

## ARTICLE

## Catching Corporate Human Rights Abuse Abroad: A Wider Net of Extraterritorial Laws

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Globalisation has allowed corporations to spread their production processes across the world. Their activities have human rights implications for the communities they touch. Often these transnational corporations operate in developing countries, where human rights laws are less stringent than those of the States in which they are domiciled. Corporations may take advantage of the relaxed regulatory environment, to the detriment of vulnerable communities that suffer human rights abuses as a result. Yet the current international human rights framework does not adequately protect these communities because it relies on each State protecting rights within the confines of its own territory. It falls short where States are unable or unwilling to put in place the necessary safeguards to do so.

This article argues that domestic human rights laws should be given extraterritorial effect in order to police the activities of transnational corporations. The legal basis for extraterritorial legislation is well established and there are good moral and economic reasons for change. Current initiatives to curb the abuses of transnational corporations have not worked, while human rights regulations within domestic legal systems are effective. These regulations should be enforced overseas to protect foreign victims. Corporate violations of human rights would not be tolerated at home—why should they be tolerated when corporations go abroad?

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## I Introduction

The current international human rights framework calls upon States to respect human rights, protect them from abuse by private actors, and provide adequate remedies to victims who suffer harm.<sup>1</sup> Instruments such as the International Covenant for Civil and Political Rights (ICCPR) and International Covenant for Economic Social and Cultural Rights (ICESCR) create binding obligations on States to fulfil these functions for the rights embodied within.<sup>2</sup> The framework largely relies on each State protecting human rights within the confines of its own territory. The system falls short where States are unable or unwilling to put in place safeguards to do so.

This shortfall has created a *governance gap*, allowing foreign corporations operating in these States to commit human rights abuses with few consequences. This is problematic because corporations have globalised and spread their production processes across the world. Their activities have human rights implications for the communities they touch. The key question this article will explore is: how can the governance gap be addressed?

This article argues that domestic human rights regulations should be given extraterritorial effect in order to police the activities of corporations operating abroad. Developing States that host corporations' activities (host States) are not in a position to unilaterally tighten their human rights laws. The focus must shift to how developed States where corporations are domiciled (home States) can bear more responsibility in preventing abuses by their transnational corporations. The legal basis for extraterritorial legislation is well established and there are good moral and economic reasons for change. Doing so will bring long-term, sustainable benefits to all. While this article targets corporations, the principles apply to all business enterprises operating abroad.

This article proceeds in four parts. Part II outlines the existing international human rights framework, identifies why it fails to protect rights, and refutes the bodies of resistance preventing reform. Part III details the moral, economic and legal reasons for change and explains why current initiatives to combat the governance gap are unworkable. Part IV offers the solution of extraterritorial legislation and discusses the nuances of how it can be applied. Using this solution, Part V attempts to reconcile the divide between host States and home States on how best to protect human rights.

## II Human Rights: The Status Quo of Corporate Compliance

### A *The current international human rights framework revolves around the State as the central actor*

Over the past 50 years, human rights law has bloomed on the international stage. Treaties codifying fundamental rights have been signed and ratified,<sup>3</sup> human rights standards have

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1 *Human rights and transnational corporations and other business enterprises* GA Res 17/4, A/HRC/Res/17/4 (2011) at [3]. This United Nations resolution was passed in endorsement of the "Protect, Respect and Remedy" framework.

2 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR], art 2; and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) [ICESCR], art 2.

3 ICCPR; and ICESCR.

become customary international law,<sup>4</sup> and individual responsibility for international crimes is now recognised.<sup>5</sup>

Human rights have been accepted into legal systems and societies as inherent and inalienable, owed directly to individuals because of their humanity and dignity. Governments have promised to *respect* human rights by refraining from violating them through state organs, and also *protect* them from violation by private actors within their jurisdiction.<sup>6</sup>

Still, human rights instruments focus on the State as the central actor. Like other aspects of public international law, these instruments are agreements between sovereign entities in what would otherwise be an “anarchic” international system.<sup>7</sup> Therefore, human rights treaties are written as sets of obligations for States, with accountability mechanisms steeped in the “traditional rules of state responsibility”.<sup>8</sup>

These treaties make two assumptions: first, that the State is the primary abuser of human rights and must be held to account; and secondly, that the State has absolute capacity and authority to protect against human rights violations within their territories by private actors, such as corporations. In the modern world, neither of these assumptions are necessarily true. The eruption of digital communication, and cross-border commerce and movement has meant that States have less of the traditional control they once exerted over their nationals. Accordingly, the international human rights framework must adapt to fulfil its purpose of securing the enjoyment of human rights for all people.

*B Globalisation has flooded the international stage with players that can heavily influence the enjoyment of human rights*

The world is more polycentric than it was when human rights made their debut onto the international stage at the signing of the Universal Declaration of Human Rights (UDHR) in 1948.<sup>9</sup> Many actors who are not States are capable of affecting human rights on a large scale. Supranational bodies such as the European Union (EU) now have direct authority to create binding laws on EU member States and their citizens.<sup>10</sup> The privatisation of public services once provided by state institutions—such as prisons, transport and education—

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4 David Weissbrodt and Muria Kruger “Human Rights Responsibilities of Businesses as Non-State Actors” in Philip Alston (ed) *Non-State Actors and Human Rights* (Oxford University Press, New York, 2005) 315 at 331.

5 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 25.

6 John Ruggie *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (United Nations Human Rights Council, A/HRC/17/31, March 2011) [*Ruggie Report* (2011)] at 6.

