Transnational corporations and international law: bringing TNCs out of the accountability vacuum

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Abstract

Purpose – This paper aims to highlight the disparity between the huge global influence and reach of transnational corporations, on the one hand, and the lack of international legal infrastructure for regulating TNC activity, on the other. Existing avenues for holding TNCs accountable for breaches of international standards are woefully inadequate. After rejecting the idea of subjecting TNCs to potential criminal liability, the paper then proposes a set of principles for international TNC responsibility modelled on the 2001 Draft Articles on State Responsibility. The potential future role of regional human rights courts and the International Labour Organisation in holding TNCs accountable is also explored.

Design/methodology/approach – A survey of existing legal texts and secondary scholarship was undertaken to determine the existing coverage of the regulatory infrastructure for holding TNCs to account, and to identify gaps in that coverage.

Findings – Significant governance gaps in the existing institutional infrastructure were identified, creating a permissive environment within which blameworthy acts by TNCs may occur without adequate sanctioning or reparation. Potential regulatory and institutional avenues for filling these gaps were identified.

Research limitations/implications – The author lacks hands-on experience of the political barriers which may exist and may make the proposed reforms unrealistic. Those in the field are encouraged to consider whether the proposed reforms are feasible/desirable.

Practical implications – The paper contains implications for the future of international law, the regional human rights courts and the International Labour Organisation.

Originality/value – The paper contains original proposals for the future evolution of international law in its application to TNCs.

Keywords Transnational companies, International law

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A growing number of lawyers, scientists and academics have emphasised the prominent role played by corporations in the global economy (Egri and Ralston, 2008). The phenomenon of transnational corporations (TNCs) is not new, but the continually increasing levels of power and influence of TNCs within the global economy of today is unprecedented. According to UNCTAD's 2009 World Investment Report, an estimated 82,000 transnational firms now span the globe, with some 810,000 foreign affiliates and millions of suppliers (UNCTAD, 2009, Vol. 1). It has been calculated that of the top 100 economies in the world today, 51 are corporations and only 49 states (Kinley and Nolan, 2008, 358 citing Anderson and Cavanagh, 2000). The fundamental role played by TNCs in global trade has been acknowledged by the WTO and other international bodies (UNCTAD, 2009). TNCs also play a fundamental role in domestic economies and the international economy. Governments everywhere recognise the role of TNCs in

economic development, particularly through global direct investment. With such mammoth economic power at their disposal, TNCs have the capacity to do great good, and also the capacity for great harm.

On the good side, TNCs can bring jobs and wages, other income earning opportunities for the local economy, as well as goods and services. They pay taxes which can be used to provide social services and infrastructure. TNCs played a central role in the rapid rise of the tiger economies between the end of the Second World War and 1997. The benefits of economic growth can be described in economic terms or in human rights terms. By generating the jobs, wages and opportunities that they do, TNCs can be central to the realisation of many rights previously not accessible to those living in poverty.

But the influence of corporations on human rights is not necessarily either positive or benign. Despite significant TNC activity in Sub-Saharan Africa, for example, poverty and its consequences still prevail. Moreover, corporations, both local and multinational, have been and continue to be minor and major abusers of human rights (Ruggie, 2008b), Survey of Scope and Patterns of Alleged Corporate-Related Human Rights Abuse, A/HRC/8/5/Add.2 (23 May 2008). See also cases documented at www.business-humanrights.org and www.actionaid.org)[1-5]. Corporations have been found guilty of treating workers badly or implementing discriminatory practices. Others have polluted the environment in ways that have had seriously detrimental impacts both in the immediate vicinity and far beyond. Other corporations have worked alongside (or inside) governments that perpetuate gross human rights abuses, such as in Nazi Germany, Apartheid South Africa, and other authoritarian and repressive regimes. In many cases, even where TNC activity has generated extra wealth for an economy, that same activity has been central to the maintenance of a status quo of gross inequalities. There may be a general correlation between improved economic status and improved human rights status, but the relationship is neither certain nor consistent.

At the domestic level, states have responded in a variety of ways to the growing potential and threats presented by the activities and growing influence of global TNCs. Some countries, particularly poorer ones, have welcomed the investment offered by TNCs, while at the same time being unwilling, or unable, to react to corporate human rights abuses. Others, mostly Western countries but also an increasing number of developing nations, have begun enacting laws designed to impose obligations on corporations. These are laws which, implicitly or explicitly, protect human rights standards, and include laws covering conditions and safety at work, environmental protection, non-discrimination, and rights of free speech and assembly.

At the international level, however, it is another story altogether. Rules imposing responsibilities and standards of behaviour on TNCs have not kept up with the expanding reach of their actions. Apart from some domestic laws that purport to have extra-territorial application, there are presently no binding legal obligations that apply to corporations operating trans-nationally in terms of human rights. At the international level, the corporate form is barely recognised, still less directly bound, whether in the human rights or any other field. TNCs have been able to operate largely in a legal vacuum because international law, including international human rights law, imposes no direct legal obligations on corporations. It is states which have traditionally been accepted as the proper subject of international law. This traditional fiction has

been just as instrumental in denying corporations "personhood" under international law as the fiction of "legal person" has been in allowing corporations to operate effectively in domestic legal systems. Together, these legal fictions have been instrumental in helping to justify continuing governance gaps, creating a "permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation" (Ruggie, 2009, citing Ruggie, 2008a: A/HRC/8/5, para. 3).

But international law has always evolved and adapted to changing global realities. The rest of this article argues that it is high time that TNCs were recognised as having responsibilities as global actors under international law. A set of basic principles for thinking about and implementing TNC responsibility for internationally wrongful acts is needed. In addition, institutional mechanisms, similar to those which currently hold states and individuals to account for breaches of international law, are also needed to provide remedies for those affected by TNC actions in breach of international standards.

