Liability of Multinational Corporations

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I. INTRODUCTION

The activities of multinational corporations (‘MNCs’) often have a positive effect on economic, social and cultural rights. They provide employment, thus facilitating the right to work. Their innovations can lead to the creation of new products, such as new medicines and computers, which facilitate the enjoyment of the rights to health or the right to education. Corporate employers may voluntarily provide for certain economic and social benefits for their workers, such as the provision of antiretroviral drugs for HIV-positive workers in the developing world, or the provision of education for younger workers. Corporate philanthropy can of course assist millions outside a corporation’s direct sphere of influence. Their investment activities may be assumed to increase wealth, thus increasing the level of affluence in societies, and the ability of people to afford satisfactory levels of economic and social prosperity.1

However, the picture is not all rosy. MNCs are capable of committing acts that detrimentally impact on the enjoyment of economic, social and cultural (‘ESC’) rights. MNCs have been accused of adopting exploitative labour practices, breaching rights to just conditions of work. MNCs are also accused of practices that are antipathetic to trade unions. Poor occupational health and safety (‘OHS’) standards can harm the rights to health of workers, and people in the vicinity of a corporation’s operations. Corporate negligence and/or subsequent cover-ups can unacceptably expose consumers to dangerous goods, such as unsafe automobiles or asbestos products. Poor environmental practices can contaminate food sources, which can harm rights to food and health. Corporate ownership of vital commodities, such as water or the patents in life-saving drugs, may drive the price of essential commodities so high as to price them out of the reach of poor people. This is not to say that MNCs, on the whole, are detrimental for the enjoyment of ESC rights.2 It is to say that MNCs are capable of harming ESC rights in a multitude of ways.

When MNCs perpetrate abuses of human rights, it is to be hoped that they will be held responsible for those abuses. The most obvious source of such corporate accountability is regulation by the government of the territory in which those abuses take place, such as laws regulating labour, OHS, and environmental practices. For example, one might expect liability for the Bhopal disaster in India in 1984, when a Union Carbide plant leaked poison gas and killed and maimed tens of

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1 However, while the increase in MNC activity across the world may have contributed to an increase in world wealth, it has not contributed to a more equal distribution of that wealth. It seems that the benefits of MNC investment flow disproportionately to the richest people, while the very poor receive little to no benefit.

thousands, to be imposed upon Union Carbide by an Indian court enforcing Indian law. It is beyond the scope of this chapter to outline the many examples of MNCs being held liable in domestic litigation for ESC violations that occur within the territory of the State where the litigation takes place.³ Domestic cases concerning transnational violations, that is those that take place overseas, are discussed in Section 3, below.

Unique problems can arise in holding MNCs accountable for abuses of ESC rights. First, it is trite to note that some MNCs are very powerful economic entities. In some cases, MNCs may be more powerful than the countries in which they operate. Certainly, some individual MNCs are more economically wealthy than individual countries.⁴ Some developing nations may perceive that they need corporate investment to attain a satisfactory level of economic development. In such situations, a developing nation may be reluctant to punish corporate malfeasance, fearing that such punishment may repel corporate investment. Indeed, local laws may not prescribe adequate regulations. It is feared that developing countries may be competing with each other to offer attractive labour and environmental regimes to corporate investors, generating a ‘race to the bottom’, which is seriously prejudicing labour rights and those rights prejudiced by environmental degradation.⁵ Essentially, the first problem in holding MNCs accountable for abuses of ESC rights is that accountability is expected to flow from host governments, which may be in a subordinate power relationship with the MNC. It is always problematic for accountability and the rule of law for a less powerful entity to be required to regulate a more powerful entity.

Second, the corporate form of MNCs may facilitate the avoidance of responsibility. Each corporate component of an MNC is a separate legal person, insulating the broader group from liability for the actions of one of its parts. An MNC can allocate its resources and legal responsibilities so as to minimise risk, even if, as is often the case, it in fact operates as a single commercial unit.⁶ Therefore, a vigilant host country may not be able to exercise effective jurisdiction in regard to an abuse perpetrated by an MNC, as it may only have jurisdiction over a local subsidiary that does not have sufficient assets to adequately compensate for its human rights abuses. For example, Indian courts clearly had jurisdiction over Union Carbide’s subsidiary in Bhopal. However, that Indian subsidiary did not have enough money to provide adequate compensation for the disaster. On the other hand, the parent company in New York probably did have sufficient assets. Any Indian judgment against the New York company would have required an Indian court to pierce the corporate veil between the Indian and US companies. If the US company did not comply with the judgment, the Indian court would have had to rely on a US court to enforce the judgment.⁷

Therefore, it is possibly unsatisfactory to rely solely on host States to provide adequate measures of

³ Examples of relevant cases include the string of litigation against James Hardie in Australia regarding its production and sale of asbestos products, resulting in asbestos related diseases in Australia. Such litigation will often take place outside an explicit human rights context. For example, any action against a company regarding its product safety or OHS practices has implications for the ESC rights to health and work. However, the legal arguments made in such a case will focus on the words of the applicable product safety or OHS standards, which might not be drafted in ‘rights’ language.


⁷ See U. Baxi, ‘Geographies of Injustice: Human Rights at the Altar of Convenience’, in C. Scott (ed.), Torture as Tort (Oxford: Hart, 2001), pp. 197–212 at 209. Note, for example, that a judgment against Shell, Dow Chemicals, and Dole Food in the sum of US$ 489 million by a Nicaraguan court was found to be unenforceable by a Californian court on the grounds that the companies were not properly named or legally notified in the originating action. The award of damages was for injuries caused by pesticides that have been linked to cancer and sterility. The pesticide, dibromochloropropane, has been removed from the US market. ‘World Business Briefing Americas: Nicaragua: Pesticide Claim Dismissed’, New York Times, 25 October 2003, p. C.4.
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accountability for MNCs when they perpetrate abuses of ESC rights. I now turn to examine alternative potential sources of accountability.

