HEALING THE BLIND EYE?

USING THE UNITED NATIONS

PROTECT, RESPECT, REMEDY FRAMEWORK

TO ACHIEVE ACCOUNTABILITY FOR CORPORATE

COMPLICITY IN HUMAN RIGHTS ABUSE

Catherine Brooks

Thesis submitted for the degree of
Doctor of Philosophy
In the
Discipline of Politics
School of History and Politics
The University of Adelaide

October 2011
## CONTENTS

Abstract ................................................................................................................ v  
Declaration ......................................................................................................... vii  
Acknowledgment ............................................................................................... viii  
Acronyms ............................................................................................................ ix  

### INTRODUCTION ...................................................................................................... 1  
The context of the thesis .................................................................................. 2  
Global Financial Crisis .................................................................................. 3  
A review of the literature: current themes and debates .................................... 5  
The developing role of international criminal law ........................................ 6  
The concept of corporate complicity ............................................................. 6  
The call for accountability ............................................................................ 7  
The failure of existing mechanisms .............................................................. 8  
Holding corporations or their officials accountable ..................................... 10  
International law: direct or indirect obligations? ........................................ 11  
Research Methodologies and Structure of the thesis ..................................... 11  

### CHAPTER 1: SEEING AND UNDERSTANDING CORPORATE COMPPLICITY .......... 19  
Seeing Corporate Complicity ......................................................................... 20  
Provision of goods and services ................................................................. 21  
Engaging security forces who commit abuse ............................................. 27  
Formal business partnerships with repressive regimes .............................. 31  
Irresponsible marketing .............................................................................. 33  
Supply chain complicity .............................................................................. 34  
Understanding Corporate Complicity ............................................................. 35  
Corporate complicity as a moral concept ................................................... 37  
Corporate complicity as a legal concept ..................................................... 40  
Corporate complicity: seen and understood? ............................................. 56  

### CHAPTER 2: RESPONSES TO CORPORATE COMPPLICITY: ........................................ 57  
Responding to the Challenge ......................................................................... 57  
The Business and Human Rights Agenda ..................................................... 59  
The United Nations Global Compact .......................................................... 59  
The OECD Guidelines for Multinational Enterprises ................................... 62  
Industry Initiatives ...................................................................................... 63  
Norms on the responsibility of Transnational Corporations and other business enterprises with regard to human rights ......................................... 65  
The Special Representative’s Report ............................................................ 73  
A review of the developments ........................................................................ 80  

### CHAPTER 3: THE STATE DUTY TO PROTECT: ........................................................ 82  
The Duty to Protect and the Existing Governance Gaps ................................ 82  
Components of the Duty to Protect ............................................................... 84  
Safeguarding the ability to protect human rights ........................................ 84  
Considering human rights when engaging with business ......................... 88  
Fostering a corporate culture of respect..................................................... 92
ABSTRACT

This thesis considers the widespread and extensive issue of corporate complicity in human rights abuse, and ways of holding corporations accountable for this involvement. It is framed around the United Nation's Protect, Respect, Remedy Framework (the Framework), which was proposed by the Special Representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie (Special Representative) on 18 June 2008. The thesis will examine the Framework from a human rights perspective.

The Human Rights Council has adopted the Framework as a conceptual policy framework that will be used as a foundation for policy development on the issue of corporate human rights abuse, including corporate complicity. The Framework rests on three pillars: first, the State’s duty to protect from human rights abuse, including those caused by business and the corresponding enforcement mechanisms including policies, regulation and adjudication; second, the corporate responsibility to respect human rights, which requires business to avoid involvement in human rights abuse complying with the law and by exercising due diligence; and third, ensuring victims and survivors have access to effective remedies, both judicial and non-judicial. In adopting the Framework, the Human Rights Council has, for the first time, enunciated a policy position on the issue of corporations and human rights. It is intended that regulation will stem from the Framework, and the goal of regulation is the protection and perseverance of all human rights. This thesis is structured around the Framework.

The influence and power of corporations continues to grow. As the process of globalisation and economic interdependence has increased, so too has market deregulation. Many transnational corporations are far more economically powerful than States; by the year 2000, corporations made up 51 of the top 100 economies in the world.1 The power of corporations can be overwhelming, and corporations’ activities can have severe consequences for human rights. Despite

this, only a fraction of the 70,000 transnational corporations around the world have moved toward any implementation of human rights standards within their companies.

This thesis will argue that the harm caused by corporate complicity in human rights abuse is a remediable injustice, and given the political will, the mechanisms to hold corporations to account can be developed, and existing mechanisms can be made more effective. Both international law and international relations will have important roles to play as this area of regulation develops. As such, it is an area of research and development that calls for and requires collaboration and joint research between political scientists and lawyers.
DECLARATION

This work contains no material which has been accepted for the award of any other degree or diploma in any University or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

I give consent to this copy of my thesis, when deposited in the University Library, being made available for loan and photocopying, subject to the provisions of the Copyright Act 1968.

I also give permission for the digital version of my thesis to be made available on the web, via the University’s digital research repository, the Library catalogue, the Australasian Digital Theses Program (ADTP) and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

Catherine Brooks
Date:
ACKNOWLEDGMENT

Many people supported me through this long, but ultimately satisfying, journey. Firstly, I would like to thank my principal supervisor, Associate Professor Felix Patrikeeff, for the professional guidance he has provided me. He has provided me with much encouragement, and for that I am grateful. I would also like to thank Dr Laura Grenfell of the Law School, University of Adelaide, who was my co-supervisor for much of my candidature. Laura provided me with moral support and advice, and I appreciated her patience and her words of encouragement. I am grateful for Laura’s comments and feedback in relation to this thesis. Thanks are also due to Dr Anthony Burke, who was my initial principal supervisor. I would like to thank him for his enthusiasm, guidance and support through those early days of candidature.

I am fortunate to have been given the opportunity to write this thesis, and would not have been able to do so without the financial assistance provided by an Australian Postgraduate Award. I am grateful to the academic staff in the Discipline of Politics and the Law School, University of Adelaide and the School of International Studies, Flinders University, for the opportunity to teach in their courses. This rewarding experience provided me with additional financial support during my candidature, as well as contributing to my professional development.

I am greatly indebted to my friends and family, particularly to my parents, for the constant love and support they have shown me over the years as I researched and wrote this thesis. I am extremely fortunate to be surrounded by such warm, caring and wonderful people.

My heartfelt thanks must go to my husband Josh. He has been by my side for the entire journey, and I could not have completed this without his support. He has encouraged me to continue when I doubted myself, and I am grateful for his love, patience and understanding. Finally, special thanks to our beautiful baby boy Tom, who has kept me company through the editing process.
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFP</td>
<td>Australian Federal Police</td>
</tr>
<tr>
<td>ATCA</td>
<td>Alien Tort Claims Act</td>
</tr>
<tr>
<td>CSR</td>
<td>Corporate Social Responsibility</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
</tr>
<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
</tr>
<tr>
<td>GSK</td>
<td>GlaxoSmithKline</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
</tr>
<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
</tr>
<tr>
<td>IFC</td>
<td>International Finance Corporation</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
</tr>
<tr>
<td>HRIA</td>
<td>Human Rights Impact Assessment</td>
</tr>
<tr>
<td>MOGE</td>
<td>Myanma Oil and Gas Enterprise</td>
</tr>
<tr>
<td>MRCF</td>
<td>Medical Research and Compensation Fund</td>
</tr>
<tr>
<td>NHRI</td>
<td>National Human Rights Institutions</td>
</tr>
<tr>
<td>NCP</td>
<td>National Contact Point</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
</tr>
<tr>
<td>RUF</td>
<td>Revolutionary United Front</td>
</tr>
<tr>
<td>TRIPS</td>
<td>Trade Related Aspects of Intellectual Property Rights</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
</tr>
<tr>
<td>UNITA</td>
<td>Uniao Nacional para a Independência Total de Angola</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organisation</td>
</tr>
</tbody>
</table>
What moves us, reasonably enough, is not the realization that the world falls short of being completely just – which few of us expect – but that there are clearly remediable injustices around us which we want to eliminate.²

This thesis addresses the issue of corporate complicity in human rights abuse, and ways of holding corporations accountable for this involvement. Specifically, it will examine the United Nation’s Protect, Respect, Remedy Framework, which has been adopted by the Human Rights Council as a conceptual policy framework upon which to build policies and responses to the issue of corporate human rights abuse, including corporate complicity. This is significant, as it is the first time that the Human Rights Council has enunciated a policy position on the issue of corporations and human rights. The core argument of the thesis is that the harm caused by corporate complicity in human rights abuse is a remediable injustice, and given the political will, the mechanisms to hold corporations to account can be developed, and existing mechanisms can be made more effective. Impunity should not be tolerated.

The influence of corporations continues to grow as the rate of globalisation, economic interdependence and market deregulation increases. There are more than 70,000 transnational corporations globally, but only around 5,000 have detailed their intentions regarding human rights, and only a fraction of these have moved towards implementing these intentions.³ The economic, social and political impact of the private sector is overwhelming and can have devastating consequences. By the year 2000, the wealthiest 200 transnational corporations had a total revenue greater than the combined GDP of all States, except for the top ten economies, and 51 of the top 100 economies in the world were corporations.⁴ In the words of Michael Gilbert and Steve Russell, “transnational

corporations have ascended to the pinnacle of world economic power.” Despite the global economic downturn, corporations continue to wield unprecedented power around the globe, both in developed and developing nations.

Corporations leave a large social footprint, and the economic and political power of many States is “dwarfed” by large multinational corporations. Philip Alston cites the example of Wal-Mart, which accounts for 2 per cent of Mexico’s Gross Domestic Product (GDP), and “is credited with single-handedly reducing the national inflation rate”. On any single day, Wal-Mart sales are greater than the GDP of thirty-six domestic economies.

This is a topic that calls for and requires collaboration and joint research between political scientists and lawyers, as it straddles the political and legal spheres at both domestic and international levels. The subject of business and human rights touches upon such key themes as international justice, international law, international political economy, neo-liberal globalisation, and social and economic policy.

The context of the thesis
This thesis has been researched and written at a time where the topic is gaining attention and momentum, including the appointment of the Special Representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie.

On 18 June 2008, in its resolution 8/7, the Human Rights Council unanimously welcomed the Protect, Respect and Remedy Framework for managing the human rights challenges posed by business, which was proposed by the Special Representative. The Framework rests on three pillars: first, the State duty to

---

9 Alston, ‘The “Not-a-Cat” Syndrome’, p 17
INTRODUCTION

protect from human rights abuse, including those caused by business and the corresponding enforcement mechanisms including policies, regulation and adjudication; second, the corporate responsibility to respect human rights, which requires business to avoid involvement in human rights abuse complying with the law and by exercising due diligence; and third, ensuring victims and survivors have access to effective remedies, both judicial and non-judicial. The pillars complement each other, and in the words of the Special Representative, “are intended to be mutually reinforcing parts of a dynamic, interactive system to advance the enjoyment of human rights.”\(^\text{10}\) It is intended that regulation will stem from the Framework, and the goal of regulation is the protection and perseverance of all human rights. This thesis is structured around the Framework.

The Framework was adopted following the stalemate that was reached between States, corporations and other stakeholders in the wake of the United Nations Norms on Transnational Corporations and Other Business Enterprises (the TNC Norms), approved by the UN Sub-Commission on the Promotion of Human Rights on 13 August 2003.\(^\text{11}\) Given the pre-existing, distinct battlelines that had been drawn between the various stakeholders that confronted the Special Representative in relation to the business and human rights mandate, the relative agreement and consensus regarding the Framework is somewhat surprising but certainly welcome.\(^\text{12}\) In fact, the Framework has already been referenced in a number of national policy assessments, including in Britain, France, Norway and South Africa.

Global Financial Crisis
The issue of business and human rights becomes more crucial in times of economic downturn. Within the context of the global financial crisis, greater pressure has been placed on the most marginalised and vulnerable members of society resulting in the issue of business and human rights becoming even more pressing, and requiring greater leadership from within the private sector.


\(^{11}\) Resolution 2003/16, UN Doc E/CN.4/Sub.2/2003/L.11

\(^{12}\) Hugh Williams, ‘Time to redraw the battle lines’, Financial Times, 30 December 2009; Williams wrote that the Special Representative “has won unprecedented backing across the battle lines from both business and pressure groups for his proposals for tougher international standards for business and governments.”
Economic crises pose a significant risk to economic and social rights, and it is well established that human rights are most at risk in times of crisis, and it is usually the most vulnerable that are the most affected. The same types of governance deficiencies that have produced a permissive and acquiescent environment for corporate-related abuse also produced the current economic crisis, and the widening chasm between the economic power of corporations, and the capacity of States and societies to counter this power is unsustainable. The Special Representative notes that this applies to the business and human rights agenda, and is reflected in the broader world political economy.

In this context, States may be tempted to allow lower corporate standards, perhaps as a means of securing foreign direct investment. However, States should be cautious of such action, as “[a]ny gains governments believe can be had by lowering human rights standards for businesses are illusory, and no sustainable recovery can be built on so flimsy a foundation.” Corporations should be wary of lowering standards, given the decreasing confidence in the private sector, and the increased focus on corporate-related human rights abuse.

The response to the global financial crisis could present an opportunity for positive developments in the sphere of business and human rights, if governments adopt policies and legislation encouraging responsible corporate behaviour. Corporations should acknowledge that “their own long-term prospects are tightly coupled with society’s well-being.” Governmental responses to the global financial crisis have the potential to contribute to an evolution towards sustainable economic integration and growth. States which had supported the neo-liberal economic order have been “reminded starkly that they have duties no other social actor can fulfil, resulting in a recalibration of the balance between market and State.”

---

15 Ruggie, Presentation of Report to United Nations Human Rights Council (2 June 2009)
16 ibid
17 UN Doc A/HRC/11/13, 22 April 2009, para 10
The business and human rights agenda “both contributes to and gains from a successful transition toward a more inclusive and sustainable model of economic growth.”

States are well versed on the positive aspects of an integrated global economy. It is high time that States turn their attention to the negative aspects and address the harm that can be caused by corporations, and seek to ensure accountability mechanisms are in place for when such harm is caused.

A review of the literature: current themes and debates

The debate surrounding corporate accountability for complicity in human rights abuse “lacks an authoritative focal point.”

There is no one overarching systemic approach to address the issue. Responses have generally been reactionary, and have not sufficiently addressed the underlying governance deficiencies. It is these deficiencies that allow the abuse to occur, even when it is unintended.

The Special Representative has, during his appointment, become the pre-eminent authority on the issue on corporate complicity in human rights abuse, and the entire business and human rights agenda more broadly.

While the Protect, Remedy, Respect Framework is intended to provide such a focal point, there are a number of key debates, including the developing role of international criminal law, the contours of corporate complicity as a concept, the failure of the existing mechanisms, and the debate over whether to hold corporations or their officials accountable. In many respects, the debates and fault lines related to this issue were most apparent in the aftermath of the TNC Norms. The fierce debate that followed clearly placed corporations and many States well apart from activists. The debate ended in a stalemate.

Despite an increased focus on the issue of corporate complicity, particularly since the beginning of the twenty-first century, there are few texts devoted to the issue of international governance and accountability for corporations. One key

18 UN Doc A/HRC/11/13, 22 April 2009, para 10
19 Gilbert and Russell, ‘Globalization of criminal justice in the corporate context’, p 227
21 UN Doc A/HRC/8/5, 7 April 2008, para 11
The concept of corporate complicity
There is no agreed definition of corporate complicity, either within the moral or legal contexts. The United Nations Global Compact, a voluntary initiative, asks

---

23 See generally Control Arms Campaign, ‘The Call for Tough Arms Controls: Voices from Sierra Leone’ (Control Arms Campaign, January 2006) available online at www.controlarms.org, last accessed 14 November 2007
that corporations avoid complicity, and to this end have developed a ‘working definition’ to provide guidance to corporations. The Global Compact refers to three types of complicity that companies should be aware of: direct complicity, indirect complicity, and silent complicity. However, this is not a legally binding instrument and does not fully reflect the current legal requirements of corporations regarding their human rights responsibilities. In 2006, the International Commission of Jurists, an organisation consisting of the world’s pre-eminent international lawyers convened an Expert Legal Panel to investigate the legal and policy meaning of corporate complicity in human rights abuse amounting to international crimes, acknowledging the considerable confusion and uncertainty that exists in relation to the concept. This research initiative was the first of its kind. The Report of the International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes was presented in 2008, and this has, whilst recognising the complexities, added a certain level of clarity around the meaning of corporate complicity. The Expert Panel has found that while there is no single applicable test for corporate complicity, as there is no internationally agreed standard, corporations should be aware that they are ‘entering a zone of legal risk’ when they enable, exacerbate, or facilitate abuse in the knowledge that they are contributing to human rights abuse.

The call for accountability

Human rights advocacy groups and campaigns were the catalyst for the current developments. Amnesty International, Human Rights Watch and Oxfam have all been publishing on the issue for over a decade. The call for accountability has been driven by a number of interrelated factors. The Report of the International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes identified three key factors. Firstly, corporate power and influence is steadily increasing. Corporations are now transnational, have extensive supply chains, and are providing functions and services that were once provided by States. Secondly, the process of globalisation and increased interconnectedness has led to “the emergence of a broadening concept of ethical responsibility”. This is driven by our increased awareness of the world around us. Thirdly, there

---

INTRODUCTION

has been a move towards legal authority in an attempt to address these concerns, in an effort to curtail corporate power, achieve accountability and ensure reparations and other remedies.26

The call for accountability has been followed by an analysis of how to do this, which is where the Framework, and this thesis, sits. While there is general agreement on the need for more effective accountability structures, there is debate about how best to achieve this. The Framework itself, and the numerous reports prepared by the Special Representative, have been invaluable to this area of research. Three research reports by the Fafo Institute for Applied International Studies, Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law (2004), Commerce or Crime? Regulating Economies of Conflict (2003), and Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law (2006) have all been important contributions to the wider debate around accountability for corporate crime and liability for grave breaches.

The failure of existing mechanisms

In the wake of the TNC Norms, the business lobby argued that voluntary self-regulation was more appropriate than legal regulation. An analysis by Penelope Simons found that these voluntary regimes are inadequate, and are unable to ensure companies are not complicit in human rights abuse.27

Jessica Woodroofe argues that the existing regulatory mechanisms are unable to consistently protect individuals and communities from corporate abuse.28 Michael Gilbert and Steve Russell examine the existing accountability mechanisms and structures, and conclude that they are unable to adequately meet the challenges of holding transnational corporations accountable.29 Gilbert and Russell suggest that the harm caused by corporate misconduct is “more ubiquitous and dangerous than the harms of terrorism and war crimes that have captured the

26 ibid
29 Gilbert and Russell, ‘Globalization of criminal justice in the corporate context’, p 211
attention of the emerging global civil society." The purpose of their article is to draw attention to the lack of accountability when corporations cause harm, such as killing and injuring people, causing environmental degradation and exploitation through questionable trade practices. They extrapolate the neo-liberal idea that economic integration will lead to peace, and argue that for there to be global peace there also needs to be "some mechanism for global justice."

Transnational corporations frequently abuse their power; yet the transnational nature of their activities poses challenges to existing regulatory measures. It remains primarily the responsibility of States to protect human rights, with political and legal regimes remaining State-based in the face of globalised economic activity. Paul O'Connell argues that the process of neo-liberal globalisation is incompatible with human rights to the extent that they require conflicting roles from the State. To this end, he argues that any appropriate response that seeks to achieve better protection of human rights, and accountability when they are violated, will need to challenge the underlying orthodoxies. Woodroffe notes the desire of host States to receive foreign direct investment, which adds another layer of complexity for human rights protection, as States may be willing to lower standards when competing for corporate investment, thus diminishing the protection afforded to their citizens. Paul Redmond argues that corporate accountability for human rights abuse requires "a further modality." He argues that there is no accountability mechanism under either international law or within domestic legal systems that can adequately respond to the power of transnational corporations and their ability to affect human rights. In this connection, Woodroffe believes that the methods of protecting human rights need to be "modernised", while the capacity of the State to regulate transnational actors needs to be strengthened. However, Woodroffe

---

30 ibid
31 ibid
32 ibid
33 Woodroffe, 'Regulating Multinational Corporations in a World of Nation States', p 131
34 ibid
36 Woodroffe, 'Regulating Multinational Corporations in a World of Nation States', p 132
38 ibid, pp 23-24
39 Woodroffe, 'Regulating Multinational Corporations in a World of Nation States', 131
argues that a regulatory framework is required, but one which builds on existing mechanisms, rather than inventing new ones.\textsuperscript{40}

**Holding corporations or their officials accountable**

Gilbert and Russell observe that while there is some resistance to holding corporations criminally responsible for the actions of the corporations, due mainly to the issue of \textit{mens rea}, or the mental element, such resistance is decreasing as the harm increases.\textsuperscript{41} This was reflected at the drafting of the Rome Statute of the International Criminal Court, where it was decided that, due to the practical challenges, jurisdiction would be limited to natural persons and not extend to legal persons.

Anita Ramasastry argues that the prosecution of an individual may not cause the harm and abuse to cease, and may not have a deterrent effect against the corporation as a whole.\textsuperscript{42} Gilbert and Russell note that corporations are more than the individual actors who are employed to work for them.\textsuperscript{43} They argue that corporate culture is what causes corporate complicity, not individuals, and that therefore it is the corporation which should be held accountable.\textsuperscript{44} Decision making in a corporation generally involves many people and layers of approval; collectively, the decisions can accumulate to human rights abuse. In such situations it may be difficult to apportion individual responsibility.\textsuperscript{45} Moreover, the resultant harm caused by such collective behaviour may be greater than if an individual was acting alone.\textsuperscript{46} As Ramasastry argues, “a collective or communitarian view of complicity would suggest that at some level, the effects of corporate wrongdoing should be borne by the corporate entity and hence, ultimately its shareholders."\textsuperscript{47} On the other hand, prosecuting a corporation may not deter individuals from acting in a criminal manner. Corporate accountability and individual responsibility should not be viewed as mutually exclusive, and there is no obstacle to holding individuals to account in addition to the corporation.

\begin{footnotes}
\item[40] Woodroffe, ‘Regulating Multinational Corporations in a World of Nation States’, 132
\item[41] Gilbert and Russell, ‘Globalization of criminal justice in the corporate context’, p 217
\item[43] Gilbert and Russell, ‘Globalization of criminal justice in the corporate context’, p 218
\item[45] Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon’, p 97
\item[46] ibid
\item[47] ibid
\end{footnotes}
International law: direct or indirect obligations?
There is considerable agreement that the current State of international law is that it places indirect obligations on corporations, through State regulation. This was the main shortfall of the TNC Norms, which sought to apply international law directly. However, Andrew Clapham has argued that international law is developing to the point where corporations, in some situations depending on the circumstances will be bound indirectly by international law.48 Conversely, Carlos Vazquez argues that international law only indirectly regulates corporate conduct.49 The Special Representative agrees with this analysis, that corporations are bound indirectly, but that there is no impediment to applying international law to regulate corporations directly, if States chose to do so. The interaction and relationship between international law and international politics is pertinent: the law will be developed and applied if there is the political will to see that happen.

Research Methodologies and Structure of the thesis
This thesis is designed to analyse the UN's Protect, Respect, Remedy Framework. This thesis is intended to fill in some of the gaps in the literature regarding the role for international governance and the human rights regime in responding to the pressing issue of corporate complicity in human rights abuse. This thesis consists of six chapters. It considers international law and international relations, as any advancement in this area will necessarily be dependent upon developments in both spheres. International relations and international law are inextricably linked, particularly so when seeking accountability for complicity in human rights abuse.

Allegations are increasingly being made against corporations for their involvement in human rights abuse that has been perpetrated by another actor. Such implication is commonly referred to as 'corporate complicity in human rights abuse', a term used by activist, human rights organisations, governments and

even the business sector itself. Despite the widespread use of the term, considerable uncertainty and confusion remains as to the precise scope of the concept, particularly in relation to when legal accountability could arise.

Some of the most publicised instances of corporate involvement in human rights abuse have led to allegations of corporate complicity. Following the Second World War, company officials faced prosecution for their involvement in human rights abuse perpetrated during the war, with some corporations declared as ‘criminal enterprises’. In recent years there have been allegations made against many corporations in a range of industries, but predominantly in the extractive industry, including the oil, diamond, gold, copper and other mining sectors, primarily for collusion with security forces and for trade in conflict commodities. There have been more than fifty cases brought under the United States Alien Tort Claims Act alleging complicity in genocide, slavery, crimes against humanity, torture and other egregious human rights violations. Chapter 1 will consider examples of situations of corporate complicity.

While the Framework is intended to cover situations of corporate involvement in abuse, in addition to direct perpetration of abuse, there is certainly no agreement as to what constitutes corporate complicity in practice, either as a legal or political standard. The business and human rights agenda tends to be discussed on an abstract level, rather than focussing on the actual requirements that would constitute corporate complicity. There is confusion around basic aspects, including the extent to which business impacts on the realisation of human rights. The Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes provides guidance, but further examination of the concept is required. The concept of corporate complicity is analysed in Chapter 1.

---

50 Vazquez, ‘Direct vs Indirect Obligations of Corporations under International Law’, p 939
51 For a more detailed discussion see Chapter 1 – Seeing and Understanding Corporate Complicity, particularly pp 20-33
52 UN Doc A/HRC/14/27, 9 April 2010; See also Joseph, Corporations and Transnational Human Rights Litigation, p 17. The ATCA litigation is discussed in more detail in Chapter 5 – The Victim’s Right to Remedy: Seeking Accountability for Corporate Complicity, pp 161-165
While the issue of corporate complicity has gained momentum in recent years, the business and human rights agenda is not an entirely new concept for the United Nations. In the 1970s and 1980s the United Nations attempted to draft an international code of conduct for business, but failed. Chapter 2 will consider the responses to the challenge of corporate complicity which lead to the Protect, Respect, Remedy Framework. Primarily, these are the UN Global Compact, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Corporations, various industry initiatives and the TNC Norms.

States have both a moral and legal imperative to ensure universal realisation of human rights. States have the principal role to play in both addressing and preventing corporate human rights abuse, by having appropriate policies, regulation and adjudication. However, many States do not have adequate policies or regulatory mechanisms in place to successfully manage the issue of business and human rights, and this often has grave consequences for victims and significant consequences for corporations and States. Conversely, the incorporation of the statute of the International Criminal Court (ICC) into domestic jurisdictions, where corporations can be held criminally responsible, has broadened the scope of the ICC provisions from individual officers to the entire corporation as an entity, greatly increasing the opportunity of a corporation being held accountable. Sometimes, policies and laws do exist but are not enforced, and this is often due to the power differential between the State and the corporation, or may be due to the fact that pursuing corporate accountability may not be in the State's interests.

The Special Representative has named five key areas for States to be cognisant of in order to achieve policy coherence to in turn better meet their duty to protect: safeguarding their ability to protect human rights and meet their obligations; being mindful of human rights when engaging with business; ensuring a corporate culture that respects human rights; developing policies in relation to conflict zones; and examining extraterritorial jurisdiction. Each of these five policy areas will be discussed in greater detail in Chapter 3, while giving consideration to the practical and political realities and the impact these may have on the realisation of such policy development.
Such developments face challenges by the increasing global liberalisation of the corporate sector, which has impacted on the State’s ability to discharge its obligations effectively. The universalisation of human rights and the increasing global liberalisation of the corporate sector are both significant forces on the international stage. The two forces share a complex and symbiotic relationship, which often appear to be set on a collision course. The subject matter of this thesis emanates at the intersection of these two forces. Increased globalisation and economic interdependence has seen the power and influence of private corporations grow, while the ability of States to regulate the behaviour of the private sector has diminished. These governance gaps are not unique to one State or one industry; rather, they pervade throughout the international community and reach all sectors. The cause and perseverance of these governance gaps is explored in Chapter 3.

Although in certain situations some rights may be more relevant than others, the responsibility to respect applies to all recognised human rights. Companies should conduct assessments of their operations in order to determine whether any human rights could be impacted. At the absolute minimum, companies should refer to the International Bill of Human Rights when conducting such assessments; the rights found within these instruments are relevant to corporations as corporations are capable of infringing upon the enjoyment of these rights. Companies who operate in conflict zones should also consider the implications of International Humanitarian Law and International Criminal Law, and depending on the circumstances companies may need to consider particular groups who may suffer adversely from their operations, including indigenous peoples. This thesis is concerned principally with corporate involvement in grave violations of human rights, including breaches of international criminal law.

The responsibility to respect human rights is acknowledged in most industry codes and other soft-law instruments and initiatives, such as the UN Global Compact. In an effort to discharge this responsibility, corporations have continued to include human rights aspects in their Corporate Social Responsibility (CSR) programmes, and other codes and initiatives. However,

---

55 The International Bill of Human Rights consists of the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights
these programmes are at best ad hoc and at worst detract from other sustainable and long-term programmes. In addition, corporate efforts have often been inadequate. The Framework intends to provide a more strategic and systematic concept to assist corporations to meet their responsibilities. These issues are discussed in further detail in Chapter 4.

Corporations have a responsibility to respect human rights, but are not directly bound by international human rights law. Legal compliance relies on corporations respecting the law, even in situations where the law is likely to remain unenforced. This is a challenge in the area of corporate complicity, as corporations often operate in regions that can be understood as being “weak governance zones” and it is in these regions that corporations are perhaps most likely to be complicit in international crimes. Although not representative of current practice, corporations have a responsibility to respect and obey the law, even if it is not enforced. At best, the failure to do so represents a lack of understanding of the corporation’s responsibilities, while at worst it represents a wilful blindness, or even a refusal to observe the law when there is no chance of sanctions. Such frames of mind represent significant challenges.

The challenge for legal compliance is complex where domestic laws are inconsistent with international human rights standards (the archetypal example being apartheid South Africa), and this issue and its implications for legal compliance for corporate responsibility requires greater research and will not be addressed in any substantial form in this thesis.

The Special Representative believes that corporations should exercise human rights due diligence, including supply chain due diligence, in order to identify and then manage any risk of infringing upon the rights of others. The Special Representative has argued that this will be a “game-changer” for corporations, enabling a move from “naming and shaming” to “knowing and showing” – that is, moving away from criticism by external stakeholders for failing to meet their responsibilities to an understanding and recognition of their responsibilities. This internalisation of the corporate responsibility to protect is a significant initiative, but is premised on corporations having a sound understanding of human rights law and the many ways in which they can infringe upon the

---

56 A/HRC/14/27, 9 April 2010, para 80
enjoyment of those rights. Critically, as discussed above, it is the current inability, or refusal, of companies to acknowledge their responsibilities that lies at the core of the challenges for legal compliance. The question, then, is whether, and how, corporations will be able to discharge due diligence requirements to a satisfactory standard. It is likely that the prosecution of corporate officials, rather than the corporate entity, will prove the greatest motivating factor for improvements in corporate culture and the achievement of due diligence which is completed sincerely and in good faith. These concerns will be explored in Chapter 4.

There are three principal mechanisms for providing victims and survivors with access to remedy: company-based mechanisms, State-based non judicial mechanisms and State-based judicial mechanisms. Many States have domestic laws that reflect core human rights norms and do bind corporations; moreover an increasing number of States are incorporating the Rome Statute of the International Criminal Court into their domestic jurisdictions. Corporate officials are directly bound and are able to be prosecuted for involvement in grave human rights abuse. The prosecutor of the International Criminal Court has stated that the role of business officials and other economic actors in the perpetration of human rights violations would be investigated for the purpose of commencing prosecutions; presumably this would extend to include corporate officials.

Grievance mechanisms alert companies to situations where rights are infringed, and can lead to the identification of systemic concerns. Moreover, they provide a process for addressing concerns directly as soon as they arise, which is a significant issue for companies as this may prevent escalation and unwanted public attention. Despite the benefits of grievance mechanisms, in relation to human rights these mechanisms remain underdeveloped. The risks, as well as the potential, of this type of mechanism are further discussed in Chapter 5.

States have a duty to protect human rights within their territory and jurisdiction. To effectively discharge this duty, States must ensure access to remedy through

---

57 A/HRC/14/27, 9 April 2010, para 89. The SRSG defines a grievance in para 90 as "a perceived injustice evoking an individual's or group's sense of entitlement, which may be based on law, explicit or implicit promises, customary practice, or general notions of fairness that may differ from standard economic and bureaucratic rationales."
a number of ways including regulatory and administrative channels. The non-judicial mechanisms can play an important role in the duty to protect human rights. For example, non-judicial mechanisms can facilitate capacity building, or providing guidance to companies. Two key non-judicial mechanisms are national human rights institutions (NHRIs) and national contact points (NCPs). NHRIs are government initiatives, while the NCPs exist under the OECD Guidelines for Multinational Enterprises to address complaints. Both of these mechanisms will be considered in greater detail in Chapter 5.

Access to remedy through judicial mechanisms is one of the fundamental responsibilities of States. Despite this, to date the only courts to hear cases of corporate complicity in international crime have been brought under the *Alien Tort Claims Act* in the United States courts. Remedy and justice through judicial mechanisms is by no means guaranteed. The reasons for this are many and varied, and include political and practical impediments. Home States and host States may be unwilling to prosecute. Practical aspects present challenges, such as determining the *mens rea* of a corporation and attributing responsibility throughout the corporation, difficulties surrounding subsidiaries and the corporate veil, the concept of *forum non conveniens*, the issue of extraterritorial jurisdiction and the doctrine of non-justiciability on the grounds of a political question. Chapter 5 will investigate the challenges of securing legal accountability of transnational corporations in a State-based international system, and investigate the difficulties of holding corporations accountable for corporate complicity.

The Framework is provided at a time when the international community is “still in the early stages of adopting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm.”\(^58\) Under international human rights law, individuals and States can be held accountable for grave violations of human rights, such as crimes against humanity, genocide and war crimes;\(^59\) the human rights regime now faces calls to

---

\(^{58}\) UN Doc A/HRC/8/5, 7 April 2008, para 1

\(^{59}\) Article 5 of the Rome Statute of the International Criminal Court provides that the jurisdiction of the International Criminal Court is limited to the most serious crimes of concern to the international community; the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The Rome Statute provides a definition of these crimes (with the exception of the crime of aggression). Article 6 defines genocide as follows: “…‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
extend this liability to corporations, as a means of acknowledging and recognising corporate involvement in the perpetration of these crimes. The accountability mechanisms that are currently available for victims are ineffectual and insufficient. This is a considerable problem, both for the Framework given that access to remedy is one of the pillars, and also for victims who are searching for justice and accountability. Chapter 6 will consider the role of international governance and the human rights regime, including the International Criminal Court, in securing respect, and achieve justice and accountability when human rights are violated, and will argue for a co-ordinated, international approach to the question of access to remedy. It will argue that this global problem requires global solutions. The thesis will then conclude by arguing that the Framework should be considered as an initial step in the right direction, rather than as a solution to the existing challenges in the area of business and human rights. Real change will be dependent on a number of factors, not least the political will of States and corporations to change their behaviour.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group t another group.

Article 7 defines crimes against humanity as follows: “... ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

War crimes include grave breaches of the Geneva Conventions of 12 August 1949 committed against persons or property protected under the provisions of the relevant Geneva Convention, and other serious violations of the laws and customs applicable in international armed conflict. In the case of an armed conflict not of an international character, war crimes include serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those place hors de combat by sickness, wounds, detention or any other cause, and other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.
CHAPTER 1

SEEING AND UNDERSTANDING CORPORATE COMPlicity

People or profit? The choice should be an easy one. But for companies it isn’t always that simple.60

The first serious attempts at holding company officials accountable for their involvement in human rights abuse came sixty-five years ago, at the end of the Second World War. Corporate executives were found to have supplied poisonous gas to concentration camps, to have actively sought access to slave labour for use in their factories, to have plundered property across occupied Europe, and to have financed projects of the Nazi party and to have donated money to the SS.61 Since then, there have been increasing reports of corporate involvement in human rights abuse. Corporations have been involved in the crimes against humanity and other human rights violations including torture, murder, enslavement and forced displacement, war crimes and genocide.62 The influence and impact of corporate behaviour has grown at an exponential rate since the 1990s, and there has been a growing recognition that corporations can cause considerable harm. In recent years the calls for corporate accountability have gained increasing momentum.

This chapter will use examples to emphasise the prevalence and problem of corporate complicity in human rights abuse. It will then turn to consider the moral and legal understandings of corporate complicity. It seeks to identify core principles that capture the kind of conduct that would constitute corporate complicity and lead to accountability in order to provide remedies to victims. It will stress the lack of consensus on what constitutes corporate complicity, which is contributing to the ongoing impunity and ineffectual accountability mechanisms.

61 Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon’, pp 104-113
62 Joseph, Corporations and Transnational Human Rights Litigation, p 13
Seeing Corporate Complicity

Corporate involvement in human rights abuse pervades many industries, affects a range of human rights, and reaches all areas of the globe. Examples of corporate complicity are shocking: oil and mining companies providing rebel or government forces with funding, vehicles or weapons that are then used against civilians; the engagement of brutal security forces; the trade in conflict commodities; and the identification of trade union members and political opponents to name a few. Allegations have been made against private air operators for involvement in the process of illegal rendition, companies have developed software to assist in the commission of abuse and discrimination, and an earthmoving company continues to provide bulldozers in the knowledge that they are being used to demolish homes in direct violation of international law. Companies in the extractive industry have benefited from the forced removal and relocation of local populations off of land required for business activities. Some companies use slave labour and child labour, or benefit from their subcontractors or suppliers using such labour, both during wartime and times of peace.

The examples of corporate complicity are many and varied and present the international community with a real cause for concern. A growing number of victims are insisting on an end to impunity for this corporate conduct that causes so much harm to so many individuals and communities. As is often the case at the intersection of international politics and international law, there are continuously developing views about what conduct constitutes an act that should attract legal liability, and which conduct is ill-advised on policy grounds, or is ethically compromised. While it is not possible to provide an exhaustive list of examples that would sit within either legal or moral accountability, as each...

---

64 Report of the International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes, Volume 1, p 1; War on Want, Profiting from the Occupation – Corporate complicity in Israel’s crimes against the Palestinian people, War On Want Report, July 2006, p 2
67 Complainants have been made against Bayer CropScience for tolerating its subcontractor’s use of child labour: see http://baseswiki.org/en/OECD_NCP_(Germany)_NGOs_vs._Bayer_CropScience_India_2007
68 This is evidenced by the increasing number of corporate complicity cases being brought under the Alien Tort Claims Act, see generally Business and Human Rights Resource Centre, Corporate Legal Accountability Portal, available online at http://www.business-humanrights.org/LegalPortal/Home, last accessed 2 September 2010
individual situation will be determined by its own unique circumstances, it is possible to talk in general terms about these types of behaviours.

While corporations have directly perpetrated abuse, corporate complicity in human rights abuse is a significant issue that deserves attention. The Special Representative requested that the Office of the High Commissioner for Human Rights (OHCHR) consider a sample of 320 cases where allegations had been made against companies. OHCHR found 41 per cent of the sample alleged indirect corporate involvement in human rights abuse. Similarly, more than fifty cases have been brought against companies in the United States under the Alien Tort Claims Act (ATCA), and most of these have concerned allegations of corporate complicity in human rights abuse. Some examples of the more common allegations of corporate complicity are discussed below, and include the provision of goods and services, employing security forces who commit human rights abuses, supply chain complicity, and formal business partnerships with States who have poor human rights records.

**Provision of goods and services**
The provision of goods and services can lead to allegations of corporate complicity. The provision of goods and services may be more likely to result in allegations of complicity when the goods are modified, which may either enable or exacerbate harm. If modifications are made, then it is reasonable to assume that the intended purpose is known. The provision of unmodified goods and services can also lead to liability; indeed, those corporations providing inherently dangerous goods, such as weapons and chemicals, should be particularly aware of this. As the ICJ Expert Panel states in its report, such companies “need to be especially vigilant about the use of their goods, as they cannot but be aware of the consequences of their illegitimate use.”

---

69 UN Doc A/HRC/8/16, 15 May 2008, para 29
Providing weapons and arms
One of the areas in which it is easiest to envisage the potential complicity of a corporation is in the arms trade and the supply of weapons, in particular to regimes, State and non-State, with poor human rights records. Corporations may facilitate grave human rights violations by manufacturing prohibited weapons, such as anti-personnel landmines or biological weapons.71

Caterpillar directly supplies the Israeli military with bulldozers as a weapon under the United States Foreign Military Sales Program.72 Though originally designed for agricultural and construction purposes, the Israeli military modifies the Caterpillar bulldozers to include machine gun mounts, smoke projectors, and grenade launchers. The armoured bulldozers are now an “indispensable part of the Israeli army’s arsenal” and have been used in all major operations in occupied Palestine.73 In 2004, the then UN Special Rapporteur on the Right to Food, Jean Ziegler, made a complaint to Caterpillar’s chief executive about the use of the bulldozers, arguing that the destruction of agricultural areas and resources limits the Palestinian people’s access to food, and as such constituted a violation of international law.74

The Israeli government is also using the bulldozers to construct a 420-mile Separation Wall, despite the International Court of Justice determining in 2004 that the Wall is illegal under international law.75 The UN General Assembly has called upon Israel to comply with its obligations under international law, but this request has gone unheeded.76 The UN Secretary-General reported to the General Assembly in May 2009 that this action is

a primary cause of poverty and humanitarian crisis in the occupied Palestinian territory, and restricts Palestinian access to health and

---

73 War on Want, ‘Profiting from the Occupation: Corporate complicity in Israel’s crimes against the Palestinian people’, July 2006, available online from http://www.waronwant.org/attachments/Profiting%20from%20the%20Occupation.pdf; last accessed 17 January 2007, p 4
74 Stephen Zunes, Obama’s Caterpillar Visit a Thumb in the Eye for Human Rights Activists; War on Want, ‘Profiling from the Occupation’, p 4
75 War on Want, ‘Profiling from the Occupation’, p 5
76 ibid
education services, employment, markets and social and religious networks.77

Despite this, Caterpillar has declined to cease supplies of its bulldozers, and they continue to be used in the construction of the wall.78

Private corporations in the arms and transport industries in Europe, Central Asia and elsewhere have provided weapons and military equipment to governments and armed groups who are known perpetrators of human rights abuse.79 In many cases these governments and groups are subject to arms embargoes; where they are not, the corporations should have been aware of the risk of the weapons being misused.80 Arms dealers provide guns and other small weapons to human rights abusers; these arms dealers and associated corporations profit from this poorly regulated trade. Arms deals can be licit and illicit; but even licit transactions can have grave consequences for the realisation of human rights. Arms can exacerbate and prolong conflicts, and arms purchasing can divert a government’s budgetary resources from other public services, such as health and education.81 Conflict has particularly negative consequences for children’s right to the highest attainable standard of health. A report funded by UNICEF found that 75 percent of children living in the occupied territories suffered psychological and emotional problems from the ongoing exposure to shooting and shelling.82 The arms trade can have a significant impact in situations of instability and has the potential to derail both peace-building and justice processes.83 Arms have played a crucial role in empowering people to commit atrocities in recent conflicts around the world. Rape, disappearances, torture, and forced labour often take place at gunpoint.

---

77 Secretary-General, Economic and Social Repercussions of the Israeli Occupation on the Living Conditions of the Palestinian People in the Occupied Palestinian Territories, including Jerusalem, and the Arab populations in occupied Syrian Golan, General Assembly, Sixty-fourth session, 7 May 2009, UN Doc A/66/77-E/2009/13, page 2. Moreover, three quarters of the Separation Wall will be built on Palestinian territory, rather than on the border.
78 Human Rights Watch, ‘On the Margins of Profit: Rights at Risk in the Global Economy’, p 17
79 ibid, p 12
80 ibid
83 ibid, p 18. For example, it is estimated that by June 2003 there were around 24 million guns in Iraq, which cost around $10 each. This is one of the reasons for the ongoing insecurity in the country.
The arms trade is lucrative: global military spending amounts to US$839 billion a year. As such, suppliers are not keen to lose their market share, and market gaps in the arms trade rarely take long to fill. Stuart Rees has observed that “corporate irresponsibility operates in mercenary fashion” in the arms industry. For example, when the United States ceased selling small arms to Indonesia in 1994, British companies filled the void and commenced selling weapons almost immediately, even though these were often used against civilian populations.

Weapons and arms flowed into Sierra Leone during the conflict, despite a UN arms embargo. A range of States, corporations and individuals were involved in providing the rebels in Sierra Leone with weapons and arms. An example of a complicated and elaborate plan to circumvent the arms embargoes against Sierra Leone is detailed below:

Ukrainian weapons were sent to Burkino Faso in a Russian aircraft, operated by a British company, Air Foyle, under a contract between a Gibraltar-based company representing the Burkino Faso Ministry of Defence and a Ukrainian state-owned company. Ukraine had issued the arms export licence after receiving an end-user certificate from the Ministry of Defence of Burkina Faso, stating that the weapons were for use in Burkina Faso and that this was their final destination. But within days, the weapons were shipped on to Liberia in an aircraft owned by an Israeli broker of Ukrainian origin, Leonid Minin, with several journeys required to transport them all. The aircraft was registered in the Cayman Islands and was operated by a company registered in Monaco. The weapons were then moved on from Liberia to Sierra Leone.

---

85 Following the violence in East Timor in 1999, where it is believed that approximately 90% of the weapons used by the militias originated in the United States, the US placed pressure on Jakarta to prosecute those responsible, leading to a cooling of relations between the two countries. This was followed closely by a change of policy from the Bush Administration with an emphasis on joint military training practices and removal of the prosecution demands. Previously, during the Indonesian invasion of East Timor, American arms shipments doubled as the killings continued.
87 ibid
88 Control Arms Campaign, ‘The Call for Tough Arms Controls: Voices from Sierra Leone’ (Control Arms Campaign, January 2006), p 14, available online at www.controlarms.org, last accessed 14 November 2007
This example details not only the involvement of the arms industry, but also the involvement of private air operators, without which the weapons would not have arrived. The Control Arms Campaign notes the involvement of Sky Air Cargo, a company based in the UK, and Occidental Airlines, a Belgian-owned company, which flew arms to Liberia, which were then delivered to the Revolutionary United Front (RUF) by a third air company. The report cites a further example of the Continental Aviation Company, based in Senegal, delivering 68 tonnes of weapons from Bulgaria to the RUF.\(^9\) In order to achieve these deliveries, companies abused aircraft registration systems. This deceit, coupled with weak air traffic control procedures in West Africa made it difficult to monitor the flights.\(^9\)

An allegation of corporate complicity could emerge following the provision of goods that are not related to the primary operations of the business. For example, the Australian/Canadian mining company, Anvil Mining, was implicated in a massacre of at least 73 villagers, perpetrated by government forces, in the area of Kilwa in the Democratic Republic of Congo (DRC) on 14 October 2004.\(^9\) Anvil Mining provided vehicles, planes and other assistance to government troops, which were used to halt a supposed uprising in Kilwa.\(^9\)

The situation leading to the massacre began when six rebels took over the local police station, intent on forcing Anvil Mining out of the region. The rebel leader, Alain Mukalai, emphasised Anvil’s lack of community engagement and involvement in order to gain support for the secession of Katunga.\(^9\) The rebels were concerned that the company was receiving millions of dollars in profits for

---

\(^9\) Control Arms Campaign, ‘The Call for Tough Arms Controls: Voices from Sierra Leone’, p 15
\(^9\) ibid. None of this trade could have been facilitated without the private brokers – the ‘middlemen’ who arrange the transfer of weapons between the seller and the buyer. While it is outside the scope of this thesis, consideration must be given to holding private brokers accountable for the harm that they enable, exacerbate and at times facilitate.
\(^9\) ibid
its operation at the silver and copper mine, but was providing little to the local community, including the local workforce.94

Anvil Mining admits bringing in planeloads of up to 100 government soldiers, on the same planes they were using to evacuate their workers.95 Eyewitnesses reported seeing Anvil vehicles used to transport detained people to be summarily executed,96 and there are reports that a soldier told the villagers that they were "under orders to shoot at anything that moved."97 An investigation completed by the United Nations states that the soldiers "launched their attack with vehicles provided by Anvil Mining."98 The UN investigation found that at least 28 people may have been killed from summary execution, and that Anvil’s vehicles were used to transport looted goods and corpses.99 Furthermore, the investigation found that three of Anvil’s drivers drove the vehicles for the government troops.100

Providing other goods and services
Complicity for the provision of goods and services is not limited to the provision of weapons. Israel will need a transport system to link Jerusalem with the settlements in the occupied West Bank in the area known as East Jerusalem. Connex is the private partner in a light rail system that will provide this link, at a cost of $500 million.101 However, East Jerusalem is not part of Israel. As has been confirmed by the UN Special Rapporteur, John Dugard, East Jerusalem is part of the occupied territory.102 Moreover, the Israeli government has openly stated that the transport system is intended to finalise the “annexation” of East

94 The mine is a “bonanza”, and has provided the company with “a market capitalisation of US$100,000,000 and seen its profits rise more than 500 per cent.” Each day the mine moves 16,000 tonne of material, which adds up to $500,000 for every day they ship: Neighbour, The Kilwa Incident Transcript
96 Report on the conclusions of the Special Investigation into allegations of summary executions and other violations of human rights committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004, para 36; also Neighbour, The Kilwa Incident Transcript
97 Neighbour, The Kilwa Incident Transcript
98 “Aust mining company implicated in Congo massacre”, ABC News Online
99 Report on the conclusions of the Special Investigation into allegations of summary executions and other violations of human rights committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004, para 2, 28–29, 36 prepared by the United Nations Organisation Mission in the Democratic Republic of Congo (MONUC); see also ‘Military Court delivers a not guilty verdict in Kilwa Trial’, available online at http://www.raid-uk.org/docs/Press_Release/PR_MilitaryCourtVerdict-eng_2Jul07.pdf last access 2 August 2010
100 Report on the conclusions of the Special Investigation into allegations of summary executions and other violations of human rights committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004, para 36
101 War on Want, ‘Profiting from the Occupation’, p 10
102 ibid
Jerusalem. Therefore, Connex can be seen as facilitating the annexation of East Jerusalem in the occupied West Bank, and as such is implicated in the illegal occupation of Palestinian land.