7 Celia Wells and Juanita Elias “Catching the Conscience of the King: Corporate Players on the International Stage” in Philip Alston (ed) *Non-State Actors and Human Rights* (Oxford University Press, New York, 2005) 141 at 145.

8 Andrew Clapham “Non-State Actors” in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (eds) *International Human Rights Law* (2nd ed, Oxford University Press, New York, 2014) 531 at 532.

9 See Philip Alston “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?” in Philip Alston (ed) *Non-State Actors and Human Rights* (Oxford University Press, New York, 2005) 3 at 3.

10 The principle of direct effect is set out in Case 26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 2.

allowed corporations to reach further into the lives of citizens.<sup>11</sup> Economic globalisation means that corporations are no longer confined to national borders. They have spread production processes across the globe to take advantage of lower production costs, transport costs, and the competitive advantages of a particular geographical market.<sup>12</sup> Transnational corporations have grown in power and influence, and many have exceeded States in economic might.<sup>13</sup>

The activities of these corporations can have far-reaching impacts on communities across the globe. Their capacity to violate human rights is reflected in the legal claims brought against them for harm. In *Kiobel v Royal Dutch Petroleum Co*, Nigerians claimed that the oil giant cooperated with the Nigerian government to violently crush environmental protests by attacking Ogoni villages, beating and killing residents and destroying homes.<sup>14</sup> In *Doe I v Unocal Corp*, Burmese villagers sued Unocal for a range of abuses committed during a pipeline project, involving forced labour and forced relocation<sup>15</sup> as part of a joint venture with the Burmese government.<sup>16</sup>

Conversely, transnational corporations can foster development in the communities they touch. They bring new jobs, capital and technology; they can actively strive to improve working and living conditions for local communities.<sup>17</sup> For example, Google has used its influence to make a stand for freedom of expression and political discourse, by pulling its services out of China due to China's censorship laws.<sup>18</sup>

Despite this, for as long as there are good *and* bad players on the field, vulnerable communities will continue to suffer at the hands of *some* corporations that do not uphold minimum human rights standards.

### *C The current human rights framework fails to protect*

In a world of globalised commerce and eroded national borders, current human rights regulations fail to catch abuses committed by transnational corporations operating outside their home States. This occurs with few repercussions but dire consequences for those affected.<sup>19</sup> There are four reasons for this.

First, measures to protect labour rights are costly and beyond the resources of governments in developing countries where transnational corporations operate. In the long term, the costs of sustained human rights abuses and poor communities are greater than the costs of protective measures. But, in the short term, such measures require

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11 International Council on Human Rights *Beyond Voluntarism: Human rights and the developing legal obligations of companies* (February 2002) at 53.

12 Wells and Elias, above n 7, at 150.

13 United Nations Research Institute for Social Development *Visible Hands: Taking Responsibility for Social Development* (January 2000) at 76–77.

14 *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013) at 2.

15 *Doe I v Unocal Corp* 395 F 3d 932 (9th Cir 2002) at 942.

16 At 937.

17 Kira Allmann, Laura Hilly and Max Harris “Some Sort of Monster’?: The Benefits and Burdens of Human Rights for Business” (Podcast, 21 May 2015) Oxford Human Rights Hub <<http://ohrh.law.ox.ac.uk>>.

18 David Scheffer and Caroline Kaeb “The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory” (2011) 29(1) Berk J Intl L 334 at 382.

19 See Wells and Elias, above n 7, at 142.

monitoring mechanisms, education and access to justice, all of which many host States are unwilling, or unable, to provide.<sup>20</sup>

Secondly, foreign direct investment has become the main driver for economic growth in developing countries; it has surpassed foreign aid as the primary driver of technological advancement and development of human resources.<sup>21</sup> In an attempt to compete for much needed investment, host States are reluctant to tighten human rights regulations for fear of creating an unfavourable environment for investors.

Thirdly, transnational corporations will set up business through subsidiaries and supply contracts, allowing them to move easily if conditions change.<sup>22</sup> These enterprises derive a lot of power from the fact that they can shift their operations from one country to the next.<sup>23</sup> Host States are under permanent threat of transnational corporations leaving, which puts them in a weak bargaining position. As a result, corporations have greater freedom to dictate production costs and operating conditions, causing harmful flow on effects to the workers and communities involved.

Finally, the spread of production through different countries and downstream supply contracts means that human rights abuses are less easily detected than if such activities took place on home soil.<sup>24</sup>

In this context, a framework that relies on every state protecting human rights within the confines of its own territory is inherently unworkable. Host States are not in a position to adequately protect their own citizens or unilaterally tighten their human rights laws.

*D The State-to-State system is not broken: it simply needs to be used*

(1) Focus must shift to the corporations that perpetuate human rights abuses

Where a State fails to complete its obligations under human rights instruments to protect its people, corporations can take advantage of the relaxed human rights laws. For this reason, many blame the state-centric human rights regime, claiming it to be one-dimensional and ineffective,<sup>25</sup> or that it cannot keep up with the realities of global politics and business.<sup>26</sup> It is argued that the state-to-state system of obligations fails to govern corporations that operate internationally, in areas where local human rights protections are weak.<sup>27</sup>

These criticisms focus too much on the lack of protection in host States. The dilemma of host States is only half the problem; this aspect will be difficult to change for as long as transnational corporations stand in a position of power. The other part of the problem is the home States that allow their corporations to perpetrate or benefit from human rights violations overseas.

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20 Wells and Elias, above n 7, at 172; and Steven Ratner “Corporations and Human Rights: A Theory of Legal Responsibility” (2001) 111 Yale LJ 443 at 462.