2. INTERNATIONAL LAW

2.1 Human Rights Treaties

States have duties to respect, protect and promote human rights under international human rights law. The duty to protect human rights entails an obligation to protect people from abuse of their rights by other people, including artificial entities like MNCs. For example, the UN Committee on Economic and Social Rights, the body established to monitor the International Covenant on Economic and Social Rights ('ICESCR'), stated in its General Comment 14 on the Right to Health:\textsuperscript{8}

Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others...\textsuperscript{9}

Though the contours of the State’s duties regarding human rights in the private sphere are underdeveloped in international jurisprudence, it is clear that states can be held to have violated their human rights obligations if they fail to exercise due diligence in preventing or punishing human rights abuses in that sphere.\textsuperscript{9} Thus, States are required, under international law, to prohibit, prevent and punish actions by MNCs that violate ESC rights.

There have been a number of international cases where States have been found to have breached their international ESC rights obligations by unduly favouring corporate interests over those of the complainants. For example, Nigeria has been held to be in breach of the African Charter of Human and Peoples’ Rights by the African Commission on Human and Peoples’ Rights in \textit{SERAC & CESR v. Nigeria},\textsuperscript{10} entailed in its failure to prevent human rights abuses by a consortium conducting oil exploration operations in Ogoniland; the consortium included the Nigerian government, the Nigerian National Petroleum Company (NNPC), and the Shell Petroleum Development Corporation (SPDC), a subsidiary corporation within the global Shell Group. The Commission found breaches of the rights to health and a general satisfactory environment, the right to property, the right to housing, the right to food, and the right to be free from the forced deprivation of one’s wealth and resources.\textsuperscript{11}

Nicaragua has been held to be in breach of the American Convention on Human Rights, in particular the right to property in Article 21 thereof, in \textit{Awas Tingni Community v. Nicaragua},\textsuperscript{12} in granting a South Korean company a concession to conduct logging operations on the lands of the indigenous Awas Tingni community. In \textit{Lubicon Lake Band v. Canada}, the Human Rights Committee, the monitoring body established under the International Covenant on Civil and Political Rights ('ICCPR'), found that the Canadian government had breached the rights of the Lubicon Lake Band indigenous minority to enjoy their own culture by allowing the state of Alberta to expropriate some of their lands for the benefit of private corporate interests (e.g. leases for energy exploration, wood pulping).\textsuperscript{13} In October 2004, the Inter-American Court found a similar complaint against Ecuador, regarding its failure to protect indigenous rights from the activities of an oil company, to be


\textsuperscript{11} See also Concluding Observations of the Committee on the Elimination of Racial Discrimination on Nigeria, UN doc. A/48/18, para 309, 15 September 1993.

\textsuperscript{12} Inter-American Court of Human Rights, \textit{Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua}, Judgment of 31 August 2001 ('Awas Tingni'), available via <http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf> (accessed 27 March 2007). See also chapter 29.5.2 of this book.

admissible in *The Kichwa Peoples of the Sarayaku Community and its Members v. Ecuador.*

There have also been a number of relevant cases before the European Court of Human Rights. For example, in *Lopez Ostra v. Spain*,

14 the Court held that the severe pollution caused by a privately owned waste treatment plant, which constituted a health hazard, breached the rights of persons who lived in the plant’s vicinity to enjoy their private and family life, contrary to Article 8 of the European Convention on Human Rights and Fundamental Freedoms. The State, in that case, had failed to take sufficient measures to control the relevant pollution. The *Lopez Ostra* decision ostensibly concerned civil rights regarding family life and privacy rather than ESC rights such as the right to health, which was clearly relevant on the facts of the case.

Of course, a problem with the above jurisprudence regarding human rights abuses by private actors is that the locus of responsibility remains with the host State. The dissatisfying consequences of that situation were discussed in Section 1. Indeed, it may be noted that the Awas Tingni peoples have filed an *amparo* action against the Nicaraguan government in Nicaraguan courts for its apparent failure to implement the decision of the Inter-American Court of Human Rights.

15 On 27 May 2003, the Lubicon Lake Band released a press statement detailing its disappointment at the Canadian government’s apparent failure to implement the Human Rights Committee’s decision of thirteen years earlier.

16 These developments demonstrate the weakness of the enforcement mechanisms in international human rights law. On the other hand, States may at least be held liable for their failure to appropriately regulate MNCs; a State cannot argue that its inadequate regulation of MNCs is a matter of domestic concern if that inadequacy permits human rights violations by MNCs. The shining of an international spotlight on a State for its failure to regulate MNCs may shame that State into a change of behaviour. It may also have significant consequences for the reputations of the relevant MNCs. It also must be noted that there are only a few international cases on this issue. If States were more regularly held liable in this way, it could potentially make a real difference to the perceived accountability of MNCs for human rights abuses.

It is doubtful that international human rights law has evolved so as to hold States responsible for the activities of their citizens abroad, including corporate citizens.

17 However, such a duty was definitely implied by the Committee on Economic Social and Cultural Rights in its General Comment 15 on the Right to Water in 2002:

18 Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.