In another example, Isa Saharkhiz, an Iranian activist is suing Nokia Siemens, alleging the firm provided the Iranian government with tracking technology that was used to spy on political dissidents. Mr Saharkhiz has been imprisoned for over a year, and was arrested as a result of the surveillance enabled by the technology, and it is alleged that he has been subject to torture and other inhumane and degrading treatment at the hand of the Iranian authorities.

Engaging security forces who commit abuse
It is quite legitimate for a company to engage security staff. However, there are increasing allegations of abuse being committed by these security forces, who are usually employed or engaged by corporations in the extractive industry to protect employees and assets. A number of security forces have a track record of violating human rights, and complicity of this nature is the consequence of an intersection of these situations:

- weak national legal systems,
- community-based operational disruptions and company requests for or acceptance of coercive measures by security forces leading to the commission of alleged crimes, which the company is then charged in a court of law with aiding and abetting.

Research completed by the Special Representative found that the extractive industry sector "utterly dominates" the spectre of reported abuse, consisting of two thirds of the sample analysed. Allegations of complicity are usually made

---

103 ibid
106 Human Rights Watch, ‘On the Margins of Profit’, p 10
in relation to serious abuse committed by security forces engaged by the corporations. For mining companies operating in conflict zones, one of the greatest risks of involvement in human rights abuse comes from the use of, and collusion with, security forces to protect their personnel and assets from community opposition, “often with brutal consequences.” Community opposition is usually in response to lax environmental standards and insufficient regulation of natural resource extraction, which have significant negative impacts on the environment, the health of local communities, and even their ability to produce food. In relation to resource extraction, opposition can also stem from a belief that the resources belong to the local population, rather than to the private sector, and this is confounded when companies operate without consultation and with little positive benefit to the community.

In some instances, corporations have been accused of involvement in serious human rights violations perpetrated by these security forces, including serious international crimes such as torture and crimes against humanity, and also war crimes in areas of armed conflict. In many instances the security forces engaged are State forces, such as military forces; in other cases they are private security firms. Allegations of collusion with security forces have been made against a number of companies, including ExxonMobil in Aceh, Freeport McMoran in West Papua, Talisman in Sudan, Shell and Chevron in Nigeria, and BP in Colombia. Some of these examples are discussed below.

**ExxonMobil**
Eleven plaintiffs from Aceh brought a case against ExxonMobil, alleging that ExxonMobil’s security forces committed torture, murder, sexual assault and false imprisonment. The villagers allege that the security force was

---

109 War on Want, ‘Fanning the Flames: The role of British mining companies in conflict and the violation of human rights’, November 2007, Preface, Sue Branford, p 1
110 *ibid*
112 *ibid*, pp 3-4; regarding the situation in Colombia, see Peter Stoett, ‘Shades of Complicity: Towards a Typology of Transnational Crimes against Humanity’ in Adam Jones (ed), *Genocide, War Crimes & The West: History and Complicity* (Zed Books, London, 2004), p 42
113 *John Doe v ExxonMobil Corporation et al*, United States Court of Appeals for the District of Columbia Circuit, 12 January 2007, Judgment (No 01cv01357), p 2. The villagers have brought a case against
comprised exclusively of the Indonesian military, engaged by ExxonMobil. They allege that ExxonMobil was aware of their previous human rights abuses, and that the security forces acted under "direction and control" of ExxonMobil. Crucially, the plaintiffs allege that Exxon provided "weapons, funding, military equipment, and other supplies" to the soldiers.\textsuperscript{114}

**Freeport-McMoran**

The Grasberg mine in West Papua has been heavily criticised. The mine is the largest gold and third largest copper deposit in the world, and is a joint venture between Rio Tinto and Freeport-McMoran.\textsuperscript{115}

The operation is protected by the Indonesian police and military, who are well known for human rights violations and for the suppression of the independence movement in West Papua.\textsuperscript{116} Indonesia’s National Commission on Human Rights has also reported that “in the mid-1990s the Indonesian security forces indulged in indiscriminate killings, torture and disappearances of local people in their safeguarding of mine operations and their campaigns against West Papuan secessionists.”\textsuperscript{117} The reliance on the police and military has led to accusations of complicity in serious human rights violations. In 2005, it was revealed that in the previous seven years, the Grasberg mine operation had paid nearly $20 million to the military and the police for their security services.\textsuperscript{118} This included hundreds of thousands of dollars to the Police Mobile Brigade, a paramilitary group, well known for committing human rights abuses. Payment was also made to an Indonesian general implicated in human rights violations committed during Indonesia’s occupation of East Timor.\textsuperscript{119}

\textsuperscript{114} John Doe v ExxonMobil Corporation et al, p 2
\textsuperscript{115} War on Want, ‘Fanning the Flames’, pp 24-25: The mine has caused extensive environmental destruction, dropping 230,000 tonnes of waste every day. During the lifetime of the project, it is estimated the mine will release 3.5 billion tonnes of waste into the river, including toxic metals. The indigenous Kamoro people who live downstream suffer the most.
\textsuperscript{116} War on Want, ‘Fanning the Flames’, pp 24-25: The conflict in West Papua has left over 100,000 people dead.
\textsuperscript{117} Ibid. p 25
\textsuperscript{118} Ibid
\textsuperscript{119} Ibid. A case brought in the United States under the ATCA was dismissed due to the plaintiff’s failure to appropriately complete the Statement of Claim under the ATCA.
**AngloGold**
AngloGold Ashanti has been exploring in Colombia since 1999. Their operation in the Sur de Bolivar region in northern Colombia is of particular concern. Here, the company has benefited from the “brutal campaign” of the State security forces, who have intimidated local communities and forced them off their property in order to enable the mining operation. A subsidiary of AngloGold Ashanti, Kedahda, is looking to commence mining activities in the San Lucas mountains. In relation to these developments, “[l]ocal community groups claim that 2,300 people have been displaced from their land and that communities have been subjected to arbitrary arrests, pillage, threats, the burning of houses and extrajudicial executions.”

**Carrejon Coal Company**
The El Cerrejon mine is the world’s largest open-cast coal mine, stretching 3 miles wide and 30 miles long. The mine is located in the La Guajira province in Colombia. A consortium of three mining companies, Anglo American, BHP Billiton and Swiss company Glencore, took control of the mine via a company called the Cerrejon Coal Company. Expansion of the mine has been at the cost of local villages and communities. There have been two particularly appalling attacks. The first was in August 2001, when, without warning, inhabitants of the neighbouring community of Tabaco were violently evicted and bulldozers subsequently destroyed most of the village. The village was completely razed in January 2002, following another attack. BHP Billiton and Anglo American have consistently denied any responsibility for the destruction of Tabaco, and argue that while their consortium owned 50% of the mine, they did not run it. The mining companies continue to rely on the Colombian security forces, while “people in the communities recount ongoing instances of harassment, theft of livestock and restrictions on freedom of movement at their hands.”

---

120 ibid
121 ibid
122 ibid
123 ibid
124 ibid
125 ibid
126 War on Want, ‘Fanning the Flames’, p 12. In the last half of 2006, BHP Billiton made a net profit of $73 million from its Cerrejon involvement.
The provision of security for Shell’s operation in the Ogoni region in Nigeria eventually led to the execution of nine protestors on 10 November 1995, including the influential Ken Saro-Wiwa. When the Ogoni movement insisted on a greater share of Nigeria’s oil being provided to Ogoniland, the Nigerian military responded by mounting “a kind of scorched-earth campaign against the Ogoni, burning villages and committing murders and rapes”, and warned that the death penalty would be used against anyone interfering with the revitalisation of the oil industry. This was not a hollow threat.

A lawsuit was brought under the ATCA, in the US District Court in New York, alleging that the company was involved in the government’s silencing of environmental and human rights activists, and that Shell assisted the government in the capture and execution of the activists. The plaintiffs alleged that company officials “helped furnish Nigerian police with weapons, participated in security sweeps of the area, and asked government troops to shoot villagers protesting the construction of a pipeline that later leaked oil.”

In June 2009, Shell agreed to an out of court settlement of $15.5 million, admitting neither liability nor wrongdoing. While the settlement figure is “less than one-hundredth of a percent of Shell’s annual revenue”, the money is desperately needed in the community, and half will be spent on social development programs, including adult literacy.

Formal business partnerships with repressive regimes
Corporations should be cautious of entering into business partnerships with States who have poor human rights records, as the corporation could be held accountable for the actions of its business partners, and can aggravate and

---

129 “Shell settles human rights suit for $15.5 m”
130 ibid
131 ibid
exacerbate existing human rights challenges.\footnote{Margaret Jungk, ‘A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad’ in Michael Addo (ed), Human Rights Standards and the Responsibility of Transnational Corporations (Kluwer Law International, The Hague, 1999), p 171} Clearly, liability will depend on the specific circumstances, but it would be difficult for a company to argue that it was unaware of abuse committed if there was a formal business partnership. As Paddy O’Reilly and Sophia Tickell argue, “oil companies make highly sophisticated geo-political commercial decisions all the time – claims of naiveté or ignorance of a given situation are not sufficient excuse” for involvement in human rights abuse.\footnote{Paddy O’Reilly and Sophia Tickell, ‘TNCs and Social Issues in the Developing World’ in Michael Addo (ed), Human Rights Standards and the Responsibility of Transnational Corporations (Kluwer Law International, The Hague, 1999), p 284}

In the Unocal case, the United States Court of Appeals for the Ninth Circuit ruled that a case could be brought against Unocal for aiding and abetting the Burmese government, despite there being no evidence that Unocal actively participated or cooperated in the wrongdoing. In the early 1990s, the Burmese government entered into a joint venture with a number of international oil companies and the State oil company, Myanmar Oil and Gas Enterprise (MOGE) to construct an oil pipeline through to Thailand, the Yadana Gas Pipeline. MOGE was responsible for providing labour and security for the pipeline, provided by the notorious military junta of the State Peace and Development Council.\footnote{David Kinley and Rachel Chambers, ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ (2006) 6(3) Human Rights Law Review 447, p 468} Allegations were made that MOGE and the government forced local people, including children, to work on the construction of an oil pipeline. There are also allegations of torture, rape, summary execution and forced relocation. Despite not directly perpetrating the abuse, Unocal and another oil company, Total, were accused of collusion.\footnote{Joseph, Corporations and Transnational Human Rights Litigation, p 4} The Ninth Circuit vacated its decision in February 2003, and allowed a review. Unocal settled the claim out of court in December 2004, before completion of the review.\footnote{Kinley and Chambers, ‘The UN Human Rights Norms for Corporations’, p 468} The settlement consisted of compensation to the plaintiffs, and the establishment of a fund to assist improve living conditions in the regions surrounding the pipeline.
Irresponsible marketing

Irresponsible marketing can have severe and disastrous consequences, in what can only be described as gross exploitation and unscrupulous conduct in the name of profit maximisation. Such marketing policies can conceal information from the public, with corporations failing to reveal the dangers or hazards of their products.\(^\text{137}\) It is now known that the tobacco industry was aware of the carcinogenic and addictive properties of nicotine, but sought to keep this information from the public.\(^\text{138}\) Similarly, there have been cases where pharmaceutical companies have withheld certain results from drug trials.

Perhaps the most well known case of irresponsible marketing leading to extreme harm, including the death of thousands of children, was the aggressive marketing by Nestle Corporation of infant formula in Africa, the Caribbean and South America in the 1960s through to the 1980s.\(^\text{139}\) The campaign persuaded millions of illiterate mothers to use infant formula, rather than breastfeed their babies. Nestle was aware that the majority of the women were unable to read the instructions, could not afford to use the correct quantity of formula, did not have sterilisation equipment, and lacked access to clean water. Millions of children died from malnutrition or dehydration from either diluted or contaminated formula, or millions more suffering dysentery as a result of the campaign.\(^\text{140}\) This is starkly put into perspective by Michael Gilbert and Steve Russell, who have noted that, "[c]orporate marketing practices, like that of the Nestle Corporation, have resulted in a greater annual pediatric [sic] body count than the wars in Rwanda and the former Yugoslavia combined."\(^\text{141}\) In a direct response to this appalling behaviour, the World Health Organisation eventually adopted the *International Code of Marketing of Breast-Milk Substitutes* in 1981.\(^\text{142}\) In addition, consumers responded with one of the largest consumer boycotts in history. However, nearly thirty years later, the misuse of infant formula continues to claim the lives of millions of children each year in developing countries.\(^\text{143}\) Nestle has not been held legally accountable.\(^\text{144}\)

\(^{137}\) Joseph, *Corporations and Transnational Human Rights Litigation*, p 2

\(^{138}\) Gilbert and Russell, ‘Globalization of criminal justice in the corporate context’, p 221


\(^{140}\) Gilbert and Russell, ‘Globalization of criminal justice in the corporate context’, p 233

\(^{141}\) ibid

\(^{142}\) Joseph, *Corporations and Transnational Human Rights Litigation*, p 2

\(^{143}\) Gilbert and Russell, ‘Globalization of criminal justice in the corporate context’, p 233
Supply chain complicity

Allegations of corporate complicity in relation to supply chains usually stems from corporations failing to ensure that there were no human rights violations in relation to the goods and services they are purchasing. For example, supply chain complicity may be made out if a corporation knew of the use of child, slave or forced labour in the making of garments, but continued to purchase from the factory, perpetuating the abuse. This is particularly so if the purchasing company is the sole purchaser, as the company would have considerable leverage and influence over the supplier, and could therefore dictate terms of the supply, including to not use child, slave or forced labour.

Trading in conflict commodities is another significant supply chain concern. Conflict commodities are an integral aspect of many modern conflicts. The sale of the commodities can fund rebel groups, and the desire to control enclaves can cause, exacerbate and protract conflicts due to the considerable wealth that can result from control of natural resources.145 The conflict in the DRC was fuelled by the profits available from minerals and resources.146 As Kofi Annan, then UN Secretary General observed:

Individuals and companies take advantage of, maintain and have even initiated armed conflicts in order to plunder destabilized countries to enrich themselves, with devastating consequences for civilian populations.147

Easily transportable, high value commodities are inherently difficult to regulate. Philippe Le Billon surmises that “qualitative analysis demonstrates that easily taxed or looted primary commodities increase the likelihood of war by providing

---

146 Information Regarding the Possible Investigation by the ICC of the Situation in Ituri, Democratic Republic of the Congo, (March 2004) United Nations Association of the United States of America, online at http://www.unausa.org/site/pp.asp?c=fVKR8MPJpF&B=345921 accessed 4 May 2005, Page 2: “Large profits from minerals and other resources fuel the continuation of hostilities. The Elite Networks fight against each other over access to mineral deposits as well as agricultural production and local tax revenues. Caught in the middle are civilians who fall victim to these operations and the various factions of military, ex-military, armed rebels and militia who are affiliated with the different Networks. Currently, four major powers exercise de facto economic control through these operations: Zimbabwe, Rwanda, Uganda and the DRC itself.”
the motivation, prize, and means of a violent contest for state or territorial control.” Angola presents an example of this: the country is the second largest oil producer in sub-Saharan Africa, and the world’s fourth largest diamond producer, but has the second worst level of under-five child mortality in the world, is extremely underdeveloped and has endured years of conflict. Diamonds have played an integral part in the financing of war, and it is likely that the economic opportunities presented by the alluvial diamonds in Angola “will continue to make armed opposition a long-term threat.” Diamonds played a pivotal role in the conflict in Sierra Leone, where weapons were largely paid for by illegal sales of diamonds; it is estimated that the RUF was making between $30 and $125 million a year from diamonds sales. Allegations have been levelled against De Beers, the prestigious diamond company, for funding insurgent groups in Angola and Sierra Leone through purchasing diamonds without due regard for the supply chain.

Understanding Corporate Complicity

Owing to the relatively limited case history, especially in relation to companies rather than individuals, and given the substantial variations in definitions of complicity within and between the legal and non-legal spheres, it is not possible to specify definitive tests for what constitutes complicity in any given context.

Complicity falls within the realm of direct abuse and mere presence, yet its exact contours and parameters are difficult to define. Complicity takes both legal and moral forms, and the meanings of each continue to evolve. Given the lack of clarity, the International Commission of Jurists (ICJ), the preeminent body of international lawyers, established an expert panel to investigate

---

149 ibid, p 57. In 2001, Angola was ranked the fifteenth least developed country.
150 ibid, pp 66-67: “Local civilians, military units, migrant diggers, well-connected businessmen, and international corporations have all participated in the development of a diversified diamond sector.”
153 Ruggie, Presentation of Report to United Nations Human Rights Council
corporate complicity from a legal perspective. The ICJ Expert Panel argues that the human rights literature and human rights campaigns often use the term complicity in a "rich and multi-layered colloquial manner", rather than a strict legal sense, with the inference being that corporations are "implicated in acts that are negative and unacceptable." However, the language of complicity is shifting towards legal accountability.

Both legal and moral concepts have implications for companies. States determine the scope of the private sector's legal obligations and responsibilities, and societal expectations widen this scope to a broader understanding of corporate responsibility. At its core, complicity requires a company to have been involved in a human rights abuse, or supported or benefited from abuse. To understand the context within which this occurred, it is useful to have knowledge about the corporation's relationship with the perpetrator, its role in the economy, the corporation's knowledge and intent, and also the nature of the abuse. Even in circumstances that do not cross the threshold for legal accountability, there can still be ramifications for corporations who act unethically or are morally compromised. Questionable conduct can be brought to the public's awareness by any range of actors, including victims, campaigners and socially aware investors. The potential impact of such action should not be disregarded; negative publicity can lead to a change in operations, particularly if the action is impinging on the corporate brand.

There is enormous scope and desperate need for policy development on the issue; impunity reigns as a direct result of the lack of consensus on the accountability framework, and the lack of clarity is a significant issue for companies. As Mark Taylor argues, without agreement we are left with two extremes:

156 UN Doc A/HRC/8/5, 7 April 2008, para 73
157 John Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Remarks, International Institute for Conflict Prevention and Resolution Corporate Leadership Award Dinner, New York, 2 October 2008
158 Irene Khan, Secretary-General, Amnesty International, 'Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws' (Business Human Rights seminar, London, 8 December 2005), AI Index: POL 34/001/2006 (Public), p 8
159 Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon', p 93
On the one extreme, those who feel corporations operating in the presence of human rights abuse are by definition complicit and, on the other extreme, the sense among companies that complicity is a concept that will be used to hunt multinationals as a kind of anti-neo-liberal blood sport.  

It is morally unacceptable that corporations can benefit from involvement in human rights abuse, including involvement in the most heinous crimes and face no ramifications for their actions. Conversely, corporations may find it difficult to avoid accusations of corporate complicity if the parameters are not defined.

Interestingly, when the ICJ Expert Panel conducted its research into accountability for corporate complicity, it found that many in-house lawyers were aware of recent developments in the area of business and human rights, but that they rarely saw this as being relevant to their own business activities. Despite a number of high profile cases relating to the extractive industries, corporate complicity is something that all corporations should be aware of and all corporations face the possibility of being held accountable, either morally or legally, for their actions: accountability will not be limited to certain specific sectors or companies. With the development of international criminal law and the continual growth in international trade, legal accountability for complicity in international crime will become ever more relevant to business entities. Accountability, whether moral or legal, will reach all sectors, including those who have not received the same level of scrutiny to date.

**Corporate complicity as a moral concept**

The concept of corporate complicity in human rights abuse gained publicity and momentum by human rights campaigners and advocates, who tend to speak of complicity in a moral sense, rather than a legal sense. In the non-legal context, complicity is a benchmark whereby society can pass judgment on corporations. To this end, corporate complicity is “an area where moral questions are as important as legal ones – at least until there is more legal

---

160 Mark Taylor, Keynote Address to the UN Global Compact Learning Forum, ‘Corporate Fallout Detectors and Fifth Amendment Capitalists: Corporate Complicity and Human Rights Abuse’, 11 December 2003
162 Ruggie, Presentation of Report to United Nations Human Rights Council
From a moral standpoint, it is the *benefit* that a corporation receives from involvement in abuse that is entirely repugnant.

Recent standard setting initiatives at the international level include the Global Compact and the OECD Guidelines. As documents that have secured considerable agreement amongst States, they are instructive insofar as they provide a guide as to existing societal expectations of acceptable and unacceptable corporate conduct. In this sense they have soft law status, but are not authoritative legal documents.

The Global Compact introduced the concept of corporate complicity into corporate responsibility discourse and was one of the first international documents to formally seek to address the issue of corporate complicity in human rights abuse. Principle Two specifically refers to complicity: “…Businesses should make sure that they are not complicit in human rights abuses.” The commentary to the Global Compact describes three main categories of complicity: direct, beneficial, and silent:

*Direct Complicity:* Occurs when a company knowingly assists a state in violating human rights. An example of this is in the case where a company assists in the forced relocation of peoples in circumstances related to business activity.

*Beneficial Complicity:* This suggests that a company benefits directly from human rights abuses committed by someone else. For example, violations committed by security forces, such as the suppression of a peaceful protest against business activities or the use of repressive measures while guarding company facilities, are often cited in this context.

*Silent Complicity:*
Describes the way human rights advocates see the failure by a company to raise the question of systematic or continuous human rights violations in its interactions with the appropriate authorities. For example, inaction or acceptance by companies of systematic discrimination in employment law against particular groups on the grounds of ethnicity or gender could bring accusations of silent complicity.167

The Global Compact encourages businesses to condemn continuous and systematic human rights violations. It specifically encourages businesses to ensure that any support provided to security forces is not used to commit human rights abuses, and to ensure that security forces are aware that the business will not condone human rights violations. The OECD Guidelines for Multinational Enterprises also calls upon companies to respect human rights.168

The working definition of ‘Direct Complicity’ is most analogous with the legal doctrine of aiding and abetting (which will be discussed later in this Chapter), and might also fall under joint criminal enterprise, depending on the facts. The International Council on Human Rights cite the coffee companies in the Rwandan genocide and their storing of arms as an example of direct complicity, and also the radio station for inciting genocide.169 The provision of arms and other weapons, and the knowledge that they may be used to commit human rights violations, could also be an example of direct complicity.

Beneficial, or indirect, complicity refers to situations where corporations have knowledge of human rights violations, and they receive a benefit from the abuse. This is most often used in relation to corporations engaging with a repressive government.170 Companies entering into joint ventures with governments with poor human rights records should be wary of beneficial complicity.171 The Danish Human Rights and Business Project categorises

---

168 The OCED is currently reviewing its Guidelines for Multinational Enterprises. The OECD intends to complete the update in 2011. Available online at www.oced.org/document/330/3343_en_2649_34889_44089653_1_1_1_1_0.html, accessed 13 August 2010
170 Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon’, pp 131-132
171 Mark Taylor, ‘Corporate Fallout Detectors and Fifth Amendment Capitalists’
Unocal’s involvement in the Yadana Gas Pipeline as indirect complicity. This example demonstrates the inter-relatedness of beneficial complicity and aiding and abetting, as the United States Court of Appeals for the Ninth Circuit ruled that a case could be brought against Unocal for aiding and abetting the Burmese government, despite there being no evidence that Unocal actively participated or cooperated in the wrongdoing. The South African Truth and Reconciliation Commission viewed benefiting from human rights abuse as a relevant consideration in attributing responsibility for corporate involvement in human rights abuse.

Silent complicity is the most contentious, and a company’s presence in a State where there are human rights violations will not in itself be cause for legal accountability, even if the company is aware of the abuse. However, this behaviour could be interpreted as endorsement of the abuse by providing political and commercial support to that regime. Remaining silent in the face of abuse would likely trigger public criticism of the company, and may result in a significant negative impact on corporate reputation, as “in the face of grave injustice, silence is not neutral.”

**Corporate complicity as a legal concept**

Victims and survivors are increasingly turning to the authority of legal accountability, in both domestic and international jurisdictions. As the issue of corporate accountability gains momentum, “the language of ethical duty is shifting by degrees towards a language of legal obligation.” This has initiated

---


173 Kinley and Chambers, ‘The UN Human Rights Norms for Corporations’, p 468

174 Ruggie, 15 May 2008, UN Doc A/HRC/8/16 para 41; Report of the International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes, Volume 1, p 14; The South African Truth and Reconciliation Commission considered the issue of business accountability for the role it played in apartheid. The TRC identified three levels of moral, as opposed to legal responsibility for business: first order involvement; second order involvement; and third order involvement. First order involvement can be understood as a direct involvement, and pertains to companies that helped the government to implement its policies of apartheid. Second order involvement pertains to businesses that were aware that their good and/or services would be used to maintain the apartheid system. Third order involvement pertains to business that received some form of indirect benefit by operating in that environment. The report is available online at [http://www.polity.org.za/polity/govdocs/commissions/1998/trc/4chap2.htm](http://www.polity.org.za/polity/govdocs/commissions/1998/trc/4chap2.htm)


176 Amnesty International (Dutch Section) and Pax Christi, p 53, quoted in International Council on Human Rights Policy, ‘Beyond Voluntarism’, p 135

177 International Council on Human Rights Policy, ‘Beyond Voluntarism’, p 74
the investigation of if and how international criminal law, and indeed the international human rights system, could reach beyond States (and individuals) to hold the corporation itself accountable when it causes harm, in addition to individual company officials.  

It is not currently possible to categorically state the legal definition and elements of corporate complicity in human rights abuse, and it is beyond the scope of this thesis to seek to define the crime of corporate complicity. As observed by Michael Addo, “[a]lthough there is agreement among the interested parties as to the need to define and delimit the responsibilities of corporations in the light of contemporary events, there is no comparable agreement as to what these responsibilities are.” The ICJ Expert Panel was convened in response to this challenge.

**Existing legal standards**

From a legal perspective corporate complicity is best understood as an “umbrella term.” Domestic jurisdictions tend to recognise a concept such as complicity, and the international tribunals recognise liability for aiding and abetting, joint criminal enterprise, and superior responsibility which can all be considered as forms of complicity. Aiding and abetting requires the assistance had a ‘substantial effect’ on the commission of the crime. Complicity has been most widely enunciated in reference to aiding and abetting international crimes; this legal doctrine is far more restrictive than the language proposed in the non-legal Global Compact. A more restrictive standard is understandable, as the Global Compact applies to respecting all human rights whereas aiding and abetting is only used in relation to international crimes, caused by violations of international criminal law.

---


179 Ruggie, 15 May 2008, UN Doc A/HRC/8/16, para 33


182 While joint criminal enterprise is of some utility, the doctrine of superior responsibility is of limited use in corporate complicity, except insofar as it enables the prosecution of those officials with greater authority in respect of crimes committed, or assisted, by subordinate officers under their effective control.

183 The Special Representative notes that the cases on aiding and abetting provide the most analogous jurisprudence: UN Doc A/HRC/8/16, 15 May 2008, para 33
The main impediment to determining the legal definition and elements of corporate complicity is the lack of jurisprudence, and the political challenges in which the concept is embedded. International law has not articulated the human rights obligations or responsibilities of corporations, particularly in regard to complicity, and has failed to provide human rights mechanisms for regulating corporate conduct. To date, the international tribunals, including the International Criminal Court, have not and do not have jurisdiction over corporations. The cases from the international tribunals are relevant, but as they do not consider the complicity of corporations they can only provide guidance. A general legal principle cannot be distilled from domestic jurisdictions as there are such differences between them. Corporations and corporate executives can be held accountable under both criminal and civil law; the question now is which factual circumstances give rise to liability.\(^{184}\)

**Using aiding and abetting to develop an understanding of complicity**

The concept of complicity has been explored in the most depth in relation to aiding and abetting international crimes.\(^ {185}\) This is a type of individual responsibility, and is yet to be applied to corporations, but could be applied to corporate officials.\(^ {186}\) Aiding and abetting international crimes is prohibited under international law, and is the most common form of accomplice liability in international and national legal systems.\(^ {187}\) Aiding and abetting requires (i) an act or omission, (ii) having a substantial effect on the commission of an international crime and (iii) knowledge of contributing to the crime.\(^ {188}\) This is supported by jurisprudence from the international criminal tribunals.\(^ {189}\)

---

\(^{184}\) Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon’ (2002) 20 Berkeley Journal of International Law 91, p 113

\(^{185}\) UN Doc A/HRC/8/5, 7 April 2008, para 74. Complicity in genocide has been prosecuted at the ICTY and ICTR due to a drafting anomaly: complicity in genocide and aiding and abetting genocide are both offences under the statutes.

\(^{186}\) This is due to jurisdictional limitations of the international tribunals; if there was a forum with jurisdiction, it could determine whether this standard should apply to corporations.


\(^{188}\) UN Doc A/HRC/8/16, 15 May 2008, para 35. See note 18: “The Statutes for the ICC, ICTY and ICTR as well as other international criminal tribunals provide for individual liability based on aiding and abetting. In the jurisprudence before the ICTY and ICTR, the tribunals have emphasized that such liability will depend on proving a physical element (substantial assistance) and a mental element (knowledge). For example, see Furundžija (ICTY Trial Chamber), 10 December 1998, para. 249; Simić (ICTY Appeals Chamber), 28 November 2006, paras. 85-86; Slagoević and Jokic (ICTY Appeals Chamber), 9 May 2007, para. 127; and Ntagerura (ICTR Appeals Chamber), 7 July 2006, para. 370.” See also Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, “Corporate Complicity and Legal Accountability”, Volume 2, p 37; see also Prosecutor v Anto Furundžija, ICTY, Trial
Actus Reus: an act or omission with substantial effect
The requisite actus reus is either an act or omission that had a substantial effect on the commission of the crime. Whether an act or omission has a substantial effect will be determined by the facts of the case. It is not necessary to show that the crime would not have been committed without the act or omission. The International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind (the Code) provides that the accomplice must contribute “directly and substantially” to commit the crime, but causal effect of the act is not required. Under the Code, accomplice liability requires a substantial effect on the crime before, during or after the perpetration of the crime. Regarding accountability for omissions, an accomplice must have been able to prevent the act from occurring, but rather did nothing.

There have been instances where an omission has been viewed as legitimising or encouraging abuse. Similarly, the effect of silence in the face of abuses should be considered, as in some limited situations, taking no action to end abuse could be interpreted as endorsement or encouragement of the act. Establishing an actus reus for silent complicity would not be impossible, but would only occur in limited circumstances. Moreover, the company would need to have known that its silence was providing such encouragement. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has found that

---

189 Prosecutor v Furundzija, Judgement, No IT-95-17/1 (ICTY Trial Chamber, 10 December 1998); Prosecutor v Akayesu, Judgement, No ICTR-96-4-T (ICTR Trial Chamber, 2 September 1998). However, in the case of Prosecutor v Kayishema and Ruzindana (Case No ICTR-95-1-T), the ICTR held that aiding and abetting are disjunctive terms whereas the ICTY interpreted aiding and abetting as a collective term in Prosecutor v Dusko Tadic (Case No IT-94-I-T). See Alex Obote-Odora, ‘Complicity in genocide as understood through the ICTR experience’ International Criminal Law Review 22 (2002), 375-408, p 391

190 For a discussion on the actus reus for corporate complicity, see I Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Volume 2, pp 18-19

191 UN Doc A/HRC/8/16, paras 36-38

192 Yearbook of the International Law Commission, 1996, vol II, Part Two, document A/51/10, p 21, para 11 of the commentary to article 1


failure to act can be interpreted as encouragement and moral support of the action of the primary perpetrator.\textsuperscript{197}

Under this legal doctrine one single act or omission can attract legal responsibility. If a company provides trucks, fuel or infrastructure that substantially assists in the commission of an act such as killing or rape, and this act is part of a wider pattern of abuse that can be categorised as a widespread or systematic attack, then an individual may be held criminally liable for aiding and abetting crimes against humanity.\textsuperscript{198} In some limited circumstances, an omission can attract legal liability when the omission encourages or legitimises abuse.\textsuperscript{199} In such a situation the omission would need to have a substantial effect on the commission of the crime, and there would need to be knowledge of the crime.

Responsibility for aiding and abetting will be established if the individual knew, or should have known, that the actions would assist in the commission of a crime, even if the actions were not intended to assist in the commission of the crime.\textsuperscript{200} However, as in any prosecution there would likely be evidentiary challenges, such as those faced by the prosecution at the international tribunals. For example, in \textit{Prosecutor v Emmanual Ndindabahizi}, the accused was prosecuted for his involvement in the distribution of weapons and his encouragement of the killing of Tutsi.\textsuperscript{201} While it was established that Ndindabahizi encouraged the Interahamwe to kill Tutsi women married to Hutu at a roadblock near Nyabahanga Bridge, the Chamber held that there was limited evidence that the accused had “directly and substantially” contributed to the deaths, and that “there was insufficient evidence of when or where such killings actually occurred to connect his conduct to the crimes.”\textsuperscript{202} Prosecutions of arms dealers and arms manufacturers would face similar evidentiary challenges.

\textsuperscript{197} Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon’, p 144, referring to \textit{Prosecutor v Blaskic}, Case No IT-95-14, Trial Judgment, March 3, 2000 at para 284; although the accused in these all had authority, or superior status


\textsuperscript{199} UN Doc A/HRC/4/35, para 257-261

\textsuperscript{200} UN Doc A/HRC/8/5, 7 April 2008, para 77, referring to \textit{Kvovka et al (IT-98-30/1-T)}, 2 November 2001, paras 257-261


\textsuperscript{202} Christina Barba, edited by Anne Heindel, ‘Prosecutor v Emmanual Ndindabahizi’ \textit{Human Rights Brief}, Volume 13 Issue 1, 2005

\textsuperscript{203} Barba, ‘Prosecutor v Emmanual Ndindabahizi’
challenges. In addition, the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have held that necessity is not a defence to aiding and abetting in human rights violations, and it is only considered in sentencing, as a mitigating factor.203

**Mens Rea**

For aiding and abetting, the element that is most contentious is the *mens rea*, or the knowledge element. The *mens rea* element for accomplice liability under international law is knowledge that the act or omission will assist in the perpetration of the crimes, but an accomplice need not know the exact crime that will be committed, nor must the accomplice intend for the crime to be committed.204 Aiding and abetting liability does not require the same criminal intent as the principal perpetrator, and the accomplice need not want the crime to occur. The international tribunals have established that accomplice liability for aiding and abetting requires the individual to know the principal perpetrator’s criminal intentions, and should know that their actions assist in a substantial way to the commission of the crime.205

For accomplice liability for crimes against humanity to be established, the accomplice must have knowledge of the discriminatory intent with which the crimes will be committed. The accomplice must also have knowledge that the involvement will have a substantial effect on the commission of the crime, but the accomplice need not share the intent with the principal perpetrator.206

The United States courts have considered the issue of *mens rea* for corporate complicity in cases brought under the *Alien Tort Claims Act*. *Mens rea* is an issue in these cases because, while they are civil cases, corporations cannot be found liable unless they are found to have a positive intention to bring about the most heinous crimes under international law. The United States Court of

---

203 Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon’, p 140
204 UN Doc A/HRC/4/35, 19 February 2007, para 32, p 12
Appeals for the Ninth Circuit reaffirmed the international legal standard of aiding and abetting in its *Unocal* decision, but as discussed previously, this decision was vacated. However, the recent decision of the United States Court of Appeals for the Second Circuit in the *Talisman* case introduced the term “purposeful complicity”. The Court found that “applying international law, we hold that the *mens rea* standard for aiding and abetting liability in [ATCA] actions is purpose rather than knowledge alone.” This is a far more stringent test, requiring intent to commit the crime, as opposed to knowledge that a crime may be committed. This is inconsistent with the elements of aiding and abetting, and such a requirement would have significant ramifications for the entire business and human rights movement. For example, the test in *Talisman* would likely have rendered a not-guilty verdict in the industrialist prosecutions after the Second World War, for it is arguable that the industrialists intended to make a profit, and knew of the crime, but they did not intend to assist with the Holocaust. The result of this is that it is now unlikely that corporations will be held liable under the *Alien Tort Claims Act*.

The knowledge element is both objective and subjective, and knowledge can be inferred from the facts, and “constructive knowledge could be inferred even where the accused has not explicitly expressed that they had such knowledge or in fact denied they had knowledge.” When imputing knowledge to individual company officials, the trials after the Second World War considered the information that was available to the individuals, including minutes of meetings or other aspects that might raise alarm, such as the increasingly large order for pesticides and other chemicals. Sometimes knowledge was imputed based on the individual’s role and authority within the company. This means that a company official who knows that the company is selling goods likely to be used to commit numerous crimes may still be liable, even though there was no certainty as to the exact crime intended. This should resonate with corporations producing and selling inherently dangerous goods, or goods

---

207 UN Doc E/CN.4/2006/97, 22 February 2006, para 72, Page 18: “The ruling stipulated three criteria: giving practical assistance to the actual perpetrator of a crime; the requirement that this assistance had a substantial effect on the commission of the criminal act; and the fact that the company knew or should have known that its acts would result in a possible crime even if it did not intend for that crime to take place. These criteria conform closely to what is widely thought to be the current state of international law on this subject.”

208 2nd U.S. Circuit Court of Appeals in The Presbyterian Church of Sudan v Talisman Energy Inc, 07-0016, p 41. The Talisman decision was upheld in February 2011.

209 UN Doc A/HRC/9/16, 15 May 2008, para 43

210 ibid, para 44

which have been modified in order to present a danger. Company officials should be wary of continuing their business operations if they are aware that their actions will “facilitate, encourage or provide moral support” for the perpetration of a crime, as they could be found guilty of aiding and abetting.212 Similarly, they should be cautious of intentionally contributing to the commission of a crime, with either intent to commit the crime or knowledge of the intention to commit the crime as they could be found criminally liable.213

Complicity in genocide
The international tribunals, in particular the ICTR, have considered complicity in genocide separate from aiding and abetting. This is due to a “technical anomaly”.214 the statutes allow for accomplice liability for genocide in two separate provisions, one for aiding and abetting, and the other for complicity in genocide. Many accused were charged with complicity in genocide in addition to aiding and abetting genocide. While this jurisprudence applies to individuals, it is instructive. In addition to determining the elements of complicity and aiding and abetting, the cases also address additional questions which relate specifically to genocide: firstly, whether the accomplice requires the dolus specialis or ‘special intent’ to commit genocide; and secondly, whether genocide resulted from a plan, and whether the accomplice was aware of the plan.215

William Schabas has observed that “[o]ne of the intriguing issues of interpretation involved in genocide prosecutions is the concept of intent.”216 It is an aspect on which there is little coherence. In Prosecutor v Akayesu,217 the trial chamber held that an individual could be found guilty of complicity in genocide if that individual knew, or had reason to know, “that the principal perpetrator was acting with genocidal intent”, but to be found guilty of aiding and abetting genocide, it would need to be established that the individual was acting with the requisite dolus specialis, or the specific intent to destroy,

212 ibid, p 22
215 On this point see Obote-Odora, ‘Complicity in genocide as understood through the ICTR experience’, pp 382-387
217 Prosecutor v Akayesu, Judgment, Case No ICTR-96-4-T, 2 September 1998
required for genocide.\textsuperscript{218} Thus, aiding and abetting in genocide would require the accomplice to share the principal’s \textit{dolus specialis}, whereas complicity in genocide requires the accomplice to be aware of the principal’s \textit{dolus specialis} but not share it.\textsuperscript{219} Conversely, in the \textit{Kayishema and Ruzindana} case, the trial chamber required specific intent for complicity in genocide, and knowledge of the principal’s genocidal intent for aiding and abetting genocide.\textsuperscript{220} The \textit{Musema} case used the same test as \textit{Akayesu}.\textsuperscript{221} Conversely, the trial chamber in \textit{Semanza} held that there is no material difference in the \textit{mens rea} required for complicity as opposed to aiding and abetting genocide:

An individual acts intentionally and with the awareness that he is influencing or assisting the principal perpetrator to commit the crime. The accused need not necessarily share the \textit{mens rea} of the principal perpetrator; the accused must be aware, however, of the essential elements of the principal’s crime including the \textit{mens rea}.\textsuperscript{222}

In \textit{Bagilishema} the trial chamber determined that knowledge of the principal’s genocidal intent suffices as the \textit{mens rea} for aiding and abetting in genocide, indicating that all forms of complicity require knowledge rather than specific intent.\textsuperscript{223} Consequently, the Trial Chamber in \textit{Milosevic} pointed out that:

\textsuperscript{218} Larissa van den Herik and Elies van Sliedregt, ‘Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes’ (2004) 17 \textit{Leiden Journal of International Law} 537, p 545. See also Schabas, “The Jelisic Case and the Mens Rea of the Crime of Genocide”, p 129, commenting on the use of ‘dolus specialis’ – Schabas notes that it is a term specific to certain civil law systems, and not completely interchangeable with terms such as ‘specific intent’ and ‘special intent’.

\textsuperscript{219} van den Herik and van Sliedregt, ‘Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities’, pp 537-557, 545: “[t]herefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the dolus specialis of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such. Thus, if for example, an accused knowingly aided or abetted another in the commission of a murder, while bring unaware that the principal was committing such a murder, with the intent to destroy, in whole or in part, the group to which the murdered victim belonged, the accused could be prosecuted for complicity in murder, and certainly nor for complicity in genocide. However, if the accused knowingly aided and betted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to the genocide, even though he did not share the murderer’s intent to destroy the group…In conclusion, the Chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy in whole or in part, a national, ethnic, racial, or religious group, as such.” \textit{Akayesu}, para 544 (quoted in William Schabas, ‘The Jelisic Case and the Mens Rea of the Crime of Genocide’, p 131)

\textsuperscript{220} \textit{Prosecutor v Kayishema and Ruzindana}, Judgment, Case No ICTR-95-I-T, T.ChII, 21 May 1999, paras 91 and 205, 297

\textsuperscript{221} See van den Herik and van Sliedregt, ‘Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities’, pp 537-557

\textsuperscript{222} \textit{Semanza} Judgement, para 388,394, quoted in van den Herik and van Sliedregt, ‘Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities’, p 547

\textsuperscript{223} van den Herik and van Sliedregt, ‘Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities’, p 545
Evidently, the *mens rea* for both complicity in genocide and aiding and abetting genocide requires clarification.\textsuperscript{225}


The ICJ Expert Panel considered legal accountability for corporate complicity in international crimes\textsuperscript{226}. The ICJ Expert Panel proposed a three-pronged test to determine if a company was likely to cross the threshold of moral and ethical accountability, and enter the ‘zone of legal risk’. The three aspects are causation, knowledge and proximity.\textsuperscript{227}

The ICJ Expert Panel argues that in order to avoid legal accountability, corporations should avoid contributing to human rights abuse, either by enabling abuse, by exacerbating abuse, or by facilitating abuse. Legal liability would attract if the corporation or its executives intended to contribute to a human rights violation, or if the company or its executives knew or should have known that there was such a risk, or chose to be wilfully blind to the risk. They also argue that the corporation or its employees would need to have a proximate relationship to the primary perpetrator, either through geography, the nature of their relationship, and any business transactions. The ICJ Expert Panel surmised that it is the proximity that will establish whether the corporation

\textsuperscript{224} Prosecutor v Slobodan Milosevic, Case No IT-02-54-T, ICTY Trial Chamber Judgment 296,16 June 2004

\textsuperscript{225} Complicity in genocide is not an offence under the Rome Statute of the International Criminal Court

\textsuperscript{226} Many gross violations of human rights, such as torture, rape and enforced disappearances can also constitute crimes against humanity or war crimes. For further information on the classification of human rights violations, see Stanislav Chernichenko, Working Paper submitted in accordance with Sub-Commission decision 1992/109, ‘Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Definition of gross and large-scale violations of human rights as an international crime’, Commission on Human Rights, Forty-fifth session, 8 June 1999, UN Doc E/CN.4/Sub.2/1993/10

\textsuperscript{227} Report of the International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes, Volume 1, p 8
did in fact enable, exacerbate or facilitate the abuse, and whether the
corporation knew or should have known the risks.228

Enabling, exacerbating and facilitating human rights abuse
A company that has caused or contributed to human rights abuse, by either
enabling, exacerbating or facilitating human rights abuse is likely to be able to
be held legally accountable for their conduct. The nature of the conduct that
could be understood as causing or contributing to harm is varied. For example,
by providing weapons or vehicles that are used to commit human rights abuse,
by providing software that could assist in identifying minorities leading to
discrimination or persecution, or by making an agreement that would involve
human rights abuse be committed by the other party, such as forced
displacement and relocation of indigenous peoples for a new mining operation.
The conduct can be either a positive or negative act, and would include
omissions like not refusing forced labour in business operations.229

The Special Representative has observed that the “moral support” aspect “may
pose specific challenges.”230 It is not unlike the Global Compact’s ‘silent
complicity’, and formulating the specific elements for such a crime will be
challenging. However, the ICJ Expert Panel considers that there may be
“special situations in which a company or its individual officials exercise such
influence, weight and authority over the principal perpetrators that their silent
presence would be taken by the principal to communicate approval and moral
encouragement to commit the gross human rights abuses.”231 It could be the
case that in certain limited circumstances, depending on the facts, the
corporation may be legally accountable for remaining silent.232

Enabling human rights abuse is the clearest example of corporate complicity. It
would include situations of corporations informing security agents and
government officials of the identity of trade unionists and political opponents;
instances of abuse committed by security forces, who commit abuse against

---

228 Report of the International Commission of Jurists Expert Panel on Corporate Complicity in International
Crimes, Volume 1, p 9
229 ibid, p 10
231 Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in
International Crimes, Volume 1, p 15
232 ibid
protestors; and situations where a corporation makes vehicles, planes and other modes of transport available to government or rebel forces who then rely on this transportation to reach villages and commit atrocities. In each case, the act or omission of the corporation enables abuse to occur.\textsuperscript{233}

A company could be held accountable under criminal and civil law if the act or omission exacerbated existing abuse. For example, a State may be able to destroy more houses more quickly if it has access to armoured bulldozers, more severe injuries could be inflicted during torture after the provision of certain instruments, and abuse aimed at civilian populations during armed conflict could be intensified with the provision of weaponry. Other examples could be, as alleged by the plaintiffs in the \textit{Talisman} case, that a corporation built roads and upgraded airfields that the Sudanese military used to launch attacks against civilians and displace populations. In return, the company gained the right to oil concessions.\textsuperscript{234}

Exacerbation may be made out for providing information to security forces, who are likely to commit abuse, or even directing them as is alleged in the case against Monterrico Metals. In that 2005 case, protestors rallying at the Rio Blanco open copper mine in Peru were detained and tortured, and managers of Monterrico Metals are alleged to have directed the police to take the action.\textsuperscript{235} Armed police fired teargas at the protestors, and detained 28 people. The detainees allege they were sprayed with a noxious substance, were hooded and beaten. The women detainees allege they were threatened with rape and sexually assaulted. The police shot three protestors, and one bled to death at the mine site after 36 hours. In its defence, Monterrico argues that the protestors were detained for shooting a police officer in the leg, and deny any involvement.