21 Olivier De Schutter “The Accountability of Multinationals for Human Rights Violations in European Law” in Philip Alston (ed) *Non-State Actors and Human Rights* (Oxford University Press, New York, 2005) 227 at 238.

22 Wells and Elias, above n 7, at 144.

23 De Schutter, above n 21, at 314.

24 See Wells and Elias, above n 7, at 150.

25 Alston, above n 9, at 3.

26 Wells and Elias, above n 7, at 146; and Alston, above n 9, at 20.

27 Alston, above n 9, at 6.

Home States often point the finger at less developed economies, claiming that those governments should be doing more for human rights. These States maintain that protection against abuses can be “fairly and effectively done by ... encouraging [host] States to enact domestic legislation implementing their obligations under human rights instruments ...”.<sup>28</sup> Their claims turn a blind eye towards the issues faced by host States outlined above. And, at the same time, home States fail to acknowledge that it is corporations domiciled in *their own jurisdictions* that commit the human rights violations. The burden of enforcement must fall more on home States if these rights are to be protected.

(2) The state-to-state system is capable of effectively policing human rights

We must remember that the global marketplace is a creation of States.<sup>29</sup> Corporations operate across national borders because commercial laws have facilitated this process. While human rights policing is more difficult in the present day, States should not be devolved of this responsibility. Doing so would be analogous to devolving parents of the responsibility to mind their children once they can walk.

It is simply not true that the international legal system does not have the capacity to enforce human rights obligations. State-to-state agreements are used to regulate cross-border commerce all the time. The World Trade Organisation (WTO) General Agreement on Tariffs and Trade (GATT) imposes obligations on State parties regarding imports from foreign traders and taxation of domestic products.<sup>30</sup> The United Nations Convention on Contracts for the International Sale of Goods imposes binding rules on private parties for international sale and purchase agreements unless explicitly opted out of.<sup>31</sup> Bilateral tax treaties and investment treaties will reach into other jurisdictions to monitor and protect the interests of business enterprises that operate abroad even though the obligations are made between States.

The existence and successful implementation of these instruments show that the state-to-state system is capable of regulating cross-border operations. Particularly so, where all parties recognise there is value in imposing uniform or mutually agreed standards. So why is it that human rights law has not been afforded the same treatment? The legal mechanisms are in place—they just need to be put into gear.

(3) Corporations cannot escape the human rights regulations of their home States

Some may argue that a state-focused approach is nevertheless unworkable because corporations can easily move across borders to evade State sanctions.<sup>32</sup> While this may be true of less developed economies, it is not true of developed economies.

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28 Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013) [Brief of the UK and Netherlands as Amici Curiae] at 25. Note capitalisation in original.

29 De Schutter, above n 21, at 314.

30 General Agreement on Tariffs and Trade 1867 UNTS 190 (opened for signature 15 April 1994, entered into force 1 January 1995) [GATT].

31 United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 3 (opened for signature 11 April 1980, entered into force 1 January 1988).

32 See Wells and Elias, above n 7, at 147.

Corporations have headquarters in home States, being the epicentre of all key business decisions, and research and development. Not only would it be impractical to move headquarter operations, delocalising to a place with less stringent human rights standards is likely to come with inherent risks such as operating without key infrastructure<sup>33</sup> and under politically unstable governments.<sup>34</sup> Further, major corporations thrive from the existence of established consumer markets of developed economies. In the age of digital communication, moving to escape legal sanctions would not escape the sanction of public opinion, boycotts or negative publicity.

International law is largely created on a state-to-state basis, with downwards imposition of those laws through domestic legislation. Corporations are governed domestically from tax obligations to directors' duties, to reporting duties in securities legislation, to health and safety standards. This works. The problem is not the state-centric system, but the lack of obligation on home States to police their corporations abroad. As such, profit-seeking corporations will inevitably take advantage of conditions favourable to them in foreign markets. A failure by developed States to control their players on the field does not mean that the game is broken; it means that greater pressure should be applied to ensure the game is fair.

#### *E Resistance to reform does not stand up to scrutiny*

There are three bodies of resistance preventing reform of the current human rights framework. First, the human rights agenda is perceived as secondary to the protection of economic rights of corporations.<sup>35</sup> Corporations and financial institutions might devolve themselves of responsibilities that they see as falling on the State. Some would stand by Milton Friedman's assertion that companies have no responsibilities other than to secure a profit for their shareholders, as long as they operate within the bounds of free competition and without deception or fraud.<sup>36</sup> This is a radical idea, but examined more closely it contains inherent limitations. Anti-fraud itself is a social policy.<sup>37</sup> In any case, as a society, we have decided that social policies such as workplace health and safety, and environmental care take precedence over pure commercial profit. Protection of human rights should do the same.

Secondly, governments are reluctant to allow international legal instruments to bind corporations directly for fear of giving them status in international law, and undermining the power of the State.<sup>38</sup> These concerns can be quelled by maintaining a state-centric system. The new framework should create greater obligations on home States to police human rights compliance.

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33 See Achim Berg and others *Bangladesh's ready-made garments landscape: The challenge of growth* (McKinsey & Company, November 2011) at 10

34 At 16.

35 For example, intellectual property rights to protect profits of a pharmaceutical company have been used to prevent manufacture of generic anti-AIDS medication. Wells and Elias, above n 7, at 171.

36 Weissbrodt and Kruger, above n 4, at 337.

37 At 337.

38 International Restructuring Education Network Europe "Controlling Corporate Wrongs: The Liability of Multinational Corporations. Legal Possibilities, Initiatives and Strategies for Civil Society" (2000) 1 LGD at [5].