This author is not however aware of any instance where a State has been rebuked by the Committee or any other international body for its failure to constrain the human rights behaviour overseas of a corporate citizen. Such duties regarding the extraterritorial behaviour of private bodies are not however unprecedented.

19 The OECD


15 See *Petition no. 167/03, Report no. 64/04, 13 October 2004.* See chapters 28 and 29 of this book.


2.2 Guidelines and Other International Standards

Voluntary guidelines for MNC behaviour have been formulated by a number of international organisations. For example, the UN Global Compact requires MNCs to commit to ten core principles, which relate to human rights, labour rights, environmental protection, and anti-corruption. The Global Compact provides a useful forum for dialogue and information transfer on these issues. However, there is no monitoring of the human rights record of signatory corporations, so no accountability is built into the mechanism beyond some reporting requirements.

The International Labour Organization (ILO) adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1977, which provides clarification of appropriate MNC behaviour regarding labour rights. As with the Global Compact, it is not envisaged that MNCs can be held to account for failure to abide by the ILO Declaration. An ILO procedure for providing interpretations of the Declaration to help resolve disputes over their meaning in the context of actual situations has been established, but is thus far under utilised.

The Organization of Economic Cooperation and Development (‘OECD’) originally adopted its Guidelines for Multinational Enterprises in 1976, and they were revised in 2000. The Guidelines...

Bribery Convention of 1977 requires States parties to exercise jurisdiction over acts of bribery by their nationals, wherever they may occur. Furthermore, UN human rights treaty bodies are increasingly ‘encouraging’ home States to regulate the overseas activity of their companies in the area of human rights. Perhaps such duties are evolving.

Under international human rights law, including the main treaties regarding ESC rights, private entities like MNCs do not have direct duties under international treaties, as they are not parties to them. The continued State-based focus of international human rights law is arguably inappropriate, as State bodies do not have a monopoly on power yet the public/private dichotomy in international law persists. Private parties have few direct duties in international human rights law, excepting those few duties imposed by customary international law, such as the prohibitions on genocide, the most grievous war crimes and crimes against humanity, piracy and slavery. It is doubtful whether any fully-fledged ESC rights per se are accepted as being within this very limited category of rights. In any case, no international tribunal currently has jurisdiction to hold MNCs liable for breaches of ESC rights.

of the Committee against Torture on the USA, confirming the US’s responsibility for the treatment of prisoners in offshore prisons, such as that in Guantanamo Bay, UN doc. CAT/C/USA/CO/2. 18 May 2006, paras. 15–16 and 22.


International criminal law treaties are exceptional in this regard, but do not, as yet, impose liabilities on MNCs as opposed to natural persons. For example, the International Criminal Court only has jurisdiction over natural persons. Of course, proceedings could commence against corporate directors or executives in their individual capacities.


See generally, <www.unglobalcompact.org> (accessed 27 March 2007). UN Global Compact companies are required to publicly communicate with the Global Compact office on their progress in implementing Global Compact norms. If they do not communicate, they are listed on the Global Compact website as non-communicating or inactive companies.


cover some issues of relevance to human rights, though many of its provisions relate to essentially commercial matters; again, the Guidelines are not enforceable. The Guidelines do provide for the establishment by member States of national contact points (‘NCPs’) to promote the Guidelines nationally, and to deal with complaints that may arise in respect of the Guidelines. The effectiveness of an NCP depends upon the powers conferred by the relevant government, and the type of personnel within it. For example, the setting up of NCPs within economic ministries might risk ‘capture’ by corporate interests. Non-governmental organisations are increasingly raising complaints with NCPs regarding the behaviour of MNCs, including complaints relating to ESC rights. In dealing with such cases, NCPs generally attempt to facilitate agreement between the parties. The NCPs have no power to enforce the Guidelines. Nevertheless, NGOs may make use of NCP proceedings to publicise and mobilise campaigns against companies, to enter into meaningful dialogue with companies, and to conciliate settlements with companies. NCPs have the capacity to become, and indeed are, an important part of the developing matrix of corporate accountability.

In August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (‘the Norms’). Paragraph 1 of the Norms suggests that, while State retain the primary obligations with regard to human rights, companies have human rights obligations within ‘their respective spheres of activity and influence’.

Paragraph 12 makes clear that these duties include ESC rights obligations:

Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.

It is envisaged in Part H of the Norms that these duties will be enforceable in a variety of ways, including, in Paragraph 18, enforcement by national courts and international tribunals. Therefore, an MNC’s enforceable duties with regard to ESC rights, according to the Norms, extend to their ‘spheres of activity and influence’. This key term is not comprehensively defined in the Norms. Some guidance is given in Paragraph (b) of the Commentary on Paragraph 1 of the Norms:

Transnational corporations and other business enterprises shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware. Transnational corporations and other business enterprises shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights. Transnational corporations and other business enterprises shall inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses. The Norms may not be used by States as an excuse for

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29 The Guidelines have been adopted by OECD nations as well as some non-OECD nations, namely Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia.


32 For example, one complaint against Adidas related to labour issues in the Indian football industry. Another complaint against three mining companies related to resettlement in Zambia. See ‘Table of Cases’, ibid.


34 See also ibid. paras. 5-9 (rights of workers), 10, 13, and 14.
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failing to take action to protect human rights, for example, through the enforcement of existing laws.

Therefore, it was clearly envisaged in the Norms that an MNC’s human rights obligations, including its obligations regarding ESC rights, will extend beyond merely negative duties (the duty to refrain from abuses) and will also encompass positive duties (the duty to take actions to prevent rights violations and, on occasion, enhance the enjoyment of human rights).