Part two of this article begins by exploring the expanding reach of international law to embrace not just states, but organisations and individuals as well. Also discussed are the efforts which have so far been made to bring corporations as well within the coverage of international norms. Arguments both for and against making international norms of behaviour for TNCs binding and enforceable are also canvassed. The conclusion is reached that if internationally agreed standards are to mean anything at all, they must be given teeth – that is, those affected by breaches of such standards must have access to an appropriate remedy. Part three of this article then outlines a model for TNC responsibility and accountability at the international level. The first part of the model is conceptual – a set of basic principles to guide the theory and practice of TNC responsibility for internationally wrongful acts. These principles are based on the International Law Commission's (2001) *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adapted for application to global corporations. The second part of the framework is institutional and involves building on the expertise of human rights and industrial relations institutions at all levels – international, regional and national – as a means of improving access to remedy for those injured by TNC breaches of international standards. These institutions would then become the main venue for the future development of law and practice relating to TNC responsibility for breaches of international standards.

TNCs and international law

The expanding reach of international law

Both theory and practice have now firmly abandoned the traditional doctrine that states are the exclusive subjects of international law. By the middle of the twentieth century, both international organisations and individuals had been brought under the coverage of international law. International organisations, of which there are a growing number, are not only constrained by the instruments under which they are constituted, but, to varying degrees, exercise rights and are subject to duties under international law (Harris, 2004). So far as individuals are concerned, persons in States which have ratified the First Optional Protocol can now lodge individual complaints to the UN Human Rights Council in the event of State failure to protect the rights contained in the *International Covenant on Civil and Political Rights*. The 1998 Rome Statute of the

International Criminal Court (ICC)[6] provides an avenue for bringing individuals to account for "the most serious crimes of concern to the international community as a whole" (Rome Statute, 1998, article 5).

So far as legal (corporate) persons are concerned, however, there are no equivalent duties imposed on them by international law. One rare exception is the 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended by a 1992 Protocol)[7] (SEDAC, 1992); article III of which imposes strict liability for oil pollution at sea on the owner of the ship, usually a company, responsible for such pollution (Harris, 2004, p. 141).

What TNCs do have, however, is access to a variety of protections and rights contained in bilateral and bilateral investment treaties. Chapter 11 of the North American Free Trade Agreement (NAFTA)[8-10], for example, protects TNCs from arbitrary expropriation of their assets by the host government. Article 1110 of the NAFTA allows TNC investors to bring a host government to compulsory arbitration in the event of expropriation without due compensation. America's bilateral trade and investment treaties also provide for protection of the rights of TNCs investing outside the country of incorporation, and for compulsory arbitration in the event of a host-government-investors dispute. These bilateral investment treaties include Chapter 11 of the Australian-United States Free Trade Agreement[11], Chapter 15 of the United-States-Singapore Free Trade Agreement[12], and equivalent chapters in America's Free Trade Agreements with other countries including Chile, Columbia, Israel and Jordan. Investor-State disputes arbitrated under the terms of such multinational and bilateral investment treaties often demonstrate the clash between foreign investor self-interest on the one hand, and host government measures for social and/or environmental protection on the other. In *Metalclad Corporation v United Mexican States*[13], for example, a municipal government refusal to grant US firm Metalclad a permit to develop and operate a hazardous waste landfill site because of the project's adverse environmental impacts was deemed to be an expropriation of Metalclad's property giving rise to a right to claim compensation. In ordering Mexico to pay approximately US$17 million in damages, the Metalclad Tribunal adopted a definition of expropriation which elevates private property rights of foreign investors above the social and environmental objectives of the host State.

Stabilisation clauses in agreements between foreign investors and host State governments also serve to elevate private property rights above social, cultural and environmental objectives of the host State. In 2009, the SRSG in collaboration with the World Bank's International Finance Corporation, analysed stabilization provisions in nearly 90 host Government agreements. The analysis discovered a sharp contrast between wealthier (OECD) countries and poorer countries when it came to allowing foreign investors to escape from the requirements of social and environmental legislation. The most sweeping stabilization provisions were found in Sub-Saharan Africa, where 7 out of 11 host-government agreements specified exemptions from, or compensation for, the effect of all new laws for the duration of the investment project, irrespective of their relevance to human rights or the environment (Ruggie, 2009).

Codes of conduct, voluntary standards and National Corporate Law

There is thus an imbalance between the rights bestowed on TNCs by international law, and the failure of international law to impose equivalent responsibilities on TNCs. This

imbalance is only partly made up for by national laws in a growing number of countries dealing with corporate social responsibility, by industry and other Codes of Conduct and by voluntary standards adopted by individual companies.

National level legislation imposing standards on company behaviour are all part of the State duty to protect the human rights of all individuals within their jurisdiction. The State duty to protect is found in the UN's major human rights conventions[14]. These include the ICCPR, the International Convention on Economic and Social Rights, the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. While none of these Conventions refers specifically to state duties regarding business, they do impose generalised obligations on states to provide mechanisms to redress non-state (i.e. private) abuses of human rights within the limits of national jurisdiction. The treaty bodies responsible for monitoring state compliance with human rights treaties have confirmed that the obligation on states to ensure treaty rights are protected is not fulfilled unless domestic legal systems provide individuals with a remedy for abusive acts committed by private entities. A state can be in breach of treaty obligations if it fails to take appropriate measures to prevent, punish, investigate and redress human rights abuses by private persons or entities within their jurisdiction (Ruggie, 2009, paras 12-14).