Finally, some governments claim that imposing greater liability on corporations would allow States to be complacent and downplay or ignore their own human rights obligations.<sup>39</sup> It is claimed that host States would then have no pressure to prevent abuses or provide remedies.<sup>40</sup> This view could be likened to a form of political victim-blaming; while host States must protect their people, one cannot direct responsibility away from the corporations that perpetrate and benefit from rights-breaching behaviour. Of course, the situation is often more complex: host States can be the primary violator of rights, with corporations incidentally benefiting. But putting corporations in a position of responsibility does not diminish the pressure on these States to respect human rights; it might even help to set a standard. In any case, if decades of diplomatic pressure have not changed the situation, the insistence that host States abide by international human rights norms is not going to solve the problem.

However strong the resistance to a new approach, it is important to remember that not so long ago human rights had no status whatsoever in international law. They were viewed as contingent, and conferred only by the goodwill of sovereign States.<sup>41</sup> That view changed after the two world wars, when the international community decided that human rights are universal, inherent and inalienable.<sup>42</sup> International law evolved to protect the individual from arbitrary state power and from violations by private actors. It further evolved to recognise individual responsibility in the most serious of crimes through ad hoc tribunals<sup>43</sup> and the International Criminal Court.<sup>44</sup>

In light of these developments, the law must evolve to address corporate abusers of human rights. Traditional views that business and social responsibility operate in distinct spheres have no place in the modern world.

### III Time for Change: A New Framework

#### *A There are moral, economic and legal bases for tightening human rights regulations on transnational corporations*

It is easy to believe that businesses are opposed to fundamental rights. But they can be drivers of social development in communities, and have the ability to exert a positive influence.<sup>45</sup> There are strong moral, economic and legal bases on which greater regulation of transnational corporations is justified.

##### (1) The moral argument

From a moral point of view, transnational corporations should respect and protect human rights because it is the right thing to do. More importantly, it is the idea that with more power comes more responsibility. Corporations have grown in wealth, power, and influence and they have a corresponding duty to take greater care not to harm. Arguably

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39 Brief of the UK and Netherlands as Amici Curiae, above n 28, at 25.

40 At 26.

41 Alston, above n 9, at 38.

42 *Universal Declaration of Human Rights* GA Res 3/217A, A/RES/3/217A (1948) at Preamble.

43 Rome Statute of the International Criminal Court, art 87.

44 Article 25.

45 Allmann, Hilly and Harris, above n 17.



there is a further duty for corporations to advance fundamental rights and social development in the communities from which they derive billion-dollar profits.<sup>46</sup> In a 2001 Report, the European Economic and Social Committee proclaimed that “[w]orld trade must bring benefits for all. Every effort must be made to avoid fierce competition between developing countries using comparative advantages solely based on low wages and exploitation.”<sup>47</sup> Competing in this way traps developing countries in a cycle of low innovation, low wages and low productivity.

## (2) Economic motivators

### (a) Commercial efficiency, sustainability and risk mitigation

Contrary to claims that international accountability would hinder commercial effectiveness, corporations and markets thrive in highly regulated, highly litigious environments—not when there is zero liability.<sup>48</sup> Articulated rules can eliminate the elements of commercial uncertainty and risk. Already, numerous civil cases have been brought before courts in home States for damage sustained by individual victim groups abroad.<sup>49</sup> Inconsistent court decisions and issues of jurisdiction have left the rules unclear; this exposes corporations to ongoing risk of litigation from an undefined class of claimants.<sup>50</sup> A defined set of regulations would mitigate this risk and set a clear standard for corporate activity abroad.

Studies by the Organisation for Economic Cooperation and Development (OECD) show that “stronger labour standards improve efficiency and lead to faster economic growth, and have not damaged export performances of countries that have adopted them”.<sup>51</sup> Further, the European Economic and Social Committee noted that foreign direct investment is mostly targeted at stable environments rather than poor countries with few regulatory safeguards.<sup>52</sup> This is because respect for human rights creates greater sustainability in emerging markets, improved worker productivity and ultimately better business performance.<sup>53</sup>

Taking an active stance towards human rights protection enhances the public perception of a corporation, and it appeals to socially conscious consumers who are willing

46 Alston, above n 9, at 7; and De Schutter, above n 21, at 259.

47 “Opinion of the Economic and Social Committee on ‘Human Rights in the Workplace’” [2001] C260 OJ 79 at [3.2.2].

48 Wells and Elias, above n 7, at 171.

49 In *Lubbe v Cape Plc* [2000] 1 WLR 1545 (HL), the UK company was alleged to have exposed employees and residents to asbestos; and in *Ngcobo v Thor Chemicals Holdings Ltd* [1995] TLR 579 another UK company was alleged to have exposed employees to highly toxic chemical processes. In both cases, the issue of jurisdiction was problematic, with the Courts accepting jurisdiction after many hurdles. *Kiobel v Royal Dutch Petroleum Co*, above n 14, and *Wiwa v Royal Dutch Petroleum Co* 226 F 3d 88 (2nd Cir 2000) were cases brought against Shell for environmental pollution and gross human rights abuses in the Niger Delta. After subsequent appeals on the applicable law and appropriate forum, both cases were dismissed on jurisdictional grounds.

50 Scheffer and Kaeb, above n 18, at 375.

51 “Policy Brief: International Trade and Core Labour Standards” (October 2000) OECD <[www.oecd.org](http://www.oecd.org)>; and De Schutter, above n 21, at 254.

