most common. Ignorance of the existence of pertinent human rights standards and their application in any given circumstance is also common, though this is nearly always associated with a corporation's lack of care or its

9 See David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, at 966–93; and also see a report by Human Rights Watch and the Center for Human Rights and Global Justice, NYU School of Law, *On the Margins of Profit: Rights at Risk in the Global Economy,* Vol. 20, No. 3(G) (February 2008), which usefully categorises the principal rights at risk and the nature of their abuse. Available at hrw.org/reports/2008/bhr0208.

negligence. In the West, at least, it is now rare to find corporations setting out intentionally and knowingly to infringe human rights. Rather, infringements are usually the indirect consequence of the corporation's blinkered pursuit of its commercial objectives – which all, ultimately, reduce to profit. This is so even in the most striking examples. Thus, in a review of Edwin Black's book *IBM and the Holocaust*, Richard Bernstein considers that IBM's continuation of commercial relations with Hitler's Germany (in particular its sale of a new system for managing data that assisted in the orchestration of the Holocaust) demonstrated 'the utter amorality of the profit motive and its indifference to consequences'.[10] IBM was not alone in this case, or in respect of corporate involvement in any number of tyrannical regimes, before and after Nazi Germany. The blindness of corporations in such situations is often wilful and reprehensible, as well as culpable, and it shows how, no matter what the circumstances, there will always be corporations that carry on 'business as usual'.[11]

Changing landscapes and mindsets

I should stress that while these are readily observable tendencies and trends, they do not account for the whole picture of the intersection between human rights, corporations and commerce. Even aside from the fact that I am, for the moment, focusing only on human rights abuses (I redress the balance by stressing how and in what circumstances commerce benefits human rights in the section that follows this one), there is a crucial dimension to this relationship that must be added. This is the need to appreciate the deeper nature of global corporate enterprise, the changes it is undergoing, and how these factors affect the evolving relationship between commerce and human rights. Within, between and around the edges of the above trends there are a clutch of important emerging issues that must be accounted for in any assessment of the current situation and in any prognosis of future developments. Together they form a dense matrix of complicating factors, all of which intertwine at some level or other.

One such issue concerns corporations that are not transnational, or do not have a brand name or public image to protect. These firms are just as

10 Richard Bernstein, 'IBM's Sales to the Nazis: Assessing the Culpability', *New York Times* (7 March 2001), at p. E8, as quoted by Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45.

11 Stephens, 'The Amorality of Profit', at 46.

liable, if not more so, to care little for human rights standards, whether they are regulated or not. It has been acknowledged, for example, that many human rights infractions in the footwear and apparel industries occur in anonymous factories situated down the supply chain. The pressure on such big, branded corporations as Nike, Adidas and Gap at the top of these supply chains has resulted in these corporations making greater efforts not only to formulate and enforce human rights protecting policies and practices in their own operations, but to apply them to their suppliers as well. But still, questions remain as to how far down the chain (that is, the supplier's suppliers, and their suppliers in turn, etc.) such pressure can be meaningfully applied, and the fact that nearly all such policies apply only to the formal sector, by-passing altogether the plight of home workers in the informal sector.[12]

The complexion of the global face of TNCs is also changing. Of particular note is the rise of globally powerful and increasingly expansive corporate players from new or emerging economies, such as India's Tata (motor vehicles), Mittal (steel) and Infosys (information technology), China's Sinopec (oil), ICBC (banking) and Chery (cars), Brazil's Sadia (foodstuffs), Embraer (aeronautics) and Vale (mining), Russia's Gazprom (oil and gas), Mexico's Cemex (concrete), and Malaysia's Petronas (oil and gas).[13] Sixty-two of the world's biggest companies in the *Fortune 500* list are now from emerging economies, up from thirty-one in 2003.[14] In 2007, almost 13 per cent of the world's total foreign direct investment was coming from corporations located in developing economies, and more than 10 per cent of all cross-border mergers and acquisition spending in that year was also sourced from developing states.[15] Few of these corporations, let alone all those smaller than them, have anything like the domestic or even international pressure to conform to human rights standards as do many Western corporations. This does not mean to say that none of them pays any heed to such standards – as I mentioned in chapter 1, Tata, for example, is very explicit about the value it puts on

12 See Rachelle Jackson, 'The New Supply Chain Standards: FTSE4Good Enough?', *Ethical Corporation*, 3 January 2005, at www.ethicalcorp.com/content.asp?ContentID=3345.

13 For discussion of the phenomenon, and especially the impact of South–South FDI flows in which corporations such as these are instrumental, see Dilek Aykut and Andrea Goldstein, *Developing Country Multinationals: South–South Investments Comes of Age*, OECD Development Centre, Working Paper No. 257 (December 2006).

14 See 'A Bigger World', Special Report on Globalisation, *The Economist*, 20 September 2008, p. 3.

15 UNCTAD, *World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge* (New York and Geneva: UN, 2008), p. 37, at p. 272.

observing its social and human rights responsibilities;[16] and nor does it mean to say, of course, that Western corporations are all good corporate citizens in this regard. Rather, it is to point to the fact that differences in corporate culture, domestic regulatory frameworks, consumer attitudes, and social and political expectations will necessarily lead to variegated levels of human rights observance by corporations.

Another emerging factor is the increasing porosity of the public/private divide in economic relations. This is evidenced in the enormous global movement towards privatisation of all sorts of public utilities (from water and power, through telecommunications and banking, to security and detention), and the massive growth in the incidence, scope and size of so-called public–private partnerships (PPPs) in commercial dealings. Both these phenomena are having an impact on the protection and promotion of human rights, not least as regards the task of determining whether, and to what extent, the state is *indirectly* responsible under international law for the actions of a privatised body, alongside its *direct* responsibility to ensure human rights protection to all within its jurisdiction which endures no matter what the level of privatisation.[17] A particular concern regarding the privatisation of essential services is the impact of replacing 'need' as the rationale of the service in question, for 'efficiency and profit'. In consequence, unprofitable sectors of society (often poor or remote communities, or ones that are infrequent or light users) are at risk of having their service provision depleted or cut off altogether. A report on *Human Rights, Trade and Investment* by the UN High Commissioner for Human Rights notes, in respect of privatisation and the right to water, that:

> while promoting investment through private sector participation in the water and sanitation sector might be a possible strategy to upgrade the sector, there is concern that private sector participation might threaten the goal of basic service provision for all, particularly the poor, and transform water from being an essential life source to primarily an economic good.[18]

16 Thus, Clause 17 of Tata Code of Conduct covering ethical conduct provides that 'every employee of a Tata company shall preserve the human rights of every individual and shall strive to honour commitments'; available at www.tatainteractive.com/pdf/TIS_TCOC.pdf.

17 See Adam McBeth, 'Privatising Human Rights: What Happens to a State's Human Rights Duties when Services are Privatised?' (2004) 5 *Melbourne Journal of International Law* 133.

18 Report of the UN High Commissioner of Human Rights, 'Human Rights, Trade and Investment', UN Doc. E/CN.4/Sub.2/2003/9 (2 July 2003), para. 47.

The usual response to such fears, of course, is to ensure that there is an appropriate degree of public intervention and oversight, by way of stipulations made in the privatisation agreement itself as to the range of service delivery and permissible charges, and through the establishment of a regulator with powers of enforcement. Thereby the sharper edges of private sector management of a public resource can be dulled in order to secure such wider goals as social welfare and human rights protection. Public–private partnerships are a particular device that may be employed for just these ends. They are essentially agreements to employ private capital to secure an asset or service that remains in, or is controlled or administered by, the public sector domain. The partnership details vary greatly, as, indeed, do perceptions of their impact on the efficiency, effectiveness, scope and fairness of service delivery in social and economic terms.[19]

The final point I wish to make in this list of emerging trend-setting issues concerns the matter of the motivations behind corporate abuses of human rights. It needs to be stressed here that the circumstances in which corporations operate today have changed – or at least, so it is perceived – regarding the relevance of human rights concerns. As I said before, instances in which corporations *intend*, knowingly and deliberately, to act in ways that breach human rights standards (as opposed to not knowing or caring about the human rights consequences of their actions) are the exception rather than the rule. Typically, corporate transgressions born of such 'inadvertency' range from unpardonable ignorance (including both 'head-in-the-sand' ineptitude and wilful neglect), to sincere practical or policy dilemmas, which have the virtue, at least, of being more understandable, if not exactly pardonable. A graphic illustration of the former attitude is displayed in the following excerpt from the transcript of a television documentary in which the CEO of Anvil Mining, Bill Turner, was interviewed about allegations that Anvil's employees took part, and Anvil's vehicles and plant were used, in a murderous, government-backed military campaign in the town of Kilwa in the Democratic Republic of Congo in October 2004:

> SALLY NEIGHBOUR [*journalist, Australian Broadcasting Corporation*]: And what about all the civilians who were killed?
> BILL TURNER: I don't know – I don't know – I don't know. We were not part of this. This was a military action conducted by the legitimate

19 See Michael Likosky's excellent case-study analyses of the human rights risks related to the establishment and delivery of public–private partnerships: *Law, Infrastructure and Human Rights* (Cambridge: Cambridge University Press, 2006), especially chapter 3.

army of the legitimate government of the country. We helped the military get to Kilwa and then we were gone. Whatever they did there, that's an internal issue. It's got nothing to do with Anvil. It's an internal government issue. How they handle that is up to them. No involvement of us, absolutely.

SALLY NEIGHBOUR: Well, except that they used your vehicles to move their troops in.

BILL TURNER: So what? So what?

SALLY NEIGHBOUR: To move their troops around.

BILL TURNER: So what?[20]

This exchange also reveals the ready appeal to corporations of seeking refuge behind the complication of political necessity; that is, where the political circumstances of the host state are such that the corporation makes out that it has little or no choice but to comply with local rules, regulations or requests, even if they lead to human rights abuses. This was effectively the reasoning initially relied upon by the corporations in such celebrated cases as Shell in Nigeria (when the company was accused of complicity by sponsoring the Nigerian military in its brutal suppression of peaceful protests against Shell's alleged environmental pollution by the local Ogoni people, through killings, rape and detention without trial),[21] and Unocal in Myanmar (when the company was accused of complicity in human rights abuses because it engaged Myanmar soldiers to protect its Yadana gas pipeline while knowing of the military's record of murder, rape, forced labour and forced relocation).[22]

Regarding the less culpable (if no less damaging and intractable) problem of human rights abuses that flow from genuine practical dilemmas, I might here recall a story told to me in Indonesia by the operations manager of a Unocal (as it then was) oil-rig situated some miles off the coast of East Kalimantan. The presence of the oil-rig had attracted local fisherman who were able greatly to extend their range of accessible fishing grounds by tying up overnight to the platform's legs, rather than having

20 ABC, *Four Corners*, 'The Kilwa Incident', 6 June 2005; at www.abc.net.au/4corners/content/2005/s1386467.htm.

21 *Wiwa v. Royal Dutch Petroleum Co.*, 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 22 February 2002). More than ten years after the filing of the original lawsuit, the case awaits resolution, having been delayed by discovery disputes and other ancillary motions; see Centre for Constitutional Rights, *Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson* and *Wiwa v. Shell Petroleum Development Company*, at http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum,-wiwa-v.-anderson-and-wiwa-v.-shell-petroleum-d.

22 *Doe v. Unocal* 403 F.3d 708 (9th Cir. 2005). The case was settled in 2005; see further discussion below, at p. 192.

to return to port each night. This was enormously beneficial to the many local communities that relied heavily on fishing for their livelihoods. The manager was well aware of this fact, but equally he was very conscious of the safety implications of such a practice (for rig personnel as well as the fishermen), and the rules prohibiting such trespass. It genuinely troubled him to do so, but he felt he had no choice but to enforce the rig's exclusion zone boundaries in respect of the fishermen. This sort of dilemma is not an uncommon problem that corporations, especially in the extractive industry, have to deal with. Companies that are involved in voluntary relocation programmes often face similar difficulties when they must ensure that compensation packages are fair not only in absolute terms, but also relative to pre-existing community differences and distinctions. And there are many other examples of such practical and ethical difficulties.

From the perspective of the victims of human rights abuse, of course, it hardly matters what was the perpetrator's motivation, but in terms of finding ways to address the problem, motivation is crucially important.[23] There is some leverage to be had when breaches are inadvertent. Levels of awareness can be raised and consciences can be pricked, dialogue, debate and argument can be pursued, and remedial and preventive action can be taken. Few, if any, of these ploys would find much purchase where a corporation considers human rights to be irrelevant and inapplicable to its objects and operations. The vast majority of corporations, however, cannot afford to be so chronically myopic. True, their attention may be so focused on their operational efficiency, market share and profit that they neither consider the human rights implications of their actions, nor fully appreciate their relevance once such implications are pointed out to them. But, through a combination of public and private exposure of the issues, engagement with stakeholders, and an eye and an ear cast to the newly emerging expectations made of corporations regarding their social, environmental and human rights footprints, corporations are increasingly less and less able to ignore or dismiss the matter.

In practice, one finds that many corporate executives and managers, at least in the West, are open to discussion on the topic. More often than not, they are frank about the causes of any alleged abuse, and increasingly

23 In this respect I find myself in direct disagreement with Onora O'Neill's view that 'unclarity about the motivation of TNCs does not matter much, given that we have few practical reasons for trying to assess the quality of TNC motivation'; Onora O'Neill, 'Agents of Justice', in Andrew Kuper (ed.), *Global Responsibilities: Who Must Deliver on Human Rights?* (New York: Routledge, 2005), p. 50.

willing to take appropriate action of some kind. There can be no denying that some are sceptical participants in such discussion and action, while others are clearly reluctant; but few simply refuse to engage in any way at all. Even when such 'engagement' is litigious, or takes some other combative stance, that too, as I amplify later, can lead to improvements in the corporation's future attitude and behaviour regarding human rights. 'Reputation risk' is an enormously powerful force in this context. Successful corporate branding is the holy grail of the modern corporate enterprise. The phenomenal potential of modern communications has been ably harnessed by corporations to make Coca-Cola's labels, Nike's 'swoosh' and David Beckham's (or Christiano Ronaldo's) No.7 Manchester United shirt readily recognisable in almost every corner of the Earth. But, as every senior executive of a big brand corporation is painfully aware, there exists an equal and opposite potential for global communications to besmirch and degrade. The inimitable Warren Buffet put it succinctly when, on becoming chairman of Salomon Brothers (a prominent Wall Street investment bank) in 1991, he told the staff: 'lose money for the firm and I will be understanding; lose a shred of reputation for the firm, and I will be ruthless'.[24]

In terms of unwanted and damaging headlines, there is nothing quite like the linking of a corporation with accusations of human rights abuses.[25] So, even if only for the reason of self-interest, human rights are now gaining entry into many corporate board rooms, just as environmental matters began to do (with similar ambivalent reception) in the early 1990s. The position is now such that, during a recent speech about his Final Report of his first mandate to the UN Human Rights Council, the SRSG John Ruggie could say with confidence that the notion that corporations possess human rights responsibilities (albeit not necessarily legal ones) is not today seriously demurred from.[26] At the same time, in

24 'Berkshire Pays the Price for Buffett's Secrecy', *The Age*, Business section, 4 June 2005.