The success with which national governments and their courts have been able to prevent or remedy human rights abuses by corporations varies widely. As already mentioned, poorer, less developed nations are often so captive to the need for foreign investment funds that their ability to impose or enforce employment, environmental, social and other standards on TNCs within their borders is severely compromised. Even in developed nations, attempts to introduce legislation requiring corporations to look beyond short term corporate profit and take the interests of "stakeholders" into account have rarely succeeded. In Australia, for example, an attempt in 2000 to introduce a Corporate Code of Conduct Bill was very soon defeated (O'Neill, 2000; CAMAC, 2006).

More successful have been recent efforts in Denmark to introduce new legislation requiring larger companies to report on their CSR program, or report that they lack one. Recent revisions to the *Companies Act* in the UK now require directors to "have regard" to such matters as "the impact of the company's operations on the community and the environment" as part of their duties towards the company. The United Kingdom Government recently confirmed that pension fund trustees are not prohibited from considering social, environmental and ethical issues in their investment decisions, providing they act in the fund's best interests. In South Africa, a new *Companies Act* allows the Government to prescribe social and ethics committees for certain companies (Companies Act 2008 (South Africa) s 72; SAIFAC, 2010). A draft *Companies Bill* in India includes a provision requiring publicly listed companies above a certain size to have a board-level "stakeholder relations committee" to "consider and resolve the grievance of stakeholders" (Ruggie, 2009, para. 25).

In the USA, Federal statutes require publicly listed companies to have robust programmes to assess, manage and report on material risks. None refers to human rights explicitly, but material risks clearly do encompass human rights issues: since the path-breaking *Doe* v. *Unocal* litigation in 1997, more than 50 cases have been

brought against companies under the *Alien Tort Claims Act* (1789) (ATCA) alleging corporate involvement in human rights abuses abroad. Reputational damage and operational disruptions post additional risks.

The ATCA, also called the Alien Tort Statute (28 U.S.C. § 1350), is a United States federal law which reads:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

This statute is notable for allowing United States courts to hear human rights cases brought by foreign citizens for conduct committed outside the USA.

But even this law, with its purported extra-territorial reach, has been of limited effectiveness. ATCA litigation is often expensive, and rarely successful. Despite the number of ATCA cases brought against multinational corporations over the past decade, only a few have had any degree of success. Most ATCA claims have alleged that the defendant company worked with or supported governments that engaged in human rights violations. Defendants have included Chevron (for claims related to protests in the Niger Delta), Rio Tinto (for claims related to slave labour and other claims related to copper mines in Papua New Guinea), Unocal (for claims related to the Yodona pipeline in Burma), a Boeing subsidiary (for claims related to extraordinary rendition), Pfizer (for claims related to non-consensual medical experimentation in Nigeria), Dow Chemical (for claims related to the effects of Agent Orange in Vietnam), major banking, automobile and computer companies (for claims related to apartheid in South Africa), a variety of companies for claims related to atrocities committed during the Second World War, and others.

Although some of these cases are still ongoing, other cases against corporations have been dismissed outright. The only two that have gone to trial resulted in victories for the defendants, including the case against Chevron. The case against Unocal settled in 2005, but on confidential terms. Likewise, the case launched in 1996 against Royal Dutch Petroleum Company, Shell Transport and Trading, and a company official and a Nigerian affiliate also settled on 8 June 2009. The action was launched by the family members of Ken Saro Wiwa and others killed as a result of government suppression of Ogoni region residents who protested against the environmental degradation and other harms associated with the large-scale extraction of oil (Wuerth, 2009). More recently, in September 2010, the US Second Circuit dismissed a putative class action brought by Esther Kiobel and other affected family members of the "Ogoni Nine" who were executed in 1995 along with Ken Saro-Wiwa. The plaintiffs alleged that the defendant TNCs, acting through a Nigerian subsidiary, aided and abetted the Nigerian dictatorship's violent suppression of civilian protests. The *Kiobel*[15] case is significant because of its broad holding that corporations are not subject to suit under the ATCA.

In other countries as well, efforts to use litigation in local courts as a means of bringing TNCs to account have failed. Efforts before courts in Canada and America to render TNCs accountable through the concept of international enterprise liability have met with only limited success (Aurora Institute, 2001). Attempts to bring corporations to account in national courts for activities amounting to crimes under international law have also been generally unsuccessful. The doctrines of separate legal entity and limited liability mean that parent companies are generally not liable for the actions of subsidiaries or business partners. Cases involving well known corporate names such

as Union Carbide[16], Monsanto, Texaco and (in Australia) James Hardie provide a constant reminder of the disparity between the harm inflicted by global firms on the one hand, and the extent of their accountability on the other.

Some corporations have attempted to modify the effect of bad publicity about corporate behaviour by adopting their own individual corporate or sector-wide codes of conduct. Examples include Codes of Conduct developed by Boeing, Halliburton, Lockheed Martin and other major TNCs; Royal Dutch/ Shell's Use of Force Guidelines and Walmart's Standards for Vendor Partners.

It would seem that TNCs are themselves beginning to recognise the limits of the State duty to protect, and that they have a responsibility to respect human rights. Unocal[17], for example, has stated publicly that "human rights are not just a matter for governments".

At the international level, efforts to codify agreed standards of behaviour for TNCs and other non-government global actors have centred around the development of voluntary codes of conduct [18]. The most important of these are the OECD Guidelines for Multinational Enterprises (2000, 2001); the ILO Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy (1977, revised in 2000); the UN Global Compact (n.d.) and ISO 26000 Social Responsibility, a new guidance standard currently being developed by the International Standards Organisation (2010).

However well intentioned, all of these international standard-setting instruments remain subject to major defects. In particular, they lack three characteristics which are essential for any set of standards to be effective (Leary, 2003):

(1) mandatory and verifiable reporting systems;

(2) mechanisms for monitoring corporate activity and compliance on an ongoing basis; and

(3) enforcement mechanisms which are effective beyond national boundaries.