52 “Opinion of the Economic and Social Committee on ‘Human Rights in the Workplace’”, above n 47, at [3.2.2].

53 Weissbrodt and Kruger, above n 4, at 317.

to pay a premium for products that are ethically sourced.<sup>54</sup> Increasingly, investors are using human rights compliance and social indices to make funding decisions.<sup>55</sup> This may be ethically driven or motivated by the knowledge that human rights and environmental compliance issues can stall project development, costing millions of dollars per day. Moreover, as Google's withdrawal from China illustrates, advocacy for human rights can form part of a long-term strategy for growth.<sup>56</sup>

(b) Advancement of free trade

A laissez-faire approach to protecting human rights would also fail the rules of free competition. Human rights regulations might be criticised as a form of protectionism, but they actually reinforce free-trade principles by reducing trade-distorting economic advantages of worker exploitation and "social dumping".<sup>57</sup> Ralph Steinhardt claims that human rights violations by governments might even amount to an export subsidy.<sup>58</sup> Healthy competition, innovation and efficiency should occur to lower production costs, not rights violations or disregard for people's livelihoods.

There is a fear that if trade and human rights were linked, it would be used to support protectionist policies. There are three ways to address this concern. First, some humanitarian principles must inevitably override the interests of trade. If trade sanctions can be justified as a means of encouraging a State to respect the fundamental rights of its people, such as those imposed on the Democratic Republic of North Korea, then other types of human rights protections must also in principle, be justifiable.

Secondly, the WTO GATT explicitly acknowledges that policies aimed at the protection of human, animal and plant life or health have a place in society, and are valid exceptions to the free trade principles.<sup>59</sup> There are limits to free trade insofar as human wellbeing is concerned.

Thirdly, the WTO has developed a complex set of rules to prevent parties from using domestic policies and customs duties as a form of protectionism or discrimination.<sup>60</sup> If a framework can be developed to prevent States from abusing current laws for protectionist purposes, a framework can equally be developed to prevent legitimate human rights laws from being used to inappropriately hinder trade.

(3) The legal basis

Corporations are creations of the law and owe their existence to the legal framework that enables their activities. They derive benefits under the law through rules of limited liability,

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54 Ralph Steinhardt "Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*" in Philip Alston (ed) *Non-State Actors and Human Rights* (Oxford University Press, New York, 2005) 177 at 181.

55 At 184–185.

56 Scheffer and Kaeb, above n 18, at 383.

57 Steinhardt, above n 54, at 190.

58 At 190.

59 Agreement on the Application of Sanitary and Phytosanitary Measures 1867 UNTS 493 (opened for signature 15 April 1994, entered into force 1 January 1995), art 2.

60 For example, General Agreement on Tariffs and Trade (1947) 55 UNTS 187 (opened for signature 30 October 1947, entered into force provisionally 1 January 1948), art 3 prevents State parties from using internal taxes as a means of imposing a secondary tax on importers who have already paid the customs duty or price of entry.

intellectual property rights and even assertions of the right to religion and freedom of speech.<sup>61</sup> Conversely, corporations should be subject to obligations necessary to create a functional society, and be challengeable under the law for damaging behaviour.

(a) Corporate regulations in the domestic sphere reflect international legal norms

There is no question that the activity of corporations is regulated in the domestic sphere. Often, these regulations directly affirm the government's international obligations in areas such as discrimination, labour practices, endangered species and climate change. In New Zealand, the Human Rights Act 1993 prevents business enterprises from practising discrimination, in accordance with the art 4 of the ICCPR, which New Zealand has ratified.<sup>62</sup> The Employment Relations Act 2000 and Health and Safety at Work Act 2015 bind corporations to core international labour standards. Laws were specifically enacted to give effect to the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Kyoto Protocol.<sup>63</sup> These examples illustrate how corporations are constantly regulated through the downward imposition of international law norms using domestic legislation.

States have also extended their jurisdictional reach to regulate the activity of their nationals abroad where the issue is important enough. The Crimes Act 1961 makes terrorism, people smuggling and sex with children punishable in New Zealand even if the wrong is committed abroad.<sup>64</sup> In the United Kingdom, the House of Lords granted jurisdiction to hear a claim against a UK company for alleged human rights violations committed in South Africa because the courts there could not provide a fair forum for the case to be heard.<sup>65</sup>

(b) International law speaks directly to corporations and individuals

Although international legal instruments bind only state parties, it would be a mistake to believe that corporations are not regulated under international law. Many international instruments speak directly to individuals and legal persons, recognising that the responsibility to protect human rights falls upon everyone.

The preamble of the UDHR addresses "every individual and every organ of society". The International Convention on the Elimination of All Forms of Racial Discrimination creates obligations for individuals, groups, organisations and the State in art 2.<sup>66</sup> Article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide addresses "constitutionally responsible rulers, public officials or private individuals".<sup>67</sup>

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61 In *Burwell v Hobby Lobby Stores Inc* 573 US \_\_\_\_ (2014), the Supreme Court of the United States ruled that the corporation was entitled to exercise its freedom of religion to deny health insurance funding to employees wanting to access contraception.

62 Human Rights Act 1993; and "New Zealand's International Obligations—International Covenant on Civil and Political Rights" Human Rights Commission <[www.hrc.co.nz](http://www.hrc.co.nz)>.

63 Trade in Endangered Species Act 1989, s 2; and Climate Change Response Act 2002, s 3(1).

64 Section 7A.

65 *Lubbe v Cape Plc*, above n 49, at 1566.