In April 2005, the UN Commission on Human Rights resolved to appoint a Special Representative, Harvard Professor John Ruggie, to investigate and clarify various aspects of the relationship between MNCs and human rights, including identification of appropriate human rights standards, including of course ESC standards.35

In the Special Representative’s interim report, issued in February 2006, the Special Rapporteur was very critical of the Norms in two respects.36 First, the Special Representative argues that the Norms suffer from doctrinal excesses in presuming to identify direct obligations for MNCs, which simply do not exist. With respect, it is submitted that this first criticism entails a misreading of the Norms: the Norms are not a binding document and therefore cannot, despite their language, impose direct obligations. They are more an expression of the obligations that MNCs should have, and which might come to be accepted under international human rights law, according to the authors of the Norms. The second criticism is that the Norms are unhelpfully vague with regard to the split of responsibilities between States and MNCs. In that respect, it must be noted that part of the Special Representative’s mandate was to undertake such clarification.

Whilst it is premature to say that the Special Representative has ‘killed’ the Norms, his subsequent reports have certainly diverted the spotlight from them. His 2008 report37 refocuses attention on the need to strengthen and clarify the duty of States to protect people from corporate human rights abuses, a clear retreat from the idea of international direct regulation of companies envisaged in the Norms. The report also acknowledges the possible development of home State duties, and is neutral on that issue. Certainly, there is scope for cooperation between home States and a host State when the latter lacks the financial and technical resources to regulate MNCs.38

The report goes on to outline the appropriate content of legally enforceable corporate duties that should be imposed by States, namely the ‘duty to respect’ human rights: corporations should be expected to refrain from harming human rights, or remedy abuses that they perpetrate. The Special Representative does not envisage that corporations should have binding duties to improve a human rights situation, but their operations should at least be human rights neutral. The duty to respect does not merely entail negative duties, as fulfilment of such duties will not realistically result in the non-occurrence of harm; companies would therefore have to exercise due diligence to prevent human rights harm.

The Special Representative adds that a corporation’s ‘duties to respect’ will be enforced by ‘social expectations’, rather than only by legally imposed obligations. Therefore, he prompts corporations to respect human rights even in the absence of legal obligations, a situation which arises when a State fails in its duties to appropriately regulate a company, or in numerous grey or ambiguous zones which will inevitably continue to exist at the margins of a ‘duty to respect’. “Social expectations” help to prevent legal obligations from becoming a ceiling as opposed to a floor for corporate human rights impacts.39

38 Ibid. para 45.
39 Ibid. para 55. The power of ‘social expectations’ in the MNC/human rights debate should not be underestimated, and may impact beyond the duty to respect human rights. Many MNCs are highly dependent on their reputations for their success and therefore are susceptible to moral arguments. For example, it is unlikely that charitable contributions by MNCs to disaster relief (unless an MNC causes the disaster) would be part of an MNC’s duties to ‘respect’ human rights. Yet Australian companies were undoubtedly ‘shamed’ into making or increasing their charitable contributions to tsunami aid appeals. See, e.g., S. Creedy, ‘Lonely Planet Challenges the Big End’, The Australian, 31 December 2004, p. 6; G. Elliot, ‘PM Urges Big Business to Dig Deeper’, The Australian, 3 January 2005, p. 6; A. McDonald, ‘Call for Companies to Give’, The Australian, 5 January 2005, p. 9; G. Elliot, ‘Big
Finally, the Special Representative focuses on the need for remedies to be devised to redress corporate breaches of the duty to respect human rights. Such remedies should essentially be provided by States, including in judicial and appropriate non-judicial forums. Less formal mechanisms, such as internal company grievance procedures and multi-stakeholder initiatives (eg initiatives adopted between companies, NGOs, and States) can help to fill accountability gaps, but they cannot be used to thwart the development of legal accountability. They can however help to give effect to the above-mentioned 'social expectations'.

The rejection by the Special Representative of the development of directly binding international norms for companies is probably a disappointment to many human rights activists worldwide. However, his approach of seeking clarification of the duties that States are required to impose on companies may yield a similar result to the clarification of directly binding duties for companies which had been envisaged in the Norms. The ultimate source of corporate accountability remains international law: indirect in the first instance and direct in the second. The practical difference between the two approaches is diminished by the fact that enforcement, at least in the short to mid term, can only emanate from State institutions, due to a lack of appropriate international forums. Of course, a major difference between the two approaches is that only the State is directly responsible in international law if breaches arise with Ruggie's approach, whereas shared responsibility between State and corporation was anticipated in the Norms. However, if States are vigorously pursued in international forums, such as existing human rights institutions, for their failure to regulate a particular company, that circumstance could hardly reflect well on the relevant company. Indeed, that company could expect to face global condemnation.

Interestingly, the Special Representative leaves open the possibility of an 'international ombudsman' which could act as a backstop to receive complaints. Such a body could play an important enforcement role if it had the power to make decisions that a company has in fact violated (or has not violated) human rights. Whilst international enforcement would likely be lacking, the decisions of such a body, so long as it commanded sufficient respect from States, business and civil society, could have an important shaming (or exonerating) effect. Shame could have a significant galvanising effect on a company, particularly one which relies on its brand to attract customers.