25 Two of the criteria used in the Reputation Institute's *Global Pulse Study 2008* of the world's most respected companies are 'governance' and 'citizenship'. The Survey's results indicated that consumers saw these two combined as amounting to more than 30 per cent of a company's reputation. 'This', commented Anthony Johndrow, the Institute's Managing Director, 'makes it critical for companies worldwide to communicate how they support good causes, protect the environment, behave ethically and act openly and transparently about the way they do business'; Media Release, 5 June 2008; at http://reputationinstitute.com/events/Global_Pulse_2008_Results.pdf.

26 John Ruggie, 'Business and Human Rights: A Political Scientist's Guide to Survival in a Domain where Lawyers and Activists Reign', Speech at the Annual Conference of the International Law Association (British Branch), London, 17 May 2008.

a report on the human rights tensions surrounding the involvement of such corporations as Nike and Coca-Cola in the Beijing Olympics, *The Economist* – a self-declared, arch-sceptic of corporate social responsibility – concedes that today we have what is, in effect, a new corporate order in which the 'striking' feature is 'how often [human rights] activists, big firms and governments are now all in agreement about the importance of human rights, and are working together to advance them'.[27] And even when they are not, or at least not initially, mindsets, including corporate, can change. Thus, for example, Global Solutions Limited (GSL), a transnational logistics and security company, was willing publicly to record its admitted changes in attitude and perspective regarding the 'understanding of our human rights obligations and, no less important, of how best these can be achieved' that followed its participation in the process dealing with a complaint brought against GSL under the OECD Guidelines for Multinational Enterprises concerning its management of immigration detention centres in Australia.[28]

All that said, much work needs to be done. Human rights abuses by corporations have been occurring since the institution of incorporation as the pre-eminent legal vehicle through which to do business, through to the manner and form of their operations today in the modern (post-1945) age of international human rights standards. We are today made more aware of the substance and scale of the abuses and the consequences that follow by the vigilance of NGOs and activists and the reach and penetrative capacity of modern communications. How to address, attenuate and remedy these abuses, and how to devise means to prevent their occurrence, are important matters with which this chapter is concerned, but, nonetheless, they are matters that must be seen within the broader context of the capacity of corporations to do good as well as bad for human rights.

Transnational corporations and their powers to do good and bad for human rights

No discussion of the corporate/human rights relationship can be taken seriously unless it also recognises the benefits commerce and corporations bring to individuals and to societies. Understanding what are the

27 'Beyond the "Genocide Olympics" ', *The Economist*, 26 April 2008, p. 81.

28 See *Australian National Contact Point's Evaluation of the GSL Specific Instance Process*, and correspondence attached thereto from Tim Hall, Director of Public Affairs, GSL, 6 October 2006; available at www.oecd.org/dataoecd/42/52/37616212.pdf.

relative merits and demerits of corporations in terms of their promotion of the ends of human rights is an essential first step towards meeting the fundamental challenge of how to preserve and enhance the positive human rights features of commercial enterprise while minimising its negative consequences. This is a challenge both analogous to, and interlinked with, the challenges that exist in respect of the relations between trade and aid with human rights that I tackled in the previous two chapters.

In typically admonitory and trenchant fashion, Aldous Huxley warned that 'facts do not cease to exist because they are ignored'.[29] Shining light on the facts of the damage corporations do to the well-being of individuals and communities must be balanced against what benefits they bring. As the key drivers of today's global economy, corporations have enormous capacity to create wealth, jobs and income; the taxes they pay finance public goods; the competition they generate accelerates innovation and development in almost every walk of life, from medicines and food production, to communications, transport and power generation; they propagate the transfer of technological and intellectual know-how; and by way of the interdependency of their commercial operations they can contribute to the establishment and maintenance of domestic social and economic order, as well as international peace and stability. They do so, what is more, not only in developing as well as developed countries, but across a range of socio-political circumstances: capitalist liberal democracies (old and new); free market socialism (viz. China and Vietnam); quasi free market theocracies (such as Saudi Arabia and Iran); post-colonial and post-dictatorship liberal economies (as in much of South and South East Asia, South America and, increasingly, Sub-Saharan Africa) and neo-communist autocracies (such as Russia and most of the other former Soviet states that today comprise the Commonwealth of Independent States) – albeit to significantly varying degrees.

Together, these features of corporate commercial enterprise provide the means by which human rights standards can be enhanced or better protected – what Mary Robinson has referred to as 'an enabling environment for the enjoyment of human rights'.[30] Such enablement is important to all states, but is especially crucial to poor or weakly governed ones where the scope for benign (as well as malign) influence is greatest. Onora O'Neill classifies TNCs as potential 'agents of justice' when they pursue policies that go 'beyond compliance' with local host (or even home) state laws

29 Aldous Huxley, *Proper Studies* (London: Chatto & Windus, 1927), p. 205.

30 Mary Robinson, 'Foreword', in Business Leaders Initiative on Human Rights, *Report 3: Towards a 'Common Framework' on Business and Human Rights: Identifying Components* (London: BLIHR, 2006), p. 1.

governing, for example, environmental, employment or anti-corruption standards.[31] In conflict and post-conflict situations some commentators, like Peter Davis, have noted that corporations can promote economic, social and even political stabilisation and reconstruction by assisting (but not replacing) failing or nascent governments in building infrastructure, providing basic health, education and communication services, and in technological and financial investment.[32]

In truth, we should expect all this to be so. Corporations, after all, are products of society, ultimately beholden to and regulated by it through the apparatus of the state. The sage words of that most red-blooded of progressives, Theodore Roosevelt, spoken more than a hundred years ago, remain apposite today: 'I believe in corporations . . . They are indispensable instruments of our modern civilization; but I believe that they should be so supervised and so regulated that they shall act for the interests of the community as a whole.'[33] Capitalism's laissez-faire is a normative principle, not a description of practice. State laws and attendant enforcement mechanisms govern not only the process of corporate creation (incorporation), but also just about all aspects of corporate conduct, from general business, investment, accounting and fiscal practices, directors duties, ownership conditions and shareholder rights, to workplace relations, labour rights, health, safety and environmental standards, product safety, purchasing and sales, and customer relations. Clearly, corporations still have much room to manoeuvre, but crucially their conduct is, and can be, regulated in respect of their human rights impacts as with any other matter deemed to be in the public interest. In short, we are all, to some extent, responsible for the corporations that we have. Our criticism of poor corporate conduct may be accurate, fair and appropriate, but it is too easily dispensed when we do not at the same time recognise the power we have to make things better. Corporate law specialist Janet Dine argues forcefully on this point when she talks of a

> moral deflection device [that] comes into play when we vilify companies for their behaviour. This gives us the high moral ground while still living comfortably because of the benefits they provide. Moral indignation at the terrible behaviour of some corporations . . . must not be allowed to obscure the fact that companies are designed by societies and their profits

31 O'Neill, 'Agents of Justice', pp. 49–50.

32 Peter Davis, 'Post Conflict Development – Successful Companies Learn from Wider Debates', *Ethical Corporation*, 13 May 2008, at www.ethicalcorp.com/content.asp?ContentID=5908.

33 As quoted by John Micklethwait and Adrian Wooldridge, *The Company* (London: Weidenfeld & Nicolson, 2003), p. 174.

> underpin much of our wealth. So when they strike bargains with evil regimes, repatriate their profits and sell us goods produced at low prices because of sweated or slave labour, this is not because of the inherent evil of the people that work in corporations but as a direct result of the legal design of corporations and the operation of the international legal system which provides them with many opportunities yet fails to regulate.[34]

Nonetheless, there is clearly some distance between statement and fact. For in saying we have the authority and (perhaps) the power to reign in corporate excesses while at the same time enhancing the advantages they bring, this does not mean that such directed and effective intervention will result.

The Realpolitik *of corporate power*

For a start, we need to remember, of course, that state intervention in respect of corporate activity is not always human rights friendly, let alone motivated by concerns of human rights promotion at all. State interdictions may be driven by self-generated government policies or by the lobbied interests of corporate sectors, or a mixture of both. In this regard it matters little that, under international human rights law, the obligations to meet the stipulated standards are directed towards states parties when the state deems it politic to breach or ignore those standards, or feels comfortable doing so, or is simply unaware of or unable to fulfil its obligations properly, if at all. Numerous examples of this phenomenon exist. I here briefly mention three different cases of corporate rights violations induced by state inadequacy, desperation or aggression. Together they demonstrate how we really only get as good or bad corporations as our governments allow or insist upon. Corporations may be ignorant, indifferent or resistant towards human rights but, whatever their stance, it is not unaffected – for good or ill – by the regulatory environments in which they operate.

Consider first a poor state like Papua New Guinea, faced with the prospect of losing the Australian mining giant BHP (now BHP Billiton) as a major corporate investor in the country after the company was sued for negligence in the Australian courts. It was alleged that the company was responsible for the ongoing discharge of dangerous substances, including ore-tailings and waste, from its Ok Tedi copper mine that poisoned huge swathes of the Ok Tedi and Fly rivers in the country's western province,

34 Janet Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005), p. 44.

destroying the livelihoods of thousands of people who lived along and depended on the river.[35] The corporation's conduct before, during and after the fiasco was so intensely, publicly and damagingly criticised that BHP decided effectively to cut its losses and abandon the project. The Ok Tedi copper mine – then one of largest copper mines in the world – generated approximately 20 per cent of PNG's exports and yielded royalties worth something in the region of 10 per cent of PNG's gross domestic product.[36] The Government was so concerned to keep the mine functioning that it was willing to advertise the fact in a television interview that it would – as it had already done with BHP[37] – indemnify any corporation interested in taking over the mine from any legal actions taken in its courts for breaches of local environmental or criminal laws.

Clearly, the PNG Government's invidious position may to some degree explain (if not justify) its actions. But my concern in the present context is merely to demonstrate how and why a desperate state can take desperate action that can facilitate and even encourage corporate breaches of human rights within its borders.

Aside from such desperation, a state's laws may simply be non-existent or inadequate to meet its obligations to protect human rights or related environmental standards. This common occurrence provides the basis for my second example of the constrictions of state/corporate relations. One of the arguments raised by Chevron in its defence to allegations that it was responsible for massive pollution of land and waterways in Ecuador, caused by the dumping of billions of gallons of crude oil waste over more

35 *Dagi v. Broken Hill Proprietary Co Ltd (No 2)* [1997] 1 VR 428 (judgment of 22 September 1995). The case was settled out of court in June 1996; however, a subsequent claim was brought in 2000 regarding the terms of, and BHP's compliance with, the settlement. The plaintiffs claimed that BHP was under an obligation to implement 'any technical and economically feasible tailings retention scheme' as recommended by an independent inquiry into tailings disposal announced by the Papua New Guinea Government. The inquiry never took place, so BHP claimed it did not need to implement any mitigatory management system for the 100,000 tonnes of tailings that were entering the river system daily, and would continue to do so for the life of the mine. See *Dagi v. Broken Hill Proprietary Co Ltd; Gagarimabu v. Broken Hill Proprietary Co Ltd* [2000] VSC 486 (unreported), Supreme Court of Victoria, 22 November 2000.

36 As estimated by Dr Roger Higgins, then the Managing Director of Ok Tedi Mining Ltd; see ABC TV, '7:30 Report', 12 August 1999, at www.abc.net.au/7.30/stories/s43531.htm.

37 The Papua New Guinea Parliament had enacted the *Ok Tedi Mine Continuation Act 2001* which indemnified the corporation from damages for environmental pollution emanating from the mine. Australian Associated Press, *Passes Law Indemnifying BHP Billiton*, 12 December 2001. The existence of this statutory protection in PNG was one of the reasons why the original *Dagi* case (see above) had been pursued in the Victorian Supreme Court in Melbourne.

than twenty years by Texaco (bought by Chevron in 2001), is not only that the company abided by the (woefully inadequate) environmental standards existing at the time,[38] but that it considers itself released from further liability following a $40 million remediation settlement with the Ecuadorian Government in the 1990s. The company is presently being sued for between $7 billion and $16 billion in the Ecuadorian courts, following the assessment of damages by a court-appointed independent assessor.[39]

And finally, consider circumstances in which the state aggressively pursues human rights infringing policies such as in the celebrated instances of internet censorship by Google, Yahoo! and Microsoft of the services they provide in China. As with all internet service providers in China, these three companies are subject to various Chinese criminal, anti-sedition and national security laws imposed on all media outlets, on- and off-line. China has one of the most sophisticated and expensive internet filtering systems in the world (dubbed the 'Great Firewall of China') that identifies and filters out such undesirable material posted in blogs or websites or sent by emails that promotes democracy, human rights, Tibetan independence or just about anything critical of the government or the Communist Party. Internet providers the world over are, of course, subject to certain content restrictions, typically with respect to criminal activities such as terrorism, extreme hate speech, fraud or child pornography. The difference with the Chinese censorship is its transparently political motivation. This has posed dilemmas both for media corporations working in China and for observers or critics of their conduct. Should Yahoo! have handed over the contact details of a journalist email client whom the Chinese authorities suspected was disseminating information about repressive government conduct and human rights violations to overseas correspondents?[40] Should Microsoft have acceded to demands that it close down a pro-democracy blog it hosted?[41] And should not Google have resisted the Government's proscription of access to YouTube inside

38 See Lucy Siegle, 'The Secrets of Sour Lake', *Observer*, 7 October 2007, p. 46.

39 See Alison Frankel, 'Chevron Lawyers Indicted in Ecuador', *The Legal Intelligences*, 16 September 2008, p. 4.

40 See BBC News, 'Yahoo Helped Jail China Writer', 7 September 2005; news.bbc.co.uk/2/hi/asia-pacific/4221538.stm. It was in fact Yahoo Holdings (Hong Kong) that supplied the details to the authorities, which raises questions as to the nature of its relationship with the parent company and the accompanying lines of responsibility.

41 David Barboza and Tom Zeller, 'Microsoft Shuts Blog's Site after Complaints by Beijing', *New York Times*, 6 January 2006, available at www.nytimes.com.