66 International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 7 March 1966, entered into force 4 January 1969), art 2(1)(d).

67 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (signed 9 December 1948, entered into force 12 January 1951). See also Weissbrodt and Kruger, above n 4, at 332.

Many treaties further require States to criminalise or sanction the conduct of corporations and individuals relating to organised crime, bribery, terrorist financing, money laundering, corruption, and environmental torts.<sup>68</sup>

In his 2007 Report, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, recognised that corporations may be held directly liable for international crimes.<sup>69</sup> In support of this, he cites the recent extension of corporate liability rules in domestic legal systems that reflect international standards.<sup>70</sup> Ruggie reiterated this principle again in his *amici curiae* brief submitted to the United States Supreme Court in the case of *Kiobel*.<sup>71</sup>

The inclusion of corporations in treaties and in discussions of human rights norms shows that they *are* subjects of international law, even if they cannot be brought before the International Court of Justice for violating a treaty obligation. In his 2011 Report to the United Nations Human Rights Council, Ruggie stressed:<sup>72</sup>

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

States such as the United Kingdom and the Netherlands have maintained that corporations are not liable under international law. They claim that any liability is a matter of domestic law, vertically imposed by a State in fulfilment of its own international obligations. Even if we accept this proposition as true, the conversation should not be about what the law currently is, but what it ought to be. Ruggie rightly states in his 2007 Report and *amici curiae* brief that the present lack of an international adjudicating body for corporations does not mean that corporate responsibility does not exist.<sup>73</sup> In the same way that individual responsibility for crimes developed over time, international law can and should develop to recognise corporate responsibility today.

#### B *Current initiatives to curb corporate abuses are not effective*

Current initiatives to encourage human rights compliance range from voluntary codes of conduct, to civil liability, to soft law instruments. None of them have been successful in creating a fair and comprehensive framework for addressing the rights-violating actions of transnational corporations.

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68 Andrew Clapham *Human Rights Obligations of Non-State Actors* (Oxford University Press, New York, 2006) at 267. See, for example, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 21 November 1997, entered into force 15 February 1999), art 1.

69 John Ruggie *Business and human rights: mapping international standards of responsibility and accountability for corporate acts* (United Nations Human Rights Council, A/HRC/4/35, February 2007) at [33].

70 At [84].

71 *Brief of Former UN Special Representative for Business and Human Rights, Professor John Ruggie; Professor Philip Alston; and the Global Justice Clinic at NYU School of Law as Amici Curiae Supporting Neither Party, Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013) (No 10-1491) [*Brief for Ruggie and others as Amici Curiae*] at 7–8.

72 *Ruggie Report* (2011), above n 6, at 13.

73 Ruggie, above n 69, at [21]; and *Brief for Ruggie and others as Amici Curiae*, above n 71, at 7.

## (1) Voluntary codes of conduct

Some corporations have adopted voluntary codes of conduct as part of corporate social responsibility initiatives. At least outwardly, these codes make protection of human rights a corporate objective.

Codes will vary widely in compliance, efficacy and credibility, depending on how they are formed and monitored. Internal policies are the least reliable because they are designed by the company itself and lack independent and public monitoring.<sup>74</sup>

On the more credible end of voluntary codes are industry-wide standards and coalitions that govern human rights practices. An example is the Bangladesh Accord on Fire and Building Safety, which was set up in the wake of the Rana Plaza factory collapse in 2013 that killed over 1,100 people.<sup>75</sup> It legally binds signatories to a five-year program of safety audits and remedial action for defects. The Voluntary Principles on Security and Human Rights in the Extractive Sector 2000 (Voluntary Principles) is another example of a code that aims to create internal shifts across the industry.<sup>76</sup>

A belief that human rights protection is best achieved through voluntary codes of conduct has also led to global initiatives such as the United Nations Global Compact, and social accountability auditing such as SA8000.<sup>77</sup> The mentality of these “opt-in” initiatives is that if they are voluntary, and drafted with corporate input, the codes will better reflect business values and lead to greater internalisation.<sup>78</sup> This line of reasoning fails in four ways:

- (1) First, not all corporations will adopt a code of conduct.
- (2) Subscription to a voluntary code may have no real influence on a corporation’s behaviour. Often they are mere public relations exercises.<sup>79</sup> Following the Rana Plaza collapse, major western corporations such as Wal-Mart opted out of the Bangladesh Accord; instead creating their own, less stringent code with no external enforceability or auditing mechanisms.<sup>80</sup> Despite participating in the Voluntary Principles described above, Shell has consistently failed to respect human rights in Nigeria.<sup>81</sup> These examples demonstrate that corporations will continue to take advantage of a relaxed regulatory environment that permits rights abuses, for as long as they can.

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74 International Council on Human Rights, above n 11, at 53; and De Schutter, above n 21, at 338.

75 Gillian B White “What’s Changed Since More Than 1,100 People Died in Bangladesh’s Factory Collapse?” *The Atlantic* (online ed, Washington DC, 3 May 2017).

76 “The Voluntary Principles” The Voluntary Principles on Security and Human Rights <[www.voluntaryprinciples.org](http://www.voluntaryprinciples.org)>.

77 “Our Mission” United Nations Global Compact <[www.unglobalcompact.org](http://www.unglobalcompact.org)>; and “SA8000 Standard” Social Accountability International <[www.sa-intl.org](http://www.sa-intl.org)>.