Efforts have been made to put especially the first two of these features into place. For example, the Global Reporting Initiative (GRI), a multi-stakeholder initiative, has developed globally applicable and recognised guidelines that can be used by reporting organisations. The Sustainability Guidelines on Economic, Environmental and Social Performance (2000), provide guidance for companies reporting on the economic, environmental and social impact of their business operations. Similar guidelines aimed at improving company reporting on non-financial aspects of business operations include the Institute of Social and Ethical Accountability's AccountAbility 1000 (AA1000, 1999) which sets out principles and a method for social reporting. The Carbon Disclosure Project and the Global Framework for Climate Risk Disclosure both seek to promote voluntary reporting of matters related to climate change.

The Global Compact has also strengthened the reporting and verification aspects of its global project. It now requires business participants to submit annual "Communications on progress" (COP) using reporting indicators such as the GRI guidelines. The COP must be placed on the UN Global Compact (n.d.) web site[19] and shared widely with the company's stakeholders. A violation of the Global Compact COP policy will result in the change in a participant's status and eventually in the delisting of the participant. As of March 2009, nearly 1,000 companies had been delisted. The OECD Guidelines are less forceful in simply "encouraging" voluntary disclosure of non-financial performance in company reports.

In the area of labour standards, the ILO's Tripartite Declaration, adopted by the ILO Governing Body, creates a procedure that requires governments, workers and employers' organisations to respond at regular intervals to questionnaires relating to how well the Declaration is being implemented. It also provides for publication of a summary of the questionnaire results. However, it contains no mechanism for making either reporting or monitoring compulsory, and no mechanism for enforcement.

So far as enforcement is concerned, none of the above standards are mandatory or enforceable. Even the ISO 26000 is careful to begin by stressing that "[T]his International Standard is not a management system standard. It is not intended or appropriate for certification purposes or regulatory or contractual use. Any offers to certify, or claims to be certified, to ISO 26000 would be a misrepresentation of the intent and purpose of the International Standard." At the international level, the closest things to enforcement mechanisms impacting on TNCs are publicity mechanisms and in some companies and some countries, complaints procedures.

Publicity becomes an enforcement mechanism when it results in consumer or investor behaviour that has an impact on company bottom line. This is becoming more likely as the internet spreads to developing as well as developed nations. Publicity is, itself, often a form of complaint mechanism. For example, the Business and Human Rights Resource Centre's web site posts human rights allegations about business operations in more than 180 countries and gets 1.5 million hits per month (Ruggie, 2009, note 38).

So far as complaints procedures are concerned, while effective grievance mechanisms at company level might be an important part of the corporate responsibility to respect human rights, few companies have established such mechanisms, and ever fewer have established effective grievance mechanisms that do not involve the company itself acting as adjudicator.

At national level, a number of national human rights institutions (NHRIs) and the National Contact Points of States adhering to the OECD Guidelines (NCPs) have established complaints procedures. NHRIs and NCPs are potentially important venues for establishing dialogue and mediation between corporations and those affected detrimentally by their actions – a first step toward providing redress and remedy. However, the mandates of some NHRIs currently preclude them from work on business and human rights. For many others, reluctance to entertain complaints against private business entities has been a question of choice, tradition or capacity. This suggests a great deal of untapped potential, which the working group on business and human rights recently established by the International Coordinating Committee of NHRIs.

Other bodies can also play important roles in providing remedy at the national level. The Ombudsman model has been successfully adopted in a growing number of countries, and could be particularly useful in mediating the relationship between business and human rights. Ombudsman and similar complaints-handling bodies which specialise in specific sector areas, such as the banking and telecommunications industry ombudsman systems in Australia, appear to show particular promise.

Non-judicial mechanisms are particularly valuable when it comes to remedying minor complaints against, and lapses of standards by, corporate entities. But when it comes to the crunch, when major human rights violations are involved and when companies have a lot to lose, non-judicial mechanisms have proven unequal to the task. Indeed, despite their potentially broader scope, non-judicial international avenues for

remedying TNC human rights abuses have proven even less effective than national-level courts (judicial procedures) when it comes to the worst offences. And it was precisely because of the need for a set of standards that could be enforced – a set of standards with teeth at international level – that the Draft Norms on the Responsibilities of TNCs and Other Business Enterprises[20] were written.

The Draft Norms and the alternative framework: protect, respect and remedy

The arrival of the Draft Norms on the international scene in 2003 provided some ground for believing that the glaring absence of provisions at international law applicable to TNCs might eventually be remedied. Written in treaty-like language, the text comprises 23 articles setting out human rights standards for companies in areas ranging from international humanitarian law, through civil, political, economic, social and cultural rights, to consumer protection and environmental practices. Acknowledging that States are the primary duty bearers in relation to human rights, it stipulates that TNCs and other business enterprises, within their "spheres of activity and influence", have corresponding legal duties. The Draft Norms also requires that corporate compliance with its terms be monitored by national and international agencies, and victims provided with effective remedies.

Perhaps not surprisingly, the Draft Norms met with considerable resistance from the corporate community. In the face of such resistance, the UN Human Rights Commission was not prepared to adopt the Draft Norms, and instead finally decided to request the UN Secretary General to appoint a Special Representative to further elaborate on key concepts in the Norms, and to submit "views and recommendations" for consideration by the Commission. The Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, was appointed on 25 July 2005 for an initial two-year term. In 2006, the Commission was replaced by a new Human Rights Council, to which Interim Reports and major Reports have been submitted by the SRSG at least annually since 2006.

Having been charged with commenting on the Draft Norms, the first interim report of the SRSG (Ruggie, 2006) was highly critical. He began by noting significant opposition to the Draft Norms from both business and governments, and concluded that the manner in which the Norms had been framed should be abandoned and replaced by a new, less controversial framework for corporate human rights responsibilities. In his second and subsequent reports the SRSG elaborated on this alternative framework, to be summed up in the catchy phrase "Protect, respect and remedy" (Ruggie, 2008a, b). As indicated by this title, the framework rests on three pillars:

(1) the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;

(2) the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and

(3) greater access by victims to effective remedies, judicial and non-judicial.