2.3 International Trade and Investment Mechanisms: MNC Rights

The flipside of the absence of direct duties for MNCs in international law is that they are conferred significant benefits or rights under certain international trade and investment mechanisms. MNCs, as the main engines of global trade, are the indirect beneficiaries of the World Trade Organisation's drive to break down free trade barriers, though it is reliant upon States to enforce those rights. MNCs do have standing to directly enforce their rights under certain regional (such as Chapter 11 of the North American Free Trade Agreement [NAFTA]) and bilateral investment treaties [BITs]. For example, an Italian company has challenged South Africa's 'black economic empowerment' laws, designed to provide economic advantages to South Africa's historically disadvantaged black community, under a BIT between Italy and South Africa. The case will be heard by the International Centre for the Settlement of Investment Disputes (ICSID).

A previous case before ICSID, in which corporations sued a State over actions that may have in fact protected ESC rights, was brought by water companies against Bolivia for breach of contract under a bilateral investment treaty ('BIT') between

41 A number of cases have clearly been brought by States on behalf of their companies, such as the so-called 'Kodak/Fuji' case: see Jeffrey L. Dunoff; 'The misguided debate over NGO participation at the WTO' , (1998) 1 Journal of International Economic Law 433, 441–448. The official name of the case is Japan-Measures Affecting Consumer Photographic Film and Paper WT/DS44/R, 31 March 1998.
42 Piero Foresti, Lauro de Carli and others v. Republic of South Africa, ICSID Case no. ARB(AF)/07/1.
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the Netherlands and Bolivia for US$ 25 million. The case arose out of a disastrous attempt to privatise water supply in Cochabamba, Bolivia. The privatisation tender was awarded to Aguas del Tunari, a company owned by International Water (a Dutch company) and Bechtel. Subsequent massive price increases in water resulted in riots. Staff at Aguas del Tunari abandoned the operations, as their safety could not be guaranteed. The Bolivian government eventually cancelled the contract, and the companies commenced the suit under the BIT. The suit was dropped on 19 January 2006, when the water companies abandoned their claims. The Democracy Center, NGO which ran a strong campaign against Bechtel throughout the currency of the ICSID case, claimed:

This is the first time that a major corporation has ever dropped a major international trade case such as this one as a direct result of global public pressure, and it sets an important precedent for the politics of future trade cases like it.43

For its part, Bechtel claimed that the suit was dropped as soon as it received an unambiguous admission that the concession failed due to civil unrest, rather than any fault of the companies.

It is uncertain whether States have yet submitted explicit human rights arguments in relevant cases, given that most relevant cases, such as that mentioned above regarding South Africa, are pending. NGOs have submitted amicus briefs in a number of international trade and investment cases in which they use human rights arguments to defend the actions of the respondent states.44 Indeed, an ICSID tribunal has affirmed its power to accept amicus briefs from NGOs in the Suez/Vivendi case, despite an objection from one of the parties.45 Human rights arguments have thus been used as a shield in international cases involving MNCs, but not yet as a sword. It is uncertain whether they will operate as an effective shield in the face of international investment rights. On the other hand, the harsh spotlight of civil society pressure may have the potential to be a substitute shield, as arguably demonstrated in the Bechtel case.

3. TRANSNATIONAL LITIGATION

If it is unsatisfactory for legal accountability for MNC activity to arise solely from the government with territorial jurisdiction over that activity, an alternative source of MNC accountability arises from extraterritorial regulation by other governments. In the last decade, there has been a marked growth in the instances of transnational litigation against companies regarding their offshore activities.46 Such litigation has normally occurred in the MNCs’ home State.47 While home States may not have an international legal duty to regulate the overseas activities of their companies, they may nevertheless choose to do so.48

3.1 Alien Tort Claims Act (US)

A notable source of such ‘transnational accountability’ is the ancient US statute, the Alien Tort Claims Act 1789 (‘ATCA’), which grants aliens rights to sue people in US federal courts for breaches of the ‘law of nations’.49 Almost all ATCA cases have involved allegations of human rights abuse. Numerous MNCs are currently being sued under ATCA with regard to allegations about their behaviour in developing countries. Clearly, a key to this statute is the interpretation by courts of the concept of ‘the law of nations’. Generally, US courts have found that a breach of the law of nations entails a breach of customary international law.50 An alternative formulation

45 See <http://www.ciel.org/Tae/ICSID_AmiciusCuriae_1Jun05.html> (24 May 2008). The case concerns a dispute regarding a contract for water privatization in Argentina. The relevant foreign investor unsuccessfully objected to the acceptance of the NGO briefs.
47 Some cases in the US have concerned the overseas actions of non-US companies; see, e.g., Wiwa v. Royal Dutch Petroleum No. 96 Civ. 8386, 2002 US Dist LEXIS 3293 (SDNY 2002, Unreported), regarding the actions of Shell, an Anglo-Dutch company.
49 Filartiga v. Pena-Irala 630 F 2d 876 (2d Cir 1980).
50 See Joseph, ‘Corporations’ (n. 55 above), p. 23, n. 16. The customary law standard was confirmed by the US
is that the relevant breach of international law must be "definable, obligatory and universally condemned." It seems that this latter formula is simply a method by which US courts have attempted to translate the test for identifying customary international law into a domestic context.

In ATCA jurisprudence to date, only a small group of the most egregious civil and political rights violations have been found to breach "the law of nations." In contrast, allegations regarding egregious environmental damage and breaches of ESC rights have been found to fall outside the ATCA. For example, in *Flores v. Southern Peru Copper*, the Court of Appeals for the Second Circuit stated, with regard to the customary international law status of the right to health:

As noted above, in order to state a claim under the ATCA, we have required that a plaintiff allege a violation of a "clear and unambiguous" rule of customary international law. . . . Far from being "clear and unambiguous," the statements relied on by plaintiffs to define the rights to life and health are vague and amorphous. . . . These principles are boundless and indeterminate. They express virtuous goals understandablely expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them. But in the words of a sister circuit, they "state abstract rights and liberties devoid of articulable or discernable standards and regulations." The precept that "[h]uman beings are . . . entitled to a healthy and productive life in harmony with nature," [Rio Declaration, Principle 1] for example, utterly fails to specify what conduct would fall within or outside of the law. Similarly, the exhortation that all people are entitled to the "highest attainable standard of physical and mental health," [ICESCR, article 12] proclaims only nebulous notions that are infinitely malleable.