78 Weissbrodt and Kruger, above n 4, at 338.

79 De Schutter, above n 21, at 295.

80 Laura Boudreau, Ryo Makioka and Mari Tanaka “The Impact of the Rana Plaza Collapse on Global Retailers” (Working paper, University of California, 2015) at 5; and “Comparison: The Accord on Fire and Building Safety in Bangladesh and the Gap/Walmart scheme” (10 July 2013) Clean Clothes Campaign <[www.cleanclothes.org](http://www.cleanclothes.org)>.

81 Human rights abuses are evidenced in the cases brought against Shell. See *Kiobel v Royal Dutch Petroleum Co*, above n 49; and *Wiwa v Royal Dutch Petroleum Co*, above n 49. But see “Companies and The Voluntary Principles on Security and Human Rights” (2013) Voluntary Principles on Security and Human Rights <[www.voluntaryprinciples.org](http://www.voluntaryprinciples.org)>.

- (3) Credibility and compliance is difficult to monitor. Particularly so where corporations have not made the full content of their internal standards available for public scrutiny. The European Parliament has found that “the broad diversity of voluntary codes of conduct and labels with very different standards and verification mechanisms makes comparison of effective performances problematic”.<sup>82</sup> This creates two problems. First, consumers will be unable to distinguish between credible and less credible codes of conduct. In the end, the worst codes will dominate.<sup>83</sup> Secondly, information about corporate operations in the field could be difficult to find, particularly without friendly cooperation or the due diligence of a litigation discovery process. Thus, even if the codes themselves are clear, a breach may be difficult to prove.
- (4) Some claim that misleading advertising legislation could be used to hold corporations accountable to their own standards.<sup>84</sup> But it would only target corporations that shout the loudest about their ethical practices. In most other cases, the information disparity between consumer and corporation would prevent a valid claim from being lodged.<sup>85</sup> More importantly, misleading advertising legislation is designed to protect the consumer. Even if a claim succeeded, it does not provide redress for victims of abuse. It is not the correct forum for protecting human rights.

## (2) Market mechanisms

Inevitably linked to voluntary codes is the idea that market forces will sway corporations into human rights compliance. The emergence of social indices on stock markets,<sup>86</sup> human rights sensitive branding and specialty products such as fair trade chocolate, shows the business world responding to investors and consumers who demand ethical standards.<sup>87</sup> It proves that social responsibility is not inherently unprofitable, but also leads to questions about whether it is driven by altruistic motives.<sup>88</sup> Adhering to human rights standards because it is ‘good business’ undermines and commodifies the basic principles of human dignity. Businesses should protect human rights because it is the right thing to do, whether profitable or not.

Leaving human rights enforcement to the market relies on having an active and informed base of consumers and investors. The information disparity between the corporation and consumer, discussed above, means this will often be lacking. Further, market mechanisms might only target large corporations with a strong enough reputation to lose respect in the public eye. Other corporations will escape scrutiny.

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82 “Corporate Social Responsibility: European Parliament resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility” [2003] C187E OJ 180 at 182.

83 De Schutter, above n 21 at 304.

84 At 301.

85 At 304.

86 Steinhardt, above n 54, at 185.

87 At 181.

88 At 185.

Ultimately, corporate promises for good behaviour adopted in response to market forces are not legally enforceable and do not give rise to consequences if violated.<sup>89</sup> Enforcement is left to self-regulation and consumer demand.<sup>90</sup> This is not enough.

### (3) Civil liability in home States

Bringing a civil case to the courts of home States is another way to hold corporations accountable, allowing victims of human rights abuse to seek redress. However, the parameters are defined by domestic courts. They decide whether to grant jurisdiction to a foreign claimant, what wrongs committed on foreign soil (if any) can be assessed, and the choice of law. Often, their decisions are driven by policy concerns and narrow interpretation of international law, leaving very little protection for victims.

Once upon a time, the Alien Tort Claims Act (ATCA) granted jurisdiction to United States courts to hear civil claims by foreigners for violations of international law.<sup>91</sup> At first blush, the ATCA granted a uniquely wide jurisdiction for United States courts to hear claims by foreign claimants, against foreign defendants for conduct that took place in foreign territory. Lawsuits were brought under the ATCA for decades against natural persons and corporations for international wrongs committed abroad.<sup>92</sup>

The scope of liability was already narrowly defined in *Doe v Unocal* because the Court's interpretation of the ATCA did not add to the net of regulations already existing in the international sphere.<sup>93</sup> It only made it easier to claim damage by converting a violation of international law into a domestic tort. However, in two successive blows dealt through *Kiobel*, the ATCA was left largely without effect. First, the Court of Appeals for the Second Circuit ruled that corporations could not be held liable under the ATCA because there was no norm of corporate liability for violations of international law.<sup>94</sup> This ruling was heavily criticised by academic commentators.<sup>95</sup> Then in 2013, the Supreme Court ruled that the ATCA has no extraterritorial application to wrongs committed abroad. Both appeal courts aired policy concerns and fears of "diplomatic strife".<sup>96</sup> Chief Judge Jacobs proclaimed that it was not for United States courts to "beggar" corporations of other countries by ordering

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89 Weissbrodt and Kruger, above n 4, at 338.

90 Scheffer and Kaeb, above n 18, at 338.

91 Alien Tort Claims Act 28 USC § 1350.

92 As examples: *Doe I v Unocal Corp*, above n 15; *Abdullahi v Pfizer* 562 F 3d 163 (2nd Cir 2009); and *Kadic v Karadzic* 70 F 3d 232 (2nd Cir 1995).