The three pillars are said to be complementary, in that each supports the others.

In the SRSG's first Interim Report, he pointed out that TNCs increasingly operate in complex socio-political contexts that pose entirely novel human rights challenges.

In addition, for many companies, going global has meant adopting network based operating models involving multiple business entities spread across and within countries. As the number of participating entitles in a supply chain increases, so also does the TNC lose control over the full range of entities and activities within its supply chain. Ruggie thus criticised the Draft Norms for their inability to adequately identify the "sphere of activity and influence within which TNCs obligations should operate". He argued that the concept of corporate spheres of influence, though useful as an analytical tool, has no legal pedigree, so that the boundaries within which TNCs obligations would take effect remains unknown.

One answer to this criticism is that all modern legal concepts had to start somewhere. For example, Ruggie's latest report suggests that more use could be made of the relatively modern concept of "legitimate expectations" in the formation of judicial and non-judicial mechanisms for remedying corporate human rights infringements. Such inchoate concepts, if useful or potentially useful, should not simply be discarded because of their insubstantial nature. They should be explored and challenged so that their full potential becomes apparent.

What is also true is that defining the "sphere of influence" of a TNC only becomes a difficult problem of "fuzzy borders" when, and to the extent that it is in the interests of that TNC for it to remain so. For TNCs have and continue to define, assert and expand their own spheres of influence whenever it is in their interests to do so. TNCs asserted their right to be at the table when the Draft Norms were negotiated. TNCs regularly assert and seek enforcement of their rights to the various protections and freedoms offered by bilateral and multinational investment agreements. These include the right to mandatory state-investor arbitration under Chapter 11 of the NAFTA Agreement, and the various investor protections in bilateral investment treaties (BITs) such as those between the USA and its major trading partners such as Singapore and Australia.. These BITs are supplemented by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Indeed, the ICSID was established precisely to provide TNCs a sphere of legal influence within which they could assert their rights on an equal basis against host nations. The speed of the increase in bilateral and multilateral investment treaties is one reason why the regulatory framework has again fallen behind the need to cover new accountability gaps. No longer is the need one of protecting investors from "waves of States arbitrarily expropriating foreign investments". Rather, recent experience suggests that some treaty guarantees and contract provisions unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its human rights obligations.

Ruggie also points out that the Draft Norms appear to require that within corporations' "sphere of influence" they would have exactly the same range of duties as states – from respecting to protecting and fulfilling rights – the only difference being that states' duties would be primary and corporations' duties secondary. The concern is that imposing positive international law obligations on corporations could simply serve to "undermine corporate autonomy, risk-taking and entrepreneurship". In addition, argues Ruggie:

> [i]mposing the full range of duties on transnational corporations under international law by definition reduces the discretionary space of individual governments within the scope of those duties (Ruggie, 2007).

Ruggie concludes that focusing on individual corporate liability for wrong doing cannot fix the problem of larger systemic imbalances in global systems of governance. In his view, international effort should be focussed, at least in the first instance, on strengthening the ability of States to more effectively protect human rights against corporate abuses. Second, Ruggie agrees with political philosopher Iris Marion Young that what is needed is not a system for assigning individual blame for discrete acts, but rather a system of "political" or "shared responsibility" based on collective action (Ruggie, 2007, citing Young, 2004). Soft law hybrid arrangements involving multi-stakeholder groups and based on voluntary compliance represent important innovations which deserve attention, support and evaluation in other domains. For Ruggie, many elements of a successful strategy lie beyond the legal sphere altogether:

> ... any successful regime needs to motivate, activate and benefit from all of the moral, social and economic rationales that can affect the behaviour of corporations. This requires ... building social movements and political coalitions that involve representation from all relevant sectors of society including business ... [in a way that] look[s] "beyond compliance" (Ruggie, 2007).

At its June 2008 session, the Human Rights Council welcomed the "protect, respect and remedy" policy framework proposed by the Special Representative. This marked the first time the Council or its predecessor had taken a substantial policy position on business and human rights. The protect, respect and remedy framework has thus been accepted as a more viable alternative to the Draft Norms, which appear to have quietly been shelved. By its resolution 8/7, the Council also extended the Special Representative's mandate for another three years, tasking him with "operationalizing" the framework – providing "practical recommendations" and "concrete guidance" to States, businesses and other social actors on its implications (Ruggie, 2009).

In seeking ways to "operationalise" the "respect, protect and remedy" framework, the SRSG has recognised the need for both effective reporting and monitoring mechanisms, and effective avenues for remedying human rights abuses when they do occur. For example, pointing to the "near-universal" recognition of the corporate responsibility to respect human rights, the SRSG asked whether companies actually have systems in place enabling them to demonstrate a respect for human rights with any degree of confidence. He found that relatively few do, and recommended that companies be persuaded or required to put into place a process of on-going human rights due diligence. The SRSG used his 2008 Report to outline the four core elements of human rights due diligence: having a human rights policy, assessing human rights impacts of company activities, integrating those values and findings into corporate cultures and management systems, and tracking as well as reporting performance (Ruggie, 2008a, A/HRC/8/5, paras 56-64; Ruggie, 2009, paras 45-85).