By concentrating on the bare words of international treaties, the *Flores* decision fails to recognise the enormous amount of work that has been done to clarify the meaning of the rights in those treaties, such as the adoption by the Committee on Economic and Social Cultural Rights of a detailed General Comment on the Right to Health. However, given the history of US scepticism over the validity of ESC rights as "rights," and that country’s failure to ratify the ICESCR, it is not surprising that US courts have failed to classify ESC rights as falling within the inner core of human rights protected by custom.

Furthermore, the relevant breach of the law of nations under ATCA normally must include an element of "State action." That is, breaches of the law of nations are normally only found if a government is somehow involved in the breach. This requirement arises from the fact that international law, including the law of nations, has generally evolved as a system that binds governments rather than non-governmental actors. Therefore, in the cases against MNCs, an element of State complicity in a violation perpetrated by an MNC, or MNC complicity in a violation by a State, must normally be present on the facts. This requirement again narrows the range of human rights abuses for which a corporation can be held liable under ATCA.

It therefore seems that ATCA does not offer a remedy to victims of ESC violations by MNCs. However, ATCA is relevant where the relevant ESC violation can be simultaneously characterised as a breach of a civil and political right that forms part of the law of nations. For example, the rights to

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54. See Joseph, ibid, pp. 26–7. The exception is that breaches of the UN Convention on the Law of the Sea have been found to violate the law of nations: see *Sarei v. Rio Tinto* 221 F Supp 2d 1116 (CD Cal, 2002), 1162 and 487 F 3d 1193, 1210 (9th cir, 2007). Cf chapter 12 of this book.

55. 406 F 3d 65, 86 (2d Cir 2003). The case concerned allegations of environmental damage that was so extreme as to amount to violations of the rights to life, health and sustainable development.


58. There are a few exceptional violations of the law of nations that, according to US courts, can arise in the absence of State action. Thus far, those violations are: the right to be free from genocide, certain war crimes, piracy, slavery, forced labour, and aircraft hijacking. See Joseph, ‘Corporations’ (n. 55 above), p. 48, ns. 206–208.
be free from slavery and forced labour have been classified as being protected under ‘the law of nations’.\(^{59}\) These violations constitute breaches of Article 8 of the ICCPR, but are also particularly egregious violations of Article 7 of the ICESCR, the right to just and favourable conditions of work. On the other hand, the court in In re Agent Orange Product Liability Litigation found that the deliberate use of a herbicide in the Vietnam war for military purposes, which had grave and long-term effects on the health of affected Vietnamese people, was not recognised as a war crime or any other type of breach of customary international law at the time of its use (which finished in April 1975).\(^{60}\)

### 3.2 General Tort Law

There are other bases for transnational causes of action that have not attracted the same publicity as ATCA. MNCs can be sued under ordinary tort law for their overseas activities in the US and other common law countries.\(^{61}\) Human rights abuses will often equate with a tort, even if the language of tort may not reflect the egregiousness of the human rights violation. Tort law formed the basis for actions against Texaco,\(^{62}\) Freeport McMoran\(^{63}\) and Southern Peru Copper\(^{64}\) for alleged egregious environmental harm in, respectively, Ecuador, West Papua, and Peru, resulting in deprivation of ESC rights such as the rights to health and food. A similar action commenced against BHP in Australia in Dagi v. BHP\(^{65}\) regarding environmental damage in the Ok Tedi river basin in Papua New Guinea.

Apart from the above-mentioned environmental cases, tort law has also formed the basis of cases regarding OHS, with plaintiffs alleging that the defendant company has negligently, or even knowingly, adopted substandard OHS regimes in its offshore operations, leading to consequent health problems for workers and/or people in the vicinity of those operations. For example, tort has formed the basis of complaints against Shell Oil and Dow Chemicals for their continued production and use of a pesticide, dibromochloropropane (‘DBCP’), on banana plantations in the developing world, despite their knowledge that DBCP had been banned in the US for causing sterilisation to those exposed.\(^{66}\) A claim was brought in the US against Union Carbide regarding the Bhopal industrial accident.\(^{67}\) Finally, a number of actions have been brought against MNCs in the UK, alleging severe harm to the health of workers caused by deficient OHS standards in the operations of their African subsidiaries.\(^{68}\)

### 3.3 Procedural Obstacles to Transnational Litigation

None of the above-mentioned cases against MNCs, including the ATCA cases, have been finally
decided on the merits. The cases have largely stalled due to the numerous preliminary challenges raised by the corporate defendants, which have taken some time to resolve, and have often led to dismissal of the case. So far, cases have tended to settle if plaintiffs make it through the minefield of preliminary hearings. I will discuss two bases for such preliminary challenges: *forum non conveniens* and the corporate veil.

In almost every transnational human rights case against a company, the corporate defendant has sought to have the case dismissed on the basis of the common law doctrine of *forum non conveniens* ('FNC'). This doctrine may be applied at a judge's discretion to dismiss a case on the basis that the case should properly be heard in another jurisdiction. Given that transnational human rights cases against companies involve allegations regarding actions or consequences in another country, there is clearly scope to argue that the case should properly be heard in that other country.