China after hundreds of images were posted on the site of the Tibetan unrest and the army's brutal responses in March 2008?[42]

It might be argued that all of these are short-term prices worth paying in order to ensure the presence of foreign internet providers in China, which in the long run will assist in the development of free speech in the country. Alternatively, some will argue that such craven attitudes on the part of these corporations are an abomination, more concerned to secure market presence and boost market share than with any thought of free speech rights or morality. 'While technologically and financially you are giants, morally you are pygmies', is how Tom Lantos, Chairman of the US House of Representatives Foreign Affairs Committee, witheringly put it to Yahoo! executives appearing before a Committee hearing on corporate complicity in media censorship in China in November 2007. The Chinese Government relies heavily on the cooperation of the internet companies in its efforts to police the internet; what Justine Nolan ironically labels 'state-induced self-censorship'.[43] Yet, countering such aggressively pursued human rights breaches by a state from the outside is not only difficult in practice, but controversial in design. Draft legislation introduced into the US Congress in 2006 which sought by measures both persuasive and coercive to have US corporations resist such overtures of foreign governments to limit freedom of expression failed to be enacted, in part because not only were the media corporations themselves sceptical about its practicability, but so were free speech NGOs, including the redoubtable Reporters Sans Frontières.[44]

The power of corporations is often a matter of some controversy. Are they really able to resist or influence states, or even to take on state functions (and their attendant responsibilities)? And if so, what are their features that allow them to do so? These are important – indeed vital – questions in the whole commerce and human rights debate, bearing directly on how we identify and conceive the relevant debatable issues, how we mark out their boundaries, and what options we have to deal with the problems they entail.

42 Jane Spencer and Kevin Delaney, 'YouTube Unplugged', *Wall Street Journal*, 21 March 2008, at online.wsj.com/public/article_print/SB120605651500353307.html.

43 Justine Nolan, 'The China Dilemma: Internet Sponsorship and Corporate Responsibility' (2009) 4 *Asian Journal of Comparative Law* (online, article 3), p. 3.

44 For discussion of the promise and problems of the mooted *Global Online Freedom Act*, see Surya Deva, 'Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?' (2007) 39 *George Washington International Law Review* 255.

Much has been made and unmade of the claims as to the financial clout of corporations, especially in terms of how they stack up against states and what implications can be drawn from such a comparison. A commonly quoted statistic is that, of the top hundred global 'economies', fifty-one are corporations.[45] Such a crude statistic could never be anything other than a very broad indication that some TNCs are indeed very large and very global, and have very large amounts of capital flow through their hands – hardly Damascan revelations. And yet TNC critics, sceptics and advocates alike have engaged in a *dialogue de sourdes* over the methodology employed in making these calculations and what are the consequences of corporate power (whatever its quantum). Unsurprisingly, economists have latched onto what is for them the comfortable domain of econometric measurement to lambaste those naïve enough to compare a state's GDP with a corporation's gross sales. Martin Wolf[46] and Jagdish Bhagwati[47] are right to point out the fallacy of this classic case of comparing apples with pears, although it has to be said that in Wolf's case he labours the point to an extent that lands him in precisely the methodological hot water that he so ridicules.[48]

Of greater significance are the differences of opinion on whether corporate power matters in terms of the promotion and protection of human rights. Regardless of definitional and measurement disputes, no one seriously denies that corporations are extremely powerful players in the global economy and thereby have, as the examples already discussed in this

45 Sarah Anderson and John Cavenaugh, 'Top 200: The Rise of Corporate Global Power', Institute for Policy Studies, Washington, DC, December 2000, at www.willison.ca/home.jsp_files/top200text.htm. Adopting a different calculus, this figure was substantially deflated to 29 out of 100 in an UNCTAD study in 2002: *Are Transnationals Bigger than Countries?* See Press release TAD/INF/PR/47 12/08/02; available at www.unctad.org/Templates/webflyer.asp?docid=2426&intItemID=2079&lang=1. I am grateful to Karin Buhmann for sharing with me the fruits of her own research on this matter.

46 Martin Wolf, *Why Globalization Works* (New Haven and London: Yale University Press, 2004), pp. 221–6.

47 Jagdish Bhagwati, *In Defense of Globalization* (New York: Oxford University Press, 2004), p. 166.

48 He replaces *gross* sales on the corporate side of the calculation with the 'value added' by corporations at the point of sale, which reduces the corporate figures dramatically. *The Economist* has also made the same argument – see Simon Cox (ed.), *Economics: Making Sense of the Modern Economy* (London: The Economist; Profile Books, 2nd edn 2006), pp. 26–7. However neither Wolf nor *The Economist* explains how this alternative indicator is any closer to GDP than is gross sales. Both are surely inadequate comparators to an indicator based on national consumption, investment, spending and trade balance as is GDP.

chapter show, very significant direct and indirect effects on our social and individual welfare. 'Big business', as Woodrow Wilson once remarked, 'is not dangerous today because it is big, but because its bigness is an unwholesome inflation created by privileges and exemptions which it ought not to enjoy.'[49] That said, such power – even political power – is not to be confused with the sovereign authority of states. Critics are correct to point out that corporations 'are not here to build a fairer society'; that is indeed 'the job of governments'.[50] However, this demarcation neither explains nor relieves corporations from legitimate expectations both that they must not impede such building work (the 'do no harm' principle), and that they should be encouraged or obliged to assist the state in protecting human rights. In fact, typically, it is the case that nearly all non-state entities – that is, legal persons such as individuals, corporations, community groups, trade unions, etc. – are already required to 'assist' the state in this regard. The so-called 'horizontal' human rights laws and policies of states that regulate private individual-to-individual relations (including corporations) operate alongside 'vertical' laws and policies that govern public state-to-individual relations (also including corporations). As such, a measure of accountability is not only expected of companies in relation to human rights, it is already imposed on them in certain important respects.[51] The significance of this situation has become all the more important as corporations increasingly take on functions and powers of public utilities and services, thereby blurring divisions not only of legal status, but also of legal responsibility.[52]

Proponents of the notion that with corporate power there comes corporate responsibility, in terms of human rights matters as with much else, draw directly on these circumstances. Yet too often those who criticise such a stance appear, inexplicably, to overlook or misunderstand the whole matter of accountability. Take, for example, Martin Wolf again. In

49 Woodrow Wilson, speech accepting the Democratic Party nomination to run for President of the US in 1912; as cited by Scott James, *Presidents, Parties and the State* (New York: Cambridge University Press, 2006), p. 156.

50 'The Acceptable Face of Capitalism', *The Economist*, 14 December 2002, p. 65.

51 As discussed in more detail later in this chapter, see pp. 187–8.

52 Thus, the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), Article 5 provides: 'The conduct of a person or entity which is not an organ of the State . . . but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.'

his book *Why Globalization Works*, Wolf dedicates a chapter to debunking what he claims are the principal propositions advanced by critics of corporations. Quite remarkably, not one of the five he nominates[53] relates to concerns over accountability gaps that exist at both domestic and international law regarding corporate infractions of human rights standards. Perhaps Wolf was concerned only to deal with the more extreme views – he characterises critics as 'detest[ing] corporations', engaged in 'collective hysteria' and being 'populists, Marxists and anarchists' (he appears to credit no one involved in this side of the debate as 'professional participants and analysts', as he expressly does so regarding parallel debates on the role of trade and finance).[54] Indeed, in his ensuing arguments Wolf invests in a fair amount of hyperbole of his own. His painting of companies like Shell as weak and defenceless against the blackmailing might of NGOs such as Greenpeace is quite a masterpiece in surrealism, given that if Shell's decision not to dump the Brent Spar oil platform at sea was taken because it was so concerned to protect its brand image, that says much more about Shell's business priorities than it does about Greenpeace's leverage![55] If Wolf is only concerned with point-scoring at this level (much of which, incidentally, I agree with), he is missing the most important point of all. Nobody worth listening to is saying that corporations are wholly unaccountable, operating free from legal regulation and restriction. But pointing out that businesses are subject to the demands of the market, consumers and certain corporations laws does not mean that in terms of the protection of human rights such demands are sufficient.

My final remark regarding the *Realpolitik* of corporate power concerns the interplay between what might be referred to as the primary and secondary inclinations of corporations. That is, where the corporate id to maximise profit is tempered by the ego not to do so at any cost. Few

53 These are: (1) corporations are more powerful than states; (2) brands give corporations power over customers; (3) FDI impoverishes developing countries and (4) their workers; and (5) corporations subvert democracy by controlling states; Wolf, *Why Globalization Works*, p. 221.

54 *Ibid.* pp. 220–1. Greenpeace, among others, had campaigned vociferously, and ultimately successfully, against Shell's initial decision to dump the decommissioned oil platform and storage buoy in the UK's territorial waters in the mid 1990s. There were in fact no environmentally risk-free options available to Shell in disposing of the facility, but the manner in which it and its opponents (and the UK Government) conducted themselves in the ensuing imbroglio is now considered a textbook example of risk communication gone wrong.

55 *Ibid.* p. 228.

corporations can afford reputationally (and therefore financially) to subscribe to the unalloyed 'greed is good' mantra of Gordon Gekko.[56] As we have established, reputation and brand image matter to corporations, and a whole professional industry has emerged to service the need to protect and preserve them. Whether for this reason or for broader, more altruistic reasons, corporations do consider their actions to be concerned with more than just profit. A *McKinsey Quarterly* survey in December 2005 of 4,238 global business executives recorded 84 per cent of respondents as agreeing with the statement that the role of large corporations is to 'generate high returns to investors, but balance[d] with contributions to the broader public good'.[57] This should not be surprising. TNCs that operate in the public gaze are often keen to stress how they act in ways that are not necessarily (at least not immediately) directly oriented towards profit. For example, Neville Isdell, the outspoken CEO of Coca-Cola, maintains that it is his 'core conviction that business is a force for good in the world. Business, when done right, strengthens communities, builds capacity, raises living standards and in the process helps drive social and environmental improvement.'[58] Some firms have even entered into what might be strictly regarded as the political domain, such as when in 2000 the UK firm Premier Oil used the leverage it gained from its operations in Myanmar to facilitate the Junta's release of a British activist held there for more than a year in solitary confinement (he had seventeen more years to serve), for daring to distribute pro-democracy pamphlets on the steps of Yangon's City Hall.[59] Whatever the merits and motivation of such endeavours, they raise the very significant question of whether, from a human rights perspective, we want to encourage corporate engagement of this

56 In Oliver Stone's 1987 film *Wall Street*. Together with some of Gekko's other choice epithets, such as 'what's worth doing, is worth doing for money' and 'lunch is for wimps', he is still flattered by imitation in the money markets, even if, by force of circumstance, today's traders are a little less brazenly avaricious. Stanley Weiser and Oliver Stone, 'Wall Street', Screenplay, 1987, at www.imsdb.com/scripts/Wall-Street.html.

57 'Global Survey of Business Executives', *McKinsey Quarterly*, January 2006, Exhibit 5: Role of Business in Society, p. 5. Only 16 per cent of respondents agreed with the Milton Friedman inspired statement that large corporations should 'focus solely on providing the highest possible returns to investors while obeying all laws and regulations'; *ibid.*

58 See Neville Isdell, 'Remarks at the WWF Annual Conference', Beijing, 5 June 2007, www.thecoca-colacompany.com/presscenter/viewpoints_isdell_wwf.html.

59 See Carl Mortishead, 'Oil Firm's Secret Deal on Burma Prisoner', *The Times*, 7 December 2000, p. 1; and see further Halina Ward, *Corporate Citizenship: Exploring the New Possibilities*, Royal Institute of International Affairs, Conference Report, July 2001, p. 4, at www.chathamhouse.org.uk/files/3027_corp_citz_report.pdf.

sort, for clearly such action could be very broad-ranging, unaccountable and even counter-productive.[60]

Certainly, companies are increasingly keen to claim that they see human rights as a business issue, at least in so far as their breach can represent a serious business risk. At the time of writing, the incomparable Business and Human Rights website resource[61] lists no fewer than 213 major corporations that have express human rights policy statements.[62] These may take the form of strategy papers, operational programmes or performance standards, or they may be public proclamations, but in any event many are quite explicit in intent. Take, for example, ExxonMobil's statement in its 2007 Corporate Citizenship Report that 'we are . . . committed to promoting respect for human rights and to serving as a positive influence in the communities where we operate. It is the right and responsible thing to do, and doing so promotes stable and constructive business environments.'[63] The UN's Global Compact (which comprises ten briefly stated principles covering environmental protection, anti-corruption, labour rights and 'human rights' (howsoever the last two differ)) has now amassed more than 4,000 signatory corporations, which, though hardly a taxing commitment on their part, is nonetheless an indication of the breadth of interest in the issue.[64] The group of

60 See for example caveats to this end issued by Carl Mortishead (in relation to the Premier Oil case), 'Ethical Mantle Falls on Company Shoulders', *The Times*, 8 December 2000; and Bhagwati (regarding the general principle), *In Defense of Globalization*, p. 169.

61 www.business-humanrights.org.

62 As of September 2008. Further, in a 2006 study conducted by the SRSG of the human rights policies of 102 Fortune Global 500 companies, 91 per cent indicated that they possessed an explicit set of human rights principles; 62 per cent said that in those principles they refer expressly to the UDHR; and 36 per cent responded that they routinely undertake human rights impact assessments. See *Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey*, table 1, p. 10, at www.reports-and-materials.org/Ruggie-survey-Fortune-Global-500.pdf. Though these figures are impressive, it is hard to know what store to set by them given that the respondent firms were self-selected, and in many cases no doubt predisposed to answering the survey questions precisely because of their existing supportive stances on human rights.

63 ExxonMobil, *2007 Corporate Citizenship Report*, p. 40; www.exxonmobil.com/Corporate/files/Corporate/community_ccr_2007.pdf.

64 See www.unglobalcompact.org/AboutTheGC/index.html. To comply, corporations need only submit annually a brief 'communication of progress' report. Those companies that fail to do so are named (with the hope of being shamed) on the Global Compact (GC) website, but only if they fail to submit a report within three years of joining, and two years thereafter, or if they fail to engage in dialogue with the GC secretariat within three months following the raising of an 'integrity matter' with the corporation. There are currently almost 1,000 participant corporations (nearly one quarter of the total) so named in the GC's 'Non-Communicating' and 'Inactive' categories.

fourteen prominent TNCs that comprised the Business Leaders Initiative on Human Rights (BLIHR) (which completed its work in March 2009) were perhaps most actively engaged in building consensus and formulating policy towards the mainstreaming of human rights in business by devising 'practical ways of applying the aspirations of the Universal Declaration on Human Rights within a business context and to inspire other businesses to do likewise'.[65]

FDI and human rights

Perhaps the single most significant feature of corporate impacts on human rights is (as noted in the previous chapter) the increasingly substantial vehicle of FDI by which corporations, mostly from developed states, invest in developing states. FDI is considered especially important on account of its particular nature, it being physical investment – in the sense of plant, infrastructure, employment, etc. – rather than simply financial (typically, in respect of investment in stocks or currency speculation). As such, it contributes more directly to the domestic economy in terms of both input and output, and indirectly to the social goods that an expanded economy then has the potential to deliver. As an OECD report on the development implications of FDI has noted:

> Given the appropriate host-country policies and a basic level of development, a preponderance of studies shows that FDI triggers technology spillovers, assists human capital formation, contributes to international trade integration, helps create a more competitive business environment and enhances enterprise development. All of these contribute to higher economic growth, which is the most potent tool for alleviating poverty in developing countries. Moreover, beyond the strictly economic benefits, FDI may help improve environmental and social conditions in the host country by, for example, transferring 'cleaner' technologies and leading to more socially responsible corporate policies.[66]

It is then, to reiterate a constant theme throughout this book, this derivate potential of the economy that human rights protagonists are (and more ought to be) interested in exploiting. The task of profitable exploitation in this way is a matter easier said than done, but it is one whose vital importance cannot be overlooked.