Facilitating existing crimes and abuse could also attract liability under both criminal and civil law. One example of such a situation is the provision of

\textsuperscript{233} ibid, p 11
improved methods, such as improved software, for identifying and targeting minority groups, who are already subject to persecution and discrimination. 236 Similar accusations were made against Yahoo, in relation to the 10-year imprisonment of Shi Tao, a Chinese journalist, in 2005. Reporters Without Borders argue that Yahoo’s Hong Kong branch enabled the Chinese government to link the journalist’s computer and e-mail account to a message warning other journalists of the risk of social instability and unrest at the 15th anniversary of the Tiananmen Square. 237 Another example of facilitation is that of financial institutions providing loans to regimes that commit human rights abuse. An example would be Deutsch Bank, which admitted to knowingly financing the construction of the crematorium at the Auschwitz concentration camp. 238

In practice, it may be difficult to determine whether the corporation’s act or omission has impacted on the harm. There are some clear examples, but some situations are more complex. One example that is not clear-cut is that of irresponsible marketing campaigns, such as the Nestle debacle. Another complex example is the role of pharmaceutical companies in the realisation of the right to health, particularly when tuberculosis and HIV/AIDS drugs are patented and prohibitively expensive to many people. 239 The trade in conflict commodities, including conflict diamonds, is similarly complicated. The availability of easily transportable, high-value resources can cause protracted conflict by financing rebel groups. 240 Terry Lynn Karl refers to this as the “paradox of plenty”: “The paradox rests in the fact that the easy access to natural, financial and military resources significantly increases the likelihood and persistence of deadly conflict, suggesting some answers to the pattern of contemporary conflict.” 241 The purchasing of conflict commodities can create a “revenue stream for the abusive armed groups.” 242 It is generally agreed that

---

242 Human Rights Watch, ‘On the Margins of Profit’, p 14
the sale of conflict diamonds was essential to the survival of the *Uniao Nacional para a Independencia Total de Angola* (UNITA) in Angola. The sale of diamonds funded the war effort, where UNITA rebels consistently committed war crimes. Similarly, the sale of diamonds financed the RUF in the Sierra Leone conflict. Many of these sales were made through neighbouring Liberia, which also helped to fund the Liberian conflict.243

The conflict in the Democratic Republic of Congo (DRC) was also largely funded by the sale of resources. The DRC is resource rich, with gold, oil, coltan and diamonds; rather than assisting the conflict ravaged country, this abundance of natural resources has only served to plunge the country into a deeper, protracted and brutal conflict. A UN Expert Panel was established in 2000 to determine whether, how, and to what degree conflict commodities from the DRC affected the conflict there.244 The Panel found that:

illicit trade and exports were indeed fuelling the conflict; that there were links in this respect to government, rebels, local and regional companies, and some international companies; and that exports escaped sanctions through sophisticated networks of fighters and businessmen in porous border regions, out of which illegal goods eventually emerged as legal.245

Metalor, a Swiss company, bought gold from the network for five years, despite claiming to have checked the supply chain to ensure that “acceptable ethical standards were being maintained.”246 Governments with poor human rights records may receive funding from more legitimate sources, but this funding can still be directed towards human rights abuse. For example, in 2001, around 60 percent of the approximately $580 million received by the Sudanese government from oil revenues was directed towards the military, whose appalling human rights record and perpetration of war crimes is well known.247

243 Control Arms Campaign, ‘The Call for Tough Arms Controls: Voices from Sierra Leone’, p 13
245 Taylor, ‘Economies of Conflict’, p 23
246 Human Rights Watch, ‘On the Margins of Profit’, p 14. Companies purchasing gold knew, or should have known, that it came from a conflict zone in DRC, where human rights abuse was systemic, and therefore should be considered a conflict commodity. The sale of this gold on the international market allows the warlords with access to money and resources, and the ability to purchase guns and weapons, perpetuating their power and “their reign of terror on local villages.”
Knowledge and foreseeability
A company may be legally responsible even if it did not intend to contribute to the abuse. Under civil law, courts will consider what a reasonable person in the corporation’s position would have, or should have known, and what they would have considered the risks to be.\textsuperscript{248} Conversely, criminal law will often require that the company had subjective knowledge which the court must determine.\textsuperscript{249}

It is often difficult to prove knowledge to the required criminal standard and is even more difficult to establish against the corporation as an entity.\textsuperscript{250} The mental state of the accused is assessed on the basis of all relevant information, through “direct and indirect or circumstantial evidence.”\textsuperscript{251} In order to determine the subjective knowledge, the courts will consider the surrounding circumstances. For example, in the case of the German industrialist Friedrich Flick, who had raised funds for the SS, the court held that when he commenced fundraising in the 1930s the criminal character of the SS was not well known, but that Flick continued after the criminal nature of the SS was generally known. Similarly, Bruno Tesch was convicted because he should have known that the ever-increasing quantities of Zyklon B gas that he was providing to the concentration camps must have been being used for more than legitimate pest extermination.\textsuperscript{252} Conversely, the Rasche case held that responsibility would not attach to officials in the financial sector, whose banks and institutions financed criminal regimes: the tribunal could not “go so far as to enunciate the proposition that the official of a loaning bank is charged with the illegal money was used to develop a domestic arms industry, and to purchase foreign weapons. For a detailed account of the type of abuse committed by Sudanese forces and the Janjawid militias, and the weapons being purchased, see Amnesty International, ‘Sudan: Arms continuing to fuel serious human rights violations in Darfur’, AI Index – AFR/54/019/2007.

\textsuperscript{248} The common law test for breach of duty is: given the knowledge and experience that a reasonable person in the defendant’s position either had or should have had, would they have been able to foresee a risk of harm to the plaintiff.

\textsuperscript{249} Report of the International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes, Volume 1, p 21


\textsuperscript{251} ibid, p 22

\textsuperscript{252} Report of the International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes, Volume 1, p 21. Similarly, corporations should be aware of the impact of environmental degradation on the realisation of human rights. Corporate behaviour can have devastating consequences on the environment, which in turn affects the right to health, the right to water, and other rights. Shell’s operations in Ogoniland in Nigeria, for example, have caused extensive environmental degradation, with consequential impacts on the realisation of the right to an adequate standard of living, and the right to food: see Joseph, \textit{Corporations and Transnational Human Rights Litigation}, p 2
operations alleged to have resulted from loans or which may have been contemplated by the borrowers.”

As knowledge can be imputed from the facts, in some circumstances it may be difficult to argue that the corporation did not have knowledge, particularly if there has been media or other interest in the human rights standards. The availability and ease at which information can be gained from the internet may make it easier to establish knowledge in some circumstances. Since the information revolution and the ease of global communications, “there is a plethora of information available to most business people about the activities of their partners and clients.” In many cases it would seem impalpable that company officers could not be aware of the actions of those around them, including the commission of heinous crimes. For example, William Schabas argues that, in relation to the media and UN coverage of the conflict in Sierra Leone, “diamond traders, airline pilots and executives, small arms suppliers and so on, have knowledge of their contribution to the conflict.” Companies based in South Africa, Israel and the UK all provided arms shipments to the Great Lakes Regions during the conflict, under agreements with the DRC, and all should have been aware of the conflict and the negative contribution they were making to that. However, the common knowledge test can be problematic, and should not be relied upon unquestioningly. As cautioned by the ICJ Expert Panel, “[t]he precise content, veracity and timing of the so called common knowledge must be examined scrupulously.”

Companies are under a responsibility to make themselves aware of the risks associated with their operations, as will be discussed in Chapter 5. This responsibility may be discharged through due diligence processes, which

---

253 Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon’, p 113; However, the suggested beneficial complicity test relates to human rights abuse, and the tribunal was prosecuting under international criminal law, which has a higher legal threshold.
255 Ibid
258 Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Volume 2, p 24. Consider, for example, the findings of the gacaca trials in Rwanda, which found that there was not one national story of genocide, and that each small village had a different story. Incredibly, the genocide bypassed some villages completely and these communities did not share the common national story that emerged after the genocide.
should identify foreseeable risks, and should ensure that companies make themselves aware of the political situations in which they operate. Wilful blindness is no defence.

**Corporate complicity: seen and understood?**

Corporate complicity encompasses both legal and moral contexts, neither of which is simply defined. This is the “messy reality”\(^{259}\) of corporate complicity. States determine the scope of the private sector’s legal obligations and responsibilities. Societal expectations widen this scope to a broader understanding of corporate responsibility.\(^{260}\) Corporations should not assume that by meeting their legal obligations they also fulfil societal expectations, particularly in regions where legal regulation is lacking.\(^{261}\)

While the jurisprudence on aiding and abetting under international law is instructive, not all involvement in human rights will amount to aiding and abetting an international crime. It is important to have legal guidance for involvement in human rights abuse that does not reach this threshold. A definitive, universally accepted definition and standard of corporate complicity is needed. In order to achieve consistency, corporate complicity requires a concerted and dedicated response from the international criminal law and human rights regimes.

The ramifications of the lack of articulated legal position cannot be overstated: there is a dire need to address this lacuna, to educate corporations of their responsibilities and to inform victims and survivors of their rights and their ability to seek remedies. These developments need to be driven by States, at both the domestic and inter-governmental level. The issue of corporate complicity is a relatively new political problem, and this is evidenced by the enormous amount of research, coordination and political will that is need to address the knowledge gaps and policy chasms with which we are presented.\(^{262}\)

---

\(^{259}\) UN Doc A/HRC/8/16, 15 May 2008, para 70

\(^{260}\) Ruggie, Remarks, International Institute for Conflict Prevention and Resolution Corporate Leadership Award Dinner, New York, 2 October 2008

\(^{261}\) ibid

\(^{262}\) Taylor, ‘Corporate Fallout Detectors and Fifth Amendment Capitalists’
CHAPTER 2

RESPONSES TO CORPORATE COMPlicity:

DEVELOPMENTS LEADING TO THE FRAMEWORK

In recent years there has been an increased awareness of the role of corporations in human rights violations, with stakeholders agreed that there is an “urgent need for a common conceptual and policy framework, a foundation on which thinking an action can build.”263 Accountability for corporate involvement in human rights abuse is a concept that is in its infancy. Currently the debate “lacks an authoritative focal point.”264 There is no one overarching systemic approach to address the issue. Responses have generally been reactionary, and have not sufficiently addressed the underlying governance deficiencies. It is these deficiencies that allow the abuse to occur, even when it is unintended.265

This chapter will consider the responses to the challenge of corporate complicity which lead to the Protect, Respect, Remedy Framework. Primarily, these are the UN Global Compact, the OECD Guidelines for Multinational Corporations, various industry initiatives and the Norms on the responsibility of Transnational Corporations and other business enterprises with regard to human rights.

Responding to the Challenge

The Special Representative acknowledges three principal forces behind this development in the area of business and human rights: the increased power of corporations, the frequency of corporate human rights abuse, and the immense capacity of modern corporations. The realisation of the growth of power of corporations has resulted in efforts to reign in the power: “the successful accumulation of power by one type of social action will induce efforts by others

263 UN Doc A/HRC/8/5, 7 April 2008, para 8
264 ibid, para 5
265 ibid, para 11
with different interests or aims to organize countervailing power.”266 Trade agreements, bilateral investment treaties and trade liberalisation policies have all increased the rights of transnational corporations.267 The 1990s saw intellectual property rights identified as trade issues, with the implementation of the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement of the World Trade Organisation (WTO).268 The TRIPS agreement allowed the right to health to be held hostage in preference to economic and property rights. Under the TRIPS agreement in 2001, GlaxoSmithKline (GSK) and 39 other corporations brought a claim against the South African government in an attempt to prevent it accessing generic HIV/AIDS antiretroviral drugs.269 Corporate responses such as these, although legitimate at the WTO, fuelled a “social backlash” against corporations.270

The second force is that a number of companies have committed human rights abuses, including the violation of labour and environmental rights. Consequently, there have been calls for greater regulation of corporations; and corporations themselves have wanted to avoid the repetition of such situations. This has led to a number of industry-wide codes of conduct, such as the Kimberley Process Certification Scheme Process. Moreover, the Special Representative suggests that it was this driving force that made domestic courts more willing to accept jurisdiction to hear cases of corporate involvement in human rights abuse overseas.271 One example of this is the interpretation of the Alien Tort Claims Act (ATCA), and the subsequent jurisprudence emanating from United States courts.

The third force identified by the Special Representative is the “global reach and capacity” of corporations, and their ability to operate quickly without the apparent

---

267 UN Doc E/CN.4/2006/97, 22 February 2006, para 12
268 For further information on the TRIPS, see ‘TRIPS material on the WTO site’, available online at http://www.wto.org/english/tratop_e/trips_e.htm, last accessed 2 September 2010
270 UN Doc E/CN.4/2006/97, 22 February 2006, para 14; see also Rees, ‘Omissions in the twentieth century’, p 306
271 ibid, para 15
inertia of States and other international agencies.\textsuperscript{272} International responses are required precisely because individual States are often unable (or unwilling) to respond to these pressing problems.\textsuperscript{273}

\textbf{The Business and Human Rights Agenda}

While the issue of corporate complicity has gained momentum in recent years, the business and human rights agenda is not new. In the 1970s and 1980s the United Nations attempted to draft an international code of conduct for business, but was unsuccessful. In 1976 the OECD created its first Guidelines for Multinational Enterprises, and the current version (which is under review at the moment) was revised in 2000. The OECD Guidelines are the longest corporate standard-setting initiative.\textsuperscript{274} The International Labour Organisation (ILO) adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1977, which were last re-issued in March 2006, and Kofi Annan proposed the Global Compact in 1999.\textsuperscript{275}

\textbf{The United Nations Global Compact}

The then-UN Secretary-General Kofi Annan proposed the Global Compact in 1999. In introducing the Global Compact, he provided the following advice:

\begin{quote}
You can uphold human rights and decent labour and environmental standards directly, by your own conduct of your own business. Indeed, you can use these universal values as the cement binding together your global corporations, since they are values people all over the world will recognize as their own. You can make sure that in your own corporate practices you uphold and respect human rights; and that you are not yourselves complicit in human rights abuses.\textsuperscript{276}
\end{quote}

\textsuperscript{272} ibid, para 16
\textsuperscript{273} While states dominate international law making, an international response would be better than responses of individual states. Chapter 3 considers the state duty to protect, including the cause of existing governance gaps in both host states and home states. An international response could help address these governance gaps. In addition, international law can help to create norms that improve national law.
\textsuperscript{275} The fourth edition of the Tripartite Declaration, March 2006, is available online at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_pub/---multi/documents/publication/wcms_094386.pdf, last accessed 28 August 2010
Kofi Annan asked the global corporate sector to respect human rights within their sphere of influence, and to ensure they were not complicit in human rights abuse. These describe two basic principles: corporations have a responsibility to respect human rights and avoid perpetrating abuse; and corporations have a duty to avoid being complicit in the human rights violations.277

More than 5,300 companies participate in the Global Compact, making it the largest corporate social responsibility and corporate citizenship initiative in the world.278 It seeks to engage corporations in implementing principles and standards of human rights, including the areas of labour standards, environmental protection and anti-corruption.279 It was the Global Compact that introduced the concepts of ‘complicity’ and ‘sphere of influence’ into corporate accountability and social responsibility discourse.280 While it is a voluntary initiative, it is of great importance as a “learning network”, where ideas can be shared and good practice can be discussed and disseminated.281 This is a key aspect, as over half of the participating corporations are from developing States, and of these two thirds have not have previous exposure to corporate social responsibility policies and practice.282 The Global Compact has a requirement of annual communication on the implementation of the initiative’s key principles.283

The Global Compact is the most well known of the international standard setting initiatives. It is a non-legally binding initiative that seeks the participation of diverse businesses. Its aim is to “stimulate change and to promote good corporate citizenship and encourage innovative solutions and partnerships.”284 If a company is a participant, the Global Compact should be part of a company’s corporate strategy, influencing their operations and management. The company should advocate for the Global Compact and must inform its shareholders annually about its progress towards implementation of the principles and its

278 Ruggie, 22 February 2006, UN Doc E/CN.4/2006/97, para 40; see also ‘Participants’, Global Compact website, http://www.globalcompact.org/ParticipantsAndStakeholders/Index.html, last accessed 25 August 2010
279 ‘The Ten Principles’, available online at http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html, last accessed 2 September 2010
280 UN Doc E/CN.4/2006/97, 22 February 2006, para 40
281 ibid
282 ibid
283 ibid
partnership projects in supporting UN goals. If a company does not report to its shareholders on its progress, its status will be recorded as ‘inactive’. Most companies that want to participate in the Global Compact are eligible. However, some companies are not able to participate: Companies that manufacture or sell prohibited weapons, are the subject of a UN sanction, or banned by UN procurement are not eligible. Rather than monitoring a company’s operations to ensure its behaviour is consistent with the principles of the Global Compact, it is envisaged that the information contained in the Communication on Progress, presented to shareholders annually or detailed in the annual report, will be sufficient to encourage good corporate practice and behaviour.

The Global Compact explicitly refers to complicity in Principle 2, which states “business should make sure that they are not complicit in human rights abuses.” To avoid complicity, the Global Compact suggests companies implement policies and procedures to prevent abuse, that companies carry out risk assessments, and that companies complete Human Rights Impact Assessments. It also suggests introducing clauses into contractual documentation that state that the company will not tolerate human rights abuse. The suggestions made by the Global Compact reflect common sense and good business practice, but do not place any real obligations on companies. The Global Compact refers to operating within a “human rights framework” and suggests companies consider a number of pertinent, if self-evident, questions.

---

285 The United Nations Global Compact, Frequently Asked Questions
286 The United Nations Global Compact, Frequently Asked Questions
287 See commentary on Principle 2 from the Global Compact, available online at http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html, last accessed 24 April 2009
288 The Global Compact suggests the following be completed:
- Human rights policies
- HRIA
- Risk management
- Monitoring systems
- Dialogue with human rights orgs
- Respect international guidelines
- Establish safeguards for engagement from security forces
- Condemn human rights violations
289 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html

A human rights framework could ask the following questions:
1. Has there been an assessment of the human rights record in the country where the corporation will be operating?
2. Has this assessment indicated any inherent risks of involvement with that country?
3. How will human rights be monitored while the corporation is trading in that country?
4. How will the company ensure its security forces, officers or contractors are not, and will not, be involved in human rights violations?
5. How will the corporation ensure open dialogue with human rights organisations?
6. Are all staff aware of the importance of respecting human rights?
The OECD Guidelines for Multinational Enterprises

In 1976, the OECD issued the Guidelines for Multinational Enterprises (OECD Guidelines). This was part of a wider strategic framework, which also included the adoption of a Declaration on International Investment and Multinational Enterprises that was intended to protect investors. The OCED adopted a revised set of Guidelines in June 2000.290

The revised OECD Guidelines cover many aspects of corporate operations, but the implementation procedure is binding on OECD States rather than corporations.291 They identify standards that corporations should meet, including standards relating to workers rights, environmental protection, corruption and taxation.292 The revised OECD Guidelines recommends the elimination of child labour and forced labour, and also includes a new paragraph, paragraph 11.2, which states that corporations should “respect human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”293 This is significant because it requires the corporations to respect both international and domestic laws, which is particularly important where domestic laws are either non-existent or unenforced, or where the corporation is operating in a weak governance zone. The international obligations of the host government would include all customary international law, including international criminal law, and extends beyond the treaties that the State has agreed to be bound by.294 There are follow-up procedures for OECD States to follow.295 Member States are required to create a complaints mechanism, called the National Contact Point, which are government offices that hear complaints of non-compliance with the Guidelines.296 These complaints include allegations of complicity.

---

290 The OECD is currently reviewing the Guidelines, and aims to have this competed in 2011. For a discussion and further information, see ‘2011 Update of the OECD Guidelines for Multinational Enterprises’ available online at http://www.oecd.org/document/33/0,3343,en_2649_34889_44086753_1_1_1_1,00.html, last accessed 22 July 2011
294 Ibid, pp 66-67
295 Karl, ‘The OECD Guidelines for Multinational Enterprises, p 89: “They are supported by follow-up procedures in the participating counties, which comprise all 29 OECD Member countries, and four non-Member countries (Argentina, Brazil, Chile and the Slovak Republic).”
296 UN Doc E/CN.4/2006/97, 22 February 2006, para 41
Industry Initiatives

In addition to the developments at the intergovernmental level, there have been a number of multi-stakeholder policy responses that take the form of soft law.\(^{297}\) The most significant of these are the Voluntary Principles on Security and Human Rights (Voluntary Principles), the Kimberley Process Certification Scheme (Kimberley Scheme), and the Extractive Industries Transparency Initiative (EITI).\(^ {298}\) The Voluntary Principles promote training of security forces involved in extractive industries and encourages the use of human rights impact assessments.\(^ {299}\) The Kimberley Scheme aims to reduce the flow of conflict diamonds. The EITI aims to achieve transparency in the revenues and taxes provided to States by extractive corporations operating within their borders.

Kimberley Process Certification Scheme

The Kimberley Scheme was established in 2002 and consists of 44 States and the European Union.\(^ {300}\) Its aim was to decrease the trade in conflict diamonds, which was fuelling conflicts and exacerbating suffering and abuse. Under the Kimberley Scheme, States are required to adopt domestic legislation, rough diamonds must be certified and traded in a tamper-resistant manner, processes are recorded and reviewed, and traders can only trade with other participants of the Kimberley Scheme.\(^ {301}\) If the requirements are met, the Kimberley Scheme will certify that shipments do not include conflict diamonds. The initiative is generally viewed as successful, although not without criticism. For example, States bear most of the cost and resource burden of implementation, some argue that corporate efforts have been inadequate, and the scheme is limited to rough, uncut and unpolished diamonds. Despite a decade of hard work, the Kimberley Scheme is unable to guarantee a diamond’s point of origin.\(^ {302}\) The threat of diamonds being exported from Zimbabwe’s Marange diamond mine, if acted upon, would identify a fundamental weakness in the scheme; it would be unable to address such a situation, and this would put the scheme’s credibility under severe pressure. Situations such as this, which are unable to be addressed by the scheme, identify the need for far reaching reforms of the diamond industry.

\(^{297}\) UN Doc A/HRC/4/35, 19 February 2007, para 52
\(^{298}\) ibid
\(^{299}\) ibid
\(^{300}\) UN Doc E/CN.4/2006/97, 22 February 2006, para 47
\(^{301}\) ibid
\(^{302}\) Harrison Mitchell and Nicholas Garrett, ‘Beyond Conflict: Reconfiguring approaches to the regional trade in minerals from Eastern DRC’, Communities and Small Scale Mining (2009), p 46
There is a push for a similar scheme to be introduced to other mining sectors, including the gold mining industry. However, the limitations and criticisms of the Kimberley Scheme should be addressed before any attempt at replication is made.

**Voluntary Principles on Security and Human Rights**

The Voluntary Principles initiative was established in 2000, in response to abuses that have been perpetrated by security forces. This initiative addresses the legitimate security needs of extractive industry corporations, and the human rights of people in local communities. Under this initiative, corporations should review the human rights record of the security forces they seek to engage, to determine whether the forces are “competent, appropriate and proportionate to the threat”. Arguably this leaves open the possibility of engaging forces who are prepared to use force, as long as the company deems this to be proportionate. Such rationale and justification is at odds with a human rights perspective. Importantly, the Voluntary Principles contain grievance mechanisms. However, given the ongoing problem of abuse committed by security forces engaged by companies, the effectiveness of the Voluntary Principles needs to be questioned. For example, a Human Rights Watch report found that police engaged by Shell had beaten detained protestors. Shell had approved and endorsed the Voluntary Principles, and Human Rights Watch sought to invoke responsibility against Shell for this behaviour. Clearly, the initiative has been unable to halt such abuse.

**Extractive Industries Transparency Initiative**

Tony Blair launched the EITI in 2002. The EITI aims to achieve transparency in the revenues and taxes provided to States by extractive corporations operating within their borders. Transparency is key: “[t]he problems of corruption and the misallocation of public revenues have been endemic. They undermine the rule of law, impede the pursuit of social objectives, and contribute to conflicts that

---

303 UN Doc E/CN.4/2006/97, 22 February 2006, para 47
304 Ibid
305 Ibid, quoting the Voluntary Principles on Security and Human Rights
306 UN Doc A/HRC/8/5, 7 April 2008, para 100
308 Available online at [http://www.state.goc/g/drl/rls/2931.htm](http://www.state.goc/g/drl/rls/2931.htm)
309 War on Want, ‘Fanning the Flames’, p 30
frequently foster human rights abuse.\textsuperscript{310} States agree to the initiative, and once they do so the EITI “becomes obligatory for extractive companies operating in those countries.”\textsuperscript{311} The World Bank then publishes the fees, royalties and taxes paid by corporations. As with many initiatives, it is of limited scope and application: there are only ten States that have joined the initiative, and many States that should participate do not.\textsuperscript{312} However, despite the corporate obligation the EITI places upon them, the scheme is without enforcement mechanisms.\textsuperscript{313}

The schemes have had some limited success. For example, the Kimberley Scheme is generally credited with reducing conflict diamonds from around four per cent of the total market to one per cent.\textsuperscript{314} Similarly, the EITI in Nigeria reports to have “gained taxpayers the equivalent of US $1 billion in 2004 and 2005”.\textsuperscript{315}

Any positive policy initiatives should be welcomed, but should not overshadow the dire need for clarity and certainty regarding legal accountability. However, scepticism rightly remains about the ability of industry initiatives or codes of conduct to effectively restrain corporate behaviour despite the corporate sector’s satisfaction with their own codes and initiatives that seek to regulate behaviour. It is ironic that the proliferation of codes of conduct has improved the reputation of corporations, but has not changed corporate behaviour, and has impinged upon and to some degree prevented further discussion of establishing a robust international regulatory forum.\textsuperscript{316}

Norms on the responsibility of Transnational Corporations and other business enterprises with regard to human rights

In 1998, by Resolution 1998/8, the Sub-Commission on the Promotion of Human Rights of the United Nations Commission on Human Rights established a

\footnotesize{\textsuperscript{310} UN Doc E/CN.4/2006/97, 22 February 2006, para 45  
\textsuperscript{311} ibid  
\textsuperscript{312} ibid  
\textsuperscript{313} War on Want, ‘Fanning the Flames’, p 30  
\textsuperscript{314} UN Doc A/HRC/4/35, 19 February 2007, para 59  
\textsuperscript{315} ibid  
working group of five members to examine the operations of corporations. In 1999, David Weissbrodt was asked to prepare a code of conduct for corporations. The resultant Code of Conduct was known as the Norms on Transnational Corporations and Other Business Enterprises (the TNC Norms).

The United Nations Sub-Commission on the Promotion of Human Rights approved the TNC Norms in its Resolution 2003/16 of 13 August 2003. This resolution also sent the TNC Norms to the Commission on Human Rights for further consideration. Under the TNC Norms, corporations would be bound directly by international law and have similar human rights obligations as States, although States were still identified as having the primary responsibility in relation to human rights protection. There was vehement opposition against the TNC Norms from the private sector, and the concept of such international regulation, or the very suggestion of it “sent shockwaves through business communities in Europe, the United States and the rest of the world.” Corporations were quick to point out the perceived positive impact of foreign direct investment in developing economies, and also emphasised their voluntary efforts at self-regulation. In essence, corporations commenced a critique of the TNC Norms, while concurrently opposing the development of corporate accountability beyond self-regulation, corporate social responsibility policies and codes of conduct.

Given the opposition, the Commission did not adopt the TNC Norms for, as David Kinley and Rachel Chambers observe, the member States had already been briefed by concerned corporations. The polarised debate continued in to 2005, with some countries, most notably the United States and Australia, adopting the view that corporations should not be bound by human rights standards, and that the TNC Norms should not be considered further. The Australian Government believed that “the way to ensure a greater business contribution to social progress is not through more norms and prescriptive regulations, but through encouraging greater awareness of societal values and concerns through

318 Weissbrodt and Kruger, ‘Norms on the Responsibilities of Transnational Corporations’, p 904
320 Kinley and Chambers, ‘The UN Human Rights Norms for Corporations’, p 448
321 ibid
322 ibid, p 459
responses to corporate complicity

voluntary initiatives.\footnote{323} However, despite the opposition, the High Commissioner on Human Rights made a recommendation to the Commission to “maintain the draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration.”\footnote{324} In addition, the High Commissioner suggested that the TNC Norms be ‘road-tested’ by the Business Leaders Initiative on Human Rights.\footnote{325} They did so until their mandate came to a close in 2009, but they concluded that as the TNC Norms were put to practical use, ambiguities became apparent.\footnote{326}

David Kinley and Rachel Chambers note that a set of enforceable international standards are a crucial aspect of seeking corporate accountability for human rights abuse, “[i]n the face of the quantum and continued expansion of corporate power, as well as the persistent revelations of corporate human rights abuses.”\footnote{327} They note that the TNC Norms seek to provide such a set of standards.\footnote{328} The standards issue is a challenging aspect of corporate accountability for involvement in human rights abuse: “insofar as the overall global context itself is in transition, standards in many instances do not simply ‘exist’ out there waiting to be recorded and implemented but are in the process of being socially constructed.”\footnote{329}

Shortfalls of the TNC Norms

There were a number of fundamental problems with the Norms. For example, they were presented as a definitive set of standards without adequate consultation; they were based on a presumption that corporations are directly bound by international law, and they relied on a nebulous concept of the ‘sphere of influence’ to attribute legal obligations. It was their binding nature which made

them more contentious than the Global Compact. Some of these shortcomings will now be discussed in greater detail.

*Direct obligations under international law*

Some commentators, such as the Norms’ principal drafter, David Weissbrodt, argue that the TNC Norms represent a “succinct, but comprehensive, restatement of the international legal principles applicable to business”. The same article goes on to argue that “[w]ith power should come responsibility, and international human rights law needs to focus adequately on these extremely potent international non-state actors.” This is undeniably true; corporate power has grown as the world has become more economically integrated, and there is a fundamental misalignment between power and responsibility. However, international law does not bind corporations directly, and aspirational goals should not be represented as legal obligations. As the Special Representative has concluded:

> What the Norms have done, in fact, is to take existing State-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law – hard, soft, or otherwise.

The greatest sticking point of the TNC Norms is their imposition of direct obligations on companies. The direct application of international law on corporations was suggested as a means of addressing the legal vacuum in which transnational corporations can operate. While this is unorthodox, and does not currently occur, it is a measure that warrants further consideration, particularly for grave human rights violations and international crimes. It is a way of addressing a governance deficiency, but those opposed to the TNC Norms have exaggerated

---

331 ibid
332 UN Doc E/CN.4/2006/97, 22 February 2006, para 60. In the same report the Special Representative expresses concern that in some instances the Norms used standards found in instruments that have not been ratified by all States, and applied these directly to corporations. However, it should be noted that universal ratification of treaties is not necessary before a norm of customary international law can be identified.
333 Kinley, Nolan and Zerial, ‘The politics of corporate social responsibility’, p 35
its implications for classic international law. The main opposition to the TNC Norms was framed in terms of State being the only subjects of international law. It was this aspect of the Norms that polarised debate:

Instead of looking to how the Norms could be changed to accommodate different views, the polarised debate has prematurely translated a draft document into a static and immutable one, which must be accepted or rejected as a whole. This has split the proponents of the Norms between those who can envisage substantive changes to the Norms that will still achieve the aims of human rights regulation of business, and those who believe that Norms need to be preserved wholly or largely in their present form. The polarisation has also allowed those companies who dislike the Norms for the simple self-serving reason that they wish to avoid their human rights obligations, to hide behind the more eloquent and often cogent arguments of those who oppose the Norms for particular formal or practical reasons. Companies can thus conveniently denigrate the Norms without hurting their corporate image.

Generally international law places only indirect obligations on corporations. As the Norms applied to all human rights, they could not have been a restatement of existing international law, but it is possible that there was nascent customary international law in relation to the obligations placed on corporations for involvement in international crimes and grave breaches of the Geneva Conventions and their protocols.

The international human rights regime is not static, and the development of individual responsibility for crimes such as genocide and crimes against humanity is a good example of this. However, it will be the behaviour of States that establishes whether legal personality can be attributed to corporations under international law; there is no one international forum that can determine that categorically. While it is generally accepted that corporations do have some type of legal personality in international law, international law still overwhelmingly

---

334 Ibid
335 Kinley, Nolan and Zerial, ‘The politics of corporate social responsibility’, p 34
336 UN Doc E/CN.4/2006/97, 22 February 2006, para 60
337 Kinley and Chambers, ‘The UN Human Rights Norms for Corporations’, p 479
imposes legal obligations directly on States as opposed to any other actor.\textsuperscript{338} The obvious exception to this rule is individual responsibility under the Rome Statute of the International Criminal Court. International law can directly obligate a State to regulate a non-State actor in a certain way, thus creating indirect obligations on non-State actors.

\textit{The concept of the ‘sphere of influence’}
The United Nations Global Compact first introduced the concept of a ‘sphere of influence’, which asks participants “to embrace, support and enact” the ten principles of the Global Compact “within their sphere of influence”.\textsuperscript{339} It was an idea introduced as a “spatial metaphor”.\textsuperscript{340} The draft TNC Norms then used the concept for attributing legal obligations to corporations, without providing a definition. The Sub-Commission on the Protection and Promotion of Human Rights viewed the sphere of influence as an issue of “critical importance when determining a limit to a corporation’s responsibility to respect, support and not be complicit in human rights violations.”\textsuperscript{341} The Sub-Commission argued that it could be used to delineate State responsibilities from corporate responsibilities, and “delimit the physical or transactional space within which companies are assumed to have some human rights responsibilities.”\textsuperscript{342} However, they conceded that this term required clarification as a matter of urgency, “both regarding the corporation itself and also its supply chain and other stakeholders.”\textsuperscript{343} As the strict legal meaning is unknown, it cannot be considered as a basis on which to place binding obligations.\textsuperscript{344}

Understandably, the enmeshing of legal accountability with a concept that was nebulous, imprecise and undefined caused great concern to the corporate sector.\textsuperscript{345} The Special Representative argues that it is problematic to determine accountability in an ‘influence’ framework, suggesting that this makes the implicit

\textsuperscript{338} ibid, p 481
\textsuperscript{340} UN Doc A/HRC/8/5, 7 April 2008, para 65
\textsuperscript{342} Ruggie, Presentation of Report to United Nations Human Rights Council, Geneva, 3 June 2008
\textsuperscript{344} UN Doc E/CN.4/2006/97, 22 February 2006, para 67
\textsuperscript{345} UN Doc A/HRC/8/16, 15 May 2008, para 10; the concept is one of the main reasons for such fierce opposition to the Norms, and their subsequent demise.
assumption that “can implies ought”, and notes that it is inappropriate to require companies to take action against States that might be violating human rights.\textsuperscript{346} The concept of a sphere of influence does not distinguish between kinds of influence: the first being ‘impact’ and the second being ‘leverage’.\textsuperscript{347} The Special Representative argues that companies cannot be expected to be responsible for every human rights impact over which they have some leverage, and that the primary protector of human rights is the State. To establish such a requirement assumes they are somehow contributing to the harm, which would not necessarily be true. In other words, “[a]sking companies to support human rights voluntarily where they have leverage is one thing; but attributing responsibility to them on that basis alone is quite another.”\textsuperscript{348} 

While it may be analogous to tortious duty of care, the concept of ‘spheres of influence’ does not have a basis in law, but rather “derives from geopolitics.”\textsuperscript{349} The Special Representative has reviewed the concept and notes that this term “lacks legal meaning”.\textsuperscript{350} He found that the concept was too imprecise to “serve as a guide in delineating the scope of a company’s due diligence in discharging its responsibility to respect.”\textsuperscript{351} The ‘sphere of influence’ could be interpreted as proximity, be that in the form of geographic, economic, political or contractual proximity. However, the precise definition of proximity, and these different permutations, is also unclear.\textsuperscript{352} Given these limitations, the Special Representative considered the terms ‘control’ and ‘causation’, but determined that these concepts “may be too restrictive for companies that seek to not only respect rights but also to voluntarily ‘support’ them, as, for example, in the context of the Global Compact.”\textsuperscript{353} The concepts of control and causation would inappropriately narrow the obligation on corporations to respect human rights and prevent violations due to their business activities. The Special Representative considers the concept of the ‘sphere of influence’ is a “useful metaphor for companies to think broadly about their human rights responsibilities and

\begin{footnotes}
\item[346] ibid, para 13
\item[347] ibid, para 12
\item[348] ibid, para 13
\item[349] UN Doc E/CN.4/2006/97, 22 February 2006, para 67
\item[350] UN Doc A/HRC/4/35, 19 February 2007, para 9
\item[351] Ruggie, Presentation of Report to United Nations Human Rights Council, Geneva, 3 June 2008
\item[352] UN Doc A/HRC/8/16, 15 May 2008, para 15
\item[353] ibid, para 16
\end{footnotes}
opportunities beyond the workplace, it is of limited utility in clarifying the specific parameters of their responsibility to respect human rights.”

The legacy of the TNC Norms
The Special Representative has commented on the difficulties and challenges he faced in raising the issue of standards without having a “recapitulation” of the debates surrounding the Norms. Those debates ended in a deadlock, with human rights activists in favour, corporations opposed, and States electing to adopt the mandate of the Special Representative to move beyond the impasse. While the Norms might represent a good foundation for negotiation, they do not espouse the existing state of international law. If a different approach had been taken, the impasse may not have been reached and discussions may have focused on how to operationalise the TNC Norms. But the project was “engulfed by its own doctrinal excesses”: the ambiguities presented by such concepts as the sphere of influence, and the direct international law obligations it placed directly on corporations concerned many international lawyers.

The TNC Norms was the first initiative to represent an authoritative set of standards, and while they were a step in the right direction they were far from definitive. The Special Representative should ensure that the standard setting approach of the Norms is not lost, and should avoid “throwing the baby (of inherent value) out with the (politically compromised) bathwater”. If adopted as a soft law instrument, the Norms could ‘harden’ into international customary law, in accordance with Article 38 of the Statute of the International Court of Justice, and could then be used to assist in the interpretation of treaties, particularly as their pertain to corporate responsibilities.

---

354 ibid, para 18
355 UN Doc E/CN.4/2006/97, 22 February 2006, para 55
356 ibid, para 58: “Had the Norms exercise confined itself to compiling such an inventory, coupled with a set of benchmarks of what practices business must or should avoid and what it could help to achieve, the subsequent debate might have focused on substantive issues: What belongs on the list, what doesn’t and why? What are the different categories of business responsibilities, ranging from the mandatory to the desirable? How can broad principles best be translated into management practices and tools?”
357 ibid, para 59
359 Kinley and Chambers, ‘The UN Human Rights Norms for Corporations, p 493-494. They continue: ‘As a ‘work in progress’, moving through the UN human rights machinery (albeit haltingly and at the lower end of the UN hierarchy), the Norms in their entirety gain a certain status, best described as soft law, and the newly minted Human Rights Council will be in a position to preserve this.”
The Special Representative’s Report

In 2005, at its 61st session, the Commission recommended that the UN Secretary General appoint a Special Representative to further research and investigate the issue of business and human rights. The appointment was made largely in response to the impasse that was reached following the drafting of the TNC Norms. The ultimate stand-off between States, non-governmental organisations, business, academics and lawyers, led to the Special Representative referring to the TNC Norms as a “train wreck.” The Special Representative’s interim report, delivered in February 2006, ultimately concluded that the TNC Norms “should be abandoned rather than pursued.” The Special Representative concluded that they did not provide enough guidance on the different State and corporate obligations, and that this would have created adverse consequences for human rights. The “furore” led the Special Representative to declare that “the Norms are dead”; but the issues that led to their creation remain. The Special Representative finalised his report to the Human Rights Council regarding the Protect, Respect Remedy Framework for business and human rights on 7 April 2008 (‘the Report’). The Report proposes a policy framework, the Protect, Respect, Remedy Framework based on three principles: the State duty to protect human rights through appropriate policies, regulation; the corporate duty to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and the right of victims and survivors to appropriate remedy, both judicial and non-judicial. It is based upon a classical view of international law, with states being at the core of the human rights regime. Importantly, it seeks to disentangle State obligations

---

360 The submissions received from States, companies and non-governmental organisations in response to the TNC Norms are available online at [http://www.ohchr.org/english/issues/globalization/business/contributions.htm](http://www.ohchr.org/english/issues/globalization/business/contributions.htm)


362 Kinley and Chambers, ‘The UN Human Rights Norms for Corporations’, p 450


RESPONSES TO CORPORATE COMPLICITY

from corporate responsibilities, in an effort to address some of the governance gaps that currently exist.

The Report is provided as an authoritative focal point for stakeholders, in an effort to “bring coherence to the complexity of the business-human rights relationship.”366 While there have been developments over recent years, these have not been subject to a coordinated approach, nor has there been any real international cooperation. The Framework is a first step towards remedying this lacuna. The report is the culmination of much research and consultation; there were fourteen stakeholder meetings around the world, and more than twenty associated research projects.367 The Report identifies the significant problem of business and human rights, and suggests a path forward. It will be important that victim perspectives are considered, as this will help ensure that the analysis of the problem is comprehensive, and proposes appropriate solutions and remedies.368

The Human Rights Council unanimously welcomed the Protect, Respect, Remedy Framework in Resolution 8/7 at its June 2008 session. This is significant, as it is the first time the Council, or the Commission before it, adopted a policy position in relation to business and human rights.369 Resolution 8/7 also extended the mandate for a further three years until 2011, with the intention of making the framework operational, and providing recommendations and guidance to States, corporations and other stakeholders. As the Special Representative noted, his new mandate “is intended to translate the framework into practical guiding principles.”370 This sounds not dissimilar to the request made of David Weissbrodt in 1999, which resulted in the TNC Norms. It is envisaged, however, that the extensive consultation completed by the Special Representative, the clear framework, and the semantics of “principles” rather than “Norms” will prevent the repetition of such a standoff.

367 ibid
369 UN Doc A/HRC/11/13, 22 April 2009, para 1
370 ibid, para 3
Given the pre-existing, distinct battlelines that confronted the Special Representative in relation to the business and human rights mandate, the relative agreement and consensus regarding the framework amongst States, corporations and interest groups is somewhat surprising but certainly welcome. The Framework’s intended purpose is to not only lead to stronger governance structures within the business and human rights agenda, but also as a guide for instances of other transnational accountability structures. There are critics of the report, who argue that it gave in to the criticisms of business and falls short of societal expectations. However, the report has generally been received with optimism.

There has been some implementation of the Framework already. For example, Canada referred to the Framework when announcing its export credit agency’s new “Statement on Human Rights”. The United Kingdom National Contact Point (NCP), under the OECD Guidelines, found that a company failed to exercise ‘due diligence’, referring to the Special Representative’s 2008 report (which outlined the Framework), and recommended the report to the corporation, to consider ways to implement appropriate policies. Norway’s 2009 White Paper on Corporate Social Responsibility makes extensive reference to the Framework. In response to the Framework, and in distinct contrast to the Australian Government’s position on the TNC Norms, a parliamentary motion was moved in the Senate, calling on the Government to “encourage Australian companies to respect the rights of members of the communities in which they operate and to develop rights-compliant grievance mechanisms, whether acting in Australia or overseas”.

Business groups have also welcomed the framework. Notably, the Business Leaders Initiative on Human Rights, who road-tested the TNC Norms, welcomed the Framework, as did the International Council of Mining and Metals. The International Chamber of Commerce, the Business and Industry Advisory

---

371 Hugh Williams, ‘Time to redraw the battle lines’, Financial Times, 30 December 2009; Williams wrote that the Special Representative “has won unprecedented backing across the battle lines from both business and pressure groups for his proposals for tougher international standards for business and governments.”
373 ibid
374 UN Doc A/HRC/11/13, 22 April 2009, para 3
375 ibid
376 ibid
378 ibid, para 4
Committee and the International Organization of Employers issued a joint statement to the OECD stating that the framework presents "a clear, practical and objective way of approaching a very complex set of issues." ExxonMobil has used the responsibility to respect as the benchmark for its employees.

Hence, at this stage at least, there appears to be general support for the Framework from States, corporations and other stakeholders. The challenge will be maintaining that support as the Framework is transformed from a theoretical policy to an implemented procedure with appropriate monitoring and enforcement mechanisms.

The State Duty to Protect Against Abuse by Non-State Actors
States have a duty to protect all human rights. Under the international human rights regime, States must refrain from committing human rights abuse, and must also ensure the realisation of human rights. States must take steps to prevent human rights violations; if human rights violations are perpetrated, they must be investigated and the violations must cease and the perpetrators must be punished.

The State duty to protect its citizens from human rights abuse is at the core of the business and human rights agenda. As the principal protector and enforcer of human rights, “[t]he debate about business and human rights would be far less pressing if all Governments faithfully executed their own laws and fulfilled their international obligations.” This obligation rests with both home States and host States, as both can facilitate the perpetuation of governance deficiencies. For example, while host States are often seen as the primary perpetrator of actual abuse, home States sometimes act without due regard to human rights, for example when issuing export credits and investment guarantees. There are strong policy reasons for home States to encourage corporations to respect human rights; for many home States, it would be considered an “untenable

379 ibid
380 ibid
381 This was first documented in the United Nations Universal Declaration of Human Rights in 1948. This responsibility was then noted at the 1993 Vienna World Conference on Human Rights. For a discussion see “World Conference on Human Rights, 14-25 June 1993, Vienna, Austria”, available online at http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx, last accessed 17 October 2011
382 See, for example, UN Doc A/HRC/4/35, 19 February 2007, para 16
383 UN Doc E/CN.4/2006/97, 22 February 2006, para 79
position” to be associated with corporate abuse abroad. Moreover, given the rules of State responsibility, there could be instances where the State could be held accountable for the actions of the corporation, if the corporation was performing public functions, or if the corporation was State-owned and controlled.

An important aspect of the State duty to protect is the monitoring of human rights, which can identify issues and can have a preventative effect. The treaty bodies emphasise the importance of monitoring, but States have wide discretion as to how they fulfil their duty to protect. The practical measures employed by States to achieve this obligation are generally legislative, but are also administrative and judicial in nature. For example, passing legislation with enforcement clauses, and consultation and monitoring measures for certain projects. States also have an obligation to ensure there is appropriate legislation in place, but treaty bodies usually do not dictate the content of the legislation.

The Special Representative has identified a trend, where the treaty bodies recommend that States influence corporations operating abroad; however, States have “wide latitude in deciding the type of influence in most circumstances.” Significantly, the research has identified an increased focus by the treaty bodies on the State duty to protect against corporate abuse.

Despite these developments, further “refinements of the legal understanding” of this duty would be “highly desirable”. States need to afford greater attention to the duty to protect, and should provide more innovative responses to fulfil this duty. Crucial questions remain unanswered, including the specific obligation of States regarding corporate abuse, whether States should implement extraterritorial legislation, whether the concept of universal jurisdiction applies in instances of corporate abuse, and how to ensure some level of synthesis between the disparate policy responses.

The Baseline Corporate Responsibility to Respect Human Rights

The second principle of the Framework is the corporate responsibility to respect human rights. The responsibility to respect human rights is “the baseline norm for
all companies in all situations.”  

The responsibility to respect exists independently of any State obligation, and is a well-established social norm. It has gained near-universal recognition, regardless of region or industry. This responsibility is recognised in a number of soft law instruments, including the OECD Guidelines and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. It is a commitment that companies make when joining the Global Compact, and it is also a claim made by many corporations themselves. Corporate legal accountability for human rights abuse has not been an easy or logical evolutionary process. There has always been the uncontested legal responsibility that corporations should respect the law of the jurisdiction in which they operate. However, this standard is somewhat insufficient from a human rights perspective, as it allows corporations to disregard human rights standards in States where such standards are either not part of domestic law, or not enforced. Yet in recent years there has been a growing global expectation that corporations should respect human rights, and a corresponding concern regarding the legal basis for such expectations. The continued implementation of human rights laws into domestic jurisdictions has “changed the nature of corporate legal accountability for human rights.”