In the US, a defendant must establish that there exists an adequate alternative forum for the litigation, and that the balance of private and public interests favours litigation in the alternative forum rather than in the US, in order to persuade a court to dismiss a case on the basis of FNC. FNC arguments are becoming less successful in ATCA cases, as judges are increasingly willing to recognise that the alternative jurisdiction in an ATCA case, which necessarily involves allegations of extreme human rights abuses and normally involves allegations that the relevant foreign government is involved in that abuse (due to the State action requirement), may be too corrupt or dangerous for a plaintiff to proceed in.69 In ATCA cases, judges are also willing to recognise the US policy interests in providing a forum to avail plaintiffs of human rights remedies under ATCA.70 However, most of the above-named US cases based on ordinary tort law have been dismissed on the basis of FNC.71 As state action is not necessarily present in the ordinary tort cases, there is less scope to argue that the alternative forum is too dangerous or corrupt to provide an adequate forum for the purposes of FNC arguments.

An encouraging sign for non-ATCA plaintiffs is the decision in *Martinez v. Dow Chemicals*, one of the more recent cases in the DBCP litigation.72 In *Martinez*, Barbier J decided not to dismiss the case on the grounds of FNC for two reasons. The relevant alternative forums were Costa Rica, Honduras and the Philippines. First, Barbier J found that the courts in the latter two jurisdictions were too corrupt and beset by inefficiency to constitute an adequate alternative forum.73 Second, Barbier J found that none of the three countries was an available alternative forum. All three countries had enacted legislation, that prohibited the commencement of a suit if that suit had already been commenced in an alternative jurisdiction.74 By definition, a suit that has been dismissed for FNC has been previously commenced elsewhere. Indeed, it seems that such legislation is designed to thwart FNC arguments and prevent the US from dumping mass tort cases on lesser developed legal systems.75 Such legislation, which is common in Latin America, may effectively trump FNC arguments. Note however that an argument regarding a similar law in Ecuador failed to fend off an FNC dismissal in *Aguinda v. Texaco*.76 In his decision, Rakoff J doubted the validity of the Ecuadorian law, Law 55, under Ecuador's Constitution.77 However, Rakoff J conceded that the court could reconsider the issue of FNC if the case should be dismissed in Ecuador on the basis of Law 55.78 At the time of writing, a parallel suit had indeed commenced in Ecuador.79

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70 Ibid. pp. 92–96.
72 219 F Supp 2d 719 (ED La 2002). In this case, Costa Rican, Honduran and Filipino workers sued a chemical company for producing a fertilizer that caused sterility on banana plantations.
73 Ibid. pp. 737 and p. 740.
74 Ibid. pp. 728, p. 735, and p. 741.
76 In *Aguinda v. Texaco*, Inc 142 F Supp 2d 534 (SDNY 2001), Peruvian and Ecuadorian nationals sued a parent oil company for property damage, personal injury and risk of disease from alleged negligent pipeline management by Texaco subsidiaries in Peru and Ecuador.
77 Ibid. p. 547.
78 Ibid. p. 547.
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Therefore, the status quo in the US is that FNC poses a formidable hurdle for plaintiffs in transnational human rights cases against MNCs, especially if the jurisdictional basis for the case is not ATCA, which will normally be the case in suits involving ESC rights violations. However, the emergence of 'retaliatory legislation' in a number of developing countries may stave off FNC dismissals.

In Australia, FNC is less of a problem for plaintiffs. The test for FNC dismissal is significantly stricter: an Australian court must be a 'clearly inappropriate forum' for the litigation. This is a more difficult test to satisfy than in other common law countries, where there simply must exist a 'more appropriate' alternative forum. The strictness of the Australian test may explain why FNC was not accepted in Namibia and South Africa, whereas it has been in the UK. The test for FNC dismissal is significantly stricter: in the UK, the test for FNC used to be closer to the Australian test. In particular, the plaintiffs in both cases were felt to be in need of free legal counsel in order to run their cases. Legal aid, or free legal counsel on some other basis such as contingency, was available in the UK but not in the respective African jurisdictions. It seems that the argument was true of South Africa was a more appropriate forum for the litigation.

The arguments regarding FNC in the IJK have now become largely moot. Owusu v. Jackson, a 2005 decision of the European Court of Justice (‘ECJ’), concerned the application of Article 2 of the Brussels Convention, to which all members of the EU are party. Article 2 provides that defendants domiciled within the EU may be sued in their domiciliary State. In Owusu, the ECJ confirmed that it does not matter if the case has a strong connection with another jurisdiction, including a State that is not party to the Brussels Convention. Thus, in both Connelly and Lubbe, the plaintiffs had tried to get around the FNC argument by suing the parent companies for their alleged negligent failure to adequately supervise the OHS policies of their African subsidiaries. On that analysis, the true sites of the torts in both cases were the board-rooms in the UK rather than the subsidiary operations in Africa. It seems that the argument was not accepted in Lubbe, as in that case South Africa was found to be a more appropriate forum from a purely geographic point of view. It is unlikely to have been deemed a more appropriate geographic forum if the court had accepted that the UK was the true site of the relevant tort. In Ngcobo v. Thor Chemicals Holdings Ltd, an unreported case again concerning poor OHS standards in Africa by a UK-based MNC, a similar argument appears to have been accepted by the Court, thus leading to rejection of an argument that South Africa was a more appropriate forum for the litigation.