65 See www.blihr.org.

66 OECD, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* (Paris: OECD, 2002), p. 5.

As a function of market demand or opportunity, FDI does not always go to the places of most need. Countries with more to offer in terms of raw materials, suitable workforce (in terms of training, skills and cost), existing infrastructure, and adequate banking and finance mechanisms, and governance and legal structures, generally present the best opportunities-to-risk profile and therefore tend to attract the bulk of investment. In recent years the developing or transitional states that best fulfil one or more of these criteria include Brazil, China, Mexico, India, Indonesia, South Africa and Vietnam. FDI contributes to the virtuous circle of such emerging economies, as it itself begets further strengthening of economic, social, political and legal factors, and so attracts further FDI. In contrast, countries that satisfy none or few of the above criteria are almost invariably the poorest and weakest states, which suffer from the vicious cycle of receiving little FDI in the first place and thereby further hindered in their chances of attracting any in the future. This group of countries has for many years comprised many African (especially Sub-Saharan) states, though this situation is changing, leading some at least to stretch the Asian economic 'tigers' metaphor to talk of the emergence of African 'lion cubs'.[67] According to UNCTAD's figures, annual FDI inflows into Africa doubled between 2004 and 2006 to $36 billion (almost a quarter of which was accounted for by Least Developed Countries (LDCs) – a slight rise on 2005), though this still represents a tiny fraction of the global total for 2006 of $1,306 billion.[68] The trend continued into 2007 according to the IMF,[69] largely on the back of oil, and some other mineral exploration (mainly by Australian, Canadian and Chinese firms),[70] though also of significant investments by European, Middle Eastern and African telecommunications companies (further fuelling Africa's extraordinary leapfrog from a situation of almost no private phones, straight over mass fixed-line phone networks, to substantial mobile phone penetration). In addition, the IMF report notes the improved financial management in many African countries, with strengthened central banks, improved fiscal regimes and greater accumulation of foreign currency reserves, which appear to be sufficiently attractive off-sets against endemic corruption and still weak legal systems for corporate investors.[71]

67 See, for example, 'Lion Cubs', *The Economist*, 19 April 2008, p. 87.

68 UNCTAD, *World Investment Report 2007*, pp. xv and xvii.

69 IMF, *Regional Economic Outlook: Sub-Saharan Africa* (Washington, DC: International Monetary Fund, 2008). Using slightly different calculations, the Fund puts the total of private capital flows to Sub-Saharan Africa at $53 billion in 2007, at p. 45.

70 UNCTAD, *World Investment Report 2007*, p. 36.

71 IMF, *Regional Economic Outlook: Sub-Saharan Africa*, p. 48 *et seq.*

It may be, therefore, that the economies of some Sub-Saharan Africa states have got their foot onto the first rung on the ladder out of poverty, but the trend must continue through the current food crises and fuel price hikes (though that should also benefit oil-producing countries like Sudan and Nigeria), and the fall-out of the global financial crisis, if there is to be any chance of improved economic conditions being translated into sustained improvements in social conditions and greater respect and protection of human rights.

However important FDI is to enabling such social enhancement, it is neither sufficient nor always necessarily beneficial. The very same political, administrative and legal factors stipulated above as vital to attracting FDI in the first place are also critical to the domestic process of making the economy work for social and human rights ends. Just as important as these consequential considerations are the conditions under which capital is raised, and what rights and obligations are attached to it once secured. Specifically, we need to know to what extent human rights concerns are taken into account in the drawing up of the financing contracts at the outset, and during the project cycle itself. In recent years, this previously largely overlooked area of corporate activity has attracted a great deal more attention. In many ways it has been a natural progression from scrutiny of the actions of corporations in the field, to asking questions about how, from whom and under what terms they raised the capital to finance their actions.

From the human rights perspective, concerns over the mechanics of FDI have shifted from outright dismissal by investors that they had any responsibilities at all in this regard. Acceptance – or at least acknowledgement – of their relevance is now widespread, even if full comprehension of their implications is not. As already noted, major corporations (which are also often the biggest users of development finance) now commonly stipulate their adherence to human rights standards to be a matter of company policy. Many of the biggest banks that provide the majority of such project finance have signed up to the Equator Principles (EPs) which, by focusing on the associated risk concerns, require lenders to consider the environmental and social implications (including some that bear on human rights issues)[72] of any proposed investment. Since

72 Mainly regarding disclosure and consultation (the right to freedom of expression comprises both receiving and imparting information), and grievance procedures (right to a fair trial, which encompasses the raising of grievances through to their fair conclusion, whether outside or, ultimately, inside the court system). Principle 3, regarding the assessment of project finance located in developing countries, expressly refers to use of the IFC

coming into force in 2003, the EPs have achieved some success in what is admittedly a niche market. As Toby Webb, writing in *Ethical Corporation*, has put it:

> although small in global finance flow terms, project finance is a high profile business for both the banks that arrange the money, and the companies who set up the deals and run the projects on the ground. While the economic and political risks of oil, gas and mining projects around the world have always been significant, in modern times NGO campaigns have added real reputational risk to the financing mix.[73]

Generally, throughout the financial services sector, whether focused on developed or developing economies, there is growing recognition of non-financial roles and responsibilities. The UN's 2006 Principles for Responsible Investment (PRI), aimed at all types of financial institutions, exhort signatories to be more aware of environmental, social and governance issues in financial management. According to Donald MacDonald, the Chair of the PRI Initiative, in his 2007 Progress Report, 'the most important contribution the PRI has made is to reinforce and promote the paradigm that environmental, social and corporate governance issues matter to the financial performance of companies, and that mainstream investors have a responsibility to take these issues seriously and, where appropriate, act to address them'.[74]

The position of the commerce/human rights relationship today has been characterised by Sheldon Leader as being concerned with a different 'danger', namely one that 'arises from the way in which the two domains are being brought together. The collision that threatens is not over *whether*, but over *how* commercial imperatives are to be integrated with this branch of social justice.'[75] Even the modest achievements of the EPs must be put in context in this regard – they are unenforceable, do not

Performance Standards in the assessment process, which as I discussed in the last chapter have some, but still limited, human rights coverage.

73 Toby Webb, 'Strategy & Management: The Equator Principles: A Toddler Finds its Feet, but Still Takes an Occasional Tumble', *Ethical Corporation*, 14 November 2007, www.ethicalcorp.com/content.asp?contentid=5518. Interestingly, Webb reports one prominent critic from 'Bank Track', Johan Frijns, not only exposing continuing problem cases with EPs-signatory Banks, but also voicing his concern with NGO myopia in focusing only on such cases and not on the evident cases of best practice which have resulted in beneficial outcomes; *ibid.*

74 PRI Initiative, *PRI Report on Progress 2007: Implementation, Assessment and Guidance* (July 2007), p. 5; at www.unpri.org/report07/PRIReportOnProgress2007.pdf.

75 Sheldon Leader, 'Human Rights, Risks, and New Strategies for Global Investment' (2006) 9(3) *Journal of International Economic Law* 657 (emphasis added).

themselves prevent corporate malpractice, and do not cover other sources from which project finance is raised (not least from a corporation's own cash reserves).[76]

The terms upon which major investments are made in developing states are significant not only in respect of the lender/investor relations, but also in respect of the specific arrangements drawn up between investors and the host institutions. Increasingly, such arrangements are being governed by overarching Bilateral Investment Treaties (BITs) which, though concluded between states, are concerned with establishing the basic legal relations that are to apply in respect of all future investment agreements made between private and/or state entities of the states parties. Nearly all BITs adhere to the same essential formula; that is, they seek to protect the interests of the foreign investor under national law at least to the extent of protection enjoyed by domestic investors, as well as prohibiting expropriation except on just terms. In his illuminating report on the legal issues concerning international investment agreements and human rights, Howard Mann notes further that, increasingly, BITs (as well as relevant investment chapters within general trade treaties) specifically require steps to be taken to liberalise the host state's financial services sector, especially when 'associated with ongoing privatization programs in public services, such as water, energy, health or sanitation'.[77]

While BITs are increasingly being drawn up between developing countries, it remains the case that the largest proportion are concluded between developed and developing states.[78] This is significant in terms of the impact they can have on human rights. To begin with, there is the crucial matter of what happens when there is a dispute between the investor and a host state authority or corporation. Almost invariably today, all types of international investment agreements (IIAs), including BITs, contain dispute settlement provisions which allow, as Mann notes,

76 Webb, 'The Equator Principles'.

77 Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (February 2008), p. 4. The report is published by the International Institute for Sustainable Development, for whom Mann works as the Senior International Law Adviser; it is available at www.iisd.org/pdf/2008/iia_business_human_rights.pdf.

78 By the end of 2006, just over one quarter of all BITs were between developing states; 40 per cent were between developed and developing states; the remainder were between developed states. See UNCTAD, *Recent Developments in International Investment Agreements (2006 – June 2007)*, IIA Monitor No. 3 (2007), p. 5, available at www.unctad.org/en/docs/webiteiia20076_en.pdf.

> foreign investors the right to initiate international arbitrations directly against the host state for alleged breaches of the IIA rights they obtain. Many of these arbitrations take place in a completely confidential setting, a fact that raises its own human rights issues [specifically in respect of access to information and rights to a fair trial] . . . To date, approximately 300 arbitrations under this process are known to have been initiated, with no way to know the exact number due to the confidentiality rules applied in many cases. It may be noted here that only private foreign investors can initiate these arbitrations, as the foreign investors have no obligations under the IIAs to be enforced against them through the dispute settlement process.[79]

The very fact that the process can be initiated by a private corporation – which, as we saw in chapter 2, is categorically not the case regarding disputes under the WTO dispute settlement process – provides the corporation with considerable leverage against the host state. As Mann continues:

> It allows a broad range of issues to materialize that may not have if only states had the ability to initiate the process. To date, the range of issues raised by foreign investors under this process has included taxation measures, environmental measures, changes in banking and radio and television laws, alterations of royalties in the resource sectors, and many others.[80]

An area which, until recently, was not a feature on this list was that of human rights. But two cases in particular have illustrated how significant the impact of BITs can be on human rights, not so much by hammering home what we already knew or suspected, but rather by revealing how little we knew about this question. For while express mention of human rights issues are hardly ever part of a BIT, the protection of human rights in a host state may nonetheless be affected greatly by so-called 'stabilisation clauses', routinely built into BITs. These clauses, which are typically concerned with protecting foreign investors from such sovereign risks as the expropriation or nationalisation of their assets, owing to a host country's changed political, economic or social circumstances, 'may also', as Andrea Shemberg notes, 'be designed to insulate investors from environmental and social legislation, [which is] a matter of growing economic significance to investors'.[81]

79 Mann, *International Investment Agreements, Business and Human Rights*, p. 4.

80 *Ibid.* p. 5.

81 Andrea Shemberg, *Stabilization Clauses and Human Rights* (11 March 2008), paper prepared for the IFC and the UN Secretary General's Special Representative on Business and Human Rights, at p. vii; available at www.ifc.org/ifcext/media.nsf/Content/Stabilization_Clauses_Human_Rights. For a description of the various types of stabilisation clauses

The first case concerned a consortium of oil corporations led by BP and the stablisation clauses in the 'host government agreements' (a type of investment contract) that had been drawn up between the consortium and the governments of Azerbaijan, Georgia and Turkey, regarding the construction of the Baku–Tbilisi–Ceyhan (BTC) oil pipeline that linked the Caspian sea in the east, to the Mediterranean coast in the west. Upon making public these provisions in 2003, BP came under intense criticism for their radical scope. The stipulation that any 'disruption to the economic equilibrium of the project' would require the state to pay compensation to the consortium was condemned for effectively limiting the states' capacities to meet their obligations actively to promote and protect human rights under international law.[82] The fact that, as a major development project many multilateral and bilateral development agencies (including the World Bank and the IFC) were involved in funding the project added points of leverage for the critics. In the end, to its credit, BP responded to the furore by amending the host government agreements by inserting a 'Human Rights Undertaking' in their terms, recognising the requirements made of states under international labour and human rights treaties, and stating that the consortium would not make any claims under the 'economic equilibrium', or like clauses in the agreements, following enactments of regulations by the states parties pursuant to any 'reasonable' interpretation of these treaties.[83]

The second case involves the use of just the sort of above-mentioned arbitration provision in an investment agreement that ostensibly protects economic interests against a state's human rights laws. In 2007, the Italian owners of two mining companies operating in South Africa unsuccessfully sought compensation from the South African Government for losses they claim they had incurred and will further incur as a consequence of the country's so-called 'black economic empowerment' laws. These laws require, inter alia, all mining companies working in South Africa to have at least a 26% 'historically disadvantaged South African' ownership by

and an analysis of their potential impact on human rights, see pp. 5–9 and 35–8 of the report, respectively.

82 See Amnesty International, *Human Rights on the Line: The Baku–Tbilisi–Ceyhan Pipeline Project* (London: Amnesty International UK, 2003). Similar concerns were also raised in respect of the Chad–Cameroon Pipeline, see Amnesty International, *Contracting Out of Human Rights: The Chad–Cameroon Pipeline Project* (London: Amnesty International UK, 2005).

83 See Baku–Tiblisi–Ceyhan Pipeline Company, *BTC Human Rights Undertaking*, 22 September 2003, at http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf.