So far as access to remedies is concerned, the SRSG has focussed primarily on removing the barriers to accessing judicial mechanisms often faced by human rights victims, and on improving salient aspects of non-judicial mechanisms. The aim is to improve not just the quantity, but more importantly the quality of non-judicial grievance mechanisms. Six key principles should, according to the SRSG, underpin this necessary improvement: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency (Ruggie, 2009, para. 99, citing Ruggie, 2008a A/HRC/8/5, para. 92). As a seventh principle specifically for company-level mechanisms, the SRSG stressed that

they should operate through dialogue and mediation rather than the company itself acting as adjudicator. The SRSG has also been successful in extracting an indication of willingness from the major global business groups, the IOE, the ICC and the BIAC, to participate in piloting the proposed Grievance Mechanism Principles. A small number of companies from relevant sectors will be identified to test pilot the Principles at plant or project level and to disseminate the results (Ruggie, 2009, para. 101, citing IOE, ICC & BIAC, 2009).

The SRSG has also emphasised the potential benefit to be gained from tapping the mediation capacity and other grievance resolution skills of NHRIs and NCPs. In particular, he has recommended that the system of OECD Guideline NCPs be given greater credibility through adherence to a set of minimum performance criteria. Several NCPs, notably in the UK and The Netherlands, have developed innovative governance structures, transparency measures and mediation mechanisms that merit attention. The SRSG has also recommended that Governments should consider ways to give more weight to NCP findings against companies. For example, the SRSG suggests that "since Governments are obliged to promote the OECD Guidelines under which NCPs operate, a negative finding logically might affect the company's access to government procurement and guarantees" (Ruggie, 2009, para. 104).

One particularly welcome initiative of the SRSG is the launching of a new global wiki: Business and Society Exploring Solutions – A Dispute Resolution Community, in collaboration with the International Bar Association and with support from the Compliance Advisor/ Ombudsman of the World Bank Group and JAMS Foundation. BASESwiki (www.baseswiki.org) is an interactive online forum for sharing, accessing and discussing information about non-judicial mechanisms that address disputes between companies and their external stakeholders. It includes information about how and where mechanisms work, solutions they have achieved, experts who can help, and research and case studies. BASESwiki is currently available with English, French, Spanish, Chinese and Russian portals, with Arabic under development.

Many NGOs and others seeking to help victims of, and prevent, corporate abuses have welcomed the SRSG's protect, respect and remedy framework. The fear remains, however, that an over-emphasis on voluntary and non-enforceable mechanisms for ensuring corporate respect for human rights may allow too many TNCs to escape from the consequences of their actions on too many occasions. It is argued that the exercise of significant influence by TNCs in national and international affairs must no longer remain free of corresponding obligations and accountability. The aim of the rest of this paper is to outline a model for addressing this concern, in a way which complements and builds on the SRSG's model.

The first part of the model outlined below outlines the basis for a theoretical framework of TNC responsibility and accountability. The framework is based on principles similar to those found in the International Law Commission's (2001) *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (the Draft Articles). The advantage of the framework is that it recognises the essentially voluntary nature of international law, where States essentially remain free to choose whether, when and on what terms they wish to sign up to international standard-setting instruments. The only exception involves those international rules which are so important that they have attained the status of fundamental norms (*jus cogens*) which are universally applicable and cannot be deviated from. It is argued

below that TNCs should likewise remain free to decide whether or not to sign up to international standard-setting instruments. They should self-select, in effect. And they should do so within the context of a global set of principles clearly delineating the consequences of signing up to a treaty, and the consequences of breaching the obligations thereby undertaken.

The second part of the framework outlined below focuses on the need for trusted and legitimate forums at the international level for dispute resolution, and to bring TNCs to account in the event of breaches of human rights and other obligations with global implications. The existing UN and Regional Human Rights Bodies and the ILO are two existing institutional structures which could provide such a network of forums.

Building institutions towards international accountability for TNCs

The global firm and responsibility for internationally wrongful acts

Should there be international criminal liability for TNCs? I have suggested elsewhere that the International Criminal Court (ICC) may be ideally placed as a forum for bringing TNCs to account for the most egregious breaches of human rights (de Jonge, 2008, pp. 33-34). At present, the ICC has jurisdiction over "the most serious crimes of concern to the international community as a whole" (Rome Statute, article 5), but this jurisdiction is limited to "natural persons" (Rome Statute, article 25). There is, as yet, no provision for the Court to exercise jurisdiction over corporate persons. But there is historical precedent for creating such a jurisdiction, in the Nuremburg tribunal discussions of corporate liability under international criminal law (Field, 2006).

After much reflection, however, I have changed my view on this possibility. First, the political obstacles already in the way of the ICC being able to operate effectively are significant enough without creating even more opposition to the Court's very existence by attempting to enlarge its jurisdictional mandate. Second, it remains the case that may legal systems around the world (e.g. Indonesia, Spain) still have problems with recognising that corporate persons can be criminally responsible. These legal systems have either refused to recognise that corporations can have the requisite *mens rea* (intent or other mental element) for criminal liability, or they apply a limited version of "semi-criminal" (my term) liability for corporations that looks very like an administrative penalty when applied. Governments in these countries would face significant opposition were they to propose agreeing to standards for TNCs in the international law arena that were so different from those applied domestically. Third and importantly, the International Law Commission, when drafting its Articles on State Responsibility looked closely at the question of whether international law did or should provide for States to be held criminally liable for egregiously wrongful international act. The Commission eventually decided against including a provision in the Draft Articles establishing a category of "international crime". An important reason for this was the Commission's desire to avoid analogies with domestic criminal law in the international realm.

TNC responsibility should be modelled on state responsibility. The Draft Articles set out simple, straight-forward guidelines for attributing behaviour and responsibility for such behaviour to States, and also outline the consequences of invoking such responsibility. I want to argue here that similar guidelines for TNC responsibility should also be developed, and should be developed so as to avoid the deficiencies inherent in the Draft UN Norms as identified by the SRSG.