Corporations have a responsibility in relation to all rights, as they are able to impact all internationally recognised human rights to some extent. What sets the Framework apart from the TNC Norms is that the Framework is attempting to define the specific responsibilities, and scope of those responsibilities, to all rights; conversely, the TNC Norms generated fierce debate about which rights corporations were required to respect, but provided only nebulous and imprecise responsibilities. This difficult and involved question of the precise responsibilities of corporations has received comparatively little attention. Hence, the issue of corporate responsibility to respect human rights is not one of

---

388 UN Doc A/HRC/11/13, 22 April 2009, para 48
389 ibid
390 UN Doc A/HRC/8/5, 7 April 2008, para 23
392 ibid
393 UN Doc A/HRC/8/5, 7 April 2008, para 52
394 ibid, para 51
395 ibid, para 53
merely under-enforcement; considerable research is required to define the parameters of this duty.396

Corporations need to demonstrate that they are meeting this responsibility, and they can do this through the due diligence framework, whereby compliance can be monitored to prevent abuse. There are four core elements of due diligence: policy; human rights impact assessments; integration in culture; and tracking and reporting.

The Victim’s Right to Remedy
Access to remedy is an important aspect of both the State duty to protect, and the corporate duty to respect. Regulation of corporate conduct by States should be accompanied by mechanisms that can investigate, punish and redress abuse. Similarly, victims who have suffered harm should be able to seek remedies from the corporation. To provide victims with appropriate access to remedy, a range of judicial and non-judicial options are required, although access to judicial mechanisms is often difficult, and non-judicial mechanisms are underdeveloped.397 Realisation will require an improvement in existing mechanisms and the creation of new ones. As the Special Representative himself has recognised, “[p]rogress from the current patchwork to a more complete and deliberate system will require improvements in access to, and the effectiveness of, existing mechanisms; and new mechanisms where no effective ones are currently in prospect.”398

It is crucial that victims and survivors have access to appropriate remedies, both judicial and non-judicial. Victims of corporate human rights abuse face their own unique impediments and barriers when seeking redress, which require attention and, if possible, resolution. It is essential that the voice of victims and survivors be heard, as this will enable a more informed analysis of corporate involvement in human rights abuse.399 Deeper scrutiny of the pervasiveness of corporate

397 UN Doc A/HRC/8/6, 7 April 2008, para 26
398 UN Doc A/HRC/11/13, 22 April 2009, para 92
399 Joint NGO Statement to the Eighth Session of the Human Rights Council, Third Report of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business
involvement in human rights abuse is required before possible solutions can be identified.\textsuperscript{400} The legal doctrines and regulatory frameworks are clearly falling behind practice. There is a need for a cohesive approach to the question of corporate accountability for human rights abuse.

\textbf{A review of the developments}

The United Nations Human Rights Council has endorsed the Protect, Respect, Remedy Framework, following the previous developments set in train by the Global Compact and the TNC Norms. By doing so, it has, for the first time, taken a policy position on the relationship between business and human rights. The United Nations must now take the intellectual lead, and begin the standard setting process. This should be coupled with a rigorous identification and delineation of State obligations and corporate responsibility. States need to implement human rights into policy areas that impact business operations, while corporations need to be more aware of how their actions can infringe upon human rights. The core concern is ensuring victims’ access to justice; toward that end, it is crucial that there are effective judicial and non-judicial remedies available.

The TNC Norms should not be completely disregarded – they are useful, and any analysis of standards will inevitably address similar issues. As a document, they initiated much debate, albeit fierce, and helped delineate the boundaries of corporate accountability. They were an important and unique development, in that they attempted to provide an authoritative, universal set of broad standards that would apply to corporations.\textsuperscript{401} That in itself is an impressive achievement. The TNC Norms, or something like them, should be viewed as a starting point for debate. While it is clearly important to identify the parameters of the State duty to protect and the corporate responsibility to respect, it would be “counterproductive” to reject the TNC Norms altogether.\textsuperscript{402} They generated intense discussion, and are a significant first step in what will be a long road.

Enterprises, 20 May 2008, available online at \url{http://www.hrw.org/english/docs/2008/05/20/global18884_txt.htm}, last accessed on 13 August 2008
\textsuperscript{400} ibid
\textsuperscript{401} Kinley and Chambers, ‘The UN Human Rights Norms for Corporations’, p 493
\textsuperscript{402} ibid, p 497
The international human rights regime needs to be further strengthened against corporate abuse; this would contribute to, and benefit from, a more sustainable international economy. States need to internalise the requirement of the duty to protect, particularly regarding abuse committed by corporations. Given that the State duty to protect is a cornerstone of the human rights regime, “this uncertainty gives rise to concern.”

A common understanding of what corporations can be held accountable for is urgently needed. The Framework is an important first step, and should be regarded as the foundation upon which to build agreed global intergovernmental standards regarding business and human rights. However, it remains to be seen whether the Framework will become an authoritative focal point. Its success will rest in its ability to provide a “common language and sensibility” amongst stakeholders. Such a foundation should be used to enable systematic and cohesive developments achieving “cumulative effects”, rather than a continuation of the fragmented and piecemeal approach that has existed to date. Much more work is needed regarding possible directions, including an analysis of possible legal and policy frameworks for States, corporations and other interested parties. Strategic planning should consider the best options for securing accountability, and must keep access to remedy at the forefront: the right to remedy must remain a key priority.

---

403 Ruggie, 19 February 2007, UN Doc A/HRC/4/35, para 86
405 Human Rights Watch, ‘On the Margins of Profit’, p 3
CHAPTER 3

THE STATE DUTY TO PROTECT:

ADDRESSING THE GOVERNANCE GAPS

States have the primary responsibility for protecting human rights, and this includes protecting from corporate abuse. The three pillars supporting the Protect, Respect, Remedy Framework are intertwined, and the State duty to protect enforces the corporate duty to respect, and thereby allows victims access to remedies for corporate abuse. The duty is applicable to both home States and host States, with the likely outcome being criminal proceedings.

There are five key areas in which States can realise their obligations to respect human rights. Firstly, States should safeguard their ability to protect human rights and this can be achieved with appropriate legislative, judicial and regulatory processes. Secondly, States should consider human rights obligations when engaging with business. For example, States should consider their human rights obligations when negotiating investment agreements and should carefully review all aspects of these agreements and their possible implications for international arbitration. Thirdly, States should seek to foster a corporate culture that respects human rights, by the adoption of policies, legislative requirements and regulation. Fourthly, both host States and home States should implement innovative policies regarding conflict areas. Finally, home States should consider extraterritorial jurisdiction to legislate and regulate the behaviour of their corporations. This chapter will consider each of these areas, in light of the political realities which the duty to protect is exercised.

The Duty to Protect and the Existing Governance Gaps

The State duty to protect human rights lies at the heart of the human rights system. Yet States have not adequately discharged this responsibility in relation
to protection from human rights abuse. States either do not fully understand their obligations, or are unwilling to fulfil them. National regulatory systems are often inadequate for responding to harm caused by transnational corporations.

Globalisation has created a disjuncture between the capabilities of corporations, and the capacity to regulate them. In some cases governments are simply unable to enforce their legislation against corporations due to the power imbalance. The first governance deficiency, structural gaps, emanates from the “misalignment” between the integrated global economy, and the State-based system of regulation and governance. The lack of policy coherence makes it difficult to identify agreed standards, and the failure to implement laws (either due to inability, or as a means of attracting investment or other similar reasons) prevents victims from seeking appropriate remedies. The lack of corporate governance regulation regarding human rights heeds the recognition by corporations that they require a “social license” to operate. Expressions of societal expectations will lead to greater awareness of the issue, although “[i]t remains to be seen how the national courts and legislators will translate the emerging social expectations concerning the human rights responsibilities of companies.” In addition to the attention given to improving corporate behaviour, it is seen to be essential that there is a concurrent emphasis on building capacity in State institutions, to address the governance gaps, the legacy of fast-paced corporate globalisation. In response to this challenge, the Special Representative has noted that “in some jurisdictions innovations in regulation and adjudication are moving toward greater recognition of the complex organizational forms characteristic of modern business enterprises.”

To date, States have not adequately fulfilled the duty to protect. This is due in part to being unable to do so, but also at times due to an unwillingness to do so. The process of globalisation and greater economic integration, and the subsequent growth of transnational corporations presents significant challenges

---

408 Woodroffe, ‘Regulating Multinational Corporations in a World of Nation States’, p 132
411 Mark Taylor, ‘The Corporate Accountability Evolution’
412 UN Doc A/HRC/4/35/Add.2, 15 February 2007, para 74, p 20
413 Ruggie, 7 April 2008, UN Doc A/HRC/8/5, para 20
to domestic legal enforcement mechanisms. Moreover, in many cases of corporate complicity the State is the primary perpetrator, and this has resulted in impunity.

**Components of the Duty to Protect**

The human rights system requires States to protect citizens from non-State abuse, and to regulate and adjudicate corporate behaviour. In order to discharge this duty, it is seen as essential that mechanisms are in place to enable victims to seek redress for corporate abuse. However, there is little guidance regarding whether the duty to protect is met when States hold company officials accountable, or whether the duty extends to holding the corporation accountable as a legal person. The treaty bodies do not explicitly make recommendations that States protect their citizens from corporations; however, they make reference to corporations in relation to vulnerable groups that need their rights protected. Both home States and host States have a duty to protect human rights. However, there is very little guidance to the extent of the obligation. It is unclear whether there is a requirement for States to take action directly against corporations, and whether States should hold corporations accountable for corporate abuse abroad, and to what extent. The precise steps that States should take remain uncertain.

**Safeguarding the ability to protect human rights**

The State duty to protect lies at the heart of the international human rights regime; it is a critical aspect of enforcing the responsibility to respect. The duty to protect takes on complexities when considered in light of the harm that can be caused by transnational corporations. States need to work together to strengthen their approach towards ensuring the appropriate discharge of this duty. Much of this revolves around ensuring appropriate accountability mechanisms and remedies available for victims; but it also includes the implementation of

---

415 Gilbert and Russell, ‘Globalization of criminal justice in the corporate context’, p 216
417 ibid, p 5
419 UN Doc A/HRC/4/35/Add.1, 13 February 2007, para 18
420 UN Doc A/HRC/11/13, 22 April 2009, para 89
preventative procedures to limit the harm caused by corporations. Corporations need to be involved if these challenges are to be met.\textsuperscript{422}

States do not seem to have internalised or harmonised the different policy spheres through which States could fulfil the duty to protect, with respect to corporate abuse. As the Special Representative has argued, “[t]his should be viewed as an urgent policy priority for governments – necessitated by the escalating exposure of people and communities to corporate-related abuses, and the growing exposure of companies to social risks they clearly cannot manage adequately on their own.”\textsuperscript{423} There is an obligation on States to protect their citizens from human rights abuse, including any abuse that might be perpetrated or facilitated by corporations. States would normally do this by legislating legal obligations on corporations. While in many jurisdictions this is a reasonable expectation, the reality is that there are States where this does not happen; this could be due to a range of reasons, including civil conflict, poverty, a lack of resources or corruption. It is in these States, where there is a ‘weak governance zone’, that the applicability of international law, rather than domestic law, becomes highly significant.

Under the human rights regime, States are obligated to respect, protect and ensure the enjoyment of human rights within their borders.\textsuperscript{424} Corporations are bound indirectly, and in order to meet their obligations, States need to regulate corporations. National governments are primarily responsible for enforcing the indirect duties that are placed on corporations. In most cases, it is the jurisdiction within which the crime was committed that has the responsibility to prosecute the case. Thus, where there is a case of a corporation’s involvement with the commission of grave crimes, it would be the State in which the abuses occur that would have responsibility to seek accountability on behalf of its citizens.

However, there are a number of practical limitations and obstacles to realising this, particularly given that most of the involvement occurs in developing States. Developing States may have legal systems that are ill-equipped to regulate the operations of corporations, especially transnational corporations. If an individual wanted to bring a civil claim against a corporation it would be difficult to do so, as

\textsuperscript{422} UN Doc A/HRC/8/5, 7 April 2008, para 50
\textsuperscript{423} ibid, para 27
\textsuperscript{424} Joseph, Corporations and Transnational Human Rights Litigation, p 9
there usually is no legal aid available in developing countries. A further, more insidious obstacle to States bringing claims against corporations is that many developing States rely on foreign direct investment to provide jobs and develop their economies. As mentioned previously, often the corporations will wield greater economic power than the States in which they operate. Sarah Joseph has observed that, “[v]ulnerable and/or corruptible governments may lack the political will to enact or enforce corporate human rights liability laws, fearing that greater regulation and accountability, for example in the environmental or labour arenas, may provoke TNCs to withdraw their investments.” Depending on a State’s priorities, a government may view the direct foreign investment provided by corporations as being more important than the prevention and punishment of grave human rights breaches.

The Need for Policy Cohesion

Human rights concerns have not been embedded in either government or corporate policies; yet in order to prevent reactionary responses and to ensure some level of systematic approach to the issue it is essential that they are entrenched. There exists a situation of policy incoherence, both ‘vertical’ and ‘horizontal’. Vertical incoherence refers to States agreeing to human rights obligations, but failing to implement them. Horizontal incoherence refers to government departments, such as those operating in trade, foreign affairs, development and corporate regulation, which “work in isolation from and largely uninformed by their Government’s human rights agencies and obligations.” Often these departments will “work at cross purposes with the State’s human rights obligations and the agencies charged with implementing them.”

There is a need for guidance from the international level to achieve policy coherence. The OECD Guidelines are the most widely applicable standards of corporate responsibility that have been endorsed by States. However, in many respects they have fallen behind corporate voluntary standards and initiatives, and are currently under review. In an effort to achieve consistency in the efforts
towards protecting human rights against corporate abuse, States should share information, especially in relation to best practice. Partnerships could be built between States, particularly where a State cannot regulate companies due to lack of resources. This would be particularly useful between home and host States, and between States with trade and investment links.430

The role of corporate law and regulation
Another factor for consideration in relation to the safeguarding of the ability to protect human rights obligations is the role of domestic corporate law and regulation. Corporate law is “typically treated as a separate universe from human rights”,431 and the implications of corporate law on human rights “remain poorly understood.”432 When it comes to corporate accountability for human rights abuse, the fundamental challenge to securing justice for victims arises from the doctrine of separate legal entity, whereby a parent company and its subsidiaries are considered to be completely different legal entities. This doctrine forms part of corporate law around in virtually all jurisdictions, and allows the corporate group to establish separate legal entities as a means of limiting liability, as the parent company would be unlikely to be held liable for wrongs committed by its subsidiary. The exception is where the subsidiary acts as an agent for the parent company.433

Domestic corporate law does not adequately respond to these inherent challenges. Corporate law is primarily concerned with securing financial accountability for investors, rather than securing human rights. As noted by Paul Redmond, “[h]uman rights concerns are for the most part extraneous to corporate regulation, culture and remedies.”434 While many domestic jurisdictions provide for directors’ duties under corporate law, these duties are not established with human rights protections in mind. Under corporate law regulations, States could require more of corporations than they currently do. They could require corporations to report on their human rights impact, or on their corporate social

430 UN Doc A/HRC/8/5, 7 April 2008, para 45
432 UN Doc A/HRC/11/13, 22 April 2009, para 24
433 UN Doc A/HRC/8/5, 7 April 2008, para 13
responsibility programs, as is required by the Danish government. The Companies Act in Britain requires company directors to consider the company's impact on the community and environment, as part of their director duties. In Canada, mining companies are required by law to consult with indigenous communities, and operations can only progress if legitimate concerns have been addressed. The British Government has confirmed that, provided decisions are made in the pension fund's interests, "pension fund trustees are not prohibited from considering social, environmental and ethical issues in their investment decisions". States could also require corporations to have certain committees: The Companies Act in South Africa enables the government to "prescribe social and ethics committees for certain companies." Similarly, a bill in India makes provision for public companies to have a "stakeholder relations committee" to "consider and resolve the grievances of stakeholders."

The Council of Australian Governments (COAG) has established a set of principles in relation to directors' duties under Australian corporate law, whereby liability should be imposed on the company in the first instance for contraventions of statutory requirements, and criminal liability would only attach to a corporate officer if the officer "encourages or assists the commission of the offence." Domestic corporate law in all jurisdictions should be better utilised as a mechanism for protecting human rights, despite not being its primary purpose. One simple step which may have large benefits would be requiring companies to report any human rights impacts to their shareholders.

Considering human rights when engaging with business
States should be mindful of their human rights obligations when engaging with business, and this extends to their investment decisions.

---

435 UN Doc A/HRC/11/13, 22 April 2009, para 25, referring to the Act to amend the Danish Financial Statements Act, entered into force on 1 January 2009
436 ibid, para 25, referring to section 172(2)(d) of the UK Companies Act, entered into force 1 October 2007
439 ibid, para 25, referring to section 72(4) of the South African Companies Act (2008)
440 ibid, para 25, referring to section 158(12-13) of the Indian Companies Bill (2008)
Socially responsible investment
The Norwegian government is a good example of a socially aware investor.\textsuperscript{442} The Council of Ethics advises Norway’s Ministry of Finance and prepares social responsibility assessments of corporations of which Norway is either a shareholder, or a potential shareholder.\textsuperscript{443} It does this out of a concern that it may be viewed as contributing to abuse by investing in companies who are involved in human rights abuse.\textsuperscript{444} In 2007, the Norwegian government divested around $13 million worth of shares in Vedanta that had previously been held by the state’s global pension fund.\textsuperscript{445} The shares were divested because of the “unacceptable risk of contributing to severe environmental damages and serious or systematic violations of human rights by continuing to invest in the company”.\textsuperscript{446} The Council’s advice to the Norwegian government concluded:

The allegations levelled at the company regarding environmental damage and complicity in human rights violations, including abuse and forced eviction of tribal peoples, are well founded. In the Council’s view the company seems to be lacking the interest and will to do anything about the severe and lasting damage that its activities inflict on people and the environment.\textsuperscript{447}

Similarly, in 2006 the Norwegian Ministry of Finance divested its shares in Wal-Mart when allegations of human rights violations were made against the company, stating that the pension fund would “incur an unacceptable risk of contributing to serious or systematic violations of human rights by maintaining its investments in the company”.\textsuperscript{448}

Investment Agreements and Arbitration
The latter part of the twentieth century witnessed rapid growth in international economic law, which has seen the development of processes whereby

\textsuperscript{442} See UN Doc A/HRC/8/16, 15 May 2008, paras 64-67
\textsuperscript{443} ibid, para 64
\textsuperscript{444} ibid, para 66
\textsuperscript{445} ibid, para 66
\textsuperscript{446} ibid
\textsuperscript{447} ibid
corporations can bring claims against States.\footnote{Robert McCorquodale, ‘The Individual and the International Legal System’ in Malcolm Evans (ed), \textit{International Law} (Oxford University Press, Oxford, 2003), p 311} States will often negotiate investment and trade agreements with companies operating within their jurisdiction. It is estimated that there are more than 2,500 bilateral investment treaties,\footnote{UN Doc A/HRC/8/5, 7 April 2008, para 12} which are enforceable through binding arbitration. In the negotiation of agreements between the State and corporations, there will invariably need to be a dispute resolution mechanism clause, and this will generally take the form of an international body where the corporation can bring a claim, and where an enforceable decision will be made. The International Chamber of Commerce and the International Centre for the Settlement of Investment Disputes have processes for bringing such claims. The United Nations Commission on International Trade Law also has established procedures.\footnote{McCorquodale, ‘The Individual and the International Legal System’, pp 311-312}

Investment agreements will often contain provisions known as ‘stabilisation clauses’, which prevent the company from being bound by future legislation and regulations. The inclusion of a stabilisation clause in investment agreements significantly limits the extent to which a State can fulfil its duty to protect human rights. A stabilisation clause essentially means that new laws, regulations and policies would not apply to the activities of the corporation.\footnote{UN Doc A/HRC/11/13, 22 April 2009, para 30} This has significant implications for long-term projects, such as major infrastructure projects, or extractive industry projects, that could have a life expectancy of fifty years.\footnote{UN Doc A/HRC/8/5, 7 April 2008, para 35} In such cases, the new regulations could be challenged by foreign investors depending upon the terms of the investment agreement.\footnote{ibid, para 35} In one recent example, a European mining company challenged South Africa’s black economic empowerment law.\footnote{ibid, para 12, referring to Piero Foresti, \textit{Laura De Carl} and others \textit{v Republic of South Africa} (International Centre for Settlement of Investment Disputes, case No ARB (AF)/07/1)}

The Special Representative conducted a collaborative research project with the International Finance Corporation on this issue. The project found that the use of stabilisation clauses is greatest in Sub-Saharan Africa, “where 7 of the 11 host Government agreements specified exemptions from or compensation for the effect of all new laws for the duration of the project, irrespective of their relevance
to protecting human rights or any other public interest.\textsuperscript{456} The majority of agreements with non-OECD host States had some protections for investors, preventing them from compliance with new environmental and social laws, while no OECD States offered any protection to investors, or where they did, they regarded the preservation of “public interest considerations”.\textsuperscript{457} This is one small example of the ‘race to the bottom’ when competition for foreign direct investment is so strong.

Broad investment agreements may be drafted to secure foreign direct investment, or due to external pressures. The World Bank has advised African States that investment agreements should contain clauses to prevent “unwarranted government interference” in the mining operations.\textsuperscript{458} However, sometimes States agree to investment agreements that are so broad as to leave them open and vulnerable to binding international arbitration. Depending on the terms of the agreement, corporations may be able to challenge regulatory developments under international arbitration, and damages could be sought when corporations face increased costs due to State policies and legislation aimed at developing social and environmental standards. Similarly, if the corporation claims such regulation will adversely affect its investment, or if there would be a cost associated with compliance, the State may need to compensate the corporation.\textsuperscript{459}

Cases under international arbitration are “generally treated as commercial disputes in which public interest considerations, including human rights, play little if any role.”\textsuperscript{460} Arbitration is a closed and confidential mechanism, and cannot be understood as a transparent process. Conversely, transparency is a fundamental principle of human rights and should not be overshadowed by corporate confidentiality concerns.\textsuperscript{461} Given the strict rules of confidentiality in arbitration, in some cases the public would not know that arbitration has commenced. The secrecy “impedes more responsible contracting by companies and Governments, and contributes to inconsistent rulings by arbitrators, undermining the system’s

\textsuperscript{456} UN Doc A/HRC/11/13, p22 April 2009, ara 32
\textsuperscript{457} ibid
\textsuperscript{459} Ruggie, Presentation of Report to United Nations Human Rights Council
\textsuperscript{460} UN Doc A/HRC/8/5, 7 April 2008, para 37
\textsuperscript{461} ibid
predictability and legitimacy. The referring of situations to international arbitration can be political. Robert McCorquodale cites an example of the United States asserting influence over the Inter-American Development Bank to withhold a loan of $175,000,000 to Costa Rica, until the government of Costa Rica referred a dispute between a corporation with a majority of US shareholders, Santa Elena, to international arbitration.

Sometimes the terms of investment agreements can diminish a State’s ability to protect its citizens from corporate human rights abuse. In response to this problem, the Special Representative is investigating the viability of developing a guide for use when preparing investment agreements. The guide will attempt to ensure a balance is struck between achieving stability for the investor and maintaining the State’s ability to meet its human rights obligations.

**Fostering a corporate culture of respect**

The Special Representative has reiterated the importance of States emphasising the creation of a “corporate culture respectful of human rights at home and abroad.” States are in a unique position to create and support the development of corporate cultures that respect human rights. States can place duties on directors, in an effort to ensure that human rights are respected. Moreover, States can place market pressures on corporations, or request certain reporting from them. Any such reporting should be transparent and made publicly available. These policies could be developed in both home States and in host States. Culture should reflect values rather than be a reflection of mandated behaviour, and to this end States have a difficult task ahead. Initially, a great deal of education will be required, but this could still reiterate the benefits that a corporate culture of respect could have on business. A ‘corporate culture’ test could then be legislated, and used to consider corporate accountability, as will be discussed in Chapter 5.

---

462 UN Doc A/HRC/11/13, 22 April 2009, para 34  
463 McCorquodale, ‘The Individual and the International Legal System’, p 312  
464 Ruggie, Presentation of Report to United Nations Human Rights Council  
465 ibid  
466 UN Doc A/HRC/8/5, 7 April 2008, para 30  
467 Rees, ‘Omissions in the twentieth century’, p 308
Implementing innovative policies relating to conflict areas and conflict commodities

As their operational stretch has widened, transnational corporations are increasingly operating in areas with very poor human rights records, and in areas of conflict and civil unrest.468 War is a major cause of poverty, and can extensively deteriorate opportunities for development, both by diverting funds and destroying agricultural land.469 Of the ten countries with the worst child mortality rates, nine have endured conflict in recent years.470 Corporations involved in natural resource extraction often operate in developing countries that are often beleaguered by conflict and war, where labour costs can be kept to an absolute minimum and “effective governance and accountability are absent”.471 The exploitation and trade in what has become known as ‘conflict commodities’ provides significant revenue and finance for rebel groups and criminal elites, enabling the continuing perpetration of human rights violations.472

Powerful corporations can bring benefits; but conversely they can negatively impact human rights.473 Companies can earn significant profits by operating in conflict zones, through providing weapons, by financing the war or organising mercenaries. Alternatively, companies can fuel conflict by operating in volatile States or by trading in conflict commodities.474 The Special Representative has observed “a negative symbiosis”,475 with the gravest abuse taking place in States which typically have low GDP, weak judicial and legal systems, corrupt governments and a history of, or currently experiencing, conflict.476

International public law and economic law say little about the standards required of corporations operating in conflict zones: “There is, in short, an absence of law governing economic activities in war.”477 Domestic criminal law generally does not prevent the violations caused by corporate activity in conflict zones.478 While it may be morally repugnant to make profits from exploitation of a conflict zone,

468 Joseph, Corporations and Transnational Human Rights Litigation, p 3
469 War on Want, ‘Profiting from the Occupation’, p 1
470 ibid
472 ibid
474 War on Want, ‘Profiting from the Occupation’, p 1; War on Want, ‘Fanning the Flames’, p 1
475 UN Doc E/CN.4/2006/97, 22 February 2006, para 30
476 ibid
478 ibid
there is unlikely to be a specific crime against it, and hence it is not illegal.\textsuperscript{479} Where there are laws prohibiting certain behaviour, the anarchy caused by the ineffective regulatory regimes can lead to impunity for involvement in conflict economies.\textsuperscript{480} These existing limitations mean it is critical for States to cooperate in a concerted effort to develop policies relating to conflict zones and conflict commodities.

The most egregious human rights violations are perpetrated in times of armed conflict. Similarly, the most egregious corporate-related human rights abuses also typically occur in times of armed conflict.\textsuperscript{481} This is not surprising: “[t]he human rights regime cannot function as intended in the unique circumstances of sporadic or sustained violence, governance breakdown, and absence of the rule of law.”\textsuperscript{482} There is only limited State practice regarding the accountability of corporations for their involvement in human rights abuse in times of armed conflict, although the Security Council has used sanctions against certain companies thought to have incited conflict in Democratic Republic of Congo, Sierra Leone and Liberia, and the Secretary-General has recommended that the use of this tool be “continued and improved”.\textsuperscript{483}

Regulation of conflict commodities, and of corporate activities in conflict zones, is a relatively new area and policies are in their infancy. The trade in conflict commodities illustrates the consequences of governance deficiencies caused by rampant neo-liberal globalisation, where the lack of governance structures is compounded by the existence of armed conflict. The approaches to this problem are far from universal, and there are few remedies available to victims.\textsuperscript{484} Decisions taken by governments and corporations are “mired in significant uncertainty”,\textsuperscript{485} with governments unable to regulate corporations, corporations unaware of their obligations, and shareholders, victims and survivors unable to hold corporations accountable against internationally agreed standards.\textsuperscript{486} This situation has led Lunde, Taylor and Huser to conclude that “[t]he immediate

\textsuperscript{479} ibid, p 47
\textsuperscript{480} ibid, p 46
\textsuperscript{481} UN Doc A/HRC/11/13, 22 April 2009, para 43
\textsuperscript{482} UN Doc A/HRC/8/5, 7 April 2008, para 47
\textsuperscript{483} ibid, para 48
\textsuperscript{484} Lunde and Taylor, with Huser, ‘Commerce or Crime?’, p 8
\textsuperscript{485} ibid
\textsuperscript{486} ibid
objective should be to single out abusive or unfair activities that occur in situations of conflict and to design some form of response.  

A UN Expert Panel was established in 2000 to determine whether, how, and to what degree conflict commodities from the Democratic Republic of Congo affected the conflict there.

The Panel concluded that illicit trade and exports were indeed fuelling the conflict; that there were links in this respect to government, rebels, local and regional companies, and some international companies; and that exports escaped sanctions through sophisticated networks of fighters and businessmen in porous border regions, out of which illegal goods eventually emerged as legal.

In relation to the conflict in DRC, a 2002 report found that eighty-five companies had violated the OECD Guidelines. However, the report did not detail how, or why, each company has violated the guidelines. A further report was released the following year, which significantly downplayed such allegations, having the effect of seeming to clear those corporations of wrongdoing. Furthermore, “an entire section of the report was dropped from the public version and given confidentially to members of the UN Security Council” in order to not adversely affect the peace process. This section “described how the elite networks involved in laundering conflict commodities have remained active and adapted themselves to post-conflict circumstances and increasing international scrutiny.” This process identified a lack of political will to address the question of conflict commodities: it was a clear opportunity for the OECD States to condemn those companies that have profited from the conflict economy in the DRC, and a chance to identify corporate responsibility from the UN perspective. Neither the UN, nor the OECD Guidelines were able to respond to the growing conflict economy in DRC, or the impact of corporations in that economy. In the words of Mark Taylor, “[t]he whole

---

487 ibid
489 ibid
490 Taylor (ed), ‘Economies of Conflict’, p 23
491 ibid
492 ibid
493 ibid
was decidedly less than the sum of its parts.”494 The government of the DRC has now announced a mining ban in the eastern parts of the country, signalling political engagement on the issue of conflict commodities.495

A policy response in relation to conflict areas and conflict commodities by States will require an understanding of the relationship between trade and economic activity, and coercion, anarchy, and criminality.496 Acceptable trade practices in such circumstances need to be identified and delineated from the unacceptable. Such an analysis should consider the role of corporations, but also the economic activities of rebel groups and militias.497

Economies of coercion
Economies of coercion exist where “armed force has become central to the activities of business entities, and economic activities have become central to the tactical or strategic considerations of belligerents.”498 Private military companies are an example of a highly “integrated relationship between commercial assets and the use of force.”499 Coercion is a factor when a resource or commodity has a strategic value to an armed group. Strategic value is determined by the opportunity to make a profit from the resource or commodity. Diamonds are of particularly high strategic value, the ultimate ‘low-volume, high-value’ commodity. Alluvial rough diamonds are extremely moveable and easily transported, and are very expensive; they are the ideal economic activity for armed groups.500

Anarchy and lack of regulation
Armed conflict can significantly decrease the effectiveness of regulation, leaving an anarchic realm. Corruption can have the same effect. Armed conflict and corruption:

---

494 Taylor (ed), ‘Economies of Conflict’, p 24
496 Lunde and Taylor, with Huser, ‘Commerce or Crime?’, p 12
497 ibid. While outside of the scope of this thesis, Lunde et al argue that it should also consider “the economic activities of non-economic actors, such as militias or their political or economic allies, as well as the non-economic behaviour of economic actors, particularly business entities.”
498 ibid, p 15
499 ibid
500 ibid, pp 12-13
drive the informalisation of state powers and economic relations undermining the rule of law, leading to a form of regulatory anarchy and resulting in the loss of effective sovereign control over a country’s wealth. Without effective regulation of sources of wealth, such as natural resources, these sources can be exploited by criminal activity that sustains conflict. Informal economies are often caused by ineffective regulation, or anarchy, in times of conflict, but also sustain it.  

Governments are not always transparent or accountable, a deficit found in both developed and developing States. Corruption can significantly undermine governance and public institutions. Lunde et al refer to the “corrupting influences of oil wealth” as an example. They go on to argue that:

strong institutions backed by political legitimacy are key to protecting public sector management of the economy from the effects of easy money. The undermining of these institutions, often in tandem with the deterioration of domestic political culture, can result in the abdication of the state in its functions as an arbiter of sovereign legitimacy on matters of economic governance. In this sense, anarchic exploitation may be understood as market based activity in the absence of the rule of law.

Corporations can play a significant role in the political economy of conflict, and in some circumstances may assist States to effectively exercise their sovereignty. Equally, their activities can perpetuate conflict, as they can support the continuation of informal economies, and the subsequent weakening of government control. Companies can have a very real impact on a State’s ability to protect its citizens in such situations: “de jure state ownership can be rendered meaningless in practice by de facto control over the resource by individuals, private companies and/or their political-military allies.” Informal economies, corruption and ineffective regulation render governments unable to control markets.

---

501 ibid, p 16
502 ibid
503 ibid, p 1, quoting Phillip Swanson, Fuelling Conflict, Fafo AIS, PICCR report 378 (2002)
504 ibid, p 17
505 ibid
506 ibid, p 12
507 ibid, p 17
Criminality
The consequence of the absence of the rule of law is that achieving legal accountability can be difficult. International humanitarian law does not specify illegal economic activities in times of armed conflict.\textsuperscript{508} So what would constitute criminal behaviour in conflict economies? There is very little guidance on this issue, an indication of this being a “relatively new and politically ‘immature’ post-cold war policy issue, one with a particularly malign political problem structure.”\textsuperscript{509}
It is an issue which must be prioritised at the international level, as it is unrealistic to expect States to devise appropriate solutions in isolation.

Extraterritorial regulation of corporations
States have the “undisputed right to extend their laws to their citizens (that is, those who have the nationality of the State), wherever they may be.”\textsuperscript{510} There is no obstacle to home States exercising extraterritorial jurisdiction to ensure their companies respect human rights, other than the principle of non-intervention. It is unclear whether the duty to protect places an obligation on States to exercise extraterritorial jurisdiction, and this aspect has not been addressed in great detail by the treaty bodies.\textsuperscript{511} However, research has identified an increased focus by the treaty bodies on the State duty to protect against corporate abuse.\textsuperscript{512} The duty to protect generally ends at the State’s borders, but this can vary “depending on the State’s degree of control.”\textsuperscript{513} The treaty bodies seem to suggest that extraterritorial jurisdiction is not prohibited, but that there should be some jurisdictional basis for States to exercise extraterritorial jurisdiction (for example, the victim or corporation is a national, or there is a significant impact on the State), and the principle of non-intervention should be observed.\textsuperscript{514} Universal jurisdiction is one such jurisdictional basis, but it is unclear how the concept of

\textsuperscript{508} ibid, p 19
\textsuperscript{509} ibid, p 22
\textsuperscript{511} UN Doc A/HRC/4/35/Add.2, 15 February 2007, Summary, p 3
\textsuperscript{512} UN Doc A/HRC/4/35/Add.1, 13 February 2007, para 93
\textsuperscript{513} UN Doc A/HRC/4/35, 19 February 2007, note 5
universal jurisdiction applies to corporations, and this is one aspect that requires additional research.

Clarification is required on the obligations regarding universal jurisdiction. Universal jurisdiction is a doctrine of international law, whereby any State can claim jurisdiction to prosecute heinous acts that shock the conscience of the international community. States may be under an obligation to regulate and punish grave international crimes that attract universal jurisdiction, but it remains unclear as to whether this obligates States to take action against legal persons in addition to natural persons: that is, does universal jurisdiction attach to the individual officers of the company alone, or also to the company itself?\textsuperscript{515}

Moreover, it is unclear whether such legal action would need to take the form of criminal prosecutions, or whether civil litigation or administrative regulatory processes would suffice.\textsuperscript{516} It may be that, under universal jurisdiction, States have an obligation to provide a remedy, rather than to institute legal action against corporations.\textsuperscript{517} The only conclusion that could be drawn on universal jurisdiction is that “States have certain obligations under universal jurisdiction, but that otherwise both the source and content of any general duties regarding extraterritorial jurisdiction remain unclear.”\textsuperscript{518} For the purposes of corporate accountability, sovereignty and globalisation are not mutually reinforcing.\textsuperscript{519}

An “overall reasonableness” test should also be met before exercising extraterritorial jurisdiction.\textsuperscript{520} It is within those boundaries that treaty bodies have indicated States could try to prevent abuse abroad.\textsuperscript{521} This is a growing trend, with treaty bodies increasingly recommending and encouraging home States to influence corporations operating abroad. A recent example is the encouragement from the Committee on the Elimination of Racial Discrimination, who encouraged


\textsuperscript{516} UN Doc A/HRC/4/35/Add.2, 15 February 2007, Summary, p 3

\textsuperscript{517} ibid, para 48

\textsuperscript{518} ibid, para 49

\textsuperscript{519} Gilbert and Russell, ‘Globalization of criminal justice in the corporate context’, p 216, noting that it is a sovereign right of a state to declare the criminal law within a state, and “the criminal laws of nations cannot be dictated from outside national borders.”

\textsuperscript{520} UN Doc A/HRC/11/13, 22 April 2009, para 15

\textsuperscript{521} ibid
a State party to “take appropriate legislative or administrative measures to prevent adverse impacts on the rights of indigenous peoples in other countries from the activities of corporations registered in the State party.” States generally have “wide latitude in deciding the type of influence in most circumstances.”

The attention given to the issue of business and human rights by the treaty bodies is significant. As the prominent monitoring mechanism for human rights treaties, it is crucial that they continue to provide guidance to States, and this in turn will provide clarity to corporations and certainty to victims. The Special Representative has suggested treaty bodies could issue general comments on the issue of business and human rights. Moreover, the treaty bodies could request States to report on their ability to hold corporations accountable for human rights abuse. On a related note, there was broad agreement at the workshops conducted as part of the Special Representative’s consultative process that the duty to protect was unlikely to “require States to provide a remedy for the extraterritorial activities of TNCs.”

In 2006, the Special Representative organised a workshop in Brussels for legal experts on the question of extraterritorial regulation of corporations. The workshop concluded that, “whether the duty to protect extends extraterritorially is an open question requiring further debate.” Furthermore, it is unclear as to whether States are obliged to provide a civil remedy to victims for torts committed abroad.

There are procedural challenges to the use of extraterritorial jurisdiction, including the cooperation required in relation to evidence gathering. Moreover, the costs could be prohibitive, and include the additional travel costs to the home State. On a political note, home States may be reluctant to regulate for corporate abuse abroad for fear of corporations relocating, and losing investment opportunities.

522 UN Doc A/HRC/8/5, 7 April 2008, note 14, referring to CERD/C/CAN/CO/18, para 17
523 UN Doc A/HRC/4/35/Add.1, 13 February 2007, para 92
524 ibid, para 94
525 ibid, para 95
526 UN Doc A/HRC/4/35/Add.2, 15 February 2007, para 27
527 ibid, para 40; see also A/HRC/11/13 (22 April 2009), para 15
528 ibid, para 60
529 ibid, para 40
530 ibid, para 69
531 UN Doc A/HRC/8/5, 7 April 2008, para 14
The use of extraterritorial legislation to regulate the behaviour of corporations abroad has been suggested, as a way of addressing the regulatory gaps created by jurisdictional limitations. There have been at least two attempts at introducing such legislation, once in the United States (the Corporate Code of Conduct Act) and once in Australia (the Corporate Code of Conduct Bill 2000). These measures attempted to introduce extraterritorial regulation and control over Australian companies operating overseas, to ensure corporate accountability for human rights violations. Neither attempt was legislated. In Australia, the Parliamentary Joint Statutory Committee on Corporations and Securities found the Bill to be “impracticable, unworkable, unnecessary and unwarranted.” Australia does exercise extraterritorial jurisdiction, provided there is a nexus between the act and the jurisdiction, and it has been noted that the approach in Australia is “relatively lenient.” Such extraterritorial legislation may not be necessary, and domestic courts may be able to hold companies to account. For example, since 1995 actions against British-based companies have been able to be heard in English courts “for harm caused abroad as a result of adopting lower health and safety standards than the levels considered acceptable in Britain.”

The Ok Tedi case made Australian corporations realise that they could be called to account for their involvement in abuse. More recently, in 2005 the Australian Federal Police (AFP) commenced an investigation into Anvil Mining, relating to allegations of complicity in grave human rights abuse that took place in the DRC in October 2004. It is alleged that Anvil Mining provided troops with vehicles

---


534 Deva, ‘Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations’

535 Phillips and Nicolson, ‘Brief on Corporations and Human Rights in the Asia-Pacific Region’ p 37


and logistical support. Mr Meeran asked the AFP to investigate on behalf of the Human Rights Council of Australia. Mr Meeran said the investigation is “the first crimes against humanity related investigation of a company that we are aware of in Australia”, and should send a warning to other companies operating in conflict zones. However, the AFP closed the case in August 2007, pursuant to orders from the Minister for Foreign Affairs.

There is some concern that the exercise of extraterritorial jurisdiction may be “too close to modern-day imperialism”. Yet, to ensure access to remedy it may be necessary for home States to regulate their corporations abroad, particularly as in many circumstances host States will be either unwilling or unable to provide such remedy to victims. If such regulation was in accordance with a State’s international obligations it would be difficult to sustain such a charge of imperialism. It has been suggested that regulation could be based on the home and host States shared obligations, but this would be difficult if there were differences in obligations due to disparity of ratification and differences between domestic legal standards.

Securing Protection: Addressing the cause of the governance gaps
This chapter will now turn to consider the forces within the international system that enabled corporations to grow in influence without a corresponding growth in mechanisms to regulate their behaviour. It will first consider neo-liberal globalisation, and the impact that has had on corporate power. It will consider the impact that this development has had on the State’s ability, and willingness, to regulate corporate behaviour. It will then consider the issue of self-interest, and the impact this has had on the State duty to protect human rights.

539 Phillips and Nicolson, ‘Brief on Corporations and Human Rights in the Asia-Pacific Region’, p 36. For a detailed account, see Neighbour, The Kilwa Incident Transcript
541 Shiel, ‘Perth company linked to Congo massacre’
543 UN Doc A/HRC/4/35/Add.2, 15 February 2007, para 24
544 ibid, Summary, p 3
545 ibid, para 24
The challenges in relation to corporate accountability for human rights abuse stem from the governance deficiencies that have been created by increased economic integration and the process of globalisation. There is a fundamental misalignment between the impact and influence of economic actors, and the capacity of governments and societies to manage the consequences. The increased size of corporations and other economic actors has meant societies are often unable to respond to the harm caused. Such governance deficiencies create a “permissive environment” where corporations are able to commit any number of wrongful acts with impunity, without appropriate sanction or any requirement of reparation. Corporate-related human rights abuse needs to be addressed, least of all because impunity may encourage other corporations to engage in such behaviour.

**Neo-liberal globalisation and the State Duty to Protect**

Neo-liberal globalisation has totally dominated the process of increased economic integration. The process of globalisation, and the increased capital and foreign investment flows has facilitated the phenomenal growth in transnational corporate power. The policies of deregulation, trade liberalisation, free trade and foreign investment opportunities have all supported the growth of transnational corporations. The “tidal wave of privatisation” commenced in the 1980s, and resulted in private actors delivering services that were previously provided by the State, in commercial and social spheres including social services, adoptions, provision of health care, supply of gas, electricity and water resources and other functions. The end of the Cold War and the corresponding growth of the neo-liberal project saw the private sector beginning to provide functions that had previously been provided by States, giving corporations enormous responsibilities that “had previously been unimaginable to entrust to them.” The 1990s saw the rate and pace of global economic trade and integration expand substantially, in response to an increase in trade and investment agreements, and process of trade liberalisation and privatisation. Corporations benefit from open trade and investment flows, but power differentials create an imbalance.

---

546 UN Doc E/CN.4/2006/97, 22 February 2006, para 18
547 UN Doc A/HRC/4/035, 9 February 2007, para 3
548 Alston, ‘The “Not-a-Cat” Syndrome’, p 17
549 ibid
550 ibid, p 7
551 UN Doc A/HRC/4/035, 9 February 2007, para 2
The continuation of governance gaps and imbalances between the power and influence corporations and markets, and the ability of States to respond to such power and protect their citizens, is unsustainable. The Special Representative suggests that without a cohesive, global response to these deficiencies, individual States may succumb to domestic pressures that may cause “assertive nationalisms or intolerant fundamentalisms [to] emerge as the promised means of providing social protection.” Yet it is not only transnational corporations that require greater regulation: there exists some conclusive evidence which suggests that domestic and State-owned corporations can cause greater harms than the “highly visible” transnationals.

A critical consequence of the domination of neo-liberal ideology has been a reduction in the ability of the State to meet its positive human rights obligations. A reliance on market forces tends to reduce access to food and water, education, housing and health care. Thus, in circumstances where the neo-liberal project has ‘succeeded’, there may be a corresponding denial, or violation, of human rights. Paul O’Connell has emphasised the incompatibility of the neo-liberal agenda and realisation of human rights, arguing that “[i]f we are serious about the protection and realisation of human rights we have to consciously break with the hegemony of the neo-liberal approach.” The extractive industries in developing counties, such as Shell in Nigeria and FreeportMcMoran in Indonesia, are examples of peoples’ right to development, and the prospects for future

---

552 UN Doc E/CN.4/2006/97, 22 February 2006, para 18: “Moreover, at the level of the world political economy as a whole policymakers and pundits of varying persuasions are coming to appreciate a lesson that history taught us long ago: severe imbalances between the scope of markets and business organizations on the one hand, and the capacity of societies to protect and promote the core values of social community on the other, are not sustainable. The Victorian variant of globalization collapsed, as did the attempt to restore a laissez-faire international financial system after the First World War, because both made it difficult if not impossible for Governments to meet mounting domestic demands for full employment and greater economic equity. Both failures contributed to the emergence of ugly ‘isms’ that were inimical to business, human rights and, in the end, to world peace. In contrast, the post-1945 institutional arrangements for monetary and trade relations balanced commitments to international liberalization with ample scope for domestic safety nets and social investments and thereby helped build domestic political support for the most recent wave of globalization. Today, the widening gap between global markets and the capacity of societies to manage their consequences may pressure political leaders to turn inward yet again, pulled by economically disadvantaged but politically empowered segments of their publics, as a result of which assertive nationalisms or intolerant fundamentalisms may emerge as the promised means of providing social protection. Embedding global markets in shared values and institutional practices is a far better alternative; contributing to that outcome is the broadest macro objective of this mandate.”

553 ibid, para 18

554 UN Doc A/HRC/4/035, 9 February 2007, para 3


556 O’Connell, ‘On Reconciling Irreconcilables’, p 508
generations, being undermined by the “priorities of profit generation and growth.”

The protection and promotion of human rights remains a fundamental objective and obligation of States, but this is complicated in a globalised world. In what will be a difficult task, “[o]ur challenge then is to modernise the way in which we protect human rights recognising the international nature of corporations, while strengthening rather than weakening the legal force of the nation State.”

Neo-liberalism and human rights

Conventional neo-liberal orthodoxy supposes that an extension of laissez-faire capitalism will inevitably lead to an improvement in social welfare and the realisation of human rights. While the Special Representative has argued that “economic development, coupled with the rule of law, is the best guarantor of the entire spectrum of human rights”, there is little evidence to suggest that any prosperity will automatically transform to positive developments for social justice, or that the most vulnerable will receive some benefit. As Louise Arbour has observed, there is “no reason to assume that prosperity will transform itself naturally into any form of social justice”, or that economic growth will benefit the most vulnerable. Moreover, there is no intrinsic link between economic growth and social development.