2012.[84] For many mining firms (including the two in this case) this will require them to sell off stock in order to comply with the legislation. Invoking the terms of the Italian, Belgian and Luxemburgian BITs with South Africa, the Italian owners have initiated compulsory arbitration proceedings before the International Centre for Settlement of Investment Disputes (ICSID), which at the time of writing are yet to be resolved.[85] The black economic empowerment laws were introduced in an attempt to correct some of the economic, social and human rights injustices of Apartheid. According to Peter Leon, a lawyer representing the Italian owners, such objectives are not what his clients are objecting to. Rather, as they purchased the mining operations in question in 1994, after Apartheid had ended, they 'never benefited from the apartheid system, [so] why are they subject to this form of redress?', Mr Leon is reported as saying.[86]

The result in the first of these two cases is widely recognised as industry best practice, while the second is indicative of the potential scope within international investment agreements to pitch economic interests against human rights in a way that favours the former. That said, we need to be careful not to set up the two objects as diametrically opposed; the whole tenor of this chapter and this book is that they are in fact interrelated and interdependent. It is how we regulate the relationship – specifically, how to ensure that the economy contributes to, and does not detract from, the fuller enjoyment of human rights – that is key. The UN's High Commissioner for Human Rights accurately characterises the situation as one in which,

> [i]nvestors' rights are instrumental rights. In other words, investors' rights are defined in order to meet some wider goal such as sustainable human development, economic growth, stability, indeed the promotion and protection of human rights. The conditional nature of investors' rights suggests that they should be balanced with corresponding checks, balances and obligations – towards individuals, the State or the environment.[87]

84 See the South African *Broad-Based Black Economic Empowerment Act*, 2003 (Act No. 53 of 2003) (Government Gazette No. 25899, 9 January 2004) and the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry* (2002) available at the South African Department of Minerals and Energy: www.dme.gov.za/minerals/mining_charter.stm.

85 *Piero Foresti, Laura De Carli and others v. Republic of South Africa* (ICSID Case No. ARB (AF)/07/1).

86 Eric Onstad, 'Italian Firms Sue S. Africa over Black Mining Law', *Reuters*, 9 March 2007, available at www.reuters.com.

87 Report of the UN High Commissioner of Human Rights, 'Human Rights, Trade and Investment', UN Doc. E/CN.4/Sub.2/2003/9 (2 July 2003), para. 37.

In terms of BITs in general, and stabilisation clauses in particular, it has to be said that the governments of many developing states are far more keen to secure international investment contracts than they are about aggressively pursuing a human rights legislative agenda, especially if the latter compromises the former. As is so often the case in these circumstances, it is a matter of balance. Certainly, to restate the point, the long-term effects of sustained or increasing FDI can be of great social and human rights benefit, so it ought to be encouraged. At the same time, logically and (one hopes) politically, that goal cannot constitute the basis for the state or investors arguing against making any efforts in the short term to protect and promote human rights.

Making power responsible: regulating the relationship between corporations and human rights

Throughout this chapter we have repeatedly come up against the twin problems of how to address corporate abuses of human rights, and how best to encourage corporate support for human rights. In this final section of the chapter, I turn to the question of the regulation of corporations in the specific circumstance of their relations to human rights, to look at what has been and is being done, what might be done better or done for the first time, and what are the various formats in which regulation takes place – formal and informal, as well as domestic and international.

At the most basic level, the regulatory problems posed by corporate abuses of human rights stem from what the SRSG presciently argues is a:

> fundamental institutional misalignment . . . between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or separation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed.[88]

Such 'misalignment' and resulting 'permissiveness' are precisely the challenges that lie at the heart of my comments about the dilemma of FDI at the end of the last section. The dissonance between economic and human

88 Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', UN Doc. A/HRC/4/35 (19 February 2007), para. 3.

rights imperatives, what is more, can occur whether there is appropriate regulation in place or not. Corporate pressures – direct and indirect – can be brought to bear on governments to curtail or dilute any inclination they have towards enacting human rights related regulations that negatively affect business, or when they seek to implement or enforce existing provisions. When regulatory tools are neutered in this way, the situation can appear somewhat hopeless. When corporations are intent on acting *only* in their best commercial interests, the task to impose other obligations on them can be 'like painting on clouds'. This was how an official from the Indonesian Environment Ministry was reported as putting it, in reference to his government's abject failure to enforce environmental laws against the mining giant Freeport-McMoran in respect of its alleged poisoning of hundreds of miles of the pristine Aghawagon river basin in West Papua by dumping nearly 1 billion tons of mine waste from the Grasberg copper and gold mine, operated by one of Freeport's subsidiary companies, into the river's headwaters.[89]

Legal regulation of human rights protection, as, indeed, with all subject-matters, is all about allocating responsibility and enforcing accountability. Law is an important and useful tool in the task of bringing corporations to account for their misdemeanours and pressing them to avoid their repetition. But its success depends heavily on social and economic circumstances, administrative capacity and political will, as well as legal pronouncement, whether in domestic or international law, or both. This context needs to be borne in mind by lawyers and non-lawyers alike in the whole debate about corporations and human rights. Human rights themselves are, as this book stands testimony to, multifaceted constructs with many dimensions besides law.[90] Moreover, the making, implementation and enforcement of laws are processes that are intensely political. Melissa Lane, writing about the moral dimension of corporate accountability, notes that, 'in an imperfect world, legal accountability of corporations leaves gaping holes not only in weak states, but also in mature democracies'.[91] By this she means that powerful special interests (including those of business) are nearly always pleaded in respect of laws being

89 Jane Perlez and Raymond Bonner, 'Controversial US Goldmine a Law unto Itself', *Sydney Morning Herald*, 28 December 2005, p. 13.

90 I have argued this point more broadly and philosophically in 'The Legal Dimension of Human Rights', in David Kinley (ed.), *Human Rights in Australian Law: Principles, Practice and Potential* (Leichhardt, NSW: The Federation Press, 1998), p. 2.

91 Melissa Lane, 'The Moral Dimension of Corporate Accountability', in Andrew Kuper (ed.), *Global Responsibilities: Who Must Deliver on Human Rights?* (New York: Routledge, 2005), p. 233.

made (or not made); laws can be, and in some places often are, out of date or inadequate, allowing corporations to exploit weaknesses; and when corporations decide to challenge the enactment laws or their interpretation, they can muster enormous legal and financial (and sometimes political) resources to their cause that rival and often surpass those of the state. Lane concludes by noting that '[f]or all these reasons, legal accountability alone – despite its virtues of clarity and sanction – all too often falls short of the expectations for control of corporations so prominent in popular discourse today'.[92]

It is true that such expectations may be set too high to be realistically achievable, though it cannot be denied that more can and must be done to curtail human rights abuses by corporations. But legal regulation cannot be thought of as a sort of morally pure (still less, value-free) knight in shining armour, come to slay, or at least tame, the wickedness of corporations. If bolstered by the parallel policies and practices of governments, civil society, international organisations, commentators, community opinion and corporations themselves, then our legal knight is more likely to succeed. It is to the relative merits of the legal and non-legal aspects of corporate regulation on human rights matters, and especially on how the two aspects interrelate, that I dedicate the remainder of this chapter.

Corporate social responsibility (CSR) and human rights

The general, non-law context in which sits the contestation over corporations and human rights is the rather amorphous but significant notion of corporate social responsibility (CSR).[93] It is amorphous because, since the late 1990s, its boundaries have been continuously stretched, its contents defined and redefined and its manifestations in practice multiplied unendingly. Yet, despite this (or perhaps precisely because of it), CSR has increasingly gained purchase in the minds and actions of critics, commentators and corporate leaders alike. As part of an earlier research project on corporations and human rights,[94] I recall interviewing a World Bank Official working in the Bank's Corporate Governance Unit in 2003, whose interpretation of corporate governance left no room whatsoever

92 *Ibid.*

93 The term is so commonly and elastically used that it defies any precise definition that is 'all-embracing'; see Marcel van Marrewijk, 'Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion' (2003) 44 *Journal of Business Ethics* 95, at 96.

94 With former colleagues at the Castan Centre for Human Rights Law, Monash University, see www.law.monash.edu.au/castancentre/projects/mchr/.

for any non-financial considerations, including – and especially – human rights.[95] This was astounding to me then (many large corporations that we had also interviewed in the project were then aware of, if not fully conversant with, the importance of such wider stakeholder interests to their governance structures), but it is quite clear that today few corporations of any size can afford – financially or otherwise – to ignore CSR in deliberations about their governance. In this atmosphere of 'new governance', many major corporations now dedicate sizeable resources and executive effort towards building CSR into their business values or principles. Somewhat ironically, it is the irregularities and skullduggery in the domain of corporate finance, as much as in the domains of social and environmental responsibility, that have provided the impetus for greater regulatory scrutiny of all aspects of corporate behaviour. The enactment of the US's Sarbanes-Oxley Act in 2002, in response to the immense corporate scandals that engulfed Enron and Worldcom, was principally a regulatory insistence on better fiscal and financial management and accountability,[96] but it was also seen by corporations and commentators alike as medicine for a cultural malaise that afflicted corporations in their attitudes towards the concerns of the societies and environments in which they operated.[97]

There now exists a vast array of codes, principles, guidelines and standards which corporations can sign up to or have their performance measured against. Phillip Rudolph, an experienced corporate lawyer who has worked for, and with, many TNCs on this topic, reports that there are at least 1,000 codes of conduct in existence,[98] with more being developed

95 Emphasising the point, see the paper by two other officials from the same Corporate Governance Unit, Olivier Fremond and Mierta Capaul, entitled 'The State of Corporate Governance: Experience from Country Assessments', World Bank Policy Research Working Paper No. 2858 (June 2002), at http://ssrn.com/abstract=636222, in which the authors expressly exclude the CSR 'agenda' from their analysis, p. 1.

96 Section 406 of the statute stipulates that issuers (of securities), including public and private corporations, must adopt 'a code of ethics for senior financial officers'.

97 A sense captured most succinctly by Elliot Schrage's melodramatic but memorable line that 'it's only a matter of time before some company becomes the Enron of human rights abuse'; 'Emerging Threat: Human Rights Claims' (2003) 81(8) *Harvard Business Review* 16 ('Memorandum').

98 Phillip Rudolph, 'The History, Variations, Impact and Future of Self-Regulation', in Ramon Mullerat (ed.), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (The Hague: Kluwer Law International, 2005), p. 367; the figure of 1,000 is taken from an estimate in a World Bank publication by Gare Smith and Dan Feldman, *Company Codes of Conduct and International Standards: An Analytical Comparison (Part I)* (Washington, DC: World Bank, 2003), p. 2.

all the time, such as in respect of corporate media censorship following the internet provider scandal in China, discussed earlier. These codes range across six main categories:[99] (i) model codes, developed by intergovernmental bodies (e.g. the UN Global Compact); (ii) intergovernmental codes, concluded between governments (e.g. the OECD's Guidelines for Multinational Enterprises); (iii) multi-stakeholder codes, which are negotiated agreements often involving corporations, labour representatives, NGOs and governments (e.g. the UK Government's Ethical Trading Initiative Base Code); (iv) industry codes (nearly all major industries have such codes, including, for example, banking with the Equator Principles); (v) company codes, which many companies (and certainly all major ones) now possess, reflecting not only the standards set by whichever of the above types of code they subscribe to, but also their own particular CSR values, and which may cover strategic direction, employee and community relations, investment protocols, complaint handling, compliance monitoring, and supply-chain management; and finally (vi) compliance and verification codes, which are tools developed to assist corporations in assessing their CSR performances (e.g. Social Accountability 8000,[100] the Global Reporting Initiative Guidelines,[101] and the forthcoming (in 2010) ISO 26000 guidelines for Social Responsibility).[102]

It can be fairly said that many of these codes incorporate some human rights values, usually embedded within avowedly social and environmental standards, but few are explicitly and centrally concerned with corporate abuses, and/or promotion, of human rights. Those that are include: the Voluntary Principles on Security and Human Rights, drawn up between a number of large mining and exploration corporations, prominent human rights NGOs, and the governments of the Netherlands, Norway, the UK and the US, which are intended 'to guide companies in balancing the needs for safety while respecting human rights and fundamental freedoms';[103] Amnesty International's Human Rights Guidelines for Companies; and the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (henceforth, the 'UN Norms'), which I discuss in detail below.

99 Drawing directly on Rudolph's typology for the first five listed categories; *ibid.* See also Josep Lozano and María Prandi, 'Corporate Social Responsibility and Human Rights', in Mullerat, *Corporate Social Responsibility*, p. 183.

100 www.sa-intl.org. 101 www.globalreporting.org.

102 www.iso.org/sr. 103 See www.voluntaryprinciples.org.

The position today is that even arch-critics of CSR – like Clive Crook, the former deputy editor of *The Economist* – accept that 'today, corporate social responsibility, if it is nothing else, is the tribute that capitalism everywhere pays to virtue'.[104] Though somewhat sardonically put, Crook's words highlight what has, in effect, been a long 'love/hate' relationship with the principles of CSR, if not (at least not until more recently) the formalised term itself. In terms of process, CSR has been about trying to take issues that have been traditionally seen as outside the purview of business and move them into the sphere of what business is, or ought to be, concerned with. In terms of substance, the field has had many contenders, from the earliest days of making corporations treat their workforces as human beings rather than merely a commodity, through matters of product safety and consumer protection, to more recent concerns over environmental protection, disclosure and transparency, ethical business practices and investment, local community welfare, and human rights, including both civil and political, and economic, social and cultural rights. The stakeholders that may express these concerns about a business now stretch beyond merely its shareholders (and even they are now much less the homogenous, dividend-seeking bloc that they were once assumed to be), to include employees, governments, local communities, civil society, project financiers and international organisations. Claire Moore Dickerson even goes so far as to assert that 'the source of this different understanding of corporate social responsibility . . . is a general change in perception, which increasingly conforms to norms of the East and South, and which is reflected in the evolving human rights norms'.[105]

That said, corporations are, generally, disinclined to take on board such a varied array of interests, actors and objects that are seen as, at best, on the periphery of their core business. This is the 'hate' dimension of the relationship, and it is what fuels CSR critics who see that such distractions from a corporation's core concerns (centrally, to make a profit in whatever they do) is neither good for business nor legitimate.[106] On the other hand, capitalism and corporations are nothing if not enterprising and opportunistic. This is the basis for the 'love' dimension. It did not take long for many corporations to appreciate that if this is what stakeholders really want (and they are, after all, potential consumers, financiers, regulators,

104 Clive Crook, 'The Good Company', *The Economist*, 20 January 2005, p. 4.

105 Claire Moore Dickerson, 'Human Rights: The Emerging Norm of Corporate Social Responsibility' (2001–2) 76 *Tulane Law Review* 1431, at 1433.