Other concepts given expression in the Draft Articles on State Responsibility could also be used as models for a new set of principles governing TNC responsibility. For example, the rules on attribution of conduct to a State in Chapter II of the Draft Articles are aimed at dealing with the problem that States, like corporations, can only act through the agency of private individuals. Chapter II thus sets out principles very reminiscent of corporations law principles found throughout the world. Article 4 provides that the conduct of any and all State organs are to be considered an act of the relevant State. A State organ is defined to include any person or entity which has the status of a State organ under the internal law of the relevant State. Likewise, the conduct of any person or entity that has the status of an "organ" of a TNC under the internal rules of that TNC (its Articles of Association) should be attributed to that TNC. Such entities and persons would include the typically recognised "agents" of the TNC, including its board of directors, its Chairman, its Managing Director or Chief Executive Officer. While rules for attribution of conduct to a company already exist in domestic law systems, a new set of globally-agreed rules is needed for the purpose of establishing the international responsibilities of TNCs. This new set of rules should reflect current State practice around the world, and should, in accordance with customary international law principles, be allowed to develop and evolve in accordance with State practice

Chapter IV of the Draft Articles deals with "Responsibility of a State in connection with the act of another State". A State can be held internationally responsible for knowingly aiding and assisting in the commission of an internationally wrongful act by another State (Article 16). A State can also be held responsible if it knowingly "directs and controls another State in the commission of an internationally wrongful act by the latter" (Article 17). And finally, a State which coerces another State to commit an act is internationally responsible for that act if the act would, but for the coercion, be an internationally wrongful act of the coerced State; and the coercing State does so with knowledge of the circumstances of the act (Article 18).

Each of the three versions of complicity outlined in Chapter IV of the Draft Articles – aiding and assisting; directing and controlling and coercion – could usefully and appropriately be applied to TNCs. They are useful and appropriate first because they do not go beyond already accepted parameters of corporate complicity. Second, the concept of directing and controlling is a particularly useful one to apply in the context of corporate groups and supply chains. The idea of directing and controlling could be used to distinguish those cases where a parent company should be held responsible for the actions of a subsidiary or related entity in a foreign country. It could also potentially be used to identify cases where a TNC should be held responsible for the actions of a supplier or other business partner – although its application in such cases would probably be rare. It is likely that the concept of coercion, as found in Article 18 of the Draft Articles, would be more relevant in the context of supply chains. Coercion has been defined to include economic coercion, which could again prove particularly relevant to business contexts.

An equally attractive aspect of the Draft Articles on State Responsibility is the emphasis placed on providing clear and simple rules governing "Reparation for injury" (Chapter II of Part II). A duty to provide "prompt, effective and adequate" reparation was recognised in paragraph 18 of the draft UN Norms on Human Rights in terms which reflect the standard set in most bilateral investment treaties for host

governments which violate the property rights of a foreign investor corporation. An obligation to provide reparation is thus particularly apt in the context of international harms for which a TNC is responsible. In the context of the Draft Articles, article 34 provides that "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination … " Each of these three forms of reparation is well recognised in international law (Campagna, 2004, pp. 1251-2).

Reparation in line with principles set down in the Articles on State Responsibility would mean that the responsible TNC would be "under an obligation to... re-establish the situation which existed before the wrongful act was committed". This duty, essentially that contained in Article 35 of the Draft Articles, would be welcomed by communities affected by TNC mining and other environmentally damaging activities. Nor would it present any major threat of insurmountable or endless liabilities for TNCs. The duty to make restitution would be limited, as it is for States, on to those circumstances where it is materially possible to make such restitution, and with the limitation that making restitution should not involve "a burden out of all proportion to the benefit deriving from restitution instead of compensation".

"To the extent that damage for which it is responsible is not made good by restitution, a State responsible for an internationally wrongful act is under an obligation to compensate for the damage. The compensation should cover any financially assessable damage … " Principles governing compensation for torts are already well recognised and established in domestic legal systems around the world with a large degree of consistency. There should be no difficulty in transferring such principles to the international responsibilities of TNCs.

Article 37 of the Draft Articles provides that "The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by the act insofar as it cannot be made good by restitution or compensation. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality". Again, protections for the wrongdoer are also present in the requirement that "Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State".

The concept of satisfaction as a remedy is particularly appropriate in the context of TNC activities causing harm. In particular, it recognises the importance of the "social" aspects of "corporate social responsibility". This aspect is particularly important in the provision of remedies for victims of human rights abuses perpetrated by TNCs.

Strengthened UN and regional human rights bodies

A growing number of countries have signed up to international and/or regional human rights standards, and have provided their citizens with access to regional and/or international human rights forums as a means of asserting such rights. Regional human rights courts now operate in Europe (www.echr.coe.int/ECHR/homepage_en), America (www.corteidh.or.cr/) and Africa (www.african-court.org/en/). In Asia, article 14 of the ASEAN Charter signed by ASEAN leaders on 20 November 2007, contains a commitment by the ASEAN member nations to establish a new ASEAN human rights body (AP DIGITAL, 2007; www.asean.org/).

In addition to hearing individual petitions, the regional human rights bodies can and do also undertake the public examination of the human rights records of individual states. While it would be both conceptually difficult and practically impossible to require all TNCs to submit regular human rights reports to the human rights bodies in the same way that sovereign states do, it would be possible to require that reports submitted by States provide details of measures taken by the State to improve the human rights behaviour of corporations operating or established within their territory. Such measures could include new reporting requirements for public companies to include a "human rights" section in their annual reports, as is already done voluntarily by many leading TNCs. Regional human rights bodies could also provide a collectively agreed forum for bringing TNCs to account for human rights violations. The jurisdiction of a regional human rights court in respect of TNC human rights abuses need not detract from State jurisdiction in respect of the same abuses, but should be a complementary jurisdiction. That is, it should be up to the State members of the relevant human rights body to decide whether or not to prosecute for human rights abuses committed by TNCs within their jurisdiction, and only when the State is unwilling or unable to initiate such prosecution should the regional human rights body have jurisdiction. This is what currently happens in the case of the ICC, which under the Rome Statute only exercises jurisdiction over individuals guilty of crimes against humanity when no State is willing or able to prosecute.