The ascendancy of neo-liberal globalisation has seen a corresponding increase in inequalities, and growth in the gaps of financial and material welfare both between and within States; the most vulnerable individuals and communities have become even more marginalised. This is significant, as poverty is closely, and negatively, related to the realisation of human rights. There is a direct connection between poverty and economic and social human rights, including the

---

558 Woodroffe, ‘Regulating Multinational Corporations in a World of Nation States’, p 131
559 UN Doc E/CN.4/2006/97, 22 February 2006, para 2
right to food, the right to health and the right to housing.\textsuperscript{563} Neo-liberal globalisation and the associated growth in corporate power has not only made individuals and communities vulnerable to direct, and indirect, abuse from corporations, it has also exacerbated existing challenges to the realisation of economic and social rights.\textsuperscript{564}

Neo-liberalism has persevered as the dominant policy orthodoxy throughout the process of globalisation, despite being unable to deliver any benefit to the majority of people, and indeed palpably worsening the lives and conditions of millions of people.\textsuperscript{565} Neo-liberalism generates powerful pressures on States to have market friendly policies. The process of neo-liberal globalisation has therefore seen a global market develop that is intended to further the interests of economic elites, where States are rendered the “facilitators” of more integrated economies.\textsuperscript{566} As Paul O’Connell has argued:

\begin{quote}
notwithstanding the loose talk of global villages, weightless economies and post-national utopias of mutual interconnectedness and interdependence devoid of context, globalisation, or at least the dominant form thereof, is understood here as being primarily: a consciously undertaken political project to privilege private economic power over public power, in the interests of global and local economic elites. It has thus sought to create a global, deregulated, privatised economy subservient to the interests of dominant transnational capital, based primarily in the United States and Western Europe.\textsuperscript{567}
\end{quote}

There is an inherent tension between neo-liberal ideology and the human rights regime. The neo-liberal project proclaims the advantages of a minimal State, one with limited social responsibilities. Conversely, the international human rights regime requires strong States that are able to meet their obligations. It is crucial that the inherent tensions between the realisation of human rights and the neo-

\begin{footnotesize}
\footnote{564}{ibid, p 30: “But these fifty years [since the UN was created] have also culminated in unprecedented economic inequality between the most affluent tenth of humankind and the poorest fifth. What makes this huge and steadily growing inequality a monstrosity, morally, is the fact that the global poor are also so incredibly poor in absolute terms. They lack secure access to food, safe water, clothing, shelter, and basic education, and they are also highly vulnerable to being deprived of the objects of their civil and political human rights by their governments as well as by private agents. Some 18 million of them die prematurely every year.”}
\footnote{565}{O’Connell, ‘On Reconciling Irreconcilables’, p 492}
\footnote{566}{ibid}
\footnote{567}{ibid. Emphasis in original}
\end{footnotesize}
liberal globalisation project are recognised and addressed, both theoretically and in practice.

Privatisation and human rights
In what has become known as the ‘Washington Consensus’, the International Monetary Fund and the World Bank have heavily promoted privatisation of State assets. The main motivations behind this policy are perceived improved competitiveness, a reduction of domestic debt, and the generation of cash flows, leading to increased government revenue and development. However, the period of transition can be one of extreme upheaval for populations, many of whom are already vulnerable, and the World Bank’s silence on how to protect the rights of these vulnerable people and their communities is indicative of their economic priorities. Moreover, the World Bank advises States to avoid universal social services and State ownership and control of resources, and in some cases “[e]mployment reduction was identified as a prerequisite for successful privatisation.”

Experience tells us that such reforms increase social and economic inequalities and can lead to increased poverty. However, the private sector generally stands to benefit from the reforms, not least due to the favourable terms of their investment agreements. Tax concessions, for example, can significantly increase corporate profit margins; yet it reduces the State’s ability to provide for its people, and diminishes the government’s ability to ensure the population’s human rights are protected. Such situations are morally reprehensible, and completely at odds with the State’s duty to protect. Economic policies should be “socially

569 ibid, pp 326-327. Feeney describes the example of the World Bank’s ‘Agenda for African Mining in the 1990s’ initiative, which identified the mining industry as a critical sector for the generation of economic development in Africa. The initiative had private investment as a core objective. The World Bank “deplored the fact” that African mining represented only 5 per cent of global mining exploration and expenditure, given its extensive resources. The initiative identified areas for action, including the adoption of new mining and investment laws and other related policies, including the right to repatriate profits and assured access to foreign exchange, and protection from losing legal title to mining rights. Zambia was significantly affected by the World Bank initiative. Zambia’s main export is copper, and when prices slumped in the early 1980s, Zambia was unable to make its debt re-payments. In 1987, the IMF and World Bank suspended their lending. Privatisation reforms have negatively impacted the rights of many Zambians. The structural reforms saw less funding allocated to social services and agriculture. In the years following the 1991 election of the Movement for Multiparty Democracy, who had a mandate of ambitious market reforms including privatising around 150 State-owned enterprises over 5 years, poverty increased, as did the economic and social inequalities (pp 326-328)
570 ibid, p 350
accountable” and must ensure the promotion and protection of social and economic rights.571

Self-interest and the State Duty to Protect

Self-interest and Realpolitik are aspects of the duty to protect that should not be ignored, particularly when seeking accountability for corporate abuse for which the State was the principal perpetrator. Yet the influence of Realpolitik is more insidious than that; home States benefit from economically strong and powerful corporations, whereas host States seek to encourage foreign direct investment.572 It may not be in a State’s economic interests to pursue corporate-related abuse, leaving victims without recourse to justice. Moreover, host States may view foreign direct investment as crucial from a security perspective. However, the realist security system fails to see the physical safety of individuals as a worthy concern.573 Greater attention needs to be devoted to the obligations of both home and host States to protect human rights; victims should not be neglected due to economic imperatives.

The State as the principal perpetrator

There is often a resistance to investigate and hold to account situations of corporate complicity where the State is the primary perpetrator of abuse. Such hesitance may come from home and host States, as home States may elect not to prosecute, based on foreign policy considerations. This is one of the fundamental shortfalls of the criminal law and justice system, where the prerequisite for legal action is the State’s election to prosecute. In corrupt States, or ones where there is little separation between the judiciary and the executive arm of government, prosecutions may not be instigated. Alternatively, trials may return a questionable result. There was widespread condemnation of the prosecution in the Democratic Republic of Congo in relation to the massacre with which Anvil Mining was implicated; indeed, the High Commissioner for Human Rights, Louise Arbour, stated her concerns in no uncertain terms. Referring to the verdict, she has said: “I am concerned at the court’s conclusions that the events

571 ibid, p 350
in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations.\textsuperscript{574} She also criticised the inappropriate use of a military court to try civilians.\textsuperscript{575} While civil cases are not dependent on the State’s election to prosecute, many of these States will not have robust legal systems in which victims can initiate legal proceedings. This has been one of the driving forces behind the increasing reliance on the United States \textit{Alien Tort Claims Act}, as victims can bring civil cases in the United States.\textsuperscript{576}

\textbf{The host State and the importance of foreign direct investment}

Many States view foreign direct investment as integral to their development, believing that their development is linked to their capacity to engage in the international trading system.\textsuperscript{577} As Olivier De Schutter has observed, “[f]or all the sour feelings that the acts of certain transnational corporations have aroused in developing countries where they have operated, there is one thing which, for a developing country, is even worse than to attract foreign direct investment (FDI): it is to attract none.”\textsuperscript{578} States are often in direct competition with one another to attract foreign direct investment, and this situation can lead to exploitation of developing States, through a number of means including unsafe work practices, low wages, political corruption and other conduct that can cause harm.\textsuperscript{579} This can lead to States being less inclined to live up to their obligation to hold corporations and corporate officials to account when they are involved in human rights abuse. This competition for foreign direct investment is causing a downward spiral, or a ‘race to the bottom’ in many developing States. In many


\textsuperscript{575}ibid

\textsuperscript{576}It should be noted that the vast majority of cases against corporations under the ATCA have failed. The reason that many people use the ATCA is that it generates publicity in the US and plaintiffs hope that the US Congress or government officials will take an interest in the matter. In addition publicity is considered a form of pressure on the corporations to settle the matter even if the corporation could win in court.


\textsuperscript{578}Olivier De Schutter, ‘Transnational Corporations as Instruments of Human Development’ in Alston and Robinson (eds), \textit{Human Rights and Development: Towards Mutual Reinforcement} (Oxford University Press, Oxford, 2005), p 403

\textsuperscript{579}Gilbert and Russell, ‘Globalization of criminal justice in the corporate context’, p 223
instances governments are placing a greater priority on attracting, attaining and maintaining foreign direct investment than on protecting the rights of their citizens.580 If all States were able to meet their duty to protect, there would be no ‘race to the bottom’ as there would be a level playing field, and corporations would be bound by the same standards regardless of where they operated.

The economic imperative of home States
Home States share the economic benefits of a strong private sector, and it is in a State’s interests for its corporations to be in a strong financial position. Britain is an instructive example of this situation. The world’s three largest mining companies are British companies.581 The British government has provided extensive support to its mining companies, despite the patterns of behaviour that can be identified and the harm caused to local communities due to the operations of the companies.582 For example, the Amantaytau Goldfields are joint-owned by Oxus Gold, a British company, and the government of Uzbekistan. The Uzbek government is a repressive regime; and has been known to kill unarmed civilians.583 In May 2005, government forces shot hundreds of unarmed protestors, for which no one has been held accountable.584 Despite the poor human rights record, the British government has expressed the mutually beneficial relationship between Britain and Uzbekistan, in relation to mining, oil and gas, pharmaceuticals, and agriculture.585 Furthermore, the British government has supported the Uzbek regime as it is an ally in the ‘war on terror’. In 2006, when the President of Kyrgyzstan revoked Oxus’s licence to develop the Jerooy gold mine, referring to the operations as “irresponsible and unlawful”, Tony Blair personally intervened in support of Oxus.586 The Foreign Office also supported Oxus, issuing a statement saying “The revocation of Oxus Gold’s licence to develop the Jerooy gold mine has further damaged the credibility of Kyrgyzstan among foreign investors.”587 This support comes despite the former

---

580 Woodroffe, ‘Regulating Multinational Corporations in a World of Nation States’, p 132. One example of this was the passing of the Compensation (Prohibition of Foreign Legal Proceedings) Act, passed by the Papua New Guinea parliament in 1995, which was drafted in response to the claim against BHP brought in the Victorian Supreme Court, and prohibited claimants from pursuing their cases in Australian courts. The text of the legislation is available online from http://www.pacll.org/ppl/legis/compl_act/cotfpa1995499.rtf, last accessed 22 July 2011
581 War on Want, ‘Fanning the Flames’, p 1
582 ibid, p 30
583 ibid, p 14
584 ibid
585 ibid, p 15
586 ibid
587 ibid
British ambassador to Uzbekistan, Craig Murray, informing the Foreign Office on numerous occasions of the Uzbek regime’s poor human rights record, and use of torture.  

Another example of home State self-interest comes from the United States, in relation to its support of Caterpillar. As discussed previously, Caterpillar directly supplies the Israeli military with bulldozers, as a weapon under the United States Foreign Military Sales Program. The United Nations believes that, since 2000, the Israeli army has destroyed around 4,500 Palestinian homes and farming land. The bulldozers have been necessary in taking this action. However, during the global financial crisis, President Obama visited the Caterpillar headquarters in Illinois. Due to the economic downturn, Caterpillar has decreased its workforce, losing thousands of jobs. It was in this light that President Obama provided his support and praise of the company. Hence, domestic economic concerns took precedence over significant and legitimate human rights concerns. This controversial issue of home State support for corporations involved in human rights abuse has not been addressed by the Special Representative, and requires greater attention and consideration.  

Reconciling the State Duty to Protect and the existing governance gaps

The State duty to protect lies at the heart of the human rights system. However, greater clarity is needed regarding the duty as it pertains to protection from corporate complicity in human rights abuse. The many aspects that States can develop in order to better ensure protection for human rights have been somewhat undermined by the process of increased neo-liberal globalisation and economic integration. Moreover, the State duty to protect from corporate abuse is hindered by the principle of self-interest, both for home States and host States, thus compounding the problem for victims.

---

588 ibid; moreover, “Murray has also revealed that the British security services connived closely with Uzbek authorities and used information extracted under torture.” The ambassador was “eventually dismissed for his pains.”
589 War on Want, ‘Profiting from the Occupation’, p 4
591 Zunes, Obama’s Caterpillar Visit a Thumb in the Eye for Human Rights Activists
592 Kinley, Nolan and Zerial, ‘The politics of corporate social responsibility’, p 39
CHAPTER 4

THE CORPORATE RESPONSIBILITY TO RESPECT:
BEYOND CORPORATE SOCIAL RESPONSIBILITY

This chapter will consider the corporate responsibility to respect, and the guidance provided by the Framework. It will consider the effectiveness of the requirements of legal compliance and due diligence in preventing corporate complicity in human rights abuse. It will reflect on the relationship between the responsibility to respect and corporate social responsibility initiatives, and will question whether these initiatives are an appropriate policy response to the complex issue of corporate complicity.

The Responsibility to Respect under the Framework

Corporations have a duty to respect human rights, as confirmed by the UN Human Rights Council when they adopted the Framework. Similarly, there is a growing expectation from global society that corporations should respect, or even promote, internationally recognised human rights. While it is not, and should not be, incumbent upon corporations to fill the human rights void where governments are failing to protect the human rights of their citizens, there are certain responsibilities placed on corporations to respect human rights, and it is therefore crucial that corporations understand, in concrete terms, what is required of them in relation to their operations. However, emphasising corporate responsibility must not detract from the role States must play in ensuring the protection and promotion of human rights, including protecting human rights from

---

593 Jungk notes that “In some of the more extreme cases, multinationals have even been called upon to take over the traditional roles of government: to promote and secure human rights themselves, either in the absence of an effective government or in opposition to an abusive one.” Margaret Jungk, ‘A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad’ in Michael Addo (ed), Human Rights Standards and the Responsibility of Transnational Corporations (Kluwer Law International, The Hague, 1999), 171-172

Corporations should consider both the legal and ethical dimensions and ramifications of their actions and operations, and should undertake due diligence to ensure they are not complicit in abuse. Governments determine the scope of the private sector’s legal obligations and responsibilities. Societal expectations widen this scope to a broader understanding of corporate responsibility. Corporations should not assume that by meeting their legal obligations they also fulfill societal expectations, particularly in regions where legal regulation is lacking. The corporate responsibility to respect human rights can be distilled to one guiding principle: do no harm.

The emerging global debate around corporate responsibility extends beyond the narrow responsibility that corporations, particularly their directors, have for shareholders. However, corporations, despite their power and influence, do not have the same legal duties as States under international law, and should not be expected to fulfill State duties when governments fail to meet their obligations.

The responsibility to respect reaches beyond the human rights regime and into social and moral spheres, and other aspects of corporate good governance and good citizenship. Human rights advocacy groups and campaigns were the catalyst for the current developments. Amnesty International, Human Rights Watch and Oxfam have all been publishing on the issue for well over a decade. The growth of voluntary codes of conduct and industry-wide initiatives may indicate that corporations are taking issues of human rights and other social matters seriously. However, there are concerns that the adoption of such codes and initiatives can be motivated by reputational concerns, fuelled by spin,
and can be public relations exercises that in the end do not further the realisation of human rights; in fact, they can detract from this goal.602

Although in certain situations some rights may be more relevant than others, the corporate responsibility to respect applies to all recognised human rights. In this sense, the responsibility to respect under the Framework is much wider reaching than corporate social responsibility policies or other initiatives, and more closely resembles the requirements of the Global Compact. Indeed, the Framework builds upon the developments made by the Global Compact and the OECD Guidelines.

The Special Representative describes the scope of the responsibility as follows:

…the actual and potential human rights impacts generated through a company’s own business activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-State actors and State agents. In addition, companies need to consider how particular country and local contexts might shape the human rights impact of their activities and relationships. Such attributes as companies’ size, influence or profit margins may be relevant factors in determining the scope of the promotional CSR activities, but they do not define the scope of the corporate responsibility to respect human rights. Direct and indirect impacts do.603

Companies should conduct assessments of their operations in order to determine whether any human rights could be impacted. The Business Leaders Initiative on Human Rights, chaired by the former High Commissioner for Human Rights, Mary Robinson, argues that at the absolute minimum, companies should refer to the International Bill of Human Rights when conducting such assessments; they have provided guidance and resources for business based on that conclusion.604 Depending on the circumstances companies may need to consider particular

---

602 Joseph, Corporations and Transnational Human Rights Litigation, p 8
603 UN Doc A/HRC/14/27, 9 April 2010, para 58
groups who may suffer adversely from their operations, including indigenous peoples, women and children.

**Embedding a human rights framework**
A human rights framework would enable companies to better realise the responsibility to respect. This is closely aligned to due diligence, but is broader, and encapsulates the whole of the corporate enterprise rather than focusing on single operations. The Business Leaders Initiative on Human Rights was somewhat of a pioneer in this area, and urged other companies to determine their strategies and develop and implement policies and procedures, to communicate with other stakeholders, to train their staff, and crucially to measure the human rights impact of these initiatives and report on them publicly. The United Nations Global Compact has written a good practice guide for companies to follow when implementing a human rights policy, which is a good starting point for companies who may be unfamiliar with the requirements of the responsibility to respect human rights.

The Special Representative is considering ways to address and resolve some of the outstanding aspects, including whether corporations ever have a responsibility that transcends beyond respecting human rights, and what standards to implement when operating in States where national regulations and law fall far below the international benchmarks set under international human rights law.

**Legal compliance**
Legal compliance relies on corporations respecting the law, including laws that are not enforced. For transnational corporations, this will mean respecting the law of the home State and the law of the host State. Many States have domestic laws that reflect core human rights norms and bind corporations. However, in practice, corporations that operate in many jurisdictions are likely to apply the minimum

---


606 ibid


standards applicable in each jurisdiction, although there may be some incentives for respecting greater standards. Corporations would not be contravening domestic laws by doing so, and in this way are able to apply low standards to their operations. In such situations legal compliance becomes more difficult. This is particularly so when corporations operate in regions that can be understood as being “weak governance zones”, such as in conflict situations, where State governance structures that would usually protect human rights are not fully operational. The International Organisation of Employers, International Chamber of Commerce and Business and Industry Advisory Committee to the OECD are in agreement as to a company’s responsibility to respect the law:

All companies have the same responsibilities in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent.

If a corporation has operations in a conflict zone, then the corporation should also comply with the requirements of international humanitarian law, and special consideration should be given to international criminal law. This is particularly pertinent to individual officials, as corporate officials are directly bound under international criminal law and are able to be prosecuted for involvement in grave human rights abuse. Moreover, an increasing number of States are incorporating the Rome Statute of the International Criminal Court into their domestic jurisdictions; the result of this is that corporations are brought within the ambit of these standards. The Global Compact’s Guidance on Responsible

---

609 Addo, ‘Human Rights and Transnational Corporations – An Introduction, p 11
610 The corporate responsibility to respect does not place an expectation on them to fulfil State obligations when States are unable to.
612 The prosecutor of the International Criminal Court has stated that the role of economic actors in the perpetration of human rights violations would be investigated for the purpose of commencing prosecutions; presumably this would extend to include corporate officials: For example, see Information Regarding the Possible Investigation by the ICC of the Situation in Ituri, Democratic Republic of the Congo, (March 2004) United Nations Association of the United States of America, online at http://www.unausa.org/site/pp.asp?c=tvKRI8MPPj&B=345921 accessed 4 May 2005, Page 5
613 When States become a party to the Rome Statute for the International Criminal Court, there will generally be a process of incorporation of the treaty law into the State’s domestic laws. The effect of many States incorporating the standards of the International Criminal Court into their domestic jurisdictions has been that these standards have been extended into the domestic legal realms, increasing the potential liability for corporations. 59 States have enacted laws, or have specific provisions in national legislation, to implement the Rome Statute into domestic legislation; 39 States have laws in the process of being enacted. For further information, see Coalition for the International Criminal Court, “Summary Chart on the Status of Ratification an Implementation of the Rome Statute and the Agreement on Privileges and Immunities”, available online at http://www.iccnow.org/documents/Chart_Summary.pdf, last accessed 22 July 2011
Business in Conflict-Affected and High-Risk Areas, with its case examples and best practice advice, will be an invaluable guide for many companies and company officials.614

The challenge for legal compliance is complex where domestic laws are inconsistent with international human rights standards, or even at odds with jus cogens norms, such as the laws in South Africa during the Apartheid era. However, in practice, corporations that operate in many jurisdictions are likely to apply the minimum standards applicable in each jurisdiction, although there may be some incentives for respecting higher standards. Indeed, some companies argue that it is the responsibility of governments to regulate the corporations, and the responsibility of the corporation to follow the law.615 Corporations would not be contravening domestic laws by doing so, and in this way are able to apply low standards to their operations.616 The Special Representative has noted that further clarification on this matter is required.617

At best, the failure to observe the law, or failure to observe international standards in the absence of national law, represents a lack of understanding of the corporation’s responsibilities, while at worst it represents a wilful blindness, or even a refusal to observe the law when there is no chance of sanctions. Such mindsets represent significant challenges.

Another aspect of legal compliance is whether corporations are able to meet their requirements under corporate and securities law if they are inadequately assessing human rights risks of their operations.618 There is a possibility that if a company failed to identify a human rights risk, then it may have failed to identify a risk to shareholders which would need to be disclosed and addressed.619

---

614 Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A resource for companies and investors, a joint UN Global Compact – PRI publication (2010), available online at http://www.globalcompact.org, last accessed 30 June 2010


617 UN Doc A/HRC/11/13, 22 April 2009, para 66


619 The Special Representative will investigate this issue further. See UN Doc A/HRC/11/13, 22 April 2009, para 27: “To provide greater clarity about what is currently expected of companies under corporate law as it relates to human rights, the Special Representative is pleased that 19 leading law firms from around the world have
For example, despite the human rights concerns arising out of the Carrejon operations, which were discussed in Chapter 1, Xstrata’s 2006 annual report made no reference to the ongoing human rights challenges. In the annual report, Xstrata’s chief executive, Mick David, stated that:

Cerrejon has already outperformed the assumptions made at the time of the mine’s exceptional resource base, the expansion currently under way and the potential for future growth... all give me great confidence that this transaction will secure significant additional value for our shareholders over the long-term.  

Similar concerns over reporting were raised following the Anvil Mining incident in Kilwa, DRC. In the Anvil Mining Newsletter issued in January 2005, there was brief mention, on the final page, of an “incursion” at Kilwa. There is no mention of a massacre, and the focus is on the evacuation of the mine site and the protection of staff.

Avoiding complicity: due diligence

As with any crime or violation, prevention is the best option, and human rights violations are no different. How can corporations act to ensure they are not complicit in human rights abuse? Companies need to make themselves aware of the political environments in which they operate, in order to avoid being implicated in human rights abuses. One way to do this is to implement a due diligence framework, and another is to complete human rights impact assessments before commencing operations.

The ICJ Expert Panel is in agreement that careful assessments are required:

---


---
in today’s world, where communication processes, information source and expertise are continuously developing, expanding and multiplying, it is unwise for a company that is seeking to avoid legal liability to fail to take steps to regularly and carefully assess the potential human rights impacts of its conduct and inform itself about the risks – thereby providing itself with the opportunity to change its conduct.622

The Special Representative has argued for a due diligence framework in response to the growing concern of corporate involvement in human rights abuse, in order to assist corporations to appropriately discharge the responsibility to respect. The Special Representative argues that:

the scope of due diligence to meet the corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence. Rather, it depends on the potential and actual human rights impacts resulting from a company’s business activities and the relationships connected to those activities.623

Such a procedure would not provide guaranteed protection from legal liability, either criminal or civil, but would help companies manage the risk of corporate complicity and it should help companies to identify risks of becoming complicit, and would send a message that companies are serious about not being complicit in abuse.624 It should help companies to identify risks requiring investigation as they emerge, and help ensure corporations do not continue to contribute to abuses, or benefit from abuse.625

Due diligence processes would require companies to take steps to identify and prevent human rights abuse, and provide mechanisms to address such abuse. In this way, a due diligence framework may have a preventative effect. In addition, it is one way for corporations to demonstrate and establish that they are meeting their responsibilities. When completing due diligence processes, companies should consider the political context in which they operate, the impact the company’s operations will have within that political context, and whether the company might contribute to any abuse through its partnerships, other State and

624 ibid, para 32
625 ibid, para 71
non-State actors, and through its supply chain. Companies face uncertainty regarding the precise obligations and standards they will be held to, as all jurisdictions have different legal and procedural rules. However, ensuring they are aware of this should form part of corporate due diligence practices. It would be ill informed, naïve and dangerous for corporations to not consider the legal systems and standards of the places where they operate.

The substantive content of due diligence frameworks should be drawn from the International Bill of Human Rights, and the ILO Declaration on Fundamental Principles and Rights at Work. Companies should, according to that approach, consider the human rights record of the States in which they operate, and whether their operations would negatively impact human rights. Depending on the situation, additional standards may need to be considered; for example, international humanitarian law, or the rights of indigenous peoples.

Completing due diligence procedures will enable companies to identify ‘red flags’ – situations that may lead to allegations of complicity in abuse, regardless of the operating context. This information is not difficult to attain, and can be found in reports of human rights agencies and governments. Companies should assess whether they are contributing to harm due to their relationships with other parties. This is particularly so when operating in conflict zones. The Special Representative stresses that assessments must be relevant to each company’s operations and its unique circumstances, and must take social, political and economic considerations into account. Moreover, such a process should cover the entire life cycle of the business operation.

One of the main goals of due diligence procedures is the prevention of corporate complicity, and therefore a prevention of harm. In this evolving area, there is a role for lawyers who work with corporations to advise them on how best to avoid

---

626 A/HRC/11/13, 22 April 2009, para 50
628 UN Doc A/HRC/11/13, 22 April 2009, para 53
629 UN Doc A/HRC/8/16, 15 May 2008, para 70
632 ibid
situations which could lead to legal proceedings, or adverse publicity, rather than solely advise in light of legal action and litigation. Lawyers engaged by corporations could conceivably form a significant part of the implementation of a due diligence framework, and could assist corporations in the identification of ‘red flags’ when heading towards the ‘zone of legal risk’. Of course, lawyers engaged by victims and the non-government sector will also have a role to play, but it is foreseeable (and quite understandable) that corporations will value the advice of their own counsel.

Due diligence and human rights impact assessments are salient in relation to supply chain complicity, both in terms of the provision of goods and services and the purchase of goods and services. Due diligence in relation to the supply chain may be more effective than the certification of minerals. Corporations will need to engage in corporate due diligence to ensure they are not complicit, either from their supply chains or from a relationship with governments who do not respect human rights. The ongoing integration of the global economy has rendered supply chain complicity a particularly sensitive issue. It is necessary for all sectors that operate internationally and have global supply chains to understand how their actions, and relationships with governments and rebel groups, could lead to charges of complicity in crimes against humanity and other human rights abuses. Commodities pass through a number of legally distinct, but overlapping, corporate entities before reaching their final destination. Corporations are under a positive obligation to take steps towards making themselves aware of the potential human rights impacts of their ventures, and also of the human rights records of the States and other stakeholders with which they operate. Companies should publish the steps they have undertaken in their due diligence procedures.

It is clear that greater clarity is needed regarding legal accountability for supply chain complicity. However, if activists are aware of the risks, there is no excuse for corporate due diligence to have not identified the human rights implications of their actions. The financing of human rights abuse is a pertinent example. A bank that finances human rights abuse risks accountability for complicity in those

---

634 ‘Red Flags: Liability risks for companies operating in high-risk zones’, available online at http://www.redflags.info/file/1, last accessed 2 September 2010
635 Global Witness, Do No Harm: Excluding conflict minerals from the supply chain, July 2010, p 5, available online at http://www.globalwitness.org, last accessed 25 August 2010
636 Mark Taylor, ‘The Corporate Accountability Evolution’
abuses, as well as risking the bank’s reputation. Due diligence is therefore relevant to financial institutions, including banks and other lenders, asset managers and investors.\textsuperscript{637} The requirements of these corporations, and the requisite due diligence and assessment is undefined and “requires further clarity.”\textsuperscript{638}

A due diligence framework should consist of policies, human rights impact assessments, integration and performance monitoring.\textsuperscript{639} Identifying, monitoring and limiting the risk of human rights abuse is an aspect of due diligence. A due diligence framework will comprise of “reasonable steps by companies to become aware of, prevent, and address adverse impacts of their activities and relationships. These steps may vary depending on factors such as country context, the nature of the activity and industry, and the magnitude of the investment or exchange.”\textsuperscript{640} Companies should analyse the actual and potential human rights impacts of their activities, and should seek to modify activities if any adverse impacts are identified.\textsuperscript{641} The OHCHR publication, \textit{Human Rights Translated} is an invaluable tool for this process.\textsuperscript{642}

The implementation of due diligence processes requires additional consideration, particularly regarding the monitoring aspect, and whether any entity would have an auditing role of due diligence procedures. One issue which has not been given much consideration is the inclusion of whistleblower protection, which could be quite important. Other significant aspects, including training for corporations on due diligence and assessments, and benchmarking appropriate international standards, have not yet been addressed.\textsuperscript{643} However, some multinational

\textsuperscript{637} UN Doc A/HRC/11/13, 22 April 2009, para 73
\textsuperscript{638} ibid; For an example of advice and guidance available for companies, see UN Global Compact, \textit{Supply Chain Sustainability: A practical guide for continuous improvement} (2010), available online at http://www.globalcompact.org, last accessed 20 August 2010
\textsuperscript{639} UN Doc A/HRC/4/74, 5 February 2007,
\textsuperscript{640} UN Doc A/HRC/8/16, 15 May 2008, para 23
\textsuperscript{641} ibid, para 21
corporations are bringing their due diligence processes into alignment with the framework, and advocacy groups are referencing the framework.644

There are other companies, however, who will require further education regarding their responsibilities. For example, the chief executive of Caterpillar insists that his company does not have the capacity or the legal duty to monitor the use of equipment once it is sold. Certainly it appears not to have the inclination. When confronted by human rights groups about the use of their equipment in violation of international humanitarian law, Caterpillar insists that “any comments on the political conflict in the region are best left to our governmental leaders who have the ability to impact action and advance the peace process.”645

The chief executive of Anvil Mining expressed a similar attitude following the Kilwa massacre. Anvil’s mine reopened three days after the quashed uprising. Anvil Mining has praised the government for its rapid response, and made a statement that “the government and military response had been rapid and supportive of the prompt resumption of operations.”646 In an interview on the Australian Broadcasting Commission’s Four Corners programme, Bill Turner responded to the allegations of complicity by retorting: “I have no knowledge, and as far as I’m concerned it never happened.”647 Despite providing the government with means of reaching the region, and the provision of vehicles once they arrived, Bill Turner, told the Australian Broadcasting Commission that the company was not involved with any of the deaths:

We were not part of this. This was a military action conducted by the legitimate 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.648

When pressed about the provision of vehicles and logistical support, Mr Turner responded by repeatedly asking “So what?”649 Perhaps this attitude can be

---

644 UN Doc A/HRC/14/27, 9 April 2010, para 14
645 Zunes, Obama’s Caterpillar Visit a Thumb in the Eye for Human Rights Activists
646 Neighbour, The Kilwa Incident Transcript
647 Bill Turner, quoted in Neighbour, The Kilwa Incident Transcript
648 ‘Aust mining company implicated in Congo massacre’, ABC News Online
649 Report on the conclusions of the Special Investigation into allegations of summary executions and other violations of human rights committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004’, para 37; Neighbour, The Kilwa Incident Transcript. For further background information to the incident, including responses from Anvil Mining, see Rights and Accountability in Development (RAID), ‘Anvil Mining Limited and
explained by not wanting to admit guilt while an investigation was underway; but it could also be symptomatic of the underlying confusion and lack of clarity as to when corporations can be held accountable and the requirements of the responsibility to respect. One of the greatest challenges that will be faced is achieving recognition and acknowledgment from individual companies that such a responsibility to respect human rights does exist. This will be essential in order to reach a level playing field. If progress is to be made, it will need to be universal and standardised across the private sector.

It has been suggested that the Global Compact could play an important role in due diligence monitoring and implementation.\textsuperscript{650} It makes sense from a public relations perspective for corporations to have robust complaints mechanisms, to prevent the escalation of allegations against the company. Often, the lack of such a complaints process has precipitated campaigns and litigation against companies.\textsuperscript{651} From a victim perspective, if grievances can be aired and addressed initially at the outset, there is the potential for behaviour change, and hence serious human rights abuse may be avoided. Rather than being considered a voluntary initiative, the due diligence framework should be thought of as a tool that enables the monitoring of corporate involvement in human rights violations.\textsuperscript{652} It is the integration aspect of the due diligence framework that may be the greatest challenge.\textsuperscript{653}

The Special Representative himself concedes that this framework is in its infancy and that “more concrete guiding principles for the human rights due diligence processes” are required.\textsuperscript{654}

**Human rights impact assessments (HRIAs)**

The Special Representative argues that there is a need for corporations to complete some kind of assessment to determine whether their proposed operations will in any way lead to their involvement in human rights abuse.\textsuperscript{655}

\textsuperscript{650} UN Doc A/HRC/8/5, 7 April 2008, para 64

\textsuperscript{651} Ruggie, Remarks at International Chamber of Commerce

\textsuperscript{652} Ruggie, Opening Statement to UK Parliament Joint Committee on Human Rights

\textsuperscript{653} UN Doc A/HRC/8/5, 7 April 2008,para 62

\textsuperscript{654} Ruggie, Presentation of Report to United Nations Human Rights Council

\textsuperscript{655} UN Doc A/HRC/4/74, 5 February 2007
While it will be difficult to posit such an assessment where the legal parameters are not completely known, an assessment tool should be able to provide a general finding. The Special Representative has argued that in many situations, corporations have faced allegations of corporate complicity due to “sheer ignorance” of the situation in which they were operating, rather than due to acting maliciously. While the veracity of this observation is open to debate, the Special Representative has advocated the need for Human Rights Impact Assessments (HRIAs), in order to draw attention to the risks and the likely impact of business activity on local populations and their communities. HRIAs are not extensively used by the corporate sector, and the development of human rights impact assessments is “as underdeveloped as environmental impact assessment was a generation or so ago”.

The International Finance Corporation is developing such an assessment tool, which will apply to all human rights. An evaluation of HRIAs cannot be completed as HRIAs have not been extensively used, and only BP has made its assessment tool publicly available (used in the Tangguh natural gas venture in Indonesia). The Special Representative notes the joint project between Shell and the Danish Institute for Human Rights to develop the Human Rights Compliance Assessment tool as a good example. There are other examples of corporations, such as BHP Billiton, Anglo American and Statoil, using similar assessment tools.

---

656 John Ruggie, Remarks at International Chamber of Commerce
657 ibid
659 UN Doc E/CN.4/2006/97, 22 February 2006, para 78: “The International Finance Corporation is funding an effort intended to fill this gap by developing an actual impact assessment guide. According to its authors the guide will review the entire spectrum of human rights, focusing on the areas where the responsibilities of companies are clearest by reminding companies that they should review all reads of rights relevant to their operations. Human rights issues will be addressed at both country and project levels. The country assessment will focus on what impacts human rights challenges can have on projects and vice versa. At the project level the guide will take companies through a methodology that includes outlining each step of a typical impact assessment, identifying what human rights considerations should be taken into account in each step and explaining what the implications of a human rights approach means for the impact assessment process.”
661 UN Doc A/HRC/4/74, 5 February 2007, para 9
662 ibid: “BHP Billiton is piloting a Human Rights Self Assessment toolkit; Anglo American has created a Socio-Economic Assessment Toolbox; Statoil is undertaking a human rights ‘concretization’ project to define and embed the company’s human rights responsibilities; and the International Council on Mining and Metals Community Development Toolkit includes assessment tools. Additional examples of business tools and processes can be found in the Business Leaders Initiative on Human Rights’ second report: A Guide to Integrating Human Rights into Business Management.”
The International Bill of Human Rights should frame the HRIAs. The matrix tool developed by the Business Leaders Initiative on Human Rights might be seen as one way of proceeding along this path, and could well be recommended to companies. It is important for HRIAs to assess the whole of the proposed operation, and in this light, they should consider the operation over its life cycle. To comply, HRIAs should be completed at the commencement of an operation, or when there are significant changes made to an operation. This could include expansion (either geographic, production or otherwise) of the operation, a change in company policy (for example, regarding recruitment or environment), or a change in suppliers. An effective HRIA would consider the standards the operation must meet, legally and administratively, including the applicable domestic laws. The Special Representative argues that the role of financial institutions forms a necessary consideration for an HRIA, as does consideration of the corporation’s own internal policies. An HRIA in response to a change in the company’s operations need not be repetitious, and should focus on the change. However, a due diligence framework could expect that corporations complete HRIA reviews on a regular basis, to ensure proper management of real, and potential, risks.

Following on from the above, it would stand to reason that HRIAs will necessarily consider the human rights record of the State, and the local area, in which the corporation is operating. The corporation will then be able to consider the risks, prioritise and implement strategies to manage those risks. This could sometimes be a very delicate and sensitive matter, particularly for joint ventures with host State governments, and especially so if the HRIA was to be made public as part of the due diligence framework. This could be particularly difficult where a company plans to engage State security forces with poor human rights records. In these cases, companies may not want to make the HRIA public, “out

---

663 Ibid: “While there is currently no global consensus about the roles and obligations of companies under international human rights standards, this exercise can be undertaken without normative assumptions, like scenario planning or other similar exercises.”
664 This is available from the Business Leaders Initiative on Human Rights legacy website: http://www.bligh.org
666 UN Doc A/HRC/4/74, 5 February 2007, para 13
667 Ibid, para 15
of concern that this could create political or legal risks for the company – or in extreme cases, endanger staff.\textsuperscript{668}

While HRIAs are not legally required, and indeed are not yet defined, they could nonetheless provide the opportunity for corporations to seriously consider human rights in their operations, and could form part of the process to embed human rights into a corporate culture. Given the increasing popular interest in this field, from a risk management perspective it makes good business sense for corporations to conduct HRIAs in areas where there has been human rights abuse, or where there is conflict. However, there would be an implicit need for training for corporations, and assessments of potential human rights impacts will need to reach an internationally agreed standard, to ensure consistency in assessments.\textsuperscript{669}

**Corporate Approaches to the Responsibility to Respect**

In recent years there have been an increased number of voluntary codes of conduct, and a corresponding increase in the use of corporate social responsibility programs. The interaction and relationship between the corporate social responsibility policies and the corporate responsibility to respect will now be considered.

**Codes of Conduct and Industry Initiatives**

There are a growing number of voluntary codes of conduct, including industry-specific codes of conduct, and many of these address the issue of complicity in human rights abuse, such as the Voluntary Principles on Security and Human Rights and the Kimberly Process Certification Scheme. International standards, such as the Global Compact, refer to the responsibility of corporations to avoid complicity in human rights violations.

Some codes and international standards have ‘soft law’ status, and they should not be dismissed as irrelevant. As Peter Muchlinksi argues, the increasing number of soft law instruments in the form of voluntary codes is "leading to the establishment of a rich set of sources from which new binding standards can

\textsuperscript{668} ibid, para 19
\textsuperscript{669} UN Doc E/CN.4/2005/91, 15 February 2005, para 51
emerge.\textsuperscript{670} However, in the absence of any agreed international standard on the responsibility of corporations, some corporations have sought to establish their own human rights policies, procedures and frameworks and this has resulted in disparate responses which often have “very different levels of specificity, commitment, and accountability.”\textsuperscript{671} Nonetheless, it appears that corporations are often unsure of the rights they need to recognise, and how they could affect these rights. There are often discrepancies in reporting requirements, and on occasion the reporting did not link company practice to company policy.\textsuperscript{672} There are also substantial differences between individual corporate policies compared to industry-based initiatives and Social Responsibility Indicator indices, and these differences also cause confusion. The most widely recognised rights in individual policies and industry initiatives are labour rights. However, beyond labour rights “there appears to be only limited common understanding of the range of human rights that apply to companies.”\textsuperscript{673}

Non-labour rights receive considerably less attention, especially so in individual policies rather than in industry initiatives. The Special Representative notes that the right to peaceful assembly has received almost no recognition from either policies or initiatives.\textsuperscript{674} Of the non-labour rights, the right to privacy is most often recognised, with around 20 per cent of policies recognising this right.\textsuperscript{675} The right to life, liberty and security of the person is recognised in 16 per cent of policies, while the right to freedom from torture is recognised in only 13 per cent of policies. The Special Representative has suggested that the right to life, liberty and security received greater recognition because some company policies consider the role of security forces in these policies. The Special Representative has also observed that a broad commitment to ‘protect’ the right to life is made by some companies in their policies.\textsuperscript{676} These figures are slightly higher when one considers the extractive industry alone. For example, 31 per cent of companies in the extractive industry recognise the right to life, liberty and security of the

\textsuperscript{670} Peter Muchlinski, ‘Human Rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations’ (2003) 3 Non-State Actors and International Law 123, p 129
\textsuperscript{672} ibid, para 210
\textsuperscript{673} ibid, para 210
\textsuperscript{674} ibid, para 216
\textsuperscript{675} ibid, para 212
\textsuperscript{676} ibid, Summary, p 2
\textsuperscript{677} ibid, para 46
person; 20 per cent recognise the right to freedom from torture. This figure could be influenced by the fact that of the 16 extractive industries considered, 15 are members of the Voluntary Principles on Security and Human Rights, which obliges security forces to respect human rights.677

Industry initiatives addressing the issue of conflict trade are sparse. Leiv Lunde and Mark Taylor suggest that the lack of a specific policy response to tackle conflict trade could be due to the problem being “a relatively new and politically ‘immature’ post-cold war policy issue, one with a particularly malign political problem structure.”678

There is great discrepancy in the extent to which corporations are expecting their supply chains to meet certain human rights standards, with some corporations insisting certain standards are met. There is also great divergence between corporations as to consultation with communities: some corporations do not consult, some have open dialogue, and some communicate following human rights impact assessments.679 It is generally the extractive industry that places the most emphasis on consultation, and this does not come as a surprise given the nature of their operations. Industry initiatives and socially responsible investment indices also consider the importance of community consultation, but still differing views remain on the consequence of dialogue and the meaning and significance of informed consent. Moreover, such a piecemeal and ad hoc approach is less than ideal.

The Special Representative has observed that the corporate sector has expressed “a widespread lack of certainty regarding which rights pertain to corporations.”680 Much of the guidance for corporations on this issue is emanating from public campaigns against certain behaviour and operations, but this pressure is neither consistent nor precise; moreover, it is not based within a legal framework, but rather a moral one.

Any code of conduct or policy should incorporate the standards of the International Bill of Human Rights, which should be considered as human rights standards.677

---

677 ibid, para 49
678 Lunde and Taylor, with Huser, ‘Commerce or Crime?’, p 22
679 UN Doc A/HRC/4/35/Add.4, 8 February 2007, para 214, p 59
680 ibid, para 216
values of the corporation.\textsuperscript{681} When developing company policies, these standards should be developed and implemented in consultation with stakeholders and should be “inspired by the social understanding of human rights.”\textsuperscript{682}

In the DRC, some gold mining companies have been linked to human rights abuse through their relationships with the warlords who control the goldmines in the northeast of the country.\textsuperscript{683} AngloGold Ashanti has come under the most criticism. The company provided political, logistical and financial support to a “murderous armed group” in the area, and in return received access to the gold mine and protection of the company’s staff.\textsuperscript{684} The armed group was responsible for war crimes and crimes against humanity, which was well known. The company had adopted a code of conduct that included human rights standards and should have applied in this situation indicates the limitations of such voluntary and unenforceable mechanisms.\textsuperscript{685} Moreover, the company had made public statements reiterating its commitment to corporate social responsibility, which further elucidates the insincerity that such commitments can be founded on.\textsuperscript{686} The British government has supported voluntary codes of conduct as a means for corporate regulation, despite their clear inability to curb corporate involvement in human rights abuse.

On the whole, self-regulation and multi-stakeholder initiatives lack credibility. They are limited as to subject matter and rights, they apply to only a certain industry or sector, they do not require reporting or any level or transparency, and lack any ability to censure under-performing companies. From this perspective they are both inappropriate and inadequate.

\textbf{Corporate Social Responsibility: beyond Friedman’s formula}

Critical perspectives on corporate law all raise the question of whether corporations exist to maximise profits, or whether they are obligated to consider the social ramifications of their activity and behaviour. The fundamental

\begin{itemize}
  \item \textsuperscript{682} ibid
  \item \textsuperscript{683} Human Rights Watch, ‘On the Margins of Profit’, p 13
  \item \textsuperscript{684} ibid, “The group, led by a brutal warlord, flaunted its guns in the streets, forced people to work in the gold mines in miserable conditions, and conducted killing sprees and used torture in nearby villages.”
  \item \textsuperscript{685} Human Rights Watch, ‘On the Margins of Profit’, p 13
  \item \textsuperscript{686} ibid
\end{itemize}
The underlying principle of corporate social responsibility is that corporations, as legal entities with a status similar to natural persons, should be bound by the same set of moral expectations as natural persons.687

The corporate responsibility to respect human rights is closely aligned with the concept of corporate social responsibility. E Merrick Dodd first espoused the idea of corporate social responsibility in 1932. Dodd argued that a corporation’s responsibilities extend beyond maximising its profits. He argued that corporations could make decisions based on good corporate citizenship, even if these decisions did not always benefit shareholders, stating that “companies, like individuals, should strive to be good corporate citizens by contributing to the community to a greater extent than is generally required”.688 Dodd held that directors could make decisions “which favour interests other than the shareholders, such as employees, consumers, local communities, or the environment.”689 This argument called for a dramatic reconceptualisation of the corporation, where shareholder rights would no longer be the directors’ sole concern.

One of the greatest opponents of such a reconceptualisation is Milton Friedman, who argues that corporate social responsibility exposes directors to a “vague and undefined standard of conduct.”690 Friedman argues that corporations exist to make profits, as indicated by his (in)famous article, “The Social Responsibility of Business is to Make Profits.”691 John Parkinson has sought to analyse the issue of whether Friedman’s formula is appropriate in current international society, or whether corporations have responsibilities other than maximizing profits.692 Parkinson argues that a moral position is required: “[t]he essence of a moral position is that it requires a questioning of the extent to which the pursuit of one’s own interests should be curtailed in order to safeguard the interests of others.”693 Moral considerations are critical “where the impact on others is huge and

---

687 Tomasic, Bottomley and McQueen, Corporations Law in Australia (The Federation Press, Sydney, 2002), p 63
689 Tomasic, Bottomley and McQueen, Corporations Law in Australia, p 63; Corporate law in Australia does not place legal requirements on corporations to behave in a socially responsible manner.
690 ibid, p 64
691 ibid, p 32
693 Parkinson, ‘The Socially Responsible Company’, p 51
potentially catastrophic, as may often be the case with the policies of large multinational businesses.\footnote{ibid} Many companies will recognise that ethically and socially responsible behaviour could provide them with a competitive edge, and in some circumstances could be profitable. Indeed, some corporate social responsibility programs can improve shareholder value.\footnote{Kim Kercher, ‘Corporate Social Responsibility: Impact of globalisation and international business’ Corporate Governance eJournal (2007), Faculty of Law, Bond University, p 2, available online at http://epublications.bond.edu.au/cgej/4, last accessed 4 April 2008} However, such responsible behaviour should be valued in its own right, rather than as a profit maximising policy, and under the circumstances there needs to be an acknowledgment that in respecting such values, sometimes corporations will be unable to make the maximum profits possible.