106 Martin Wolf, 'Sleep-walking with the Enemy', *Financial Times*, 16 May 2001, p. 21.

opinion-makers), then that is what they should deliver, provided, crucially, that in the process they continue to make profits. 'Enlightened self-interest' is how some have put it,[107] which, as exemplified by the highly successful 'Fair Trade Certification' programme, aims to secure labour, social and environmental standards for producers, at the same time as making profits for retailers.[108]

For a time, terms such as 'triple bottom line' (that is: profit, society and environment) held sway, but thankfully this particular tag is now hardly ever heard, having been consigned to the oxymoronic dustbin (profit is the only *bottom* line, the other two are just – quite rightly – conditions that are imposed on how that profit is generated).[109] Companies now frequently refer to needing to earn their 'social licence to operate',[110] which, at least at one level of interpretation, is not at all a new concept. As discussed earlier, corporations are entirely products of society in the sense that it is society, through the state, that both facilitates and regulates the existence of corporations and what it is they can and cannot do. However, today there is usually more invested in the label. Some in the corporate world see the whole CSR enterprise to be something largely outside (and typically trying to ward off) state regulation. According to this view, CSR entails no more than a voluntary adherence to principles that are seen as reflections of community expectations, whatever the law might actually demand. Examples of this include the setting of social and/or environmental targets that are 'beyond compliance'; investing in local communities (it is now not uncommon for extractive industry corporations working in developing states to assist in providing health care, school education, transport or communication facilities); and institutionalised corporate philanthropy (as discussed below).

In part, of course, this is just good risk management; avoiding community 'outrage', as my colleague Katherine Teh-White calls it, over corporate insensitivity to, or contempt towards, social or environmental

107 See the report of the Australian Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risks and Creating Value* (Canberra: Parliamentary Joint Committee on Corporations and Financial Services, 2006), at para. 4.76; and 'Just Good Business: A Special Report on Corporate Social Responsibility', *The Economist*, 19 January 2008, p. 21.

108 See www.fairtrade.net.

109 This is the point I was making in chapter 1 concerning Milton Friedman's notorious remarks on the subject of corporate objectives.

110 For example, mining giant Anglo American's *Report to Society 2006*, which talks of 'maintaining a social license to operate'; available at www.investis.com/aa/development/sdreports/gr/2007gr/sc-engagement.htm.

standards.[111] There can be little doubt that personal vanity and ambition also play their powerful parts in corporate decision-making in this regard. This may be taken too far at times, with fanciful claims being made of corporate intentions. For example, it is surely somewhat gauche at best for Indra Nooyi, the Chairperson and CEO of PepsiCo, to prescribe that alongside financial results, 'large companies' must also 'ensur[e] that their products contribute positively and responsibly to sustaining human civilization'.[112] But Geoff Brennan and Philip Pettit (economist and philosopher, respectively) are on to something in their thought-provoking book *The Economy of Esteem*, when they argue that in addition to the two celebrated drivers of economic and social order – the 'invisible hand' of the market and the 'iron hand' of the state – there is a third, the 'intangible hand' of esteem, which today is far less studied and understood in the social sciences.[113] Brennan and Pettit associate the desires of individuals to secure personal esteem (directly, or indirectly through that bestowed on institutions with which they are intimately connected) with the social phenomenon of community expectations of, and pronouncements on, who or what deserves to be held in esteem.[114] Business leaders fit neatly into this framework, where their actions, or the actions of the corporations they run, have the potential to attract esteem or disesteem, by way of good or bad publicity, respectively. For businesses today – certainly for those of any size or prominence – publicity is something they have to expect. For them, they simply cannot be 'confident that the things [they] do will be unobserved', especially, one might add, in the field of human rights.[115] For many corporations and their CEOs, therefore, rather than shun publicity regarding human rights specifically, and their CSR profile generally, they have learnt to accept and even embrace it. Corporate executives are increasingly keen to assure public gatherings that, when they gaze into the proverbial bathroom mirror in the morning, they really do want to be able to say, without blinking, that they are proud, or at least have a clear conscience, about what it is their company does and how it does it. Not all of them, at all times, can

111 See www.futureye.com/team_katherine.php; Teh-White is the Managing Director of *Futureye*.

112 Indra Nooyi, 'The Responsible Company', in *The World in 2008* (London: The Economist, 2007), p. 143.

113 Geoff Brennan and Philip Pettit, *The Economy of Esteem: An Essay on Civil and Political Society* (Oxford and New York: Oxford University Press, 2004), pp. 4–5.

114 Referring to the latter as 'civil society', *ibid.* p. 5.

115 *Ibid.* p. 185.

do so with such candour, of course, but the sentiment is clear: business leaders care about their corporation's image and their own reputation and self-esteem.

A singularly clear manifestation of this concern is the phenomenon of institutionalised corporate philanthropy. From Rockefeller and Ford, through to Buffett and Gates, the tradition has been built, especially in the United States.[116] There can be no doubt that for these corporate and individual giants, and, on much smaller scales, for many other executives, their concerns stem from what they consider to be their social responsibilities that lie alongside their commercial obligations. Thus, for Bill and Melinda Gates, the fundamental reason why they established their foundation was because, as they say, 'we benefited from great schools, great health care, and a vibrant economic system. That is why we feel a tremendous responsibility to give back to society.'[117] Though, no matter how big the pay-back – and the Gates Foundation's is unquestionably impressive[118] – such philanthropy does not beatify; 'philanthropy no more canonises the good businessman than it exculpates the bad', as *The Economist* tartly observes.[119]

Important though it is, focusing too intently on the business case for CSR undermines its rationale (it is concerned with business 'responsibility' not 'opportunity'), and it leaves the enterprise open to abuse. Such a 'limited form of CSR', as Tom Campbell points out in characteristically prescient fashion, 'amounts to little more than intelligent business practice that enhances long-term profitability, to the virtual exclusion of responsibilities that are not just justifiable in terms of the economic interests of the corporations in question'.[120] Campbell argues that 'the real

116 It might be noted that the manifestation of corporate philanthropy as a matter of CSR appears to be a particular Anglo-American phenomenon; see 'Corporate Social Responsibility: In a Global Context', in Andrew Crane, Dirk Matten and Laura J. Spence (eds.), *Corporate Social Responsibility: Readings and Cases in a Global Context* (New York: Routledge, 2008), p. 3, at p. 13. I am grateful to Karin Buhmann for raising this point with me.

117 'Letter from Bill and Melinda Gates', at www.gatesfoundation.org/AboutUs/OurValues/GatesLetter/default.htm.

118 According to its 2007 Annual Report, the Foundation has $38.7 billion in assets; had given away $3 billion in 2007, and had already approved a further $4.4 billion for disbursement in 2008; see www.gatesfoundation.org/nr/public/media/annualreports/annualreport07/AR2007Financials.html.

119 'The Meaning of Bill Gates', *The Economist*, 28 June 2008, p. 16.

120 Tom Campbell, 'The Normative Grounding of the Corporate Social Responsibility: A Human Rights Approach', in Doreen McBarnet, Aurora Voiculescu and Tom Campbell

crunch questions in CSR concern what to do when the business case does not hold because it is not economically wise for a particular economic unit or business sector to "do the right thing" '.[121] There are two answers to this proposition. The first is that in reality, after all other things are taken into consideration, corporations will still opt for the least bad of the economic choices before them, so in that sense these will have made a business case for their actions, however unpalatable these might be in absolute terms. The second is that Campbell's observation effectively marks the boundary between that which can reasonably be expected of voluntary CSR, and that which has to be mandated by law.

The voluntarism of CSR has its critics as well as its supporters, but the debate and practice have now reached a stage of maturity such that CSR can no longer (if ever it could) be seen as a law-free domain. Not least, this is due to the fact that, as Phillip Rudolph says, '[l]awyers typically represent the front lines in the development of documents and tools intended to embed these [CSR] expectations into commercial relationships. More and more deals are requiring, as part of the due diligence process, an assessment of CSR-related activities and risks.'[122] But it is also due to the dawning realisation that it is not necessarily true that 'you can never have too much of a good thing'. For in so far as CSR initiatives can, broadly, be seen as good things, the facts of their multiplication and their kaleidoscopic coverage and format have provided fertile grounds for confusion, and evasion. This is the salutary message that John Conley and Cynthia Williams draw from their empirical study of the implications (including for human rights) of CSR practices in mainly UK and US corporations. So apparent to them was the skill and stealth with which many corporations were able to exploit this circumstance that they were moved to conclude that 'Foucault himself could not have conjured a better example of the exercise of power through subtle and distributed disciplinary practices'.[123] The prospect of direction, or at least hierarchy, being established through legal regulation (whether of the hard or soft law variety) is therefore not only appealing, but necessary.

(eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007), p. 530.

121 *Ibid.* p. 531.

122 Phillip Rudolph, 'The Central Role of Lawyers in Managing, Minimizing, and Responding to Responsibility Risks – A US Perspective', in Mullerat, *Corporate Social Responsibility*, p. 318.

123 John Conley and Cynthia Williams, 'Engage, Embed, and Embellish: Theory versus Practice in the Corporate Social Responsibility Movement' (2005–6) 31 *Journal of Corporation Law* 1, at 34.

Hard law and soft law approaches

In fact, there is already plenty of law regarding the human rights obligations of corporations. As I have argued elsewhere,[124] domestic laws governing occupational health and safety, labour and workplace relations, anti-discrimination, privacy, environmental protection, property rights, freedom of expression, fair trial (complaints handling and disciplinary procedures) and criminal prohibitions (such as against physical abuse, fraud and corruption, and property offences) are typically found in the statute books of developed countries. Further, they are also, increasingly, to be found in developing countries, as the twin forces of global economic order and the rule of law propagate them, and the demands of regulatory certainty and fairness become ever more insistent.[125] Across and within nations, these laws are, of course, incomplete and imperfect, but the records of the state courts and tribunals that enforce them, such as they are, against corporations on a daily basis are testimony to the prevalence and importance of existing community expectations about corporate observance of human rights standards.

In all the debates about whether, or which, or how human rights obligations apply to corporations, it is important to remember that this array of legal regulation already exists. Too often the fact is overlooked by those blinded by their zeal to protect their position in the human rights and corporations debate. This, for example, was the effect of the barely disguised contempt with which some in the business world greeted the proposition that consideration be given to making TNCs in some way responsible for their human rights abuses at international law. In its lengthy submission to the OHCHR inquiry into the legal relationship between corporations and human rights (that was prompted by the 2003 UN Human Rights Norms for Corporations), the Confederation of British Industry achieved the astounding feat of not once acknowledging the breadth of domestic human rights and human rights related laws to which companies in the UK (and elsewhere) are already subject; an omission that it underlined by blandly stating that 'the principal, and practically

124 David Kinley, 'Human Rights as Legally Binding or Merely Relevant?', in David Kinley and Stephen Bottomley (eds.), *Commercial Law and Human Rights* (Aldershot: Ashgate Dartmouth, 2002), p. 25.

125 See David Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', in David Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006), p. 74 at pp. 84–6.

the sole, source of human rights law is conventions in force', as if state legislatures (and a few hundred years of domestic jurisprudence) were simply non-existent.[126]

The regulatory questions that are to be addressed in this field are, therefore, concerned with how much further corporations should be made to wade into the waters of human rights, rather than with deliberations about whether they should get their feet wet in the first place. Peter Muchlinski, in his prodigious work on all aspects of the legal status of TNCs, correctly characterises the issue as arguments for and against the extension of corporations' human rights responsibilities.[127]

Domestic legislation, policies and practices regarding the requirements made of corporations to protect and promote human rights and the consequences of their breach must continue to be the most significant and effective vehicles to enunciate and enforce such responsibilities. This is all well and good, and while, evidently, not all states utilise their regulatory frameworks sufficiently and effectively in this regard, such limitations are due to variations in political will, administrative capacity and economic imperatives, *not* a lack of jurisdictional competence. What has been of vital importance to much of the debate about corporations and human rights since the late 1990s (and to my focus in this book on the global economy) is when the human rights actions of the corporations in questions are *trans*national: that is to say, when the corporation is legally incorporated in one (home) state, while it conducts its operations in another or other (host) states. The crux of this matter is when the human rights laws that apply to corporations differ significantly, in form and/or substance, between the home and host states. For such legal gaps in human rights protections lead, almost inevitably, to their neglect and abuse in practice. Though such gaps can appear between any two states, they are most obvious and potentially most damaging when the corporation's home state is a rich, liberal state in the West, and the host state is a poor, weakly governed state in the developing world.

126 Submission by letter (from John Cridland, Deputy Director-General, CBI) and annexures, headed 'Request from the Office of the UN Commissioner for Human Rights', 4 August 2004, at Annex B, para. 6; see www.ohchr.org/english/issues/globalization/business/contributions.htm. This misunderstanding of such a basic point of international and constitutional law is made all the more remarkable by the fact that it relies on the advice of a senior English barrister briefed by the CBI.

127 Peter Muchlinski, *Multinational Enterprises and the Law*, 2nd edn (Oxford and New York: Oxford University Press, 2007), pp. 514–18.

Adopting the perspective of the victims (or potential victims) of abuse in these circumstances, there exist four possibilities by which legal regulation might possibly address corporate infractions and provide redress for the abused.

First, most directly, international and domestic pressure (from other states, international organisations, civil society and even corporations themselves) might be put on the states to plug the gaps in their own laws regarding corporate behaviour within their jurisdiction, by enactment of legislation where there is none or it is inadequate, or enforcing that which exists but is ignored or easily evaded. In situations of states with weak governance, however, this is of course to invest in hope more than expectation. By definition, weakly governed states lack capacity and probably political will, and many egregious breaches involving corporations are perpetrated jointly with (and often principally by) state organs themselves. In such cases this may be a pointless exercise – like 'throwing water at the sun', as I recall one Burmese activist putting it to me regarding efforts to raise the human rights consciousness of the ruling Junta there – and points of legal leverage will have to be sought elsewhere.

The second possibility is the extension of the extra-territorial reach of strong-state laws, effectively to make corporations liable at home (under home-state law) for their actions overseas (despite host-state laws). Extra-territoriality has many legal guises,[128] including, most directly, the criminalisation of acts taken by individuals or other legal persons, including corporations, offshore – relatively common examples of which include sex tourism, drug trafficking, terrorism activities and war crimes.[129] Tort liability is another example, in respect of offences against persons, negligence resulting in egregious harm such as severe environmental damage or, most notoriously, breaches of fundamental international legal norms, as with the US's revivified *Alien Torts Claims Act* (ATCA), provided that such norms are 'specific, obligatory and universal'.[130] In addition, other

128 Surya Deva, 'Acting Extraterritorially To Tame Multinational Corporations for Human Rights Violations: Who Should "Bell the Cat"?' (2004) 5 *Melbourne Journal of International Law* 37.

129 See Eric Engle, 'Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?' (2006) 20 *St. John's Journal of Legal Commentary* 287, at 291.