A significant, but not impossible, investment of political will and some resources would be needed to expand the jurisdiction and powers of the international human rights council and its regional counterparts. But if done properly and in a coordinated fashion, it could also provide the opportunity for linking the regional bodies into a global network of human rights bodies, with the UN Human Rights Council at their apex. A network of human rights bodies would be far stronger and more effective than the same number of human rights bodies standing separately.

For greatest efficacy and legitimacy, it is essential that such a network of human rights bodies have the capacity to facilitate mediated processes on the ground in locations where human rights-related disputes arise. Many such disputes are complex and involve diverse and economically unequal parties in remote locations. In such cases, processes based solely on written submissions are unlikely to meet basic standards of fairness and rigor.

The mediation process used should also reflect the grievance mechanism principles set out by the SRSG referred to above. Arbitration by such entities might also be an option. In particular, companies operating in conflict affected areas should have a strong incentive to agree ex ante to use such mediation/ arbitration bodies in the event of disputes with communities, and their investors and States should have a strong interest in seeing them do so.

Even where the highest standards are maintained, the demands of appropriate investigations and /or hearings are likely to raise significant evidentiary, practical, financial and political challenges, while offering only limited prospects of remedies that are timely and enforceable. So it is also important that Governments and relevant international bodies, including the UN, are willing to support such a human rights mediation infrastructure, through eventual court-based enforcement where necessary.

Nor is the idea of an international system of human rights bodies, with the UN at its apex, a radical or new idea. Dr M. Fitzmaurice, speaking in 1997 on the occasion of the

50th anniversary of the International Court of Justice, envisaged a time when organizations, including NGOs and private organisations, could be permitted to access a global system of courts and tribunals, possibly headed by the ICJ. Her vision was of an international legal system where specialized courts would "exist within a single, or at least linked, system of international courts, within which the ICJ would maintain an appellate position, enabling it to guide the unified development of general rules of international law" (Fitzmaurice, 1997, pp. 413-416). A system of linked human rights tribunals, with the UN Human Rights Council at its centre, must surely be part of this future system – a system in which all global actors, including TNCs, are willingly subject to the order it imposes. The vision is one of global citizenship, with all the possibilities inherent in that idea.

The global firm and a stronger international labour organisation

In the area of decent working standards, Virginia Leary has convincingly argued that "the focus in international law on state action alone fails to address the influence of the activities of non-state actors, such as transnational corporations, on labor and other social issues". International law's pre-occupation with the nation state is reflected in the fact that the ILO Tripartite Declaration, as well as other instruments adopted by the ILO Governing Body (where workers' organisation and employer bodies participate alongside governments), have a lesser legal status than instruments adopted by the ILO Annual Conference, which is open only to nation States that are ILO members.

If TNCs and other international organisations were recognised as having international legal personhood, they could then become an integral part of the Annual Conference and the various sub-committees of the ILO. TNCs would then have a greater incentive to subscribe to ILO standards, and to talk to recognised worker organisations. Once an individual enterprise had agreed to abide by the standards established in an ILO instrument, that firm would then bring those standards with it wherever it set up business, and in all its business relationships. If compulsory mechanisms for reporting and monitoring were also established for firms which signed up to ILO standards, the provision of remedies to those affected by failure to reach those standards would be possible. One mechanism for facilitating remedies which might be both effective in resolving labour disputes, and acceptable to TNCs, is mandatory ILO arbitration through agreed arbitration procedures.

TNCs have proven to be well able to make use of the various Investment protection arbitration procedures to their own advantage. So they should also be open to the possibility that compulsory and transparent ILO arbitration in the event of labour rights disputes could be to the benefit of all. So far as employees are concerned, the ILO has estimated that the number of persons officially unemployed could rise above 230 million in 2009, from 193 million in 2008 (Ruggie, 2009, para. 8, citing www.ilo.org/wcmsp5/groups/public/–-dgreports/–-dcomm/documents/publication/wcms_103456.pdf). And those most likely to be severely affected in a major downturn are those who are already vulnerable. International as well as national efforts are needed to limit the damage and restore economic momentum. For companies, maintaining and restoring public trust during the process of downsizing is as important as the process itself in ensuring continued survival.

An increasing number of countries have established mechanisms for resolving labour disputes. Under guidance from the ILO and international human rights bodies, these mechanisms are proving remarkably effective. However, they do not always work, or always work effectively. Moreover, particularly in developing countries, there are often systemic problems with basis standards of work in certain industries falling behind or becoming worse under the pressures of financial downturn. The ILO has national contact points in most countries, and these could provide a valuable mechanism for providing a remedy when national systems fail. They could also be a useful resource for beginning to research and redress systemic failures in national systems of labour protection.

Conclusion

In his most recent report to the Human Rights Council, the SSRG recognised that the State duty to protect human rights "could be rendered weak or even meaningless" in the absence of mechanisms to punish and redress corporate-related abuse of the human rights of individuals within their jurisdiction. He further recognised that such mechanisms can be either judicial or non-judicial, national-level or international in nature. In this article, I have outlined a possible model, consistent with the SRSG's Protect, Respect and Remedy framework, for supporting the implementation of that framework. The first part of the model is conceptual – a set of basic principles to guide the theory and practice of TNC responsibility for internationally wrongful acts. The second part of the framework is institutional – building on the expertise of human rights and industrial relations institutions at all levels - international, regional and national - as a means of improving access to remedy for those injured by TNC breaches of international standards.

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