93 *Doe I v Unocal Corp*, above n 15. See Steinhardt, above n 54, at 196. The Court articulated two circumstances under which a private actor could be liable under the ATCA: first, where the corporation commits a narrow class of wrongs identified by treaty and custom as wrongful, in which international law prescribes individual responsibility; and secondly, where the conduct is sufficiently infused with state action to be attributable to the State.

94 *Kiobel v Royal Dutch Petroleum Co* 621 F 3d 111 (2nd Cir 2010).

95 Odette Murray, David Kinley and Chip Pitts "Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of *Kiobel*" in Andrew Clapham (ed) *Human Rights and Non-State Actors* (Edward Elgar Publishing, Cheltenham, 2013) 456 at 472; Scheffer and Kaeb, above n 18, at 364; and *Brief for Ruggie and others as Amici Curiae*, above n 71, at 5–6.

96 *Kiobel v Royal Dutch Petroleum Co*, above n 14, at 13.

them to pay damages, which would “provoke international rivalry”.<sup>97</sup> These rulings have rendered the ATCA ineffective in protecting against corporate abuse abroad.

Courts may find reasons to reject a claim even if it falls within the subject matter of a statute, often taking the same line of “not our business”.<sup>98</sup> The Brussels Convention gives jurisdiction to courts of EU member States to hear cases against companies domiciled in that State, for damage caused in third countries.<sup>99</sup> But the *forum non conveniens* limitation has allowed courts to reject a claim if there are alternative avenues open for redress.<sup>100</sup> Reluctance by courts in developed economies to adjudicate issues may lead to an international ping-pong game of responsibility. In the end, policy concerns and judicial caution will likely take precedence over bringing perpetrators to justice.

Even when civil liability is a valid option, corporations will often settle in order to placate small victim groups. In doing so, they avoid the risk of an unfavourable precedent that could jeopardise future operations or create negative publicity.<sup>101</sup> With hundreds of millions at stake in potential damages, it is relatively cheap for corporations to buy silence with no admission of guilt.<sup>102</sup> Some corporations will go as far as settling claims in three different jurisdictions to avoid headlights being drawn to their operations.<sup>103</sup>

Moreover, each civil case requires a willing plaintiff with the capacity to sue in a foreign court. Placing too much reliance on this avenue may exclude victims who do not have the resources or legal support to bring such a claim forward.

Unwilling courts and successive settlements have suppressed the emergence of a standard-setting precedent for corporate behaviour abroad. Using civil liability to hold corporations to account is not the way forward.

#### (4) Soft law instruments

Soft law instruments, such as the OECD Guidelines for Multinational Enterprises, create non-binding standards. They call upon transnational corporations to implement minimum labour standards and to respect the rights of those affected by their activities, judged against an international law standard.<sup>104</sup> Other guidelines include the International Labour Organisation (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises

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97 *Kiobel v Royal Dutch Petroleum Co* 621 F 3d 111 (2nd Cir 2010) 4 February 2011 (Order No 06-4800) at 4. See also Andrew Clapham “Introduction” in Andrew Clapham (ed) *Human Rights and Non-State Actors* (Edward Elgar Publishing, Cheltenham, 2013) xiii at xix.

98 De Schutter, above n 21, at 267–268.

99 Convention concerning judicial competence and the execution of decisions in civil and commercial matters 1262 UNTS 153 (adopted 27 September 1968, entered into force 1 February 1973) [Brussels Convention], replaced by “Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters” [2001] L12 OJ 1.

100 De Schutter, above n 21, at 267.

101 Scheffer and Kaeb, above n 18, at 375.

102 At 375.

103 At 371.

104 *OECD Guidelines for Multinational Enterprises* (OECD, 25 May 2011) at [II.2].



1977,<sup>105</sup> and the United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regards to Human Rights (UN Norms).<sup>106</sup>

Following these developments, a EU Directive has made it mandatory for corporations with over 500 employees to report on non-financial issues, including human rights compliance.<sup>107</sup> Some monitoring and implementation mechanisms do exist, such as the national contact points set up by the OCED to promote the guidelines, handle enquiries and assist in difficulties arising from implementation.<sup>108</sup>

The United Nations Guiding Principles on Business and Human Rights (Guiding Principles) is the most recent soft law instrument to be adopted. The Guiding Principles direct States and corporations to protect, respect and remedy human rights abuses.

In his report presenting the Guiding Principles to the United Nations Human Rights Council, drafter John Ruggie acknowledges the failings of previous soft law instruments. He notes how the UN Norms triggered a divide between the business community and human rights advocates, leading to their ultimate rejection.<sup>109</sup> In his research, Ruggie found that the world was lacking a single “authoritative focal point around which the expectations and actions of relevant stakeholders could converge”.<sup>110</sup> The many existing initiatives were not large enough in scale to truly move markets—they were fragmented pockets, unable to work together in a coherent system.

Ruggie claims that the Guiding Principles are distinct from previous initiatives because they were developed in a research-based consultative manner. The Guiding Principles are informed by actual business practice, with their workability tested in different companies and sectors.<sup>111</sup> They claim to be a single, coherent and comprehensive template to identify existing international law obligations and standards for corporations.<sup>112</sup>

While the Guiding Principles have received wide enthusiasm, progress is difficult to measure. According to Ruggie, they are no less important than legally binding obligations, and the courts of public opinion would ensure compliance.<sup>113</sup> Yet we are still struggling with incidents such as the Rana Plaza collapse in 2013, unsafe working conditions in Chinese Apple factories, and ultimately, corporations turning a blind eye to human rights abuses.<sup>114</sup> Furthermore, the Guiding Principles primarily address a