130 As stipulated in the US Supreme Court's landmark decision in *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004), at 732; see further Lucien Dhooge, 'Lohengrin Revealed: The Implications of *Sosa v. Alvarez-Machain* for Human Rights Litigation Pursuant to the Alien Tort Claims Act' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 393. Also see Joanna Kyriakakis, 'Freeport in West Papua: Bringing Corporations

laws or legal techniques may have a facilitative extra-territorial capacity in this regard. Corporations laws, for example, regulate the nature and extent of legal liability of corporations for the actions of their overseas subsidiaries,[131] which can include actions that violate human rights, and there have been various attempts (so far unsuccessful) in Australia, the UK and the US to enact 'corporate code of conduct' legislation that would bind corporations, and/or their directors, in respect of their conduct overseas.[132] Use by corporations of *forum non conveniens* (FNC) to deflect litigation from home-state courts (which are normally far more rigorous, less tolerant and more punitively minded of corporate indiscretions than host-state courts) has also been watered down in certain common law courts in which it is applicable. As a result, this peculiar, but important, determinant of the jurisdictional competence (determining, that is, whether a home-state court has the power to hear a case regarding action taken in another state's jurisdiction, and if so, whether it should) has effectively extended the extra-territorial reach of home-state courts in cases where they are *not* 'seen as a clearly inappropriate forum'.[133] Such a broad interpretation of the doctrine allows considerable latitude to home-state courts as the onus is placed on the party claiming the defence of FNC to demonstrate that the home-state courts are indeed clearly inappropriate. Finally, the international legal facility of 'universal jurisdiction' – whereby states 'have jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern'[134] – has also been used by states to arrogate

to Account for the International Human Rights Abuses under Australian Criminal and Tort Law' (2005) 31 *Monash University Law Review* 95.

131 See *Lubbe and Others v. Cape Plc* [2000] 1 WLR 1545, in which the House of Lords, rejecting the defendant's argument of *forum non conveniens*, demolished attempts of a parent company to distance itself from the damage done by its asbestos mining subsidiary in South Africa.

132 Adam McBeth, 'A Look at Corporate Code of Conduct Legislation' (2004) 33 *Common Law World Review* 222.

133 This is the formulation that prevails in Australian courts as enunciated in *Oceanic Sun Line Special Shipping Company Inc v. Fay* [1988] HCA 32, per Deane J, at para. 18. In the UK, FNC was also similarly removed as an effective defence against removal of cases to home-state courts in *Connelly v. RTZ Corporation Plc and Others* [1998] AC 854. For a discussion of the much more limited inroads into the defensive use of *forum non conveniens* in the US, see Malcolm Rogge, 'Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine on *Forum Non Conveniens* in *In re*: Union Carbide, Alfaro, Sequihua, and Aguinda' (2001) 36 *Texas International Law Journal* 299.

134 These are the defining words used in the *Restatement (Third), The Foreign Relations Law of the United States (1987)*, section 404.

extra-territorial powers to their courts, which power might conceivably extend to corporations.[135]

All that said, such extra-territoriality in the specific respect of corporate behaviour that affects human rights is relatively rare, certainly as compared to normal, intra-territorial, law. It is a potentially highly charged, political issue. Extra-territorial laws emanate almost exclusively from Western states and are therefore seen by many developing states as, at best, presumptuous and somewhat patronising, and, at worst, imperialist challenges to their sovereignty.[136] In the home states themselves, the device can also be subject to intense political pressure – from those activists in favour, and, more significantly in terms of lobbying power, from the business community against such extended jurisdictional reach in respect of corporate activity. Indeed, the failures of the national corporate code of conduct bills mentioned above bear testimony to business's lobbying power,[137] and there can be no doubt that the ATCA would have met the same fate were it not for the fact that it was enacted more than two hundred years ago in 1789 (and with no intention that it would apply to corporations in the way pursued at least since the mid 1990s).

The benefit of extra-territorial legislation in this area for those whose human rights are abused is that it provides a potential alternative forum in which to pursue their claims against corporations. Sarah Joseph, in her meticulous review of corporations and transnational human rights litigation, asks us to consider whether 'it is unfair to TNCs for them to be subjected to forum-shopping in the law of their home state, or a state in

135 For an overview of the various forms of implementation of universal jurisdiction in the common law and civil law jurisdictions of Europe, see Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art* (June 2006), Vol. 18, No. 5(D). It should also be noted here that officers of corporations, as individuals, may be subject to the jurisdiction of the International Criminal Court for grave breaches of international law, including genocide, war crimes, crimes against humanity and the crime of aggression; *Rome Statute of the International Criminal Court 2000*, Articles 6–9.

136 In fact, sometimes developing countries actively support litigation in the courts of a corporation's home state rather than their own precisely in order to pursue higher damages claims. This was the position adopted by the Indian Government in the Bhopal case discussed at the beginning of this chapter.

137 Though, in Australia, it seems that this issue might be put to the test once again, following the Rudd Government's decision in June 2008 to support a Parliamentary motion to consider 'the development of measures to prevent the involvement or complicity of Australian companies in activities that may result in the abuse of human rights, including by fostering a corporate culture that is respectful of human rights in Australia and overseas', see Oxfam Australia media release, 23 June 2008, at www.reports-and-materials.org/Oxfam-Australia-on-parliament-motion-23-Jun-2008.doc.

which they do business, rather than the laws of the country in which they are operating'.[138] To which she answers, convincingly,

> TNCs themselves have shopped around for the best investment conditions, simultaneously promoting a 'race to the bottom' in developing countries, for example, in terms of environmental and labor standards. Forum shopping is the flipside of the jurisdiction-shopping of TNCs; should not both TNCs and their apparent victims be able to play the game of globalisation? The orthodoxy which promotes the unique freedom from regulation for TNCs, in that their various components which usually operate as a single economic entity are not regulated by the laws of any single state, enabling the apportionment of legal responsibility according to least risk without any concern for humanitarian consequences, is unsatisfactory. Economic globalisation, which confers huge benefits on TNCs, should be accompanied by the imposition of transnational responsibilities by a parallel globalisation of law. In this respect it is poignant to add that the putative forum-shoppers in the salient cases are innocent people who have been severely hurt by TNCs, and who are probably unable to receive appropriate recompense in the forum where the injury occurred. The 'intolerable double standard' that denies victims in the developing world but not the developed world relief from severe corporate maltreatment should not continue.[139]

Joseph's 'globalisation of law' in respect of the human rights obligations of corporations, however, has not been, and will not be, achieved on the back of extra-territorial laws alone. Even their most celebrated manifestation, the now much litigated ATCA, has so far yielded just one concluded trial (and then in favour of the corporation),[140] and one notable out of court settlement.[141] This is despite dozens of high-profile cases having

138 Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2004), p. 150.

139 *Ibid.* pp. 150–1.

140 On 26 July 2007, an Alabama jury found the coal corporation, Drummond, not to be guilty of complicity in the 2001 murder of three union leaders at one of its mines in Colombia; *In Re Juan Aguas Romero v. Drummond Company, Inc., et al.*, United States District Court for the Northern District of Alabama (Case No. 702-CV-00665). At the time of writing, the plaintiff had appealed to the Eleventh Circuit Court of Appeals.

141 Appeals pending in the *Unocal* litigation were dismissed by the Ninth Circuit Court of Appeals following the settlement of the case: see *John Doe I v. Unocal Corp.* 403 F.3d 708 (9th Cir. 2005). For a discussion of the settlement, see Rachel Chambers, 'The *Unocal* Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses' (2005) 13(1) *Human Rights Brief* 14; and see EarthRights International, 'Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers', 2 April 2005, at www.earthrights.org/legalfeature/historic_advance_for_universal_human_rights_unocal_to_compensate_burmese_villagers.html.

been brought against some of the world's largest companies,[142] alleging human rights abuses including complicity in murder, forced and child labour, assault, rape, forced relocation and expropriation, and aiding and abetting apartheid. As a means to publicise the alleged bad deeds of corporations, the ATCA is a useful if somewhat quixotic instrument.[143] As a tool for effective and efficient legal regulation, it is quite another matter. With the insider knowledge of having represented a number of ATCA plaintiffs coupled with the big-picture perspective of a scholar, Harold Koh recognises the statute for what it really is: an extremely limited, highly conditional, litigable instrument of last resort.[144] To be sure, it is an important, indeed vital, backstop, but it does not and cannot serve as a central plank in any regulatory programme to address corporate abuses of human rights standards.

My third and fourth regulatory possibilities are both situated in the same transnational sphere and, though very different and controversial in their own ways, together offer the prospect of bolstering a more globalised perspective of the legal regulation of corporations in regard to human rights protections.

The third possible avenue relates to the human rights standards contained in transnational codes of conduct, developed by industry peak bodies, governments and NGOs or by TNCs themselves. Though soft law and, in the main, entirely voluntary initiatives, such codes nonetheless provide the foundations for harder legal regulation, not only because they constitute the policy firmament from which future domestic and international laws are likely to develop, but also because corporations, in their desire to stipulate standards and to proclaim their adherence to

142 Including Coca-Cola, Chevron, Chiquita, ExxonMobil, Nestlé, Shell, Texaco, Yahoo! and Wal-Mart. For an overview, see Beth Stephens *et al.*, *International Human Rights Litigation in US Courts* (Leiden: Martinus Nijhoff, 2008 (2nd edn)), pp. 309–33.

143 On which see the comments by Richard Herz, a lawyer from Earth Rights International which has been actively involved in a number of ATCA cases, including the Unocal case, regarding how the statute can be used as a powerful shaming tool: 'Holding Multinational Corporations Accountable for Human and Environmental Rights Abuses', in David Barnhizer (ed.), *Effective Strategies for Protecting Human Rights: Economic Sanctions, Use of National Courts and International Fora and Coercive Power* (Aldershot: Ashgate, 2001), p. 263.

144 Harold Koh, 'Separating Myth from Reality about Corporate Responsibility Litigation' (2004) 7 *Journal of International Economic Law* 263. Koh specifically notes that these conditions (as to forum and personal jurisdiction; compliance with the Statute of Limitations; nature of breaches of international law amounting to complicity in a state crime; and meeting the substantial burden of proof linking cause to effect) constitute 'very high multiple barriers to recovery' under the statute; at 269.

them, are in effect engaging in commercial speech – or, to put it more directly, in marketing.[145] All developed states, and many strictly so, have trade practices rules governing false advertising, and misleading or deceptive conduct such that a company is prevented from making any false or misleading claims in an effort to entreat you to purchase their products. In a landmark case brought against Nike in California, anti-corporate activist Marc Kasky claimed that he had been so entreated to buy a pair of Nike shoes on the basis of the company's self-declared good human rights business practice of not engaging sweat-shop labour in the manufacture of its products, only for him later to discover, he alleged, that the claims were false. The veracity of Kasky's allegations was never tested in court as the case was settled,[146] but the point was made that specific claims as to one's human rights practices can be just as strictly regulated as are those made in respect of the quality of one's stitching, or the curative effects of one's drugs, or the longevity of one's battery life. Rather curiously, there have been few repetitions of such litigation under similar trade practices and competition laws in other developed states, but the prospect of such litigation appears to have had the salutary effect of making corporations think more carefully about the justifications for their public pronouncements about their respect for or compliance with human rights standards. That is despite the somewhat dire and blinkered claims of both corporations and civil liberties organisations (like the American Civil Liberties Union),[147] that such commercial requirements infringe constitutional (that is First Amendment) free speech and have a chilling effect on corporate engagement in discussion of CSR and human rights concerns.[148]

145 Codes might also be framed and adopted in ways that make them contractually binding, such as when comprising part of a contractual agreement between a company and its suppliers.

146 Following controversy over working conditions in Nike's supply chain, Nike embarked on a public relations campaign claiming that it had improved conditions for overseas workers. In 1998, Marc Kasky filed a claim in California, alleging misleading advertising by Nike. The central legal issue was whether Nike's public statements were 'commercial speech' or 'political speech'– if the former, then Nike was subject to advertising and competition laws; if the latter, then Nike could rely on its First Amendment right to free speech. In 2002 the Supreme Court of California found in favour of Kasky (see *Kasky v. Nike, Inc.* 27 Cal. 4th 939 (2002)). Nike appealed to the US Supreme Court, which initially granted leave to appeal, but later determined not to decide the issue: *Nike, Inc. v. Kasky* 539 U.S. 654 (2003). In September 2003 the case was settled, with Nike agreeing to pay $1.5 million to the Fair Labor Association.

147 See its *amicus* brief in the *Nike v. Kasky* case, at www.aclu.org/FilesPDFs/nike.pdf.

148 See Ronald Collins and David Skover, 'The Landmark Free-Speech Case That Wasn't: The *Nike v. Kasky* Story' (2004) 54 *Case Western Reserve Law Review* 965.

The fourth possibility is perhaps the most ambitious as it entails proposals for the regulation of corporate entities regarding human rights under international law. There are in fact two dimensions to this possibility. One is actively to encourage such international human rights bodies as the committees that oversee the implementation of the main UN human rights treaties, to make more use of their existing authority to press signatory states to do more within their respective jurisdictions to protect and promote human rights, *including* in respect of relevant acts of commission or omission by corporations. Some of these committees, through their consideration of periodic reports, hearings of individual communications, and publication of General Comments, do already inquire of states what they are doing in this regard, make specific suggestions as to how they might do it better, and indicate more broadly how corporations might assist, or be required to assist, in the domestic protection of human rights. An SRSG survey of the position in respect of the UN's core human rights treaties concludes that 'an examination of the treaties and treaty bodies' commentary and jurisprudence . . . confirms that the duty to protect includes preventing corporations – both national and transnational, publicly or privately owned – from breaching rights and taking steps to punish them and provide reparation to victims when they do so'.[149] In actual practice, however, moves to extend this duty to cover corporations are still in their infancy. Such moves also rely on the very entities that give us cause for concern about their competence to regulate effectively the errant activities of corporations – namely, states, and especially weakly governed states.

The other dimension is to seek to establish some form of international legal regime under which corporations might also be held *directly* liable for breaches of particular human rights standards, thereby, where needs be, avoiding the intermediary of state action. This is where the controversy begins. For while the first of these two international law options is unremarkable (if yet wanting in will and capacity), the second is more revolutionary because it promotes the as yet nascent idea that international law can apply to, and bind, non-state entities as well as states. As such, the notion has attracted both unprecedented levels of debate between all parties (not itself a bad thing, of course), and, as Rachel Chambers and I have remarked elsewhere, 'a potent mix of distrust and

149 SRSG, *State Responsibilities To Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties* (12 February 2007), para. 7, at www.humanrights.ch/home/upload/pdf/070410_ruggie_2.pdf.

suspicion, vested interests, politics and economics has given rise to a great deal of grand-standing and cant'.[150] The focus of so much of this debate and controversy has, at least since their 'publication' in 2003, been on the UN Human Rights Norms for Corporations.[151] It was in August that year that a UN body of experts – the Sub-Commission on the Protection and Promotion of Human Rights – endorsed the Norms and committed them for consideration the following year by the then Commission on Human Rights, comprising the state representatives.[152] There was nothing especially unusual in this process, and nor was the treaty format in which the Norms were drafted especially remarkable. In the main, the human rights included in the Norms were somewhat predictable[153] – non-discrimination, security of persons, workers' rights and children's rights.[154] The Norms, like so many UN human rights instruments before them, were, in effect, being submitted for consideration, debate, amendment, acceptance or rejection.[155] The ensuing furore, however, inside and outside the Commission, saw battle lines quickly drawn between states, human rights activists and corporate representatives that had the curious consequence of entrenching the existing contents and format of the Norms, as if they were already written in stone, rather than opening up the issue for broader discussion using the Norms as a starting point. Almost immediately, therefore, the debate became frustratingly narrow in focus – the arid terrain of lawyers (and quasi-lawyers) arguing over such drafting

150 David Kinley and Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6 *Human Rights Law Review* 447, at 447–8.

151 '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 (26 August 2003).