Maintaining a social licence to operate
Corporations are adopting their own corporate social responsibility policies and governments are encouraging this development. As the Special Representative argues, this reflects “the now inescapable fact that their own long-term prospects are tightly coupled with the well-being of society as a whole.”\footnote{UN Doc A/HRC/11/13, 22 April 2009, para 119} In 2004, the World Bank defined Corporate Social Responsibility as “the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life, in ways that are both good for business and good for development.”\footnote{Michael Bowfield, ‘Corporate Social Responsibility: reinventing the meaning of development?’ (2005) 81(3) International Affairs 515, p 515, quoting from www.worldbank.org/privatesector/whatwedo.htm} The greatest champions of Corporate Social Responsibility have primarily been the oil and gas sector.\footnote{Jedrzej George Frynas, ‘The false developmental promise of Corporate Social Responsibility: evidence from multinational oil companies’ (2005) 81 International Affairs 581, p 581} In 2001, the oil, gas and mining sector funded over US$500 million in community development schemes.\footnote{ibid} Corporations must not only sustain their legal licence to operate, they must also sustain a social licence, particularly where legal regulation is weak, and observing social norms can be just as vital for corporate success as observing legal obligations.\footnote{UN Doc A/HRC/11/13, 22 April 2009, para 119} Social accountability is a significant tool in the fight against corporate abuse, and as Irene Khan notes, “[s]ome of the toughest campaigns against corporate behaviour were not fought in the court of law but in the court of
public opinion.”701 Corporations can engage targeted local spending as a means to shore up the social licence, in an attempt to secure community acceptance.702 Perhaps because of these short-term motivating factors, there is evidence of a discrepancy between the intended outcomes of corporate social responsibility schemes as espoused by business leaders, and the impact that these schemes have on communities in reality.703

Nevertheless, it is encouraging that the patterns of business recognition of human rights suggest that these policies are being implemented for reasons other than corporate necessity, and that “policy innovation and diffusion clearly also drive their uptake of human rights concerns.”704 For example, in a survey completed for the Special Representative, nine out of ten companies reported having human rights principles and practices, but less than half reported having experienced a significant human rights issue.705

Many investors are increasingly concerned about making socially responsible investment decisions. Socially responsible investment is gaining momentum, and public and private investors have shown they are willing to divest based on human rights concerns, including indirect abuse. Often, this is seen as a risk management strategy for the investment fund: some are concerned that the funds themselves may be construed as being complicit in the abuse if they invest in companies that are themselves complicit in human rights abuse.706 Andrew Clapham and Scott Jerbi report that investors are becoming concerned about the procedures corporations are putting in place to prevent complicity, and also the measures that are being adopted to secure respect for and protection of human rights more generally.707 Regarding the protection of human rights, Clapham and Jerbi refer to shareholder resolutions that “put pressure on Chief Executives to raise with the authorities issues regarding human rights defenders or labour

701 Irene Khan, Secretary-General, Amnesty International, ‘Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws’ (Business Human Rights seminar, London, 8 December 2005), AI Index: POL 34/001/2006 (Public), p 8
702 David Fig, ‘Manufacturing Amnesia: Corporate Social Responsibility in South Africa’ (2005) 81 International Affairs 599, p 605
703 Frynas, ‘The false developmental promise of Corporate Social Responsibility’, p 581
705 UN Doc A/HRC/4/35/Add.3, 28 February 2007, para 72
706 UN Doc A/HRC/8/16, 15 May 2008, para 64
707 Clapham and Jerbi, ‘Towards a Common Understanding of Business Complicity in Human Rights Abuses’
activists who have been imprisoned, even in the absence of any legal obligation on the company to do so. While it would be preferable for corporations to respect human rights and behave in an ethically responsible manner because it was the proper thing to do, the effectiveness of these motivating factors should not be overlooked.

The relationship between the Responsibility to Respect and corporate social responsibility

Corporate social responsibility does not equate to the corporate responsibility to respect. The responsibility to respect is the baseline responsibility of all companies; companies can then act philanthropically if they choose, but this does not offset their responsibilities. In many respects, the existence of corporate social responsibility stands to confuse and obfuscate the emergence of a broader debate about the responsibility to respect human rights. However, for completeness, consideration will be given to these policies.

Corporate social responsibility policies

There are some good examples of corporate social responsibility initiatives, and the key to achieving successful outcomes appears to be a partnership between the company, the community, and non-government organisations. Extensive consultation with members of the community is vital. For example, Statoil funded a local non-government organisation to train Shari’a court judges in Nigeria, and in Venezuela partnered with Amnesty International and UNDP to train Venezuelan judges in human rights. A good example of best practice is Statoil’s Akassa project, in Bayelsa State, Nigeria. However, without detracting from the achievements of the Akassa project, the oil operations in Akassa are offshore, which may in and of itself have an impact on the likelihood of a

708 ibid
709 Professor John Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Presentation of Report to United Nations Human Rights Council, Geneva, 3 June 2008: “The corporate responsibility to respect human rights is the baseline expectation for all companies in all situations. It is recognized by virtually every voluntary initiative, and it is stipulated in several soft law instruments, including the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and the OECD Guidelines for Multinational Enterprises.”
710 Frynas, ‘The false developmental promise of Corporate Social Responsibility’, p 597
711 ibid, pp 594-595. Significantly, this project was implemented by ProNatura, a non-government organisation with experience and expertise in development. There was extensive “grass-roots” consultation with the community, which determined the project’s priorities. During the consultation, ProNatura staff lived in the villages before planning any initiatives; village chiefs, women and young people were all consulted throughout this stage. ProNatura actively sought to increase the capacity of the local community, by providing training and advice, and establishing community development councils and an associated development foundation. Another distinguishing element of the Akassa project was that the entire Akassa Clan, around 30,000 people, was part of the development plan, rather than assistance being provided to one host community.
successful corporate social responsibility project, and may make such a benchmark difficult to replicate in other areas where, for example, communities may have been forced off their land and relationships are already hostile.

Some corporations have sought to do more than respect human rights in their own activities. There have been some examples of engagement between corporations and non-government organisations on social issues, in what Heike Fabig has referred to as a “possible new and fascinating chapter in the history of corporate responsibilities and relations between business and NGOs: corporate campaigning for social change.”\(^\text{712}\) A noticeable example is The Body Shop, who engaged with the Ogoni in the resistance against Shell. This culminated in the 1997 Commonwealth Heads of Government Meeting in Edinburgh, where The Body Shop paid for Ogoni representatives to travel to Edinburgh, and organised interviews, a press conference and a demonstration calling for the release of twenty gaoloed activists. The gaoloed Ogoni activists were eventually released on 8 September 1998.

The Body Shop’s involvement in the Ogoni campaign represents a milestone in corporate campaigning, as it was the first time a company had actively supported a campaign for social change.\(^\text{713}\) Critics of such developments argue that such corporate involvement in social and human rights causes is motivated by public relations and marketing; a gap does exist between image and outcomes.\(^\text{714}\) Little research has been completed in the area of corporate campaigning, and greater critical analysis is warranted.

**Beyond respect? Corporate social responsibility and development**

Corporate social responsibility initiatives have tended to be closely related to sustainable development and poverty reduction.\(^\text{715}\) Many corporate social responsibility schemes aim to achieve community development goals. This raises a number of pertinent questions: is this a reasonable, legitimate, achievable or sensible objective? Moreover, is the money spent on community development schemes under corporate social responsibility achieving the desired

---


\(^\text{713}\) ibid, p 320

\(^\text{714}\) ibid, pp 313-314

\(^\text{715}\) Bowfield, ‘Corporate Social Responsibility: reinventing the meaning of development?’, p 515
outcomes? \(^{716}\) Is it reasonable to expect oil companies to contribute to
development and society through their own corporate social responsibility
practices, or should the State and non-government organisations take
responsibility for community development? Given that corporate social
responsibility initiatives are generally supported by “profit maximising motives,”\(^{717}\) there seems to be an inherent incompatibility between the initiatives and the
realisation of positive development outcomes. As Michael Bowfield observes,
“companies engage with developing economies for commercial reasons, not
developmental ones.”\(^{718}\)

One practical challenge that companies can face is a community expectation that
they provide developmental assistance and capacity building when the State is
unable to. In many cases, corporations are called upon to provide a
developmental role because the State has been unable to fulfil that role. For
example, in Nigeria “Shell has been regarded by many as a quasi-
government.”\(^{719}\) While corporations are expected to “do no harm” and respect
human rights, they are not under any obligation to promote or engage in
community development. The expectation that they do so is a moral one, and is
closely related to a corporation’s social license to operate; but the responsibility
to respect does not equate to a responsibility to deliver community development
programs. This is a particular problem in many oil-producing countries where
there is a “widespread belief … that oil is part of the national heritage and that the
country’s population can expect to share in this national wealth.”\(^{720}\) This can be a
cause of community opposition against company operations, and is an aspect
that requires greater research.\(^{721}\)

Another significant limitation of corporate social responsibility development
projects, and an unintended consequence, is community dependency on such
policies, with initiatives viewed as ’gifts’ by the local community.\(^{722}\) Corporate
social responsibility initiatives are often unable to be continued without the

---

716 Frynas, ‘The false developmental promise of Corporate Social Responsibility’, p 582
717 ibid, p 598
718 Bowfield, ‘Corporate Social Responsibility: reinventing the meaning of development?’, p 518
719 Frynas, ‘The false developmental promise of Corporate Social Responsibility’, p 596
720 ibid, p 590
721 ibid, p 582. Frynas has considered the impact, both intended and unintended, of corporate social
responsibility policies and projects in Africa. His research produced some interesting findings. For example, in
Ghana, his feedback from local people was that the CSR schemes of oil companies should assist in ‘building
local capacity’ and ‘filling in where government falls short.’
722 ibid, p 590
ongoing support of the company... Moreover, without proper coordination of
devolution initiatives, “inter-communal jealousies” can erupt. Without an
overarching development plan, one community could resent another for a
perceived inequity. One extreme example of this is a community near an oil
company burning down a host community which was closer to the company, in
order to become the host community by default.

Limitations of corporate social responsibility policies
Despite a best practice benchmark, corporate social responsibility has limitations
and is unable to address some of the most critical issues. Moreover, there is no
consistency between policies, even within industries. Corporate social
responsibility policies are unable to prevent complicity in corporate abuse.

These policies are often silent on the broader responsibility to respect human
rights, and do not consider issues of governance, and it is governance
deficiencies that lie at the heart of the business and human rights agenda.

In other cases, corporate social responsibility policies and projects just do not
achieve the desired outcomes. In 2001, an independent audit of Shell’s initiatives
in Nigeria found that only one-third of initiatives were functional. Corporate
social responsibility initiatives are often implemented in an effort to help to
achieve a company’s short-term operational goals, rather than a community’s
development goals. This can lead to poor outcomes. One example is from the
Niger Delta, where Shell built three town halls, one for each village chief. In
some cases, this is due to infrastructure projects not being supported by capacity
building efforts: classrooms lacking teachers; hospitals lacking medical staff and
running water. This is often due to limited, or superficial, community
consultation. Some initiatives can be thwarted by governments. For example,
ExxonMobil donated mosquito nets to Equatorial Guinea’s Health Department as part of a malaria prevention initiative, but department officials then sold the nets to Cameroon. Some initiatives are not fully considered. For example, BP distributed condoms in Angola as part of an AIDS-prevention campaign, but the condoms were too small and could not be used.

Companies often justify corporate social responsibility, social, and environmental policies due to their perceived commercial benefits. This commercial justification of corporate social responsibility is pervasive and is one of its most significant limitations. The justification of corporate social responsibility policies on the basis of commercial benefit demonstrates the way in which business values permeate our value systems. If the motivation behind corporate responsibility policies is the prevention of hostilities against the company’s main project, it is unlikely that the company will engage in extensive consultation with the community to determine their development needs. Stakeholder theory tells us that those consulting with stakeholders will place greater emphasis on the views expressed by those who present the greatest threat to operations; these are not necessarily the same stakeholders with the knowledge relating to development needs.

There are risks involved in framing environmental and social concerns within financial objectives alone. Michael Bowfield suggests that corporate social responsibility policies may in some cases perpetuate governance gaps. For example, he argues that while a company may guarantee certain labour rights under corporate social responsibility policies, companies maintain the right to close down facilities and sack workers without the provision of any compensation. Governance gaps can also be perpetuated when corporate social responsibility is promoted and advocated as an alternative to State regulation; it is likely that corporate social responsibility would not address all issues covered by State regulation, leading to a deficiency in regulation and enforcement. Talisman had a company-based self-regulatory policy in place.

---

731 ibid, p 587
732 ibid, p 587
733 Bowfield, ‘Corporate Social Responsibility: reinventing the meaning of development?’, p 520
734 ibid, 521
735 Frynas, ‘The false developmental promise of Corporate Social Responsibility’, p 585
736 Bowfield, ‘Corporate Social Responsibility: reinventing the meaning of development?’, p 517
737 ibid’, p 517
and this did not prevent the company’s complicity in grave human rights violations.\textsuperscript{738}

The public relations mandate may distort the development projects undertaken, with companies electing to support “media-friendly projects”, such as building hospitals, rather than engaging in capacity building initiatives such as training medical staff.\textsuperscript{739} There have been extreme cases where public relations imperatives have led oil companies to promote and publicise non-existent projects, or projects that had been partially implemented.\textsuperscript{740} Such behaviour is less likely to be scrutinised or verified in developing countries.

Sometimes corporate social responsibility can be used strategically, and corporations can be motivated to engage in and implement corporate social responsibility policies because of the perceived ‘competitive advantage’ they can bestow. For example, Chevron Texaco employees have admitted (albeit privately) that a $50 million partnership between Chevron Texaco, UNDP and USAID was announced to coincide with oil negotiations around an oil field in Angola, which had a daily output of 400,000 barrels.\textsuperscript{741} Chevron’s concession was extended until 2030, and the company promised an additional $80 million to the fund.\textsuperscript{742}

Corporate social responsibility is an insufficient protection for vulnerable communities. These policies cover a limited set of rights, and apply to a limited number of individual companies and industries. In the absence of widely agreed overarching standards, corporate social responsibility policies create a “messy and inconsistent patchwork of voluntary pledges that have limited application, generally do not fully align with international human rights norms, and in any case are frequently disregarded in practice.” \textsuperscript{743} On the whole, self-regulation, including corporate social responsibility initiatives, lack credibility. They are limited as to subject matter and rights, they apply to only a certain company or sector, they do not require reporting or any level of transparency, and lack any

\begin{itemize}
\item Simons, ‘Corporate Voluntarism and Human Rights’, p 105
\item Frynas, ‘The false developmental promise of Corporate Social Responsibility’, p 585
\item ibid
\item ibid, p 584
\item ibid
\item ibid
\item Human Rights Watch, ‘On the Margins of Profit’, p 1
\end{itemize}
ability to censure under-performing companies. From this perspective they are both inappropriate and inadequate.

An appraisal
Corporate social responsibility programs can obfuscate and deflect attention away from bad corporate behaviour, concealing involvement in human rights abuse and ensuring awareness of positive stories. Moreover, there is no guarantee that a corporate social responsibility policy will prevent corporate complicity in human rights abuse. In some cases there is a disjuncture between corporate social responsibility policies and the actions of corporations in relation to human rights. For example, since its involvement in the Kilwa massacre, Anvil Mining has tried to regain its reputation as a good corporate citizen, and embarked on a path of corporate social responsibility policies. However, Bill Turner does not seem to appreciate that good corporate citizenship transcends corporate social responsibility policies:

We are doing some damn good stuff and it would be kind of pleasant if people were to focus a little bit on some of the good things instead of picking some tiny little aspect that someone thinks they've got some hold on to blow up into something that is totally irrelevant to what we're doing.744

Nevertheless, Anvil says that it holds 10 per cent of the mine’s equity in trust for the local community. Anvil has built a school, and will refurbish the Kilwa hospital.745 However, they would arguably provide greater financial assistance if they paid tax, although there would be no guarantee that the local community would receive any benefits.

Corporate social responsibility is often silent on the issue of undue influence exerted over governments. An example is taxation; corporate social responsibility very rarely addresses the issue of corporate taxation and it is State regulation that would regulate and enforce that aspect of corporate operations.746 These policies very rarely consider the broader impact, often negative, that corporations have on host States. A focus on corporate social responsibility, rather than the

---

744 Bill Turner, quoted in Neighbour, The Kilwa Incident Transcript
745 Neighbour, The Kilwa Incident Transcript
746 Bowfield, ‘Corporate Social Responsibility: reinventing the meaning of development?’, p 517
responsibility to respect, could lead to scant attention being paid to the complex societal issues that arise in relation to corporations and human rights.747

The experiment of self-regulation and codes of conduct has shown that these regulatory techniques are ineffective and unable to “restrain effectively corporate misbehaviour”.748 Non-judicial mechanisms at all levels are “seriously underdeveloped.”749 One of the seminal reports in this area is a 2002 report by the International Council on Human Rights Policy, Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies. The report notes the growing concern that voluntary codes are insufficient, and that “their proliferation is leading to contradictory or incoherent efforts.”750 An emphasis on voluntary codes is adding to the piecemeal and disjointed nature of corporate accountability, rather than assisting with the development of universal, consistent international standards, laws and levels of accountability. As Michael Addo notes, “only a select few among private corporations are likely to willingly submit to new responsibilities without being legally compelled to do so.”751 He argues that voluntary codes tend to be developed as a reactive response to “errors, scandals or accidents”, and as such focus on a particular aspect of the company’s operations, and are not rigorous.752 Any serious attempt at a code of conduct should be thoroughly thought out and should seek extensive consultation and feedback from stakeholders, including relevant communities, although in practice this often simply does not occur. A major consequence of this is that there is little cohesion between codes, and that sometimes there are “contradictory demands” placed on corporations.753

Self-regulation initiatives driven by industry has “created a widening gulf between expectation and results”.754 Voluntary codes should not be viewed as a substitute for legally binding alternatives. Moreover, corporate social responsibility projects are unable to address the causes of under-development, and should therefore...
not be considered as a primary development tool. In the words of Michael Bowfield:

if poverty is structural rather than, as much of modern development theory implies, a matter of capacity, access and opportunity, then CSR is unlikely to provide a solution. On the contrary, the strength of CSR lies not in presenting an alternative model of business, but in capturing and presenting the moral dimensions of capitalism in ways that resonate with investors and consumer, and are actionable by managers.  

Corporations are required to respect human rights, as they are rooted in law: “[r]especting them was never meant to be an optional extra, a question of choice.” Corporate conduct should be consistent with recognised human rights principles, and any corporate social responsibility program should be initiated through a human rights framework.

Corporations do have responsibilities beyond their own economic imperatives. However, corporate social responsibility policies and projects are unlikely to result in significant community development outcomes, given the motivations behind such initiatives. Nevertheless, the combination of corporate social responsibility policies and the corporate responsibility to respect human rights may result in corporations playing a constructive, rather than negative, role in governance and development.

Both governments and corporations have “shown a distinct preference for limiting the debate to voluntary standard and self-regulation.” While this may be an indication of the private sector’s willingness to address and limit their involvement in crimes, and may indicate they are taking human rights issues seriously, “there are concerns that the adoption and publication of such codes are often public relations exercises.” Sigrun Skogly argues that while these codes are a positive step, the fact that they are drafted by the corporate sector and are not enforceable in legal proceedings indicates that they are “unlikely to be the best

---

755 Bowfield, ‘Corporate Social Responsibility’, p 523
758 Joseph, Corporations and Transnational Human Rights Litigation, p 8
tool to ensure that transnational corporations act in accordance with internationally recognised human rights standards, including standards for economic and social rights. The British government, and indeed other home States, need to realise that the self-regulation experiment has proved a failure, and has not prevented the perpetration of human rights abuse, neither has it prevented corporations becoming involved in, facilitating, or benefiting from such abuse. Until more robust accountability mechanisms are available, companies will be able to continue to operate with impunity.

The great contradiction is that as the use of voluntary codes has gained momentum, so too has the resistance to legal regulation of corporations. It appears that there is an inverse correlation between the two, with corporations willing to be bound by voluntary codes but being fiercely opposed to legal regulation. As was clearly evident in response to the TNC Norms, many business entities are vehemently opposed to mandatory or legal regulation and instead prefer voluntary regulation. This backlash against the Norms due to their binding nature is “the best evidence of the insincerity” of the voluntary code movement. While there is scope for alternatives to legal prosecutions, voluntary codes represent a “failed experiment” that should be rejected by both the human rights community and also the all-important consuming public (and this should include shareholders). Litigation may provide the necessary impetus for corporations to join with the human rights community and States, to look for “real alternatives to litigation, including a globally-applicable code of conduct that includes reasonable enforcement mechanisms.”

The Special Representative has noted that “policies of voluntarism are often indistinguishable from laissez-faire – that is to say, they are not policies at all.” Often those that advocate voluntarism provide little, if any, guidance to corporations on their responsibility to respect human rights. Moreover, proponents of voluntary schemes do not provide guidance on ensuring

---

761 ibid
762 ibid
763 ibid
764 ibid
consistency between initiatives, or on securing compliance.\textsuperscript{765} States must ensure there are agreed, enforceable standards and accountability measures at both the national and international level.\textsuperscript{766} Despite its commercial imperatives, corporate social responsibility may have a role to play in opposing or moderating those views.\textsuperscript{767} In the words of Peter Newell, “CSR can work, for some people, in some places, some of the time.”\textsuperscript{768} Corporations need to be part of the solution, and corporate social responsibility may be the first step in engagement. However, the responsibility to respect is far wider than any corporate social responsibility policy, and meeting this responsibility will require a significant change in culture for many companies.

**Summing up**

As part of the responsibility to respect human rights, corporations should avoid complicity in human rights abuse. To do this, corporations will need to ensure they have completed robust assessments of their operations, to ensure they are in no way involved in human rights abuse. Due diligence may assist, but will only do so when they are completed in good faith. A key aspect is human rights impact assessments, which are currently an underdeveloped and under-utilised tool.\textsuperscript{769} Due diligence will enable corporations to become aware of the human rights risks, and allow these to be investigated and addressed, in order to prevent the company from knowingly contributing to human rights abuses, or knowingly benefiting from abuse.

While due diligence would be a significant development, it is difficult to expect corporations to reach this point without clarification on what is meant by complicity: it is almost impossible to complete a rigorous risk assessment or Human Rights Impact Assessment when the exact contours of the risk – the ‘zone of legal risk’, according to the terminology suggested by the ICJ Expert Panel – is difficult to define. In that regard, while the due diligence framework is of foreseeable utility in the future, it seems that significant work needs to be completed before it can be fully functional.

\textsuperscript{765} ibid
\textsuperscript{766} War on Want, ‘Fanning the Flames’, p 2
\textsuperscript{767} Bowfield, ‘Corporate Social Responsibility: reinventing the meaning of development?’, 517
\textsuperscript{768} Peter Newell, ‘Citizenship, accountability and community: the limits of the CSR agenda” (2003) 81(3) International Affairs 3 541, 556
By completing assessments under a due diligence procedure, corporations should at least become aware of concerns, or ‘red flags’ that would indicate that they are entering such a zone of legal risk. The corporation would then need to determine its response. It would appear that rigorous accountability mechanisms may influence such decisions regarding how to proceed once a risk was identified.

In the absence of agreed standards on company activity, voluntary codes and self-regulation may have a role to play in ensuring companies meet basic human rights standards, particularly in States where local laws do not meet these standards.\(^\text{770}\)

While there has been significant increase in business recognition of human rights recently, there is a need for a cohesive approach, and the clarification of business responsibilities and societal expectations. This momentum should be capitalised: the Special Representative has observed that more companies need to recognise human rights, and more initiatives need to be created, espousing industry commitments to human rights.\(^\text{771}\) Voluntary codes and self-regulation may be significant, but they are insufficient. This area requires both voluntary engagement from corporations, “driven by enlightened self-interest”,\(^\text{772}\) and also a strong legal foundation for securing accountability for human rights violations.\(^\text{773}\) As Kinley, Nolan and Zerial argue, “[v]oluntarism has its limits.”\(^\text{774}\)

Perhaps a more satisfactory solution would be for States to negotiate stronger positions for themselves when doing business with corporations and entering into investment agreements, and demanding higher revenues for commodities; by doing so, governments would have greater capacity to secure development. Of course, this would require a government free of corruption which intends to secure development and respect of human rights. It also assumes that the State

---


\(^\text{774}\) Kinley, Nolan and Zerial, ‘The politics of corporate social responsibility’, p 39
is in a position to take a strong stance when negotiating such agreements; as discussed previously, the power differentials often mean that States are not in such a position.

There is a growing consensus that companies should not be able to exploit poor and marginalised communities in developing countries. While this recognition is significant, it is only a first step. The convergence of corporate social responsibility policies with the responsibility to respect, coupled with appropriate legal regulation, should lead to more positive outcomes for those individuals and communities most vulnerable to corporate abuse. Corporate initiatives should not be disregarded, but they should be far more robust, transparent and accountable than they currently are. Fundamental, long lasting change will only be realised when human rights are embedded within the corporate culture. Such a development will likely need to be supported by solid legal accountability mechanisms. These will be discussed in the following Chapter.

---

775 Bowfield, ‘Corporate Social Responsibility: reinventing the meaning of development?’ p 518
CHAPTER 5

THE VICTIM’S RIGHT TO REMEDY:
SEEKING ACCOUNTABILITY FOR CORPORATE COMPLICITY

The previous two chapters considered the duty of States and the responsibility of corporations, respectively, and their different roles in preventing corporate involvement in human rights abuse. Yet, even with the most rigorous preventative measures in place, there is no guarantee that all potential instances of corporate complicity could be avoided. When corporations do become involved in human rights abuse, victims need access to remedy. This chapter will analyse the right to remedy, through both judicial and non-judicial mechanisms, and the political and legal realities of seeking remedies through the existing mechanisms. It will argue that the existing accountability structures are ineffective and insufficient, due to political and legal limitations and obstacles. Such limitations and obstacles will need to be addressed if victims are to be provided with access to remedy.

The need for access to remedy
Not all abuse can be prevented, and victims and survivors need access to remedy when their rights are violated. However, victims are often left without redress for corporate abuse, and can face retaliation for attempting to seek justice. Access to justice for victims of corporate-related abuse, including corporate complicity, needs to be promoted by the international community as an urgent priority. States must monitor the behaviour of corporations and address any violations at the domestic level. States have an obligation to protect human rights, and this extends to protection from third parties including corporations.

Any reasons for not meeting these obligations should be explored and addressed. However, critically, in many situations where regulation and

776 Ruggie, Presentation of Report to United Nations Human Rights Council
777 Human Rights Watch, ‘On the Margins of Profit’, p 2
778 UN Doc E/CN.4/2005/91, 15 February 2005, para 43
779 Human Rights Watch, ‘On the Margins of Profit’, p 2
monitoring is needed most desperately, the State is either unwilling or unable to protect the human rights of its citizens. The saddest irony is that formal judicial systems are often most underdeveloped where they are most needed.

**Mechanisms for seeking redress for corporate complicity**
Under the Framework, victims and survivors should have access to appropriate and effective remedies, both judicial and non-judicial. In addition to States bringing cases against corporations, individuals can also take direct action against a company, in the form of civil litigation. Victims of corporate human rights abuse face their own unique impediments and barriers when seeking redress, which require attention and, if possible, resolution. Practical developments are required to ensure victims have access to remedy in home States; there should be mechanisms to address and cease abuse, in addition to legal liability after abuse occurs; and there is a real need for capacity building initiatives in the legal systems of host States.780

If States are unwilling or unable to prosecute, “informal accountability”781 mechanisms can be utilised. Nevertheless, all victims should have access to formal accountability structures. It is imperative that there is an international legal standard on what constitutes complicity in grave human rights abuses and other forms of informal accountability should not diminish the momentum towards identifying and applying this standard. It is the continued implicit permissibility of corporate wrongs and corporate involvement in international crime that allows its pervasive perseverance.

The Special Representative has “placed relatively little emphasis” on ways of holding corporations accountable, despite the impunity that currently exists.782 Non-government organisations and human rights groups have informed the Human Rights Council of their desire to see this issue of accountability for corporate abuse, and access to remedy, remain a priority of the council. They acknowledge the need for immediate policy-based solutions, but argue that

---

780 UN Doc A/HRC/4/35/Add.2, 15 February 2007, Summary, p 4
781 Joseph, Corporations and Transnational Human Rights Litigation, p 6
agreed international standards must be viewed as the ultimate goal.\textsuperscript{783} It is essential that efforts consider and acknowledge the realities of this abuse on those who are directly affected, and considers their perspectives and opinions in future developments, in order to afford them justice and redress.\textsuperscript{784} Consultation with victims is an aspect that has been somewhat overlooked, possibly due to the attention afforded to the private sector in an effort to avoid the same criticisms as made in relation to the drafting of the TNC Norms – that business was not consulted. Victim perspectives are a significant component of justice mechanisms. Sam Garkawe refers to the lack of victim perspectives as the ‘missing link’ of international criminal justice, which he believes will come to the fore in the years ahead.\textsuperscript{785}

There is a need for both judicial and non-judicial accountability mechanisms. Non-judicial mechanisms can provide responses sooner than the judicial process, and may be able to address corporate behaviour. Moreover, corporations may be motivated to change their behaviour if there is a risk of litigation or adverse publicity. Company-level mechanisms may inform companies of growing concerns as they develop. Judicially, both civil and criminal sanctions are appropriate, and these should be dissuasive, proportionate and effective.\textsuperscript{786}

\textbf{Non-judicial mechanisms}
While judicial mechanisms are crucial, non-judicial mechanisms are also important. Non-judicial mechanisms emanate from public policy, market mechanisms, public campaigns, incentives and other points of leverage.

\textbf{Shareholder action}
Another non-judicial mechanism is shareholder action. One key example of the use of this mechanism is its use against the British Banks during the Apartheid era in South Africa. The accusations relate to the banks “redirecting ‘black’ savings into the ‘white’ economy, channelling funds towards the public sector and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{783} ibid
\item \textsuperscript{784} ibid
\item \textsuperscript{785} Sam Garkawe, ‘Victims and the International Criminal Court: Three major issues’ (2003) 3 International Criminal Law Review 345, p 367. For a discussion on the importance of understanding and reconciling the views and perceptions of victims within the international justice sphere, see Marie-Benedicte Dembour and Emily Haslam, ‘Silencing Hearings? Victim-Witnesses at War Crimes Trials’ (2004) 15 European Journal of International Law 151
\item \textsuperscript{786} UN Doc A/HRC/4/35/Add.2, 15 February 2007, para 58
\end{itemize}
\end{footnotesize}
cementing foreign economic ties through trade and investment.”787 The campaign that resulted brought unprecedented attention to issues of investor responsibility, corporate ethics and public accountability.788 In the campaign against Barclays Bank, campaigners bought single shares in order to attend the Annual General Meeting. This in turn led to shareholder pressure being applied against other banks. The British banks withdrew, due to the pressure and the negative publicity that was being generated.789 The campaign against the banks is indicative of the immense influence of international finance on governments; it also indicates that shareholder pressure is a “potent weapon”790 and that “financial institutions were not unassailable when faced with public pressure on ethical issues.”791

Informal accountability
In the absence of strong and effective formal mechanisms, informal mechanisms such as human rights campaigns and activism will inevitably be utilised.792 Informal accountability mechanisms, including the importance of all individuals as consumers will become more of an issue as this topic gains wider publicity. The decisions that individuals, as consumers, make in their day-to-day lives can be a force for change. The enormity and anonymity of ‘global civilisation’ should not deter consumers from seeking to make socially and ethically responsible decisions.

Company based grievance mechanisms
The Special Representative has encouraged corporations to ensure they have appropriate grievance mechanisms in place as part of a due diligence framework. Dispute resolution at an early opportunity will prevent the abuse, and claim, from escalating. From a risk management perspective, this would enable victims a forum to air their complaints, as at the moment the principal method of airing grievances against companies is litigation and campaigns. Grievance mechanisms could form part of due diligence procedures that were discussed in the previous chapter. Such processes should be legitimate, accessible,

788 ibid
789 ibid, p 426
790 ibid, p 421
791 ibid, p 433. However, the 1985 debt crisis also played a role in the change in conduct.
predictable, equitable, rights-based and transparent, and operate through
mediation and dialogue.\textsuperscript{793} There are currently five companies trialling such
company based mechanisms.\textsuperscript{794} It is noteworthy that many of the international
codes and initiatives lack grievance mechanisms. While these will be of
substantial benefit, they should not detract from efforts to develop more effective
judicial mechanisms. The futile voluntary-mandatory debate risks being
introduced to the debates around accountability mechanisms.

**State-based non-judicial mechanisms**

National Human Rights Institutions (NHRI) play an important role in protecting
and promoting human rights.\textsuperscript{795} The processes under NRHIs are “culturally
appropriate, accessible, and expeditious.”\textsuperscript{796} However, some NRHIs are more
effective than others, and one element that is particularly important is public
accountability.\textsuperscript{797} Nevertheless, they are far preferable to the National Contact
Points (NCPs) established in accordance with the OECD Guidelines on
Multinational Enterprises. The NCPs were established as a means of providing a
non-judicial remedy to those affected by corporations of OECD States. Both
mechanisms have their limitations, as their decisions carry little weight, are not
enforceable, and their decisions are not widely reported.

The UK NCP received a complaint about Vedanta Resources, in relation to its
aluminium refinery in Orissa, India.\textsuperscript{798} The mountain at the refinery is sacred to
the local indigenous population. The complaint stated that this group was not
consulted about the refinery, and that other people had been forced off their land.
When the UK NCP contacted Vedanta, the company responded by refuting all
allegations and failing to attend mediation.\textsuperscript{799} The NCP then recommended that
Vedanta observe the OECD Guidelines; however it was not authorised to enforce
Vedanta to cooperate. In another example, a complaint was made to the German

\textsuperscript{793} UN Doc A/HRC/11/13, para 99
\textsuperscript{794} UN Doc A/HRC/14/27, 9 April 2010, para 11. These companies are “Carbones del Cerrejon with
neighbouring indigenous communities in Colombia; Esquel Group, a garment manufacturer based in Hong
Kong, China, in its Vietnamese facility; Sakhalin Energy Investment Corporation in Russia; the retailer Tesco in
its South African fruit supply chain; and Hewlett-Packard with two of its suppliers in China.”
\textsuperscript{795} Louise Arbour, “Forward”, in International Council on Human Rights Policy, *Assessing the Effectiveness of
National Human Rights Institutions*, 2005, Versoix, p 3
\textsuperscript{796} UN Doc A/HRC/8/5, 7 April 2008,para 97
\textsuperscript{797} International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights
Institutions*, p 50
\textsuperscript{798} Complaint from Survival International against Vedanta Resources Plc, available online at
28 August 2010
\textsuperscript{799} Complaint from Survival International against Vedanta Resources Plc
NCP in relation to Bayer CropScience’s toleration of child labour in its supply chains and subcontractors. Bayer responded that the complaint was unfounded, but independent investigations 14 months later found that there were around 450-500 children working for subcontractors. Bayer CropScience’s response was then to issue a declaration to abide by the OECD Guidelines. Both of these examples show how ineffectual the NCPs were at achieving a positive outcome for the claimants, or the victims. Being unable to compel the companies, the NCPs are somewhat impotent.

As the examples cited illustrate, the NCPs have not met their potential. The reasons for this are varied. Some NCPs are located within government departments, creating the suggestion of conflict of interest, some are under resourced, and some are unable to provide mediation. As a general deficiency, there are generally no time limitations on the completion of processes, and often outcomes go unreported. The Special Representative has observed that the NCPs do not meet his suggested mandatory criteria of a legitimate, accessible, predictable, equitable, rights-compatible and transparent due diligence process. These deficiencies could be addressed. NCPs could be independent bodies, such as the NCP established by the Dutch Government, or alternatively they could form part of a NHRI.

**Judicial mechanisms**

The renewed attention by human rights campaigners and activists on corporate accountability for involvement in international crimes was largely viewed through a moral accountability lens. This attention has been the catalyst for investigation of corresponding legal accountability.

**Why legal accountability?**

Victims and survivors are increasingly turning to the authority of judicial mechanisms, seeking justice and access to remedy. Trials help correct the

---

800 Complaint from German Watch, Global March, and Coordination gegen Bayer-Gefahren against Bayer CropScience, available online at [http://basewiki.org/en/OECD_NCP_(Germany)_NGOs_vs_Bayer_CropScience,_India_2007](http://basewiki.org/en/OECD_NCP_(Germany)_NGOs_vs_Bayer_CropScience,_India_2007), last accessed 28 August 2010

historical landscape, establish a public record and provide credible documentation of atrocities. They also offer accountability for wrongs committed. They have the difficult task of achieving justice, a mix of both retribution and forgiveness in a severely traumatised society. A culture of justice “makes moral credibility a valuable political asset for victim groups”. This is important as “vengeance is violence and violence begets more violence.” Moreover, trial judgments offer a specified punishment, a psychological prerequisite for societal forgiveness. Furthermore, inaction sends the message that corporate behaviour and the consequences of corporate actions are not worth prosecuting.

Court cases could bring to light certain details of corporate activity, and such details may increase the political will and generate public motivation to address such corporate behaviour in conflict economies, to curb such abuse. While it is true that these kinds of prosecutions can sometimes be seen as the “opening of old wounds”, this should not prevent the pursuance of perpetrators. The former Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights found that victims have three fundamental rights: the right to know, the right to justice and the right to reparation. The perpetrator of the crime should be irrelevant to the realisation of these rights: it is an unacceptable anomaly that these rights could be denied simply because the crime was committed, or facilitated with the assistance of, a private corporation. Other non-State actors, including individuals and armed rebel groups, have legal obligations under international law, and “it would be

802 Margaret Minow, Between Vengeance and Forgiveness: facing history after genocide and mass violence (Beacon Press, Boston, 1998), p 50. For a discussion of the challenges victims can face when seeking justice through judicial mechanisms following gross human rights violations, see Marie-Benedicte Dembur and Emily Haslam, ‘Silencing Hearings? Victim-Witnesses at War Crimes Trials’ (2004) 15 European Journal of International Law 151
803 ibid, p 50
804 ibid, p 26
807 Minow, Between Vengeance and Forgiveness, p 58
anomalous for companies to remain almost wholly outside the ambit of international law."\textsuperscript{811}

Successful cases may have greater ramifications for corporate activity broadly. Motivated by the desire to avoid litigation, corporations monitor their behaviour and cease involvement in human rights abuse, and consider the impact of their activities on human rights. Legal accountability and litigation capitalises on a corporation’s profit motive: prosecutions can leave a company with a damaged reputation and a lowered market value. Corporations should be advised and encouraged to take the precautionary measures, and to make themselves aware of the requirements under human rights law, and advocates should try speaking a language that corporations understand. In the words of Terry Collingsworth, “The profit motive does work as a tool for good if used properly.”\textsuperscript{812}

**The Basic Principles and the Individual Right to Remedy**

The State obligation to provide access to remedy applies to all corporate abuse of internationally recognised human rights.\textsuperscript{813} The individual right to remedy as recognised by some international and regional human rights conventions is distinct from the State obligation to provide access to remedy. The individual right to remedy, and its interaction with non-State abuse, is less well understood.

The individual right to remedy was confirmed by the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex) (‘Basic Principles’). For acts covered by the Basic Principles, individuals have the right to a remedy “irrespective of who may ultimately be the bearer of responsibility for the violation.”\textsuperscript{814} Significantly, the Basic Principles were drafted

\textsuperscript{811} Kinley and Chambers, ‘The UN Human Rights Norms for Corporations’, p 493

\textsuperscript{812} Collingsworth, ‘Bringing the Rule of Law to the Global Economy – Using the Alien Tort Statute to Hold Multinational Companies Accountable for Human Rights Violations’

\textsuperscript{813} UN Doc A/HRC/11/13, 22 April 2009, para 88, Principle 3(c). In some cases, the actions of a corporation could be attributed to the state under the doctrine of state responsibility. This is most likely to occur if the corporation was carrying out public functions, or if it was state owned. The *Chorzow Factory* case (1928, Permanent Court of International Justice) found that States have an obligation to make reparation for breaches of international law. Similarly, the International Law Commission’s Draft Articles on State Responsibility for Internationally Wrongful Acts provide that States should make full reparation for any violation of their international obligations. While the Draft Articles are not legally binding, they are very influential, and they do codify the *Chorzow Factory* principle. If a corporation was involved in human rights abuse that amounted to an international crime, and responsibility for this was attributed to the state, then the state would need to make reparations.

\textsuperscript{814} ibid, para 88, Principle 3(c)
as a restatement of existing State obligations. Their adoption by the General Assembly indicates the international community’s concern over ensuring access to remedy where victims have suffered gross violations of human rights, including at the hand of corporations. Their adoption invites a renewed focus on “the legal and practical implications of the individual right to remedy in cases involving corporations.”

The Basic Principles provide three core aspects: “the right to equal and effective access to justice; to adequate, effective and prompt reparation for harm suffered; and to access to relevant information concerning violations and reparation mechanisms.”

The Basic Principles obligate States to investigate, prosecute and punish international crimes, and to cooperate with other States to bring perpetrators to justice. The Basic Principles may place a heavier burden on States to meet their obligations where gross violations have occurred. In order to establish that a victim of gross human rights violations has access to an effective judicial remedy, the State must show that the barriers to justice have been addressed, to enable effective access to justice.

**Domestic criminal law: prosecuting corporations and corporate officials**

One significant recent development in domestic criminal legal jurisdictions has been the incorporation of international criminal standards into domestic legal systems. There has been somewhat of a human rights revolution since the Rome Statute of the International Criminal Court came into being in 1998. As at 18 August 2010, the Rome Statute had some 113 State parties. Many of these States have begun the process of integrating international criminal law standards, specifically the crimes of genocide, war crimes and crimes against humanity, into their own domestic criminal jurisdictions. The process of implementation of the Rome Statute of the International Criminal Court in the domestic jurisdictions of State parties has led to a growing number of domestic courts that are able to...

---

816 UN Doc A/HRC/11/13/Add.1, 15 May 2009, summary
817 ibid, para 102; principles 4 and 5
818 ibid, para 109
819 State parties to the Rome Statute, available online at [www.icc-cpi.int/states+parties/](http://www.icc-cpi.int/states+parties/), last accessed 20 August 2010
apply human rights law and prosecute crimes under international criminal law. The consequence has been to “globalise” international criminal law protections through domestic jurisdictions.\textsuperscript{820} As domestic courts have incorporated international criminal law and international humanitarian law into their domestic jurisdictions, the “web of liability” has expanded significantly.\textsuperscript{821} The result of this has been that corporate liability for involvement in human rights abuse that amounts to international crime can be imposed through domestic courts.\textsuperscript{822} In States where there is also some kind of aiding and abetting, or accomplice, liability, it should be possible to hold corporations criminally responsible for their role in aiding and abetting international crimes in addition to corporate officials.\textsuperscript{823}

However, there is no common agreement among States as to the need for, or the extent of, a causal connection between the act of the accomplice and the commission of the offence.\textsuperscript{824} The knowledge element in domestic criminal law depends on the law of the jurisdiction; but when prosecuting these crimes, domestic courts may rely on international criminal law standards.\textsuperscript{825} The \textit{mens rea} element was not met in two recent prosecutions of businessmen for complicity in grave breaches of human rights, where the Dutch courts acquitted the accused because it was not established that the businessmen knew the intention of the principal perpetrators, and the specific crimes they intended to commit.\textsuperscript{826}

The \textit{International Criminal Court (Consequential Amendments) Act 2002} completed the implementation of the Rome Statute into Australian law, meaning Australian law now expressly criminalises genocide, crimes against humanity and

\begin{flushright}
\begin{footnotesize}
\textsuperscript{820} Mark Taylor, ‘The Corporate Accountability Evolution’
\textsuperscript{821} Ramasastry and Thompson, ‘Commerce, Crime and Conflict’, p 27
\textsuperscript{822} UN Doc A/HRC/4/35, 19 February 2007, para 22, p 9: Fafo report – of the 16 states, 11 were parties to the ICC, 9 had fully incorporated the three crimes; of these, 6 already provided for corporate criminal liability
\textsuperscript{823} UN Doc A/HRC/8/16, 15 May 2008, para 46
\textsuperscript{825} UN Doc A/HRC/8/16, 15 May 2008, para 47
\textsuperscript{826} Ramasastry and Thompson, ‘Commerce, Crime and Conflict’, p 19: Note 17: “The first case is that of Frans van Anraat (District Court, 23 December 2005, LjN; AU8685). Van Anraat was charged with complicity in war crimes and genocide, arising out of his supplying the chemical thiodiglycol (TDC) to Saddam Hussein during the 1980s. Hussein used the chemical as a raw material in the production of mustard gas that was employed both in the Iran-Iraq war (a war crime) and against the Kurdish village of Halabja (an act of genocide). The trial court found that van Anraat did not know of Hussein’s genocidal intentions and thus acquitted him of that specific charge, although van Anraat was convicted of complicity in war crimes for having operated a timber trading company in close association with former President Charles Taylor of Liberia. He was acquitted of the complicity charge owing to lack of evidence that he was aware of Taylor’s war crimes, but convicted on a charge of violating sanctions imposed on timber trading by the UN.”
\end{footnotesize}
\end{flushright}
war crimes. This legislation is yet to be tested in court.\footnote{Phillips and Nicolson, ‘Brief on Corporations and Human Rights in the Asia-Pacific, p 29. While it is significant that Australia has incorporated the Rome Statute into its domestic legislation, its historical failure in prosecuting war criminals would lead one to question how often the legislation would be used.} Furthermore, the \textit{Criminal Code Act 1995} makes it an offence to “provide (or cause to be provided) a benefit to another person, where such a benefit is not legitimately due, with the intention of influencing a foreign public official in order to retain or obtain business or a business advantage. The foreign public official may not necessarily be the person ‘influenced’ in order for the offence to have been committed.”\footnote{Phillips and Nicolson, ‘Brief on Corporations and Human Rights in the Asia-Pacific Region’, p 39. See section 70.2} In Australia, there is broad scope for corporate criminal liability, as the \textit{Criminal Code} attaches liability to any person (or corporation) who aids, abets, counsels or procures the commission of an offence by another person.\footnote{ibid, pp 36-37; \textit{Criminal Code Act 1995} section 11.2} Australia has “broad, vicarious liability for the actions of employees acting on the corporation’s behalf.”\footnote{Phillips and Nicolson, ‘Brief on Corporations and Human Rights in the Asia-Pacific, p 30} Under the \textit{Criminal Code}, fault may be attributed to a “body corporate that expressly, tacitly, or impliedly authorized the commission of a criminal offence.”\footnote{Ramasastry and Thompson, ‘Commerce, Crime and Conflict’, p 13}

In many domestic jurisdictions there is no delineation between natural and legal persons, and as such the implementation of these crimes allows for the prosecution of corporations and business entities in addition to corporate officials.\footnote{International Peace Academy and Fafo, ‘Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law’ Fafo Report 467, 2004, p 22: “Each of the Surveys found that business entities could indeed be held liable for violations of that jurisdiction’s criminal or penal code.” See also Anita Ramasastry, ‘Mapping the Web of Liability: The Expanding Geography of Corporate Accountability in Domestic Jurisdictions’, available online at \url{http://www.business-humanrights.org}, last accessed 30 October 2008} As discussed in Chapter 4, some States have included extraterritorial provisions, making it possible for corporations to be held accountable for their operations abroad, including their involvement in international crimes.\footnote{Taylor, ‘The Corporate Accountability Evolution’}

While an international forum to hear cases against corporations is still of critical need, this development may alleviate some of the jurisdictional and accountability gaps that currently exists. However, the utilisation of this judicial mechanism remains to be seen. Despite the ability of many domestic jurisdictions to prosecute corporations, there are yet to be any prosecutions of corporations for breaching international criminal law initiated by a prosecutor.\footnote{Ramasastry, ‘Mapping the Web of Liability’}
Establishing the *mens rea* of a corporation

It is inherently difficult to prosecute a corporation as a legal person. In many counties a corporation can only be found liable if the actions of senior officers can be attributed to the company, and the *mens rea* element for the violation must be established for the corporation as a whole. If legislated provisions were enacted, a ‘corporate culture’ test could be used to consider corporate accountability. This would enable States to “examine a company’s policies, rules and practices to determine criminal liability and punishment, rather than basing accountability on the individual acts of employees or officers. These principles may be invoked at the liability stage, or during sentencing and in exercising prosecutorial discretion.” This avoids the notoriously difficult task of proving corporate ‘mind and will’ in criminal cases.

Australia has adopted such a ‘corporate culture’ test, found in section 12.3 of the *Criminal Code*. It states that a corporation’s culture should be considered, to determine whether it can be “deemed expressly or tacitly to permit the commission of an offence by an employee”. If this can be established, the firm may be held liable. However, there are some defences to this which lessen the provision’s potential reach, including “whether the conduct would be regarded as lawful in the foreign public official’s country, and was performed by an individual acting as an employee of an international or governmental organisation, or other position under a law of the foreign country.” Switzerland has similar provisions in its *Penal Code*, while the Italian criminal law provides that a corporation may be found liable if it does not have sufficient supervision or control systems in place. One recent example of the corporate culture test being referred to in an Australian context was at the Cole Inquiry, in relation to the Australian Wheat Board (AWB) scandal with the Oil for Food program in Iraq. The Cole Inquiry found that AWB had paid approximately $224 million in transportation fees, in

---

836 UN Doc A/HRC/8/5, 7 April 2008, para 31
838 ibid: see *Criminal Code Act 1995* (Cth), sections 12.3(2)(c) and (d)
840 A/HRC/14/27, 9 April 2010, para 42
violation of Security Council resolutions. The Inquiry was of the opinion that there had been a “failure in corporate culture.”