83 See P. Prince, ‘Bhopal, Bougainville and Ok Tedi: Why Australia’s Forum Non Conveniens Approach is Better’, International and Comparative Law Quarterly, Vol. 47 (1998), pp. 573–598. See also Renault v. Zhang (2002) 210 CLR 491 (High Court of Australia). 84 In Connelly, the arguments located the torts in both the UK and Namibia, so the Court was not called upon to decide whether the UK was the ‘true’ site of the tort. 85 Mr. James Stewart QC, sitting as a Deputy Judge of the High Court, in Ngcobo v. Thor Chemicals Holdings Ltd, unreported judgment of 11 April 1995, implicitly accepted that the alleged tort arose in England with the decisions of the parent company rather than in South Africa with the implementation of those decisions (transcript at 20).

86 Case C-281/02, (1 March 2005) (Grand Chamber of the European Court of Justice).

FNC, a common law doctrine that never applied in most of the EU, can no longer apply in the UK to dismiss cases against defendants domiciled in the UK, regardless of the strength (or weakness) of the connection between the case and the UK. The UK has therefore become a more attractive forum for transnational human rights litigation.

In most of these cases, the parent company is being sued in its home state with regard to the alleged actions of an offshore subsidiary. The parent company will naturally argue that it is a separate legal entity from its subsidiary, and is therefore not involved in the alleged human rights abuse. Such an argument led to the dismissal of a case against Freeport McMoran in *Alomang v. Freeport McMorran*, where the Louisiana Court of Appeal found that the New Orleans based parent could not be held liable for the alleged actions of its Indonesian subsidiary. Arguments regarding the corporate veil probably also influenced the decision by Rakoff J in *Aguinda v. Texaco*, where the judge found, in a decision to dismiss the case on the basis of FNC (see above), that there was not ‘a meaningful nexus between the US and the decisions and practices’ in Ecuador that were the subject of the suit.

As noted above with regard to the UK cases, plaintiffs have occasionally directly targeted the actions and omissions of parent companies in an attempt to get around the corporate veil, and also to thwart FNC arguments. Such issues can only be resolved on the merits, and no salient case has yet been decided on the merits. Most courts in these cases have been prepared to assume that the subsidiary company is an alter ego of the defendant parent for preliminary purposes. However, the issue of separate corporate personality is likely to be reopened on the merits in most of the salient cases. It may be that the corporate veil will prove to be a greater obstacle for plaintiffs than FNC.

Transnational human rights litigation is in its formative stages, and potentially provides an important avenue of redress for the victims of ESC abuses by MNCs. This avenue however is littered with preliminary obstacles, such as arguments regarding FNC and the corporate veil. Nevertheless, such litigation provides an important alternative to international legal processes, which lack efficient enforcement mechanisms, and host state processes, which may be neither adequate nor realistically available in some circumstances. The potential effectiveness of transnational litigation is evinced by the concern that MNCs have over such litigation. For example, business groups have lobbied the US government to repeal the ATCA. Furthermore, several high profile cases have been settled. Settlement has prevented merits decisions which could set broad precedents binding on all MNCs, but have at least provided the relevant plaintiffs with some measure of redress for their suffering.

On the other hand, merits decisions have also been thwarted by numerous dismissals on procedural grounds. At the time of writing, no merits decision had been delivered in a transnational human rights case against a company.

4. CONCLUSION

MNCs are not inherently antagonistic to ESC rights. Indeed, many MNCs are taking the concept of ‘corporate social responsibility’ seriously by voluntarily performing above and beyond that required by law to assist in the enhancement of the enjoyment of ESC rights. Of course, the record of MNCs in this regard is not perfect. When ‘things go wrong’ and ESC rights are violated due to MNC operations, those MNCs should be accountable for those violations. Violations will proliferate if there are no consequences for them.

At present, the most likely source of accountability is the laws of the host state in which the violations

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89 811 So 2d 98 (La App 2002). In this case, Indonesian nationals unsuccessfully sued a parent mining company for its subsidiary’s activities, which allegedly constituted cultural genocide, environmental damage and human rights abuses, under the Louisiana equivalent of the ATCA.


92 The cases in *Lubbe v. Cape Plc*, *Dagi v. BHP*, and *Doe v. Unocal* have now been settled. For example, see <http://www.earthrights.org/legal/unocal/> (accessed 24 May 2008) for details of the Unocal settlement.
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occur. In many situations, those laws will suffice to appropriately punish a delinquent MNC. However, given the unique power and mobility of MNCs, and their ability to manipulate risks and liabilities within their corporate structures, it is important that alternative sources of accountability beyond the borders of host states be developed.

With the adoption of the Norms in 2003, momentum seemed to be building for the adoption of enforceable international human rights duties for MNCs. However, the UN Special Representative seems to have abandoned that route for now. Instead, he recommends clarification and strengthening of the duties of States, possibly including home States, to provide for and enforce human rights duties for corporations.

Victims of ESC rights violations have increasingly sought to hold MNCs accountable in transnational litigation. While plaintiffs have had to withstand a barrage of preliminary challenges in the salient transnational cases, some cases have been settled leading to the delivery of a measure of redress to victims, and other cases are ongoing, with possibilities for further redress and vindication.

Of course, litigation, whether it takes place in host states, home states, third party states, or international forums, only represents ‘the tip of the iceberg’93 of ESC abuses by MNCs. Many victims lack the resources or ability to bring such cases. It is therefore important that legal sources of accountability continue to be supplemented by informal non-legal sources of pressure, such as that exercised by NGOs, consumers, the media, investors, employees, and shareholders.