152 Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2003/16 of 13 August 2003, UN Doc. E/CN.4/Sub.2/RES/2003/16; and see Commission on Human Rights, Decision 2004/116 of 20 April 2004, UN Doc. E/CN.4/DEC/2004/116.

153 For further discussion of the reasons why these and other human rights are predictably applicable to corporations see David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, at 960–93.

154 There was also the peculiar (but not irrational) inclusion of consumer protection and environmental protection as 'human rights', as well as the stipulation of a state's right – namely, as a sovereign entity – not to have its efforts to protect and promote human rights inhibited by corporate action.

155 See the article by David Weissbrodt (a member of the Sub-Commission and the primary architect of the Norms) and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 *American Journal of International Law* 901.

points as: if states are to be the 'primary' bearers of human rights responsibilities, what is the nature and extent of secondary responsibilities of corporations; and to that end, what is meant by 'sphere of influence' as it might apply to the legal obligations of corporations; and if international human rights obligations are to apply directly to corporations, how will their compliance be policed and enforced?

Let me be clear: I consider these to be important questions, but they were not the right – that is to say, the most important – questions to be asking at that time, or even now, and here I admit to tramping, with a number of colleagues, all over the terrain, albeit hunting oases.[156] To some degree, it was just this sort of need to stand back and put things in perspective that motivated the Human Rights Commission to recommend that the UN Secretary-General appoint a special representative, inter alia, to 'elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation'.[157] Professor John Ruggie, a political scientist from Harvard University with long experience working in and with the UN, was duly appointed in July 2005, and has since had his original two-year term extended twice, most recently for a further three years from June 2008.[158] Ruggie's tenure in the position has been marked by extraordinary energy; a commendable willingness to engage and openness to debate; a determination to find common ground and move off that which has been 'poisoned'; and a prodigious output of well-researched, succinct and readable reports and papers.[159] Through his work he has helped to broaden and broadcast the debate, and to harness some of the goodwill and better understanding generated by the very fact of so much debate (albeit some of it heated), and has managed to chart some way forward.

However, the SRSG has not been able to avoid getting bogged down in the trench warfare over the Norms. To be fair, he was explicit from

156 Kinley and Tadaki, 'From Talk to Walk'; Kinley and Chambers, 'The UN Human Rights Norms for Corporations'; David Kinley, Justine Nolan and Natalie Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 *Company and Securities Law Journal* 30; and David Kinley and Justine Nolan, 'Trading and Aiding Human Rights: Corporations in the Global Economy' (2007) 4 *Nordic Journal of Human Rights* 353.

157 Commission on Human Rights, Resolution 2005/69 of 15 April 2005, para. 1(b), UN Doc. E/CN.4/2005/L.87.

158 Human Rights Council, Resolution 8/7 of 18 June 2008, UN Doc. A/HRC/RES/8/7.

159 See SRSG's site on the Business and Human Rights website, at www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative.

the outset that he felt compelled to wade into the debate in order to pull the two sides apart and try to bring the discussion back to first principles: how corporations relate to human rights at present; what regulations states already have in place currently; what the coverage of corporations is in international human rights law; what the practical as well conceptual obstacles are to strengthening regulation and enforcement of human rights laws against corporations. In part too, the terms of his mandate directed him into the technical debate over the meaning of 'spheres of influence' and 'complicity'.[160] But for some, he has been too quick to throw the human rights baby out with the bath-water of the Norms' procedural infelicities.[161] And his recent dismissal of the prospects of any international initiative to plug the gap (which he acknowledges is there and is serious) left by inadequate or non-existent state-based hard and soft law regulation, as impolitic and impractical because it would be 'unlikely to get off the ground' (and even if it did, likely to be counter-productive),[162] is seen by some as appealing too much to corporate sensibilities. The SRSG prefers instead reliance on the 'protect, respect and remedy' framework he outlined in his third report to the Human Rights Council in June 2008.

In and of itself, this framework is unobjectionable, rightly urging the following: states to 'protect', by taking more seriously and implementing more thoroughly their obligations under international human rights law regarding corporate activities in their jurisdiction (my first possibility above); corporations to 'respect' rights, by which Ruggie means, ultimately, that failure to do so 'can subject companies to the courts of public opinion – comprising employees, communities, civil society, as well as investors – and occasionally to charges in actual [domestic] courts';[163] and victims to have access to 'remedies' that 'could include

160 On which see the three-volume report of the International Commission of Jurists' Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity and Legal Accountability* (Geneva: International Commission of Jurists, 2008). In Volume I, the Report outlines the basic conditions (causation, knowledge and proximity) necessary to establish corporate complicity in human rights abuses under international and domestic laws, at p. 8 *et seq.*

161 See Amnesty International, 'Submission to the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises', July 2008, at www.reports-and-materials.org/Amnesty-submission-to-Ruggie-Jul-2008.doc.

162 John Ruggie, 'Business and Human Rights: Treaty Road Not Travelled', *Ethical Corporation*, 6 May 2008, at www.ethicalcorp.com/content.asp?contentid=5887.

163 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,

compensation, restitution, guarantees of non-repetition, changes in relevant law, and public apologies'.[164] But this framework with these features does not address the problem set out at the start of this section, namely, situations in which states are so weak or unwilling to protect human rights, and corporations are so comparatively strong or conveniently transnational to evade human rights responsibilities. Moreover, Ruggie's reasons for not backing further negotiations on an international treaty are unconvincing.[165] If we were always to back away from the invariably tough challenges of establishing new international human rights regimes merely because 'treaty-making can be painfully slow' and 'serious questions remain about how [any treaty obligations] would be enforced', as he argues,[166] then few if any of the human rights instruments that populate the post-war international law landscape of today would have made it beyond the stage of high-minded rhetoric. His additional contention that even to start down (once again) the treaty path would be to risk 'undermining effective shorter-term measures to raise business standards on human rights',[167] is logically difficult to comprehend. For those corporations that implement and abide by such measures already have nothing to fear from discussions at the international treaty-making level and would, in fact, surely welcome the opportunity to participate, and hopefully level the playing field to their advantage by bringing other corporations up to their own standards. For those corporations that do not so implement or abide by these standards, or worse, are steadfastly opposed to any moves to make them do so, they should have something to fear, and rightly so. If, logic aside, the argument here is simply that, in reality, many corporations (and states)[168] will not generally welcome discussions that have the possibility of a treaty on the agenda, then that is surely to lack boldness, where boldness is called for. Ruggie, after all, has made it clear that

'Protect, Respect and Remedy: A Framework for Business and Human Rights', UN Doc. A/HRC/8/5 (7 April 2008), para. 54.

164 *Ibid.* para. 83.

165 Responding to this statement in correspondence with the author (7 September 2008), Ruggie defended his decision by arguing that on balance he did not see it as the right time to pursue the international option as it would probably set back 'pull-effect' of the efforts of vanguard corporations to advance corporate respect for human rights.

166 Ruggie, 'Business and Human Rights'. 167 *Ibid.*

168 Though that would not include Australia it would seem, following the Rudd Government's recently declared willingness to back the 'development at the international level of standards and mechanisms aimed at ensuring that transnational corporations and other business enterprises respect human rights'; Oxfam Australia media release, 23 June 2008.

he sees 'no inherent conceptual barriers to States deciding to hold corporations directly responsible [for violations of international law] . . . by establishing some form of international jurisdiction'.[169]

There is no shortage of thoughtful and carefully constructed guides as to how and why to start down the road from concept to practice. Steven Ratner, for example, charts the various forms in which international law has already imposed, or been read to impose, legal duties directly on corporations – from the war crimes cases of Nazi-supporting industrial conglomerates after the Second World War, through duties to respect labour rights under the ILO, environmental obligations mediated by 'polluter pays' and related notions, and international prohibitions on bribery and corruption, to UN sanctions that encompass corporations, and the vast array of legal obligations to which European corporations are subject under the EU's *sui generis* regime of international law.[170] Ratner sees these instances as, together, forming a sound basis upon which to construct a theory of international legal responsibility for corporations that might encompass the responsibility not to infringe human rights, albeit, crucially, of necessarily limited scope. The nature and extent of a corporation's association with the state, its proximity (spatially and legally) to the affected populations, the precise form of the substantive rights at issue, and the need to take into account the peculiarities of corporate structure when seeking to attribute responsibility, must, in Ratner's view, curtail the scope of any international human rights law duties imposed on corporations.[171] Larry Catá Backer's work provides another intelligent guide in respect of the particular matter of what forms these international human rights law obligations might take. Backer, rightly, sees the Norms as but the first, flawed attempt to travel down the road. Their value, he believes, are as a harbinger of changes, already apparent, in the ways corporations are having to operate, and as symptomatic of 'rearrangements in the relative power of systems of domestic, international, public and private systems of governance', by making more visible private economic orderings that were previously invisible.[172] Neither Ratner nor Backer is providing a fully signposted roadmap – nor does either seek to do so –

169 John Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. E/CN.4/2006/97 (22 February 2006), para. 65.

170 Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443, at 477–85.

171 *Ibid.* 497–522.

172 Larry Catá Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger

but their work and that of others does set down markers indicating ways to move forward down what will, inevitably, be a long road.

It may be that with another three years (from June 2008) added to the term of his mandate, and the extension of the mandate itself regarding, in particular, the provision of 'concrete and practical recommendations on ways to strengthen the fulfillment of the duty of the State to protect all human rights from abuses by or involving transnational corporations',[173] the SRSG will be able to develop a consensus for a bolder foray into the international field. Whatever the case, it must be said that the success of any mission will rely on constructive roles being played by all the main interested parties to the debate. Geoffrey Chandler makes a typically politically savvy point in this respect when he remarks that:

> [t]he fulfillment of the special representative's mandate is wholly dependent on the support of three stakeholders – NGOs, companies and governments. He has for the moment skillfully defused the opposition of the corporate world. But the human rights NGOs remain aloof, though the cause of human rights has everything to gain from the fulfillment of the mandate. They have dithered for the two or more years of the post-Norms period without a clear objective or a coherent strategy.[174]

The SRSG remains the most obvious and best-equipped instrument for advancing intelligent, engaged and committed investigation of how to fill the regulatory gaps that exist between domestic and international laws in respect of transnational human rights breaches by corporations, as the patent need, from the victims' points of view, for effective action remains as dire as ever.

Conclusion

In a submission to the UN HCHR inquiry into corporations and human rights in 2004, the US Council for International Business stated that '[t]here is much that business has done and can do to help promote respect for human rights'.[175] This is true and reflects the tenor of this

of Corporate Social Responsibility in International Law' (2006) 37 *Columbia Human Rights Law Review* 287, at 293, and further 356–88.

173 Human Rights Council, *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Resolution 8/7 (18 June 2008), para. 4(a).

174 Geoffrey Chandler, 'Business and Human Rights: One Step at a Time', *Ethical Corporation*, 5 October 2007; at www.ethicalcorp.com/content.asp?ContentID=5420.

175 United States Council for International Business, Submission to the High Commissioner for Human Rights for the report on the 'Responsibilities of Transnational Corporations

chapter: namely, that business and its evident attributes and outputs benefit human rights. However, not only can it and should it do more, but its abuses of human rights – inadvertent, by neglect or design – must be curtailed. As a matter of principle, these are non-negotiable precepts; as a matter of practice, much more needs to be done. Geoffrey Chandler again, with his unique qualifications as both a former senior executive (with Shell) and a leading NGO activist (with Amnesty International) and commentator, is clear about where, ultimately, the burden to act must lie:

> I believe that leadership should come from within the corporate sector. There is indeed moral leadership within individual companies. But there is no collective leadership. Even the best companies, knowing themselves to be human and fallible, are reluctant to stand up and preach to others. And the corporate sector is ill-served on moral issues by its representative institutions such as the International Chamber of Commerce.[176]

Chandler then adds:

> [t]he NGO movement therefore has an opportunity as never before to shape the future. It has yet to seize that opportunity. But that is the challenge.[177]

To complete the picture, one must also stress the singular importance of the role of states in urging, facilitating and, if necessary, coercing corporations better to protect and promote human rights, starting by demonstrating greater vigilance themselves in these respects. The front line will be in corporate boardrooms and management mindsets. Lawrence Mitchell, an eminent corporate law scholar, has argued that CSR and the human rights guarantees it encompasses must be 'something central to the corporation's business, not something the corporation does in addition to business',[178] and as such, he maintains, 'corporate management that looks to the best interests of the business over the long term will largely, if not completely, fulfill many of the goals of CSR'.[179]

Corporate mindsets are changeable in this regard, and, as we have seen, there has been evidence to prove this in recent years, from the now

and Related Business Enterprises with Regard to Human Rights', September 2004 at www.reports-and-materials.org/USCIB-submission-to-UN.pdf.

176 Geoffrey Chandler, 'Business and Human Rights – A Personal Account from the Front Line', *Ethical Corporation*, 11 February 2008, at www.ethicalcorp.com/content.asp?ContentID=5695.

177 *Ibid.*

178 Lawrence Mitchell, 'The Board as a Path toward Corporate Social Responsibility', in McBarnet *et al.* (eds.), *The New Corporate Accountability*, p. 280.

179 *Ibid.* p. 181.

significant involvement of TNCs in embracing CSR and human rights principles at the level of business strategy, engagement with CSR and human rights experts and organisations, and implementation of lessons learned in policies and practices. Significantly, the centrality of CSR to the health and welfare of the global economy was stressed by G8 Heads of State in both their 2007 and 2008 meetings.[180] Such outcomes are preferable to all interested parties – corporate, activist, state, and above all those whose human rights might otherwise suffer. In the end, therefore, underpinning all the initiatives canvassed in this chapter, what will serve human rights best in the field will be if corporations 'pray not for lighter burdens but for stronger backs'.[181] And it will be up to states both to insist upon and assist in the quest.

180 See G8 Summit Declaration, *Growth and Responsibility in the World Economy* 2007; www.g-8.de/Content/EN/Artikel/_g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng,property=publicationFile.pdf, paras 21–9; and G8 Hokkaido Toyako Summit Leaders Declaration, 8 July 2008, www.g8summit.go.jp/eng/doc/doc080714_en.html.

181 Attributed to Theodore Roosevelt.