Civil law: private claims for personal injury
Civil law, or the law of tort, is increasingly being utilised to seek accountability for corporate complicity in human rights violations. Most acts which constitute war crimes and crimes against humanity also constitute torts. For example, human rights violations could be categorised as such civil wrongs as assault, wrongful death or false imprisonment. While these cases do not refer to ‘human rights’ they seek liability for the same acts, arguing that corporations failed to “comply with basic non-criminal law tenets.” These cases are generally brought against the corporation as an entity, rather than against individual corporate officials. Tort law litigation may not have the same clout or connotation as a prosecution for violations of international law, but it “may be another effective way of holding business entities financially accountable while providing redress for victims”, given the opportunity for compensation through civil action. Additionally, the threat of large compensation claims and the impact that would have on a corporation’s financial status and resources may hasten change in the behaviour of corporations. Generally, common law jurisdictions have a much more developed system of tort litigation than other legal systems.

Civil litigation does present some practical benefits to victims when compared with criminal prosecutions: plaintiffs can bring their own cases (rather than relying on the prosecution, and the political decisions that may be associated to the decision to prosecute), there is a lower burden of proof (facts and accountability must be established ‘on the balance of probabilities’, rather than ‘beyond reasonable doubt’), and it is sometimes easier to attribute the actions of employees to the corporation as a whole in a civil case rather than in a criminal case. Also, it may be easier for victims to establish causation, rather than prove

842 Tully, ‘Australian Inquiry into Corporate Responsibility for Complicity in Efforts to Manipulate Humanitarian Exceptions to Security Council Sanction Regimes’
844 UN Doc A/HRC/4/35, 19 February 2007, para 27
845 UN Doc A/HRC/8/16, 15 May 2008, para 52
847 International Peace Academy and Fafo, ‘Business and International Crimes’, p 15
848 ibid, p 15
aiding and abetting. The knowledge element may also have a lower threshold in civil cases rather than criminal. More research is required on the practicalities and challenges of bringing civil cases for violations that amount to breaches of international criminal law. Aspects that require further investigation include the use of class actions, contingency fees, appropriate damages, and also a deeper analysis of forum non conveniens. It is quite logical that corporations should be held accountable for their complicity in grave violations of human rights, and that civil litigation should allow this to happen. This was observed in the Eastman Kodak v Kavlin judgement, which held that “it would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power.” Nevertheless, it is excruciatingly ironic that the most serious crimes known to humanity should need to be categorised as torts in an effort to seek accountability and justice for victims.

ATCA litigation
As discussed above, there is no international forum capable of prosecuting corporations for breaches of international criminal law or other human rights abuses. This leaves victims with the option of seeking justice and redress in either their country, or the corporation’s country of incorporation. Often, neither of these options will be satisfactory, or available. This lacuna has seen a growth in the number of victims seeking redress for grave crimes committed by corporations, and for their complicity in these crimes, in the United States, by relying on the Alien Tort Claims Act (ATCA). Over fifty cases have been brought against corporations, for alleged perpetration of egregious abuse, under the ATCA. Moreover, foreign plaintiffs are using ATCA to bring claims against non-United States companies for harm suffered outside of the United States. However, there is yet to be a case brought under ATCA that was decided on the merits.

849 ibid, p 24
850 Ramasastry and Thompson, ‘Commerce, Crime and Conflict’, p 29
851 Eastman Kodak Co v Kavlin 978 F Supp 1078 (SD Fla 1997) 1091 quoted in Joseph, Corporations and Transnational Human Rights Litigation, p 33
852 UN Doc A/HRC/14/27, 9 April 2010; See also Joseph, Corporations and Transnational Human Rights Litigation, p 17
853 UN Doc A/HRC/8/5, 7 April 2008, para 90
The ATCA allows foreign nationals to bring claims in the United States for “breaches of their rights under the law of nations.”854 The ATCA provides that the United States district courts “shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”855 This has generally been interpreted as meaning a breach of customary international law, which need not be a breach of a _jus cogens_ norm.856 In many cases, the ATCA has provided the sole avenue for seeking legal redress. However, in relation to corporate complicity, the ATCA is still being interpreted.857 The United States Supreme Court has only made one decision under ATCA, _Sosa v Alvarez-Machain_, and this decision does not appear to prohibit corporate liability for aiding and abetting.858 Moreover, “the weight of current US judicial opinion appears to support the existence of such liability.”859 It was a case against Unocal, heard in 1997, which held that actions could be brought against corporations under ATCA.860 This case was eventually settled “but, in the process, the federal courts consistently approved the legal theory and the reported decision paved the way for subsequent human rights cases against multinational companies.”861 Importantly, jurisdiction over corporations has been interpreted to include accessory liability. This is significant, given the number of corporations accused of colluding and assisting corrupt and brutal governments and militarised groups.862 In some cases, courts have applied international criminal law standards of aiding and abetting to determine corporate complicity under ATCA.863 In fact, the most detailed interpretation of corporate accountability under customary international law has arisen from domestic jurisprudence emanating from the US in cases reliant upon the ATCA.864

---

854 Joseph, _Corporations and Transnational Human Rights Litigation_, p 17
855 _Alien Tort Claims Act_, 28 USC s1350 quoted in Joseph, _Corporations and Transnational Human Rights Litigation_, p 21
856 Joseph, _Corporations and Transnational Human Rights Litigation_, p 23
857 UN Doc A/HRC/8/16, 15 May 2008, para 50
858 ibid, para 51
859 ibid
860 Joseph, _Corporations and Transnational Human Rights Litigation_, p 22
861 Collingsworth, ‘Bringing the Rule of Law to the Global Economy – Using the Alien Tort Statute to Hold Multinational Companies Accountable for Human Rights Violations’. The lawsuit in Alabama against Drummond Coal Company was the first such case to go to trial. The case was around the alleged involvement of the company in the murder of union leaders.
862 Joseph, _Corporations and Transnational Human Rights Litigation_, p 17
864 ibid, para 29; Joseph, _Corporations and Transnational Human Rights Litigation_, p 10
There are a number of high profile cases that have been brought under the ATCA that should commence by 2011. These include cases against ExxonMobil for its operations in Aceh, and its alleged use of the Indonesian military to terrorise local communities, against Chevron for its alleged complicity in Nigeria, and against the Coca-Cola Company for allegedly attempting to keep the bottling plants in Colombia free of unions by using paramilitaries.\textsuperscript{865} ATCA has been very influential: “the mere fact of providing the possibility of a remedy has made a difference.”\textsuperscript{866}

In addition to the ATCA, there are a number of other practical reasons for victims to choose to sue in the United States. For example, many lawyers will act on a contingency fee basis, only receiving payment if the case is successful. On the same continuum, unsuccessful litigants do not pay both sides costs, “unless the claim is deemed utterly vexatious”.\textsuperscript{867} Moreover, damages awarded in the United States tend to be larger than those awarded in other States, and tend to award punitive damages more readily. As the name suggests, punitive damages are awarded to punish defendants, rather than compensate victims. Some cases under ATCA have resulted in damages of hundreds of millions and into the billions of dollars. ATCA played a “catalyzing role” in two significant settlements between corporations and the heirs of victims of the Nazis: there was a $1.25 billion settlement with Swiss Banks, and a settlement with the German government and corporations was reached for $5 billion.\textsuperscript{868} While it is important to acknowledge that money cannot provide complete restitution, compensation can go someway towards community (re)development and can assist in transitional justice mechanisms. Further, Sarah Joseph notes that the rules and procedures relating to discovery are “comparatively lenient to plaintiffs, which is of great importance when much evidence is likely to lie in the corporate defendant’s control.”\textsuperscript{869} A down side is that it is expensive for plaintiffs to access, particularly as they, their witnesses and their evidence must travel to the United States. The cumulative effect of these factors is that the United States legal system offers an effective framework to bring civil cases, and often a unique opportunity for victims

\textsuperscript{865} Collingsworth, ‘Bringing the Rule of Law to the Global Economy – Using the Alien Tort Statute to Hold Multinational Companies Accountable for Human Rights Violations’
\textsuperscript{866} UN Doc E/CN.4/2006/97, 22 February 2006, para 62
\textsuperscript{867} Joseph, Corporations and Transnational Human Rights Litigation , p 16
\textsuperscript{868} Global Policy Forum, ‘Corporate Liability for Violations of International Human Rights Law’, pp 2040-41
\textsuperscript{869} Joseph, Corporations and Transnational Human Rights Litigation, p 16
to seek redress. Joseph does warn of the concerns that this kind of litigation could instigate a form of "global ambulance chasing." Despite this, such a course would doubtless be seen by victims as a preferable one to inaction.

Not everyone supports the ATCA, and it certainly faces its share of criticism from some quarters. The United States State Department believes the cases against corporations being brought under the ATCA “threaten US foreign policy interests by deterring present and future investments.” The use of the ATCA has caused a somewhat inevitable "political fall-out" from the business lobby, which views the ATCA as a mechanism for “hunting” corporations. This has resulted in their efforts to “de-legitimize” the Act, and they are seeking to have it repealed. Similarly, business groups filed an amici curiae in relation to Sosa v Alvarez-Machain, arguing that the use of ATCA against United States companies in human rights litigation “would put them at a competitive disadvantage on the global economy.” Terry Collingsworth emphasises the “audacity” of the argument, noting that the ATCA is very limited in scope and can only hear cases where egregious human rights violations are alleged. Corporations and the business lobby should not be fearful of legal regulation, unless they breach the legal standards. Rather than the private sector fearing litigation, clear and universal standards may hold some advantage for it.

The ATCA makes the United States one of the only jurisdictions to explicitly recognise grave human rights abuses as a tort. While many human rights abuses can be understood as torts, rarely is this expressly recognised in domestic legal systems. Another issue with litigation under the ATCA is that there is yet to be a decision decided on its merits, litigants are unaware of the requirements as they are often without precedent. For example, it has now been

---

870 ibid, pp 16-17
871 ibid, p 17
873 ibid
874 ibid
876 Collingsworth, ‘Bringing the Rule of Law to the Global Economy – Using the Alien Tort Statute to Hold Multinational Companies Accountable for Human Rights Violations’ ibid
877 ibid
held on appeal that claimants must show that they are not required to exhaust their own domestic remedies before bringing a claim under the ATCA.880

Obstacles to remedy

There are a number of challenges in bringing judicial cases against corporations, whether criminal or civil cases. In criminal cases, the case needs to be brought on behalf of the State, meaning the State is the determinant of whether a case is heard or not. As has been discussed, it is not always in a State’s interests to intervene, and States that obstruct access to justice act inconsistently with their duty to respect. For access to remedy to be improved, both States and companies will need to support the judicial process.881 Moreover, there is a need for the political will to engage in greater levels of cooperation, particularly in the areas of extradition agreements, mutual assistance, and regional/international cooperation agreements.882

In both civil and criminal cases, the general challenges of prosecuting corporations exist: the continual problem of separate legal entity and the need to pierce the corporate veil. In civil cases, the associated costs can be prohibitive, there can be issues of standing, there is the question of forum non conveniens which can be problematic, and there are jurisdictional issues and associated evidentiary challenges. The legal principles of ‘separate legal entity’ and ‘forum non conveniens’ afford protections to corporations, which Richard Meeran argues creates a "double standard where corporations are involved in abuse in developing countries.883 These legal doctrines effectively allow corporations to avoid legal responsibility, and have been “formulated and developed by reference to commercial interests” at the expense of victims’ rights.884

Perennial problems persist, including equality of legal representation: for example, the ATCA case against Freeport McMoran in West Papua was dismissed due to the plaintiff’s failure to adequately prepare a Statement of

881 UN Doc A/HRC/14/27, 9 April 2010, para 103
882 Ramasastry and Thompson, ‘Commerce, Crime and Conflict’, p 28
884 ibid
Claim, which may have been the result of inequitable legal representation. On a related note, in criminal cases the investigation of claims of corporate complicity is beyond a State prosecutor’s normal range of expertise, and requires international cooperation, extensive resources, and often extraterritorial jurisdiction and extradition. Moreover, weak and corruptible judicial systems may appear to uphold justice by prosecuting offenders, but these cases may be mere formalities. There have been some positive developments, and in some cases the law is evolving in response to these challenges.

Separate legal entity
The doctrine of separate legal entity, or the existence of the corporate veil, is of crucial importance in the quest for corporate accountability. Sarah Joseph refers to it as “[t]he most outstanding issue” when considering holding parent companies to account for the actions of their subsidiaries.

Corporations can be made up of domestic and foreign subsidiaries and sub-entities, creating a “complex, interlocking” system. Corporations can protect themselves from liability by creating these complex legal entities, creating the appearance of independence from parent companies. The consequence of this is that the subsidiaries are not subject to the laws of the home State of the parent company, and the State of incorporation may have weak governance functions and be either unable or unwilling to regulate corporate behaviour. This effectively distances the parent company from the subsidiary, and makes legal liability difficult to establish. This has been particularly true in the extractive industry sector. In practice, this often means that the parent company will be in the home State, the victim and subsidiary will be in the host State, and sometimes the assets will be in a third State. Generally, the subsidiary will have limited funds, meaning victims are unable to receive appropriate remedies or compensation. However, the doctrine of separate legal entity makes this difficult. Moreover, this doctrine protects the parent company from reputational damage,

885 Beanal v Freeport-McMoran, Fifth Circuit, United States Court of Appeals, No. 98-30235, available online at http://laws.findlaw.com/5th/9830235cv0.html, last accessed 11 November 2009
886 UN Doc A/HRC/14/27, 9 April 2010, para 108
887 Joseph, Corporations and Transnational Human Rights Litigation, p 20
889 Meeran, ‘The Unveiling of Transnational Corporations: A Direct Approach’, p 162
particularly if the subsidiary has a distinctly different name. This dilemma is symptomatic of the governance deficiencies, and is becoming increasingly problematic as the process of global economic integration continues.

Given that corporations may have intricate corporate structures, which may be transnational in nature, this enable finances to be transferred within distinctly different enterprises. It is important to utilise freezing injunctions, whereby assets cannot be transferred, sold or moved. For example, as discussed in Chapter 1, Monterrico Metals will have a multi-million pound case brought against it in the High Court in London for its alleged involvement in the detention and torture of protestors at its Rio Blanco open copper mine in Peru in 2005.891 Richard Meeran, the solicitor for the plaintiffs, sought and obtained a freezing injunction against the company, obliging Monterrico Metals to keep £5 million worth of assets in the UK.892

Human rights litigants will often want to target the parent company for the activities of its subsidiaries. The subsidiary may not have the financial resources to provide adequate compensation, and the host State may be unable or unwilling to launch proceedings against the company. To establish liability, the connection between subsidiary and parent will need to be “sufficiently substantial.”893 In practice, this means the parent company exercises “some degree of regular control and knowledge about events and decisions occurring in its subsidiary,”894 such as an influence on internal frameworks and policies, such as employment procedures, budget requirements and other management operations.895

The response to the doctrine of separate legal entity is often seen as the need to “pierce the corporate veil.” This doctrine enables victims to seek redress from parent companies, who have greater resources than their subsidiaries. Such claims are usually brought in the State where the parent company is located.

---

892 ibid
894 ibid
There is no single agreed formula for when or how to pierce the corporate veil, and each jurisdiction has its own version of this legal doctrine. Generally, it must be shown that the parent company exerts some degree of control over the decisions made within the subsidiary.\textsuperscript{896} This is an important doctrine, as it is often the parent company that claimants want to hold accountable in the home State, by having the parent company found responsible for the acts of the subsidiary.\textsuperscript{897} Without this ability, subsidiaries could violate human rights in host States that may be unable or unwilling to regulate corporations. In effect, this would enable subsidiaries to operate with impunity.\textsuperscript{898} This is also tactically important, as the parent company will often have greater resources.

However, it can be notoriously difficult to achieve this and attribute responsibility to the parent company.\textsuperscript{899} Defence lawyers will argue the principle of separate personality, and the courts have tended to agree. For example, courts have recognised that Rio Tinto plc and Rio Tinto (London) Ltd have separate legal personality, and have held that accountability cannot be attributed carte blanche to Rio Tinto (London) Ltd.\textsuperscript{900} Attributing responsibility through the corporate group remains an aspect that requires greater clarity. Australian courts will consider “whether the profits are treated as the profits of the parent company; whether the company was the head and the brain of the trading venture; the contributions towards financing the subsidiary; and the degree of control the parent corporation exercise or is entitled to exercise over the running of the business conducted by the subsidiary.”\textsuperscript{901}

\textbf{Forum non conveniens}

The doctrine of \textit{forum non conveniens} provides that if a court is of the opinion that there is a more appropriate forum for the case to be heard in, then the case can be withdrawn. If the court is of the opinion that there is a more appropriate forum, the victim must establish that justice could not be achieved in the alternative forum.\textsuperscript{902} Quite often, the most appropriate forum, legally speaking,
would be in the State where the abuse took place. However, it is often the case that these States have legal systems that are weak and not fully functioning. Hence, this doctrine provides “a powerful incentive on the part of the defendants to try to stay claims in favour of a forum in which they know claimants cannot obtain justice.” 903 Nonetheless, some jurisdictions are making it harder for defendants to have cases thrown out on the basis of forum non conveniens. Australian courts, for example, have attempted to reduce the “procedural hurdle” for litigants, and have instituted a “plaintiff-deferential approach to the forum non conveniens issue.” 904 Courts in Australia will only decline the exercise of jurisdiction if the Australian court is a “clearly inappropriate forum.” 905 In addition, recent cases in the United States and the United Kingdom suggest that courts will be “critical of dismissing a case involved with gross international legal violations” on the grounds of forum non conveniens alone. 906

Non-justiciability: the political question

The legal principle of non-justiciability on the grounds of a political question is pertinent to corporate complicity. Bringing cases of complicity against corporations generally implies that a State has violated human rights. In home State jurisdictions, prosecutions for complicity where another State is the primary perpetrator may be non-justiciable on the doctrine of ‘political question’. Paradoxically, the greater the level of State involvement, the more likely it is that a case will be dismissed. 907 This issue was canvassed in the ExxonMobil case, where the US State Department wrote to the court and urged it to dismiss the case as a finding against the corporation could negatively impact on United States foreign policy. The State Department was concerned that the case could negatively impact relations with Indonesia, an ally in the war on terrorism. 908 The court did not accept this argument, but Circuit Judge Kavanaugh dissented, and agreed with the State Department’s argument that the appeal should be allowed and the case dismissed as non-justiciable on the grounds of political question, given the State Department’s explanation of how the case could harm US

903 ibid, p 163
904 Phillips and Nicolson, ‘Brief on Corporations and Human Rights in the Asia-Pacific Region’, p 37
905 ibid
908 John Doe v ExxonMobil Corporation et al, United States Court of Appeals for the District of Columbia Circuit, 12 January 2007, Judgment (No 01cv01357), p 3
interests.909 Similar challenges were faced in the United States during the case concerning the Abu Ghraib incident. In that case Judge Robertson cautioned that, “the more plaintiffs assert official complicity in the acts of which they complain, the closer they sail to the jurisdictional limitation of the political question doctrine.”910 Thus, international political considerations pose significant ramifications for achieving justice and ensuring access to remedy.

Limitations of State-based judicial mechanisms

Law is generally slow to develop, and tends to be reactionary. This characteristic is in sharp contrast to the “swift and often dynamic development of transnational corporate policy”, leaving regulation by existing law alone an inadequate solution.911 Yet law is capable of responding to the challenges presented by corporations.

When human rights law cannot be accessed, victims and survivors are often left to rely on domestic criminal and civil legal systems. As a report by Allens Arthur Robinson notes, domestic legal mechanisms “were not necessarily developed with the human rights violations of corporations in mind.”912 Although there has been some flexibility in the application of some of the legal doctrines in cases of corporate involvement in human rights violations, “other traditional legal doctrines may not be adequately equipped to accommodate these types of claims.”913 The greatest limitation of domestic legal regulation of transnational corporations is its jurisdictional impediments.914

There are practical difficulties to holding transnational corporations accountable. Well functioning judiciaries and strong judicial capacity are pre-requisites for ensuring remedies, either through criminal or civil channels. However, often the States in which corporations are involved in human rights abuse do not have a strong judiciary, resulting in significant barriers to judicial remedies. The ability of

909 John Doe v ExxonMobil Corporation et al. Judgement of Judge Kavanaugh, pp 23-47 (pp 1-25 of Judge Kavanaugh’s dissenting judgement). Judge Kavanaugh quotes from the State Department’s argument at pp 25-26 (pp 3-4 of Judge Kavanaugh’s dissenting judgement); see in particular his reasoning at pp 28-42 (pp 6-20 of Judge Kavanaugh’s dissenting judgement)
912 Phillips and Nicolson, ‘Brief on Corporations and Human Rights in the Asia-Pacific Region’ p 817
913 Phillips and Nicolson, ‘Brief on Corporations and Human Rights in the Asia-Pacific Region’ p 817
the home State to regulate the actions of one of its corporations operating in another State would require extraterritorial legislation. As the Special Representative has observed, “pressure from the business community in general can be a powerful deterrent to States exercising jurisdiction.”\(^{915}\) In many respects, State based mechanisms are not equipped for the provision of remedies for victims of corporate involvement in human rights abuse.\(^{916}\) While States should address any obstacles which prevent access to justice, “especially where alleged abuses reach the level of widespread and systematic human rights violations,”\(^{917}\) this is not something that any single State could tackle in isolation, and requires a concerted and cohesive international response, as will be discussed in the following chapter.

**Difficulties when seeking accountability in home States**

Home States generally do not regulate corporate behaviour extraterritorially, or take responsibility for the actions of their corporations abroad, but this is changing.\(^{918}\) This unwillingness is sometimes due to the home State’s support for, or own involvement in, corporate human rights abuse.\(^{919}\) It has tended to not be in a home State’s interests to regulate the activity of its corporations operating abroad: “[e]xperience indicates that governments are disinclined to make corporate misconduct a priority when the potential domestic economic and political fallout is high and the injured parties are citizens of a poor, far away country.”\(^{920}\) The domestic opposition to the ATCA from the business lobby, which was discussed previously, also highlights the perceived “competitive disadvantage” that home State regulation would place upon their corporations.\(^{921}\)

One very fundamental issue with requiring the home State to regulate corporate behaviour, and ensuring access to remedy, is determining who the home State actually is. States determine the nationality of corporations under their domestic laws, but the practice is complex. As identified by the International Court of Justice in the *Barcelona Traction* case,\(^{922}\) there is diverse State practice. There is

---

915 UN Doc A/HRC/4/35/Add.2, 15 February 2007, para 65  
916 UN Doc A/HRC/8/5, 7 April 2008, para 88  
917 ibid, para 91  
918 Woodroffe, ‘Regulating Multinational Corporations in a World of Nation States’, p 132  
919 Kinley, Nolan and Zerial, ‘The politics of corporate social responsibility’, p 39  
921 Collingsworth, ‘Bringing the Rule of Law to the Global Economy – Using the Alien Tort Statute to Hold Multinational Companies Accountable for Human Rights Violations’  
no definitive rule of international law to determine the nationality of legal persons, but usually nationality is determined by place of incorporation and location of main office.923

Common law states generally consider the place of incorporation as the nationality of the company, irrespective of where management site, or where the business operates.924 On the other hand, civil law countries generally consider the place of management as the determinant of nationality. There are practical difficulties in determining the ‘home State’, particularly as incorporation is beginning to lose its territorial aspect, with some jurisdictions not requiring any physical presence for incorporation to go ahead. Beyond incorporation, the financing of the corporation through the provision of export credits, or being listed on the national stock exchange do indicate elements of control, suggesting “political responsibility on the home State to regulate such corporations.”925 Nevertheless, corporations cannot change their nationality; to achieve the end result of a new nationality, a corporation would need to commence on a corporate succession procedure, whereby the corporation would need to dissolve and re-incorporate in (and move assets and management into) another jurisdiction.926

**Challenges when seeking accountability in host States**
The most obvious jurisdiction for holding corporations accountable is the State in which the crime or abuse takes place. However, corporate complicity poses its own unique sensitivities and challenges for accountability through host States, given that in many circumstances the State is the principal perpetrator. The main impediments to seeking redress in host States are the lack of resources, a lack of access to effective remedies, and jurisdictional limitations. Accountability for corporate complicity is enmeshed and embedded within the realm of *Realpolitik*, as discussed in Chapter 4, and while this should not impede the quest for accountability for corporate complicity in human rights abuse, it is a significant issue which may lead a State to be unwilling to prosecute. Moreover, many instances of corporate abuse and complicity in abuse have taken place in

---

923 UN Doc A/HRC/4/35/Add.2, 15 February 2007, para 54
926 Lowe, ‘Jurisdiction’, p 340
developing States, where foreign direct investment has been encouraged by
governments as a means to secure economic development.

The power differentials between corporations and States, and the inherent
challenges of enforcing domestic laws against transnational entities hinder
government ability to regulate corporations. It is not unusual for transnational
corporations to have greater economic power than the States in which they
operate, and they have great leverage given the States’ perceived need for
investment. Given the professed requirement for investment, many governments
lack the political will to regulate corporations, and enforce such regulations, for
fear that companies would choose to invest in an environment that is less
rigorously regulated, or over fear that established industries may withdraw; in
some cases corruption and bribery also plays a significant role.927 The challenge
is compounded in States with weak judicial institutions, where the rule of law is
lacking, or where there is civil unrest. Such States often have underdeveloped
legal and judicial systems, and may be unable (as opposed to unwilling) to
regulate corporate activity.

Alternatively, accountability mechanisms in some host States may result in a
situation where the outcome of criminal prosecutions is condemned by observers,
such as the prosecution in the DRC of government solders and Anvil Mining staff.
However, that prosecution was the first time that foreign employees of a
multinational corporation were tried for complicity in war crimes in the DRC,928
and in this respect it set an important precedent. Nevertheless, there were
limitations. For example, the Congolese government prevented investigations for
nearly a year, victims and witnesses report being intimidated, and the prosecutor
was pressured to drop the charges against the Anvil employees.929 He declined
to do so, and was transferred.930

The case went to trial in DRC, with nine Congolese soldiers prosecuted for war
crimes, and three employees of Anvil Mining prosecuted for complicity in war
crimes.931 The trial was heard by a military court, and all defendants were

927 Joseph, Corporations and Transnational Human Rights Litigation, pp 4-5
928 Global Witness Press Release, ‘Victims of Kilwa massacre denied justice by Congolese military court’
929 ibid
930 ibid
931 ibid
acquitted.\textsuperscript{932} The case was largely unreported in DRC, and according to journalists the government pressured the media to not report on the trial.\textsuperscript{933} Unlike the United Nations investigation which found that there had been 28 summary executions, the court found there had been no summary executions. The court found that fifteen government soldiers had been killed, but UN peacekeepers say the army suffered no casualties during the fighting.\textsuperscript{934} Such deficiencies of host State judicial systems is one of the key reasons supporting the role of the international human rights framework and supra-national standard setting and accountability mechanisms.

Every legal system faces the same “fundamental crisis of legitimacy” when charged with ensuring that the marginalised and powerless have access to remedy and redress against “the depredations of the powerful”.\textsuperscript{935} This is particularly salient in cases of corporate complicity in developing States, where it is difficult for plaintiffs to bring cases as there is usually no legal aid, making the cost of such action prohibitive.\textsuperscript{936} Given these practical limitations of host State regulation, other sources of accountability should be examined. It is both unrealistic and unsatisfactory to expect accountability measures for corporate human rights abuse “to emanate exclusively from the host State in which that operation exists.”\textsuperscript{937} The great incongruity is that States who most desperately need to enforce human rights protection are most often the least able to enforce such protections against corporations; alternatively, these States may be reliant upon foreign direct investment and may therefore be unwilling to enforce such protections. It is simplistic to argue merely that these States should do more, without considering the limitation of the political dimension within which they operate. Additional forms and sources of accountability must be considered.\textsuperscript{938}

The Victim’s Right to Remedy: Access denied?

Justice and accountability mechanisms for corporate complicity are severely inadequate. Both judicial and non-judicial mechanisms are important, and both need to be improved. More companies need to incorporate grievance mechanisms into their procedures. In addition, shareholders should be

\textsuperscript{932} ibid
\textsuperscript{933} ibid
\textsuperscript{934} ibid
\textsuperscript{935} Gilbert and Russell, ‘Globalization of criminal justice in the corporate context’, p 212
\textsuperscript{936} Joseph, Corporations and Transnational Human Rights Litigation, p 5
\textsuperscript{937} ibid, pp 5-6
\textsuperscript{938} Joseph, Corporations and Transnational Human Rights Litigation, pp 5-6
encouraged to engage in socially responsible investment, monitor the behaviour of the companies in which they are shareholders, and raise their concerns. Using State-based judicial mechanisms for holding transnational corporations accountable poses unique jurisdictional problems, and the impact of State self-interest is never far away. Victims, who are often from developing countries, have resorted to bringing private civil cases against transnational corporations in United States courts. This attracts considerable cost, and a case of corporate complicity under the ATCA is yet to be heard on its merits. Legal impediments, such as *forum non conveniens* and non-justiciability on the grounds of a political question, are not immune to cases brought under ATCA. The key challenge of transnational corporate litigation and accountability is the doctrine of separate legal entity, which makes it difficult to trace accountability from subsidiaries to the parent company. This is an aspect which warrants greater research. Victims are frustrated at every turn, and every step along the path to justice and accountability is imbued with State self-interest, either from the home State, the host State or both. While the State-based mechanisms are not ideal for transnational corporate accountability, they could be put to much more effective use, if there was the political will or inclination to do so.
CHAPTER 6

BEYOND THE FRAMEWORK:
INTERNATIONAL GOVERNANCE AND THE
HUMAN RIGHTS REGIME

The previous chapter analysed the accountability mechanisms that are currently available for victims, and found them wanting. This is a considerable problem, both for the Framework given that access to remedy is one of the pillars, and also for victims who are searching for justice and accountability. This chapter will consider the role of international governance and the human rights regime, including the International Criminal Court, in securing respect, and achieve justice and accountability when human rights are violated, and will argue for a co-ordinated, international approach to the question of access to remedy. It will ultimately argue that this global problem requires global solutions.

**Bringing corporations within the human rights regime**

If respect for human rights is to become the groundnorm of the global social and economic order, the conduct of significant non-state actors needs to be integrated into international human rights law or respect for human rights become part of corporate law.939

The impact and influence of corporations on the realisation of human rights has received increased attention over the last twenty years. This challenges the traditional underpinnings of international human rights law, which are intended, largely, to protect the individual against the State. Yet, humanitarian catastrophes and serious human rights violations can be exacerbated and facilitated by corporations, which then benefit from such egregious acts. This has led many to

challenge the narrow underpinnings of international human rights law, which appear “to be based more on a formalistic understanding of international law, than on the realities in which people live.” The protection and recognition of human dignity should be the founding principle of human rights law, and this protection should not be dependent upon the legal personality perpetrating, exacerbating or enabling the abuse.

As in all aspects of human rights, enforcement instruments are of critical importance. Without enforcement, human rights remain aspirational ideology and theory. Chapter 5 considered access to remedy through State-based mechanisms, and a number of deficiencies were identified. Many of these deficiencies stemmed from principles of self-interest, which is inherent in international relations. It is simply unacceptable that human rights, and the protection and recognition of them, can be “subordinated to political engagement.” Yet, as has been discussed, rampant neo-liberal globalisation and economic integration, coupled with a State-based accountability structure, has meant that human rights protection is subject to political realities and considerations, and this has resulted in the gaping governance deficiencies. The question to consider now is whether the human rights regime can provide a more suitable, responsive and just alternative.

The Special Representative has recognised the governance gaps that exist in the business and human rights mandate. However, in its efforts to confirm the existing obligations of States and corporations, the Protect, Respect, Remedy Framework does not provide much practical guidance on how to address these deficiencies. While the Framework is not intended as a panacea, as a restatement of existing obligations and responsibilities the Framework will be of little effect if these existing obstacles are not addressed. Reiterating the current situation will not, in and of itself, lead to positive outcomes. However, the Framework having been adopted by the Human Rights Council is now part of the push to develop international law and incorporating the international legal system into the Framework may assist in addressing many of the existing practical

941 Kinley, Nolan and Zerial, ‘The politics of corporate social responsibility’, p 39
942 The Human Rights Commission, and subsequently the Human Rights Council, recognised the need for further research and debate about whether there should be an international, supra-national regime to enforce accountability.
challenges resulting from the Framework, and may be able to neutralise them. As neither governments nor corporations can credibly argue against the applicability of human rights standards, these standards could be relied upon to apply pressure for changing behaviour.\textsuperscript{943} Currently, corporations face a range of expectations from various stakeholders, and there is no definitive agreement as to the scope of the responsibility of corporations to respect human rights.\textsuperscript{944}

The human rights regime is the most universal and legitimate framework to determine the scope of corporate responsibility, accountability and governance, and this was recognised by the Business Leaders Initiative on Human Rights.\textsuperscript{945} The business and human rights agenda is a universal issue that needs to be considered by international civil society, the human rights and international criminal legal regimes. The human rights regime could be utilised as a review system for domestic decisions that impact on human rights; or, when faced with international crimes, a system of complementarity could be utilised, whereby jurisdiction is only activated if a State is unwilling or unable to prosecute, which may be a preferred option to ongoing impunity. In this way, the Framework could then be understood as having four pillars: Protect, Respect, \textit{Review}, and Remedy.

The threat of personal prosecution may have a deterrent and preventative effect, perhaps even more so than if the corporation itself was to be held accountable. Yet, victims would be more likely to receive restitution and reparations for the harm they have suffered if the corporation itself was held accountable for the harm caused, rather than the individual. Access to reparations under international criminal law is an important aspect of a victim’s access to remedy. The General Assembly has recently adopted the United Nations Basic Principles as discussed in the previous chapter, which provide an individual right to remedy for victims of gross human rights violations, “irrespective of who may ultimately be the bearer of responsibility for the violation.”\textsuperscript{946}

\begin{footnotes}
\begin{enumerate}
\item Addo, ‘Human Rights and Transnational Corporations – An Introduction’, p 24
\item UN Doc A/HRC/11/13/Add.1, 15 May 2009, summary, GA Res 60/147, annex, Principle 3(c)
\end{enumerate}
\end{footnotes}
The regulation of corporations through human rights is an area where researchers have “only started to scratch the surface” and more research is required.947 It is generally accepted that the business and human rights agenda, and the corporate accountability project is an “ambiguous and murky” area of law and policy.948 Human rights law and the human rights regime could provide the legal basis for corporate accountability, and the foundation of a good governance framework. Human rights principles are “sufficiently diverse, pervasive and flexible” to provide such a foundation.949

Using human rights as the basis of legal accountability for corporate involvement in human rights abuse would be more appropriate than a reliance on domestic criminal and civil legal systems. Human rights are, by definition, universal and would therefore be an appropriate regime to regulate the widespread and trans-jurisdictional operations of corporations. Human rights have achieved a level of global respect, at least in theory, and corporations could not easily disregard such standards. Olivier De Schutter advocates a globalisation that emphasises “an enriched understanding of the obligation of transnational corporations to respect human rights.”950 The impact and influence of economic liberalisation on human rights is clearly evident; it is time that human rights considerations impacted on the process of economic liberalisation.951

Nevertheless, international law and the human rights regime have been slow to respond to the growing power of corporations. International law has not articulated the human rights obligations or responsibilities of corporations, particularly in regard to complicity, and has failed “to provide mechanisms for regulating corporate conduct in the field of human rights.”952 In order to achieve consistency, corporate complicity requires a concerted and dedicated response from the international criminal law and human rights regimes. This chapter will argue that accountability for corporate complicity would be best achieved through a human rights framework which would complement the Protect, Respect,
Remedy Framework. Such a human rights framework could include a new international treaty, which could establish a relevant treaty body. International legal responses are necessary in the long term.

As was discussed in the previous Chapter, one of the most significant recent developments in terms of legal accountability for corporate conduct that amounts to international crime has come from States incorporating international standards into their domestic jurisdictions. The consequence of States adopting principles from the Rome Statute of the International Criminal Court has been an extension of liability to corporations, as many domestic jurisdictions do not differentiate between natural and legal persons; a law meant for individuals also applies to corporations. This most influential development has largely been “an unanticipated by-product of the implementation and incorporation process. While it is a welcome development, and corporations should certainly be held accountable for complicity in egregious human rights abuse, including crimes against humanity, war crimes and genocide, “its actual operation will reflect variations in national practice, which is not an ideal solution for anyone.”

Moreover, this process relates solely to the crimes over which the International Criminal Court has jurisdiction: genocide, crimes against humanity and war crimes; similar developments have not occurred for other human rights, leaving “protection gaps for victims” and “predictability gaps for companies.” It is in everyone’s interest that there are clear, internationally agreed human rights standards with explicit enforcement mechanisms.

**International cooperation**

There is a need for a structural reconceptualisation of how States view their responsibility to protect human rights: this obligation must transcend all State operations and policy. Given that the State duty to protect human rights is at the core of the business and human rights dilemma, it is time that States ceased their narrow approach to the issue. The business and human rights agenda needs to be advanced and integrated “beyond its currently narrow confines.” Furthermore, States should provide corporations with guidance, and regulation.
The less information States provide to corporations, “the more they increase reputational and other risks to business.”

Corporations can utilise their mobility and escape liability by exploiting the governance gaps. In addition, corporations can apply pressure on States to prevent them exercising their jurisdiction over the corporation. Individual States working in isolation cannot adequately address the barriers to effective remedies for corporate involvement in human rights abuse: there is a need for international cooperation, leading to an international approach with appropriate international accountability mechanisms.

There is a role for international cooperation in raising awareness, building capacity and solving problems. States need to utilise existing forums to “enhance peer learning”. Such forums include the treaty bodies, National Contact Points in OECD countries, and the Human Rights Council’s Universal Periodic Review. As the Special Representative has observed, “[n]o serious intergovernmental dialogue on these issues is evident in international trade and financial institutions, with the exception of the IFC and OECD, in part reflecting the involvement of private sector actors.” Similarly, building capacity is not high on the agenda; consider, for example, the use of stabilisation clauses in investment agreements. This precludes a State from fulfilling its duty to protect human rights. Problem solving is particularly important in conflict areas, where the human rights regime cannot operate effectively.

The Special Representative, and his mandate, has turned his attention towards assisting States to realise and recognise how to better protect human rights, which will involve a widening of the current narrow confines within which States seek to discharge their duties. Having received unprecedented levels of support from stakeholders on all side of the business and human rights agenda, it will be interesting to see if this support continues as the Framework is operationalised. Indeed, the support may have been due to the lack of standard setting detailed within the Framework; support may wane as States and corporations are further

---

959 UN Doc A/HRC/8/5, 7 April 2008, para 23
961 UN Doc A/HRC/4/35/Add.2, 15 February 2007, para 65
962 UN Doc A/HRC/11/13, 22 April 2009, para 39
963 ibid
educated about their obligations and responsibilities. The sincerity of the support will be indicated as the Framework is implemented, and as the business and human rights agenda further develops at the international level.

There is “no single silver bullet solution”; it is a question of changing behaviour and addressing the governance gaps. Any attempt at corporate regulation needs to acknowledge that the governance gaps are structural, and therefore corporate regulation needs to be seen as part of the nuanced reconceptualisation of governance deficiencies that have arisen out of the period of increased globalisation and economic integration. If it is to respond to the crucial challenges that exist, the new framework will need to be universal, systemic and dynamic. Such a framework “requires a model of strategically coherent distributed action focused on realigning the relationships among actors, including States, corporations and civil society”.

**Accessing remedy and securing accountability: a co-ordinated, international response**

There is a “patchwork of grievance mechanisms” within the international system, and there is no guarantee that victims will be able to seek redress for corporate abuse. The patchwork is symptomatic of an incoherence of both international law and policy. The reliance on domestic jurisdictions, and the associated limitations, is insufficient when holding transnational entities accountable. The existing regulatory systems are ill-equipped to protect the rights of individuals in our ever-increasingly globalised world. These challenges were discussed in the previous Chapter. Globalisation has raised the issue of “shared responsibility” between many actors: between parent companies and subsidiaries; between corporations and host governments; between corporations and home governments. The human rights regime could assist in the provision

---

964 UN Doc A/HRC/8/5, 7 April 2008, para 7  
965 UN Doc A/HRC/4/35/Add.2, 15 February 2007, para 34  
966 UN Doc A/HRC/8/5, 7 April 2008, para 102  
967 Woodroffe, ‘Regulating Multinational Corporations in a World of Nation States’, p 131  
968 Addo, ‘Human Rights and Transnational Corporations – An Introduction’, p 32: “Apart from the problem of enforcement, there is the difficulty of addressing the question relating to the spheres of shared responsibility between the parent corporations and subsidiaries or between foreign corporations and host governments. The marketing of useful but dangerous drugs, the manufacture of products that can have dual or multiple purposes, including misuse for human rights violations, require the sharing of responsibilities between transnational corporations and governments. There are no clear rules in human rights law for sorting out the responsibilities in this field. State sovereignty and the legitimate desire to make profit may weigh heavily against effective corporate action in this regard although there could be practical ways for transnational corporations that so wish to effectively accomplish their share of human rights responsibilities raise in this context.”
of clear guidance to decipher and determine these responsibilities; what is needed is a reconceptualisation of the nature, and our understanding, of corporate responsibility and accountability within human rights discourse.

Given the global reach of transnational corporations, and specifically their transnational operations, it is important that international consensus is reached on the issue of corporate accountability. Clearly, domestic jurisdictions have a significant role to play; but they will be unable to meet all the jurisdictional challenges posed. A human rights framework would be most appropriate, whereby domestic mechanisms are exhausted before international mechanisms become available. Given the challenges of enforcing the responsibility to respect, it is imperative that supra-national mechanisms are available. Moreover, many instances of corporate involvement in human rights abuse would, if substantiated, amount to violations of international criminal law, and there is no legal or philosophical obstacle to holding corporations to account for these crimes.

The key challenge is to create a framework that recognises the rights and responsibilities of corporations, while simultaneously respecting the founding principles of the human rights regime.\textsuperscript{969} It is a challenge that must be met, if the human rights regime is to maintain relevance in the face of these new realities. As Philip Alston argues:

A refusal to recognize and accommodate the new realities in relation to non-state actors will only serve to marginalize the existing arrangements and underscore the need to bypass it in devising future arrangements. An international human rights regime which is not capable of effectively addressing situations in which powerful corporate actors are involved in major human rights violations, or of ensuring that private actors are held responsible, will not only lose credibility in the years ahead but will render itself unnecessarily irrelevant in relation to important issues.\textsuperscript{970}

The potential of international law needs to be explored, particularly in light of the limitations of domestic jurisdictions when holding transnational actors to account.


\textsuperscript{970} ibid
As with other systems within the human rights regime, State avenues would need to be exhausted before any remedies could be sought. It would represent a system of complementarity not unlike that established by the Rome Statute of the International Court. However, there is no agreement that this is the appropriate way to proceed, with disagreement stemming from the “fundamental mechanism and design of any standards seeking to regulate corporate action that violates human rights.”

Minimalists believe international law should not bind corporations, beyond initiatives such as the Global Compact; maximalists believe international law can and should be used to regulate corporations. Some maximalists argue for an international forum similar to the International Criminal Court to hear cases against corporations. The Special Representative has noted that there are no conceptual obstacles to States choosing to hold corporations directly responsible in such an international forum. However, the challenge would be reaching agreement amongst States for international law to directly bind corporations, and to create such a forum, and then to implement such a system.

The need for an internationally agreed standard
The Protect, Respect, Remedy Framework provides a conceptual basis upon which to develop thinking in relation to the business and human rights agenda, but it does not provide a set of standards for debate. Consistent international standards are needed, particularly so in cases where national laws fall short of international standards. This is a complex dilemma for companies, given that States may require compliance with their laws, while human rights advocates would expect corporations to adhere to international standards. While every allegation of corporate complicity will turn on its unique facts and there will never be an exhaustive list of examples of corporate complicity, such a standard setting document would be useful. Standards for determining corporate complicity, at least in relation to grave violations, should be internationally agreed and

---

971 Kinley, Nolan and Zerial, ‘The politics of corporate social responsibility’, p 36
972 ibid
973 ibid, p 39
974 UN Doc A/HRC/11/13, 22 April 2009, para 66
incorporated into domestic jurisdictions. The problem is global: it is therefore logical to seek a global standard.975

The TNC Norms sought to provide such a standard-setting document. While there is merit in pursuing the TNC Norms, it appears that it is not a priority of the Special Representative. Indeed, he has commented that the TNC Norms, and the impasse, “generated adverse consequences for the realization of rights.”976 There will inevitably be some burdens placed on corporations as initiatives are developed and implemented. Concerns from business should be acknowledged, but they should not be able to stall the process. It is difficult to envisage an international standard setting document that looks significantly different from the TNC Norms, or at least their core provisions. Kinley et al note that there is “intriguing cogent arguments for an international document that speaks directly to corporations”,977 but that the international legal path ahead (at least in the foreseeable future) is almost certainly the road of State responsibility and obligation. It is crucial that there is an international response to this issue, and international law “must be the spine of any serious effort to reform this area”.978 A standard setting document like the TNC Norms could be used as the basis for the next stage of development in the area of business and human rights, as States debate and formulate such a common understanding. Similarly, the ‘Essential Steps’ drafted by the Business Leaders Initiative on Human Rights, which provides a commentary on corporate considerations in relation to the human rights that form part of the International Bill of Human Rights is likely to prove a crucial tool as corporations move towards embedding human rights into their corporate culture.979

The TNC Norms initiated much debate, albeit fierce, and helped delineate the boundaries of corporate accountability. Importantly, they ensured that the issue of corporate accountability for human rights abuse was placed on the international agenda. That in itself is an impressive achievement. The Special Representative has commented on the difficulties and challenges he faced in raising the issue of standards without having a return to the divisive and futile debates surrounding

---

976 Ruggie, Remarks at International Chamber of Commerce
977 Kinley, Nolan and Zerial, ‘The politics of corporate social responsibility’, p 41
978 ibid
It is clearly important to identify the parameters of the State duty to protect and the corporate responsibility to respect, but it would be “counterproductive” to reject the TNC Norms altogether. David Kinley and Rachel Chambers call for a “mature instrument of public international law to emerge, after appropriate modification and amendment, from the presently neophyte Norms.” This new instrument could provide victims with an avenue of redress when their own legal systems are either unable or unwilling to provide a remedy. Such an instrument will provide a more level playing field, with States and corporations across the globe bound by the same standards.

Carlos Vazquez suggests that a solution may be “an agreement by developing countries regarding standards for multinationals operating in their territory.” Any such agreement would require appropriate enforcement mechanisms, and would likely still be reliant on State-based enforcement mechanisms. Jessica Woodroffe argues this situation requires a regulatory framework, building on and strengthening existing systems, rather than another international agreement. Given the lack of clarity, it seems that both are an imperative: the international agreement as a basis of certain standards, and a strengthened regulatory framework in which to uphold those minimum standards. Without proper legal enforcement, standards remain empty theory; aspirations that offer no protection. The Special Representative is yet to fully consider the creation of such enforcement mechanisms. While international law is by its nature difficult to enforce, such an instrument should have certain enforcement provisions, to “ensure that the standards are not simply ignored as toothless tigers.” The preparation of such an instrument would not be inconsistent with the Framework. Moreover, it would address the governance deficiencies identified by the Special Representative.

---

980 UN Doc E/CN.4/2006/97, 22 February 2006, para 55
982 ibid, p 495
984 Woodroffe, ‘Regulating Multinational Corporations in a World of Nation States’, p 132
985 Kinley, Nolan and Zerial, ‘The politics of corporate social responsibility’, p 39
986 Kinley and Chambers, ‘The UN Human Rights Norms for Corporations’, p 495
A treaty regarding corporate accountability?

It has been argued that the most effective way to achieve corporate accountability for human rights violations would be to enter into an international treaty that specifies the required standards and requires States to take action, either criminal, civil, or administrative, to provide remedies for these violations. Despite the precedent set by the drafting of the draft TNC Norms, the drafting process would be a valuable opportunity for international consensus to be reached on the parameters of corporate accountability for human rights violations. An agreement should establish the standards of behaviour expected, and require States to enforce their own criminal, civil or administrative laws on corporations. An international treaty would be subject to variation between national enforcement mechanisms, but would provide certainty for all stakeholders. A treaty would be drafted by States, and require State consent to be bound by its terms. It remains to be seen whether the support for the Framework will translate to developments including a treaty to codify its requirements. The legal structures exist to engage in such a process, but such a development would require political will of States.

Any multilateral agreement requiring States to hold corporations accountable should draw the standards from the existing international human rights treaties, in particular the International Bill of Human Rights, and could build upon the developments made by the Business Leaders Initiative on Human Rights. This includes economic, social and cultural rights, including harm to indigenous populations and damage to the environment and non-derogable rights, such as the right to life, the right to freedom from torture, and the right to freedom from arbitrary arrest and detention. It should also make provision for grave breaches and international crimes, including genocide, crimes against humanity and war crimes. Attention should be given to formalising the State duty to protect, regardless of whether a treaty sought to directly place obligations on corporations.

Importantly, such an agreement should establish its own body to monitor and review the business and human rights agenda, with such a body able to provide advice, guidance and review to States and to corporations regarding their

---

987 Global Policy Forum, ‘Corporate Liability for Violations of International Human Rights Law’
988 ibid
respective obligations and responsibilities. In addition, there have been calls for a global ombudsman to receive complaints. The Special Representative has stated that the mechanism “would need to provide ready access without becoming a first port of call; offer effective processes without undermining the development of national mechanisms; provide timely responses while likely being located far from participants; and furnish appropriate solutions while dealing with different sectors, cultures and political contexts.”

To achieve such outcomes it would need to be well-resourced, and the Special Representative has cautioned that careful consideration should be given to whether such a mechanism could meet the stated outcomes before moves are made towards implementation of such a scheme.

Another dimension: using international law to regulate corporations

States lie at the heart of the international legal system. The international legal system exists to regulate the behaviour amongst and between States, and primarily applies to States. Under the classic view of international law, only States are bound by international law. Developments in the area of international criminal law and international humanitarian law have augmented this somewhat, and individual responsibility can attach for a small category of international crimes, including torture, slavery, genocide, crimes against humanity and war crimes. Corporate officials and executives can be held responsible for their involvement in these kinds of crimes. However, it is a shortcoming of international human rights law that corporations, as non-state actors, are currently excluded from direct responsibility for human rights violations.

The international legal framework privileges States; for example, States as sovereign entities elect which treaties to become parties to, and choose to

---

989 UN Doc A/HRC/8/5, 7 April 2008, para 103
990 ibid
992 In 2006, the Special Representative held a number of legal workshops on corporate responsibility under international law, and issues in extraterritorial regulation. These were held at the Royal Institute of International Affairs (Chatham House), at the Council for Ethics for the Norwegian Government Pension Fund in Oslo, in Brussels and in New York. The fundamental question addressed by these legal workshops was: “in the absence of States acting to attached obligations for human rights to corporations, are there any potential grounds under international law for doing so?” See UN Doc A/HRC/4/35/Add.2, 15 February 2007
respect the United Nations and its various entities. International law regulates
the conduct of corporations and other non-State actors to some extent, but the
vast majority of this regulation occurs indirectly, because States are under an
obligation to regulate the corporations and other non-State actors. However,
there is no theoretical obstacle to placing more direct obligations on
corporations. States could choose to have international law directly bind
corporations, just as States chose to develop the responsibility of the individual
under the international criminal legal system.

It has been argued that the classic view “oversimplifies the existing state of
international law”. Indeed, there has been an emerging trend over the past
thirty years to extend treaty obligations beyond States to individuals,
 organisations and private enterprise. However, on the whole they do this by
obligating States to ensure certain acts do not occur. For example, the
Convention on Combating Bribery of Foreign Public Officials requires States to
criminalise bribery, whether committed by an individual or a corporation.
Similarly, while the Convention on the Elimination of All Forms of Racial
Discrimination requires corporations to not discriminate on the basis of race, it is
States that are required to prohibit that act.

In some limited and exceptional circumstances, international law can place direct
obligations on non-State actors, including non-governmental bodies. Some
treaties expressly prohibit non-governmental bodies from committing universal
crimes, including genocide, crimes against humanity and war crimes. The
extent of direct obligations under customary international law is “highly
uncertain.” The International Criminal Tribunal for Rwanda, the International
Criminal Tribunal for the Former Yugoslavia, and the International Criminal

---

994 States do not choose to be bound by customary international law; customary international law binds all
States once it is formed.
995 Vazquez, ‘Direct vs Indirect Obligations of Corporations under International Law’, p 930; Joseph,
Corporations and Transnational Human Rights Litigation, p 9; see also Nicola Jägers, ‘The Legal Status of the
Multinational Corporation Under International Law’ in Michael Addo (ed), Human Rights Standards and the
996 Vazquez, ‘Direct vs Indirect Obligations of Corporations under International Law’, p 930; International Council
on Human Rights, ‘Beyond Voluntarism’, p 64
997 Colin Warbrick, ‘States and Recognition in International Law’ in Malcolm Evans (ed), International Law
(Oxford University Press, Oxford, 2003), p 206
998 McCrorquodale, ‘The Individual and the International Legal System’, p 322
999 UN Doc A/HRC/4/35/Add.2, 15 February 2007, para 12
1000 International Peace Academy and Fafo ‘Business and International Crimes: Assessing the Liability of
Business Entities for Grave Violations of International Law’, p 19
1001 Vazquez, ‘Direct vs Indirect Obligations of Corporations under International Law’, p 934
1002 Joseph, Corporations and Transnational Human Rights Litigation, pp 9-10
1003 ibid
all have jurisdiction over individuals charged with genocide, crimes against humanity and war crimes. This does not, however, mean that non-governmental liability is limited to these crimes; it merely reflects subject matter jurisdiction of the respective statutes.\footnote{ibid}

It is essential that the role of international law in securing corporate accountability be fully explored. Legal accountability is essential, as this will ensure victims have access to appropriate redress for their suffering, including compensation, restitution, and other damages for any losses they have endured.\footnote{ibid} As the International Council on Human Rights notes:

> Just as human rights law was initially developed as a response to the power of states, now there is a need to respond to the growing power of private enterprise, which affects the lives of millions of people around the world. The law is not and should not be static. It must evolve if it is to meet the needs of societies, and should reflect prevalent economic, political and social norms, including ethical values. The concept of the sovereignty of states, which has been eroded by the development of human rights, should not be replaced by a new corporate sovereignty, which is unrestricted or unaccountable.\footnote{ibid}

Law, including international law, is a vehicle for social change; as law develops, it considers the social values within which it is anchored, and expressions of societal moral outrage at corporate impunity may lead to legal developments. However, the relationship between economic globalisation and human rights protection is dynamic and complex and David Kinley warns that it is unlikely that the rule of law will be the panacea to this intolerable situation. He argues for a more nuanced approach that acknowledges the political, economic and social dimensions in addition to the legal considerations. He believes that only then will there be a possibility of delivering human rights protection from the business sector.\footnote{David Kinley, ‘Human Rights, Globalization and the Rule of Law: Friend, Foe or Family?’ (2002-3) 7 UCLA Journal of International Law and Foreign Affairs 239} This may be the case, but this should not prevent the development of international standards and enforcement mechanisms.

\footnote{ibid} \footnote{ibid} \footnote{International Council on Human Rights Policy, ‘Beyond Voluntarism’, p 10}
There is “no conceptual barrier” to prevent corporations being held accountable under international law for international crimes.\(^\text{1008}\) This is reflected in a number of codes and international standards that have ‘soft law’ status, as they have been agreed by a number of States as being appropriate standards. While treaty-based international law and customary international law bind corporations indirectly through States, soft law instruments are evolving to regulate corporations directly.\(^\text{1009}\) Such instruments include the TNC Norms, the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the UN Global Compact.\(^\text{1010}\) Soft law instruments are relevant, as these can lead to “the establishment of a rich set of sources from which new binding standards can emerge.”\(^\text{1011}\) Yet the ‘hardening’ process can be a lengthy one, and it can be difficult to determine at what point it has occurred, and to what extent. For example, the International Council on Human Rights Policy has observed in relation to the OECD Guidelines that “[f]urther research would be needed to assess whether an intention to create legally binding norms emerges from delegates’ statements during the OECD’s review of its Guidelines, from the work of the Committee that interprets the Guidelines, and from their application in national law and practice.”\(^\text{1012}\)

Aside from these soft law instruments, there have been few developments at the international level, with “little movement in establishing direct legal obligations of corporations under the international bill of human rights and related instruments.”\(^\text{1013}\) This lack of movement on the international level maintains the existing protection gap for victims, given that governments are sometimes unable or unwilling to hold corporations to account, either for policy reasons or due to shortcomings in their legal systems.\(^\text{1014}\) Given the lack of regulation in the face of the potential consequences of the harm that can be wrought, there is a need for a more immediate response. Clearly the process of recognizing, developing and

\(^{1008}\) International Council on Human Rights Policy, ‘Beyond Voluntarism’, p 64

\(^{1009}\) Ibid, p 73

\(^{1010}\) The TNC Norms were adopted by the United Nations Sub-Commission on the Promotion of Human Rights and it is therefore likely that they have soft law status.

\(^{1011}\) Peter Muchlinski, ‘Human Rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations’ (2003) 3 Non-State Actors and International Law 123, p 129.; Soft law can ‘harden’ over time to create binding international norms.

\(^{1012}\) International Council on Human Rights Policy, ‘Beyond Voluntarism’, p 68; If the OECD Guidelines did form part of customary international law, this would lend support to the argument that corporations can be bound by international law.

\(^{1013}\) Ruggie, Remarks at International Chamber of Commerce

\(^{1014}\) Ibid
agreeing international law is an often slow and arduous task, but nevertheless consensus is required as a matter of urgency.

Moreover, the International Council on Human Rights Policy argues that “there is a clear basis in international law for extending international legal obligations to companies in relation to human rights.”\textsuperscript{1015} The Council believes that if “stronger international legal rules [existed] in regard to companies, it is likely that they would give priority attention to steps that States (and national institutions) should take to better regulate corporate conduct.”\textsuperscript{1016} On the issue of whether international law could bind private actors, including corporations, the Council states that it is “entirely appropriate to apply international legal obligations to companies.”\textsuperscript{1017} The Council notes that many corporations access private international law forums, including international commercial dispute resolution mechanisms and other compensation forums and have benefited from these developments.\textsuperscript{1018} Many corporations have pursued their own interests during these developments, and have benefited from the protections of international law. As such, it is reasonable to expect that duties may also be placed on them. It is now a matter of convincing States of the need for, and benefit of, international regulation and accountability structures that would complement the existing State-based mechanisms and self-regulation procedures. Given the political considerations that have prevented corporate accountability in domestic legal jurisdictions, the opportunity of an international forum to hold corporations to account may indeed be preferable to some States.

The Special Representative has argued that there is “fluidity in the applicability of international legal principles to acts by companies.”\textsuperscript{1019} Furthermore, he has observed the possibility of an emerging customary international law whereby “corporations may be held liable for committing, or complicity in, the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labour, torture and some crimes against humanity.”\textsuperscript{1020} Nevertheless, the Special Representative has made it clear that the developments do not indicate that international law binds directly on corporations:

\textsuperscript{1015} International Council on Human Rights Policy, ‘Beyond Voluntarism’, p 2
\textsuperscript{1016} ibid, p 11
\textsuperscript{1017} ibid, p 12
\textsuperscript{1018} ibid, pp 56-57
\textsuperscript{1019} UN Doc E/CN.4/2006/97, 22 February 2006, para 64
\textsuperscript{1020} ibid, para 61
None of these changes, however, support the claim ... that international law has been transformed to the point where it can be said that the broad array of international human rights attach direct legal obligations to corporations, a claim that has generated the most doubt and contestation.\textsuperscript{1021}

International lawyers generally divide the key actors into State actors and non-State actors, with States remaining the sole subject of international law; textbooks, too, maintain this argument, “despite its ever-diminishing capacity to describe the evolving reality.”\textsuperscript{1022} The concept of legal personality can evolve and develop, and the International Court of Justice supported this argument in the \textit{Reparations for Injuries} case, where it stated that “subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community”.\textsuperscript{1023} Evidently, progress in this area will require “[r]econciling the traditional academic view of international law with the real human rights failings of all states”,\textsuperscript{1024} an immensely difficult task.

Arguments surrounding whether corporations are ‘subjects’ of international law has “impeded conceptual thinking”,\textsuperscript{1025} and corporations should be viewed as ‘participants’ at the international level, rather than ‘subjects’ of international law.\textsuperscript{1026} Rosalyn Higgins generally prefers the use of the term ‘participant’, and argues that “the whole notion of ‘subjects’ and ‘objects’ has no credible reality, and, in my view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint”.\textsuperscript{1027} Thinking of corporations as participants will enable a more detailed analysis of the practical and conceptual role of corporations in the international system.\textsuperscript{1028} The process of identifying corporate obligations should ‘move up’ from the obligations on individuals, rather than moving ‘down’ from State obligations. While the list of

\textsuperscript{1021} ibid, para 64
\textsuperscript{1022} Alston, ‘The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’, p 20
\textsuperscript{1023} ibid’, p 19, referring to the Reparations for Injuries Case, 1949 \textit{ICJ Rep}, 178
\textsuperscript{1024} Kinley, Nolan and Zerial, ‘The politics of corporate social responsibility’, p 39
\textsuperscript{1025} UN Doc A/HRC/4/35, 19 February 2007, para 20
\textsuperscript{1026} ibid
\textsuperscript{1028} McCorquodale, ‘The Individual and the International Legal System’, p 322
responsibilities would be incomplete, it would reflect the obligations in relation to international crimes, which are the most accepted obligations.\footnote{1029 UN Doc A/HRC/4/35/Add.2, 15 February 2007, para 18}

The international community is “poly-centric”, and viewing it as a completely State-based community will provide a “rather distorted image” of the world.\footnote{1030 Philip Alston, ‘The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’, p 4}

Such a “monochromatic” view of the world ignores current developments, making it “much more difficult to adapt the human rights regime in order to take adequate account of the fundamental changes that have occurred in recent years.”\footnote{1031 ibid} What is required is a “re-imagining”, or a “re-interpretation” of the concepts of the human rights regime and its relationship with those actors within it.\footnote{1032 ibid} The credibility of the human rights regime will be undermined if it is unable to hold corporations, as non-State actors, accountable for their actions. The accountability framework needs to be developed if it is to operate effectively to account for non-State actors. As Philip Alston argues:

> the international human rights regime’s aspiration to ensure the accountability of all major actors will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than currently exists in order to take adequate account of the roles played by some non-state actors. In practice, if not in theory, too many of them currently escape the net cast by international human rights norms and institutional arrangements.\footnote{1033 ibid, p 6}

The effects of human rights violations are the same whether they are caused by a government or a corporation; from a victim’s perspective, and indeed a justice perspective, it is incoherent to have avenues for redress against one actor but not another. A narrow approach to human rights, which enables corporations to act with impunity, challenges the credibility of the human rights regime and results in a situation which belies belief and which seems implausible.\footnote{1034 Sigrun Skogly, ‘Economic and Social Rights, Private Actors and International Organisations’ in Michael Addo (ed), Human Rights Standards and the Responsibility of Transnational Corporations (Kluwer Law International, The Hague, 1999), p 239} Extending accountability under the human rights regime to corporations need not impinge upon or jeopardise the obligations of States: there is no limitation to holding...
States, corporations, and corporate officials accountable for the same abuse. The new approach is not necessarily inconsistent with the traditional concepts of State obligations; it will be States that hold corporations accountable under international criminal law, and it will be domestic legal systems that enable individuals to take action against corporations. Both the analytical and normative frameworks need to be reconsidered and developed, but any significant departure from the existing human rights regime will require agreement among States.

An international forum to hear cases of corporate abuse, including complicity
The Framework and the Special Representative have placed relatively little emphasis on ways of holding corporations accountable, despite the challenges presented by the existing mechanisms. If the possibility of a claim under the ATCA has made a difference to corporate behaviour, as the Special Representative has noted, it seems logical to assume that an international court or tribunal, or other accountability mechanism, would likewise impact on corporate behaviour. The issue of corporate accountability is relatively recent, and the issue of accountability and justice in a global context is complex and will undoubtedly require many years of discussion, debate and negotiation. It is worth considering that it took over fifty years to create the International Criminal Court. However, there is some room for optimism, and as Mark Taylor suggests, it is possible that “a decade from now States will have matched the rights that companies have been given with a responsibility to respect human rights for which they will be held accountable.” The increased attention afforded to the business and human rights agenda should such a development.

The benefit of an international forum would be the elimination, or at least a reduction, of the jurisdictional impediments to seeking justice in a State-based system. A clear regulatory framework with efficient and effective enforcement mechanisms is needed. Companies and human rights advocates alike recognise the importance of the rule of law, and as Mary Robinson has observed, companies “are the first to stress the importance of a transparent, well-

1035 Mark Taylor, ‘The Corporate Accountability Evolution’. See also Kevin Jackson, ‘A Cosmopolitan Court for Transnational Corporate Wrongdoing: Why its time has come” (1998) 17 Journal of Business Ethics 757, pp 757-758, who argues that the court should have criminal and civil jurisdiction
functioning and just legal system as a critical part of an enabling environment for investment and economic growth." There inevitably be differences between even the highest functioning legal systems; the one way to ensure consistency is to have internationally agreed standards and an international forum to hear cases. Such a forum could be predicated on a system of complementarity, as at the International Criminal Court.

**Making the most of what we’ve got: utilising the International Criminal Court**

A forum to hold corporations accountable for human rights abuse and involvement in human rights abuse would enhance the protection and promotion of human rights, and would provide guidance and assistance to States to strengthen their own domestic legal systems regulating corporate accountability. It may even improve industry standards in the area of human rights.

There is no international tribunal that has the jurisdiction to hold a company, as a distinct legal entity, accountable for crimes under international criminal law, or international law more generally. It was hoped by many observers that the creation of the International Criminal Court would finally provide a forum to hear cases of violations of international criminal law by corporations. However, pursuant to Article 25 of the Rome Statute of the International Criminal Court, the court has jurisdiction over natural persons only, excluding other legal persons such as corporations.

At the Rome Conference both France and the Solomon Islands provided proposals to include legal persons within the jurisdiction of the International Criminal Court. France proposed that jurisdiction be extended to corporations in limited circumstances, where senior executives at private corporations perpetrated abuse on behalf of the corporation with the explicit consent of the corporation in the course of its business operations. The official records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment

---

of an International Criminal Court note that France “felt that the Statute should go at least as far as the Nuremberg Charter, which had provided for the criminal responsibility of ‘criminal enterprises’.”1039 This proposal was not adopted, as it was felt that this was a departure from individual criminal responsibility, which was the focus of the International Criminal Court. In addition, it was decided that the elements of this posed “overwhelming problems of evidence”.1040 Perhaps the deciding factor was that there is no international agreed standard of corporate complicity; therefore, attempts to draft this into the Statute in light of the principle of complementarity would be close to impossible. As consensus could not be reached, the jurisdiction of the ICC was limited to natural persons, and as such there remains no international forum mandated to hold corporations accountable for international crimes.1041 Therefore, criminal liability of a corporation in an international forum remains untested.1042

The first Review Conference of the Rome Statute was held between 31 May and 11 June 2010, in Kampala, Uganda. This would have been an ideal opportunity to re-examine the issue of jurisdiction over legal persons, but the Assembly of State Parties did not propose this as an agenda item.

Between 2002 and 2009, the Office of the Prosecutor of the International Criminal Court received 8461 communications from over 132 countries.1043 Right from the start, the Office of the Prosecutor was receiving communications regarding links between the activities of certain corporations, in particular corporations involved in gold mining, oil extraction, international finance and the arms trade and the atrocities in the Democratic Republic of Congo.1044 As the Office of the Prosecutor states, “[t]here is general concern that the atrocities allegedly committed in the country may be fuelled by the exploitation of natural resources there and the arms trade, which are enabled through the international banking

---

1041 Ramasastry, ‘Mapping the Web of Liability’
1044 Communications Received by the Office of the Prosecutor of the ICC (Press Release, 16 July 2003), available online at www.icc-cpi.int, last accessed 25 May 2005, p 3
The Prosecutor recognises that prosecuting those involved in the financing of alleged atrocities is critical, and that this could have a preventative effect on the financing of crime.

The Office of the Prosecutor is determining whether investigations and prosecutions are occurring in home States, under the principle of complementarity. Similarly, the International Criminal Court could prosecute individual corporate officials who knowingly assist in the commission of international crimes. This is a way of achieving “de facto company accountability.” The precedent for such prosecutions was set at the Nuremberg tribunal, where corporate officials faced prosecution, rather than the corporations themselves. As with the International Criminal Court, this was due to the jurisdictional limitations of the tribunal. Nevertheless, despite this limitation, the tribunal was able to declare organisations to be ‘criminal enterprises’, and the tribunal did declare some corporations as such. This tends to support the view that the corporations themselves were also ‘guilty’ despite the fact they were not actually prosecuted. Identification of corporate guilt could lead into the realm of moral accountability, even if legal accountability was not forthcoming.

Individual Responsibility under the Rome Statute of the ICC
Despite not having jurisdiction over corporations, the text of the Rome Statute of the International Criminal Court is the most comprehensive elucidation of international criminal law to date, combining traditional international humanitarian law with developments at the ad hoc tribunals. The Rome Statute, under Article 25(3)(c), Individual Criminal Responsibility, provides that legal accountability will arise where an individual, for the purpose of facilitating the commission of a crime, aids, abets or otherwise assists in the commission or attempted commission of a crime, including providing the means for its commission. There is some disagreement about the inclusion of “for the purposes of facilitating”, and whether this will place a more stringent knowledge test on cases

---

1045 ibid
1046 ibid, p 4
1049 Vazquez, ‘Direct vs Indirect Obligations of Corporations under International Law’, p 939
1050 For a discussion, see Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Volume 2, p 22
before the ICC, where proof may be required that the individual knew the contribution was provided to assist in the facilitation of a crime. This clause presents a necessary intention that was not previously required for accomplice liability, and “it marks a textual departure from the approach of the ILC Code and the appellate jurisprudence of the ad hoc tribunals.” Gerhard Werle has suggested that, under Article 25(3)(c), corporations would not need to share the same particular intent as the principal perpetrator but could rather be held criminally responsible due to their awareness that they are contributing to the commission of a crime.

Article 25(3)(d) also warrants consideration. This article provides that an individual shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

The requisite intention under Article 25(3)(d) is yet to be tested and interpreted by the International Criminal Court, although it is similar to but broader than the ‘joint criminal enterprise’ jurisprudence of the ICTY. The Statute does not look to the purpose of the assistance; knowledge of the intention of the group is enough to attract criminal responsibility. The Appeals Chamber in 

Kvocka surmised that there are three types of joint criminal enterprise: in the first type, all co-perpetrators share the same intent to commit the crime; in the second type, all of the perpetrators have knowledge; and in the third type the crimes are a foreseeable consequence of the common purpose but are committed outside the common purpose. The decision of the ICC Pre-Trial Chamber is instructive:

---

1051 ibid: “The phrase was borrowed from the Model Penal Code of the American Law Institute and generally implies a specific subjective requirement stricter than knowledge.”
In this regard, the Chamber notes that, by moving away from the concept of co-perpetration embodied in article 25(3)(a), article 25(3)(d) defines the concept of (i) contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose, (ii) with the aim of furthering the criminal activity of the group or in the knowledge of the criminal activity of the group or in the knowledge of the criminal purpose.

The Chamber considers that this latter concept – which is closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY – would have been the basis of the concept of co-perpetration within the meaning of Article 25(3)(a), had the drafters of the Statute opted for a subjective approach for distinguishing between principals and accessories.

Moreover, the Chamber observes that the wording of article 25(3)(d) of the Statute begins with the words ‘[i]n any other way contributes to the commission or attempted commission of such crime.’ Hence, in the view of the Chamber, article 25(3)(d) of the Statute provides for a residual form of accessory liability which makes it possible to criminalise those contributions to a crime which cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25(3)(b) or article 25(3)(c) of the Statute by reason of the state of mind in which the contributions were made.1054

While Article 25 does not apply to corporations, due to the limited jurisdiction of the ICC Statute, it would apply to individual company officers prosecuted by the ICC. While the ICC will only prosecute individual company officials rather than the corporation itself, such prosecutions could help clarify the liability of corporations who are involved in abuse which amounts to international crime.1055 Such prosecutions may help to achieve more substantive developments and continue the momentum in this area.1056

1054 Decision on the Confirmation of Charges, Lubanga (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, quoted in Clapham, ‘Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups’, pp 909-910


Article 30 of the ICC Statute details the intent and knowledge elements required to establish criminal responsibility.\textsuperscript{1057} Put simply, it seems that once an individual becomes aware their actions are likely to be contributing to a crime, and it accepts that its actions may assist in the commission of the crime and it continues to act, then the threshold is met for the mental element of assisting the commission of international crimes.\textsuperscript{1058} While the knowledge test is subjective, knowledge can be imputed from the facts. For example, in the case of \textit{Krstic}, the accused’s protestations of his lack of knowledge of the Srebrenica massacre were difficult to sustain, as news of the missing men was reported in Chinese media three days after the takeover of the town.\textsuperscript{1059} It was therefore unlikely that Krstic really was unaware of the massacre.

\textbf{The path ahead: unchartered waters}

There is no guarantee that victims will be able to seek redress for corporate abuse. The mélange of accountability and grievance mechanisms is symptomatic of an incoherence of both international law and policy. The reliance on domestic jurisdictions, and the associated limitations, is insufficient and ineffective when holding transnational entities accountable.

International consensus, agreement and law should be at the core of reforms in the area of business and human rights. International agreement is needed regarding the precise requirements under the business and human rights agenda as there is currently great variation between jurisdictions. However, the existing differences should not preclude further discussions and deliberations about what the international standard would require. The role and ability of international law to respond to the corporate accountability crisis is not easy to define. There is no inherent obstacle to States deciding to hold corporations directly responsible for

\begin{itemize}
  \item \textsuperscript{1057} Article 30 of the ICC Statute provides as follows:
    1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
    2. For the purposes of this article, a person has intent where:
      (a) In relation to conduct, that person means to engage in the conduct;
      (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
    3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.
  \item \textsuperscript{1058} Clapham, ‘Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups’, p 911
  \item \textsuperscript{1059} Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Volume 2, p 26
\end{itemize}
violations of international law; international law has the capacity to bind corporations, but States must consent to such a development. However, achieving agreement from States that international law should directly bind corporations, and the practicalities of identifying elements of accountability as it pertains to corporations, as well as the implementation of such an international legal apparatus, would be a challenge. It stands to reason that the corporate sector, and some States, will resist such legal regulation; they are satisfied with the regulation provided by industry codes and corporate social responsibility programs.

There is no international forum with jurisdiction to prosecute a company as a legal entity, where human rights abuse was enabled, facilitated or exacerbated by corporations. This is a failing that leaves victims unable to seek redress outside of State mechanisms. Given the inherent political sensitivities surrounding corporate complicity, where the State is often the primary actor, the independence of an international forum may lead to more just outcomes for victims. Such a forum could have similar principles of complementarity as the International Criminal Court, where a State must be either unwilling or unable to prosecute before the court is able to gain jurisdiction. The idea of a corporate version of the International Criminal Court is one enforcement possibility, although it may be more efficient to review the jurisdiction of the International Criminal Court and extend this to legal persons, before embarking on another mechanism. However, the subject matter jurisdiction of the International Criminal Court is limited to breaches of international criminal law and international humanitarian law, and victims should be able to seek remedy for any human rights violation. As the business and human rights agenda gains momentum and more research is conducted and understanding grows, the prospect of an international forum increases.

The human rights regime is the most universal and legitimate framework to determine the scope of corporate responsibility and governance. Anchoring corporate accountability within a human rights framework would provide another avenue for redress for victims. The limitations of the existing regulatory regime

---

1060 Although it is widely accepted that corporate officials could be prosecuted at the international level for crimes under international law, and the Prosecutor of the International Criminal Court has indicated he would consider investigations of company officials and other individual economic actors if appropriate.
indicate a real need for better enforcement mechanisms; it is quite evident that the existing mechanisms are unable to provide the vast majority of victims with any redress. This is why the international human rights regime is so integral to the area of corporate accountability for involvement in human rights abuse; it transcends self-interest and Realpolitik, and provides an impartial and independent arbiter. If international agreement was reached, the international human rights regime could provide a review system for the Protect, Respect, Remedy Framework: State legislation and policies could be considered; corporate policies and due-diligence procedures could be analysed; and cases of corporate involvement in human rights abuse could be heard if domestic avenues had been exhausted, or if the State was unwilling or unable to investigate the claims. Such a development would complement the framework proposed by the Special Representative, by adding one more pillar to become the Protect, Respect, Review, Remedy Framework.
CONCLUSION

The issue of business and human rights abuse is a relatively new political problem, as is evident by the increasing amount of research dedicated to the topic. Strategies for addressing the concerns presented by the issue of corporate involvement in human rights, and the way in which corporations can influence and impact upon abuse are in their infancy.

While there is no definitive agreement as to what constitutes corporate complicity, it is generally understood as involvement in human rights abuse, where the corporation has in some way (in the words of the ICJ Expert Panel), enabled, exacerbated or facilitated the abuse, in the knowledge that their act or omission would contribute to the violation. Sometimes corporations will be complicit in human rights abuse that amounts to an international crime. While there is very little jurisprudence at the international level as to how this standard specifically applies to corporations, due largely to the lack of an international forum to hear such cases, there is jurisprudence on prosecuting individual corporate officials for aiding and abetting international crimes. However, not all corporate complicity will reach the threshold of being a crime under international law, and more concrete guidance as to the scope of complicity is required. A common understanding will enable States to ensure they meet their obligations, and will assist corporations to avoid becoming complicit. A common understanding is also vital for ensuring access to remedy.

Corporations from all industries and sectors are required to respect all internationally recognised human rights. The examples of corporate involvement in human rights abuse are many and varied, but there are some common allegations of complicity. These include the provision of goods and services which can be used to commit or perpetrate abuse, and employing security forces who commit human rights violations that the corporation is either aware of or wilfully blind to. Allegations have been made against corporations for having formal business partnerships with governments with poor human rights records, and for having irresponsible marketing campaigns. Supply chain complicity is another significant issue, and includes the trade in conflict commodities such as
diamond and gold, the sale of which can be used to finance rebel groups and can
lead to protracted conflict.

As the power and influence of corporations continues to grow, so does interest in
accountability for corporate complicity. The appointment, and extension, of the
Special Representative to the Secretary General on the issue of human rights
and transnational corporations and other business enterprises, Professor John
Ruggie, is illustrative of this. To date, the Special Representative has presented
the Protect, Respect, Remedy Framework, which has been unanimously adopted
by the Human Rights Council. Significantly, it has also been welcomed by both
the corporate sector and a number of States, and has not faced the same
criticisms as were levelled against the Norms on the Responsibilities of
Transnational Corporations and Other Business Enterprises with Regard to
Human Rights.

As discussed throughout this thesis, the Framework rests on three pillars: the
State duty to protect, the corporate responsibility to respect, and the right to
access to remedy.

States have not adequately discharged their duty to protect human rights from
corporate abuse, including corporate involvement in human rights abuse, and a
“climate of impunity” exists around corporate activities that facilitate human rights
violations, be that facilitation through access to finance, arms, or other
resources.1061 State have either misunderstood their obligations, or have been
unable or unwilling to meet them. In order to better respond to these challenges,
States should focus on a number of key factors. These include better ways to
safeguard their ability to protect human rights, being mindful of their human rights
obligations when engaging with business, fostering a corporate culture that
respects human rights by adopting appropriate regulation and legislation,
developing innovative policies regarding conflict areas, and considering
extraterritorial jurisdiction to regulate the behaviour of their corporations operating
abroad. Focusing on these factors should, in time, lead to better human rights
outcomes.

1061 International Peace Academy and Fafo, ‘Business and International Crimes: Assessing the Liability of
Business Entities for Grave Violations of International Law’, p 6
However, these developments may not be immediately forthcoming, as they ignore the strong undercurrent and force of neo-liberal globalisation within which the business and human rights agenda is embedded. It was largely the process of such unbridled economic integration which led to the governance gaps we are faced with today, whereby the power differentials mean that States have a duty to regulate corporations that are, often, far more powerful than the State, both economically and politically due to the close ties with their home State. Moreover, many developing States believe that foreign direct investment is crucial to their development, and even survival, and fear that tougher regulation may see foreign companies move their operations to other States, where they are not so closely regulated. This applies to any number of aspects of corporate regulation: taxation, environmental standards, and other social initiatives. Moreover, there are clear political sensitivities in relation to corporate complicity, especially for host States, who may be the primary perpetrator of abuse.

States could try to regulate the behaviour of their companies abroad through extraterritorial jurisdiction. However, it is not always in a State's interests to regulate in such a manner, particularly if the company employs a large number of people, or pays a significant amount of tax, or is a positive for the State's economy in any way. This does not detract from the importance to regulate abroad from a human rights perspective, but does signal challenges ahead for this kind of regulation without an overarching international agreement between States that this is the appropriate way forward.

The second pillar is the corporation’s responsibility to respect human rights, and avoid complicity in human rights abuse. Of the 70,000 transnational corporations in the world, only a few hundred have acted to include human rights considerations in their strategic intentions. The corporate responsibility to respect will involve corporations completing due diligence, including human rights impact assessments, to ensure their operations do not impact on human rights, and this should consider their supply chains. Corporations must comply with the law, even when it is not enforced. One particular challenge this presents is when domestic standards fall short of the agreed international human rights standards, particularly as there is no international agreement as to the exact scope or extent of the corporate responsibility to respect. This is an aspect that requires further research and consideration. However, corporations should not assume that by
meeting their legal obligations they also fulfil societal expectations, particularly in regions where legal regulation is lacking.\textsuperscript{1062}

Until now, corporations and the private sector have embarked on initiatives and self-regulation that have sought to address some of these concerns. It is no mere coincidence that many of the corporate social responsibility programs are well publicised, which is one of the reasons that human rights activists are sometimes dubious and sceptical of the nature of the intentions of such programs.

The key limitation of corporate social responsibility and other self-regulation initiatives is that they are piecemeal, ad hoc, and are generally unable to censure corporations with enforceable outcomes. In some cases, corporate social responsibility programs can adversely impact on sustainable development. Moreover, they can be used as a tool for deflecting negative criticism for human rights abuse: a company can respond to questions of involvement in human rights abuse, such as the engagement of brutal security forces, with details of the local school or hospital that they have funded. While corporate social responsibility programmes do have a place when dully considered and implemented following extensive consultation with the local community, they are no alternative for a co-ordinated, embedded, due diligence framework whereby respecting human rights is part of the corporate culture. This includes having appropriate grievance mechanisms and policies in place. Indeed, the rule of law will not be enough, and real progress will only be made in this area once corporations themselves internalise and embed the notion and importance of human rights to their operations and culture.

However, even if States do fully discharge their obligations, and corporations do internalise human rights, there will still be situations where corporations are complicit in abuse, and in these situations victims must be able to access remedies. Remedies should be available through company grievance policies, through State based non-judicial channels, and through State-based judicial means. Very few companies have corporate grievance mechanisms, and there are five companies trialling these mechanisms under the Framework.\textsuperscript{1063} This

\textsuperscript{1062} Ruggie, Remarks, International Institute for Conflict Prevention and Resolution Corporate Leadership Award Dinner
\textsuperscript{1063} UN Doc A/HRC/14/27, 9 April 2010, para 11
being the case, it seems that the business case for company grievance policies has not been effectively sold to the private sector: such mechanisms could consider problems at the early stages, before they escalate and before they do any significant damage to the corporate brand or reputation. While one would prefer such policies to be adopted because of an internalisation of the importance of human rights, which may occur in the future, for now the corporate benefit seems to be a message that companies would be more likely to listen to and act upon.

State based non-judicial mechanisms are an under utilised resources. Many States have national human rights institutes, and these should consider complaints of corporate complicity, both within home States and host States. These non-judicial mechanisms may be able to cause the conduct to cease, and change corporate behaviour. However, just like corporate self-regulation, these mechanisms lack the authority of enforceable decisions.

The importance of non-judicial, informal accountability mechanisms should not be disregarded. In some instances, the consumer boycotts and shareholder action have changed company behaviour. Key examples are the consumer boycott of Nestle products after the infant milk formula fiasco, and the shareholder pressure placed upon Barclays Bank in opposition to its role in financing Apartheid-era South Africa.

State based judicial mechanisms are the key source of access to remedy, through either criminal or civil jurisdiction. However, there are severe limitations to accessing remedy through domestic jurisdictions. For example, the doctrine of non-justiciability on the grounds of a political question is a key challenge, particularly where another State is the primary perpetrator. Other doctrines, such as separate legal entity, can also frustrate attempts at achieving justice. While individual company officials can be prosecuted for their involvement in human rights abuse, there is no agreed standard for establishing the knowledge and intent element attributable to the company as a whole.

There are also more fundamental challenges in relation to criminal prosecutions. Largely these arise from the issue of self-interest and Realpolitik. As with regulation of companies, States may elect to be lenient when it comes to legal
accountability, and may not pursue criminal prosecutions. Alternatively, where a State does pursue prosecutions, perhaps due to considerable international pressure, there is no guarantee that such proceedings would meet any acceptable standard. There is no obstacle to States regulating their corporations abroad, and prosecuting when they breach criminal laws, but this does not often happen in practice. Thus, while it is significant that the web of potential liability for corporate complicity has expanded with the incorporation of the Rome Statute of the International Criminal Court into domestic jurisdictions, there is yet to be any great reliance on this development, or any real advancement in access to remedy.

These political constraints can be somewhat avoided in civil cases, where victims are able to bring proceedings themselves. However, such situations pose their own challenges to victims, including the cost of proceedings, the difficulties of forum non conveniens, and the pressures placed on victims for bringing such proceedings and making such allegations. While the State-based mechanisms are not ideal for transnational corporate accountability, they could be put to much more effective use, if there was the political will or inclination to do so.

What is missing from the Framework is an acknowledgment of the important role that international law and regulation will play. The human rights regime could play a significant role in the review of State responses to situations of abuse, and consider corporate regulation policies. This could be a role for a treaty body, or similar, if international agreement was reached. However, seeking legal accountability at the international level is not a straightforward process, as this is an area of international law that is “ambiguous and murky.”

While there is no international forum with jurisdiction to hear cases against corporations, the United States courts are being relied upon with plaintiffs relying on the ATCA. There is considerable opposition to the ATCA from within the United States, as some in the business lobby consider that it impedes upon United States companies, by making them less competitive. Such arguments indicate the long road ahead for the business and human rights agenda.

---

The courts in the United States are being used as a quasi-international court due to the ATCA and the absence of any other options. However, it is unacceptable that this has eventuated. As it is, the jurisprudence under ATCA is being narrowed and tightened, and the strong opposition lobby has the potential, as with any domestic legislation, to push for legislative amendment. The large number of cases that are brought under ATCA is indicative of the need for an international forum to hear these cases. The International Criminal Court does not have jurisdiction to prosecute corporations due to Article 25 of the Rome Statute, but could prosecute corporate officials as individuals. The Review Conference of the Rome Statute was an ideal time to reconsider the jurisdictional limitation of the International Criminal Court, but this topic was not on the agenda. However, with the ongoing interest and research currently taking place, the original concerns regarding the inclusion of legal person jurisdiction within Article 25 are diminishing and may one day be addressed, opening the door to jurisdictional expansion. This would be preferable to an entirely new and separate forum. Yet, this would mean that there was no forum in which to bring cases against corporations that do not meet the threshold of an international crime. In such situations, a body (such as one established under a treaty) could review State decisions.

Now that there is agreement amongst stakeholders as to the accountability framework for the business and human rights mandate, it is time for the international community, under the auspices of the United Nations, to develop agreed international standards of what specifically constitutes corporate complicity, and the scope of each of the three pillars of the Framework. A common understanding of what corporations can be held accountable for is urgently needed. Such a foundation should be used to enable systematic and cohesive developments achieving “cumulative effects”, rather than a continuation of the fragmented and piecemeal approach that has existed to date. In addition, consideration should be given to the role of the human rights regime. The human rights regime could review State decisions, and provide an alternative forum where States are either unwilling or unable to address corporate involvement in human rights. In this sense, the human rights regime provides a

---

1065 Ruggie, Presentation of Report to United Nations Human Rights Council
fourth pillar, Review, to the Framework, rendering it the Protect, Respect, Review, Remedy Framework.

As the Framework is adopted and implemented, the impetus and momentum should turn to focus on the identification of a “common international approach to corporate complicity”,¹⁰⁶⁶ to ensure corporations are aware of their responsibilities, and also that victims and survivors, and their communities, are aware of their rights and able to hold corporations to account. It is incumbent on States to detail the extent of corporate responsibility with regard to human rights abuse. Clarification at the international level will not only provide victims with an understanding of when they are entitled to remedy, but it may also encourage corporations from becoming complicit.

Given the international character of the problem, international responses are required. The increasing dynamism and integration of global society calls for a universal approach to the issue of business and human rights, which includes a significant role for the international human rights regime. Part of this response must include a consideration of victim perspectives, as this aspect is lacking from the current debate and research. Victims are caught by two powerful forces within the international system: the process of neo-liberal globalisation has meant that the power of corporations has increased without corresponding accountability structures, and the dominant realist ideology means that even where there are accountability structures it is often not in a State’s interests to intervene. It is, however, an ideal time to consult with victims in order to ensure an understanding of the scale and consequences of corporate abuse, and to ensure appropriate solutions and remedies are progressed and initiated. Individual responses, developed in isolation by States, will be insufficient. State must now agree on the next steps, and translate the policies and intention into action. Corporations have benefited from the international system: it is time that the system turned its focus to preventing corporate abuse and involvement in abuse and securing accountability when this occurs.

The time for action is now. We have been presented with an auspicious opportunity to make real and lasting change. The impetus and momentum must

¹⁰⁶⁶ Ramasastry and Thompson, ‘Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law’, p 28
be harnessed to achieve positive outcomes. We have all insidiously and innocuously contributed to this situation. Every organ of society – States, corporations, individuals – must realise the part they play in perpetuating the problem of corporate complicity if this issue is to be addressed. The Framework should be considered as an initial step in the right direction, rather than as a solution to the existing challenges in the area of business and human rights. Real change will be dependent on a number of factors, not least the political will of States and corporations to change their behaviour.

It is fitting to end this thesis with a quote from John Pilger’s documentary, *Death of a Nation: The Timor Conspiracy*. In this 1993 documentary, Pilger discusses corporate complicity broadly, and highlights some of the British companies both selling weapons and supporting Indonesia financially during the occupation of East Timor. In the words of Ines Almeida, at that time a Timorese exile:

“The evidence is there. You can’t turn a blind eye anymore.”
BIBLIOGRAPHY

Texts


Minow, Margaret, *Between Vengeance and Forgiveness: facing history after genocide and mass violence* (Beacon Press, Boston, 1998)

Tomasic, Roman, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (The Federation Press, Sydney, 2002)


Edited texts


Rees, Stuart and Shelley Wright (eds), *Human Rights, Corporate Responsibility* (Pluto Press, Sydney, 2000)

Chapters from edited texts


Journal Articles

Barba, Christina (edited by Anne Heindel), 'Prosecutor v Emmanuel Ndindabahizi' (2005) 13 Human Rights Brief 38


Bowfield, Michael, ‘Corporate Social Responsibility: reinventing the meaning of development?’ (2005) 81 International Affairs 515


Fig, David, ‘Manufacturing Amnesia: Corporate Social Responsibility in South Africa’ (2005) 81(3) International Affairs 599


Frynas, Jedrzej, 'The false developmental promise of Corporate Social Responsibility: evidence from multinational oil companies' (2005) 81 International Affairs 581


Muchlinski, Peter, ‘Human Rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations’ (2003) 3 *Non-State Actors and International Law* 123

Muchlinski, Peter, ‘Human Rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations’ (2003) 3 *Non-State Actors and International Law* 123


Obote-Odora, Alex, ‘Complicity in genocide as understood through the ICTR experience’ (2002) 22 *International Criminal Law Review* 375


Newspaper articles


Boseley, Sarah, ‘Profits before the poor? Drugs giant offer and answer to the toxic question facing a ‘heartless’ industry’, The Guardian, 14 February 2009,
available online at http://www.guardian.co.uk/business/2009/feb/14/gsk-big-pharma-drugs/print, last accessed 19 February 2009


Williams, Hugh, ‘Time to redraw the battle lines’, Financial Times, 30 December 2009


Speeches and Addresses


Research, Working Papers and Discussion Papers


Amis, Lucy, Guide on How to Develop a Human Rights Policy, United Nations Global Compact (2010), available online at http://www.unglobalcompact.org, last accessed 30 June 2010

Chambers, Rachel, ‘Responsibility of transnational corporations and related business enterprises with regard to human rights’, Submission from the Castan Centre for Human Rights Law, Monash University, Melbourne, Australia, available online at


Ramasastry, Anita and Robert Thompson, ‘Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A


*Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A resource for companies and investors*, a joint UN Global Compact – PRI publication (2010), available online at http://www.globalcompact.org, last accessed 30 June 2010


UN Global Compact, Supply Chain Sustainability: A practical guide for continuous improvement (2010), available online at http://www.globalcompact.org, last accessed 20 August 2010

War on Want, Fanning the Flames: The role of British mining companies in conflict and the violation of human rights, November 2007, available online at http://www.waronwant.org/attachments/Fanning%20the%20Flames.pdf, last accessed 5 February 2008


Reports of the Special Representative


Ruggie, John, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum – State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries, Implementation of General Assembly


Ruggie, John, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, ‘Business and Human Rights: Further steps toward the
operationalization of the “protect, respect and remedy” framework’, Human Rights Council, UN Doc A/HRC/14/27, 9 April 2010

**Other Primary Documents**


Rome Statute of the International Criminal Court

Secretary-General, Economic and Social Repercussions of the Israeli Occupation on the Living Conditions of the Palestinian People in the Occupied Palestinian Territories, including Jerusalem, and the Arab populations in occupied Syrian Golan, General Assembly, Sixty-fourth session, 7 May 2009, UN Doc A/66/77-E/2009/13


**Cases**

*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, ICJ Reports 2002

*John Doe v ExxonMobil Corporation et al*, United States Court of Appeals for the District of Columbia Circuit, 12 January 2007, Judgment (No 01cv01357)
Prosecutor v Akayesu, Judgement, Case No ICTR-96-4-T

Prosecutor v Dusko Tadic, Judgement, Case No IT-94-1-T

Prosecutor v Furundzija, Judgement, Case No IT-95-17/1

Prosecutor v Kayishema and Ruzindana, Judgment, Case No ICTR-95-I-T

Web-based resources


Neighbour, Sally, The Kilwa Incident Transcript, Four Corners, Australian Broadcasting Commission, aired 6 June 2005, available online at http://www.abc.net.au/4corners/content/2005/s1386467.htm, last accessed 24 July 2009


Commentary on Principle 2 from the Global Compact, available online at http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html, last accessed 24 April 2009

Communications Received by the Office of the Prosecutor of the ICC (Press Release, 16 July 2003), available online at www.icc-cpi.int, last accessed 25 May 2005

‘Communications, Referrals and Preliminary Analysis’, International Criminal Court website, available online at http://www.icc-

Complaint from German Watch, Global March, and Coordination gegen Bayer Gefahren against Bayer CropScience, available online at http://basewiki.org/en/OECD_NCP_(Germany)_NGOs_vs_Bayer_CropScience_India_2007, last accessed 28 August 2010

Complaint made against Bayer CropScience for tolerating its subcontractor’s use of child labour: available online at http://basewiki.org/en/OECD_NCP_(Germany)_NGOs_vs_Bayer_CropScience_India_2007, last accessed 28 August 2010


‘Military Court delivers a not guilty verdict in Kilwa Trial’, available online at http://www.raid-uk.org/docs/Press_Release/PR_MilitaryCourtVerdict_eng_2Jul07.pdf last accessed 2 August 2010


‘Red Flags: Liability risks for companies operating in high-risk zones’, available online at http://www.redflags.info/file/1, last accessed 2 September 2010


State parties to the Rome Statute, available online at www.icc-cpi.int/states+parties/, last accessed 20 August 2010

Submissions received from States, companies and non government organisations in response to the TNC Norms, available online at http://www.ohchr.org/english/issues/globalization/business/contributions.htm, last accessed 16 June 2008


‘TRIPS material on the WTO site’, available online at http://www.wto.org/english/tratop_e/trips_e.htm, last accessed 2 September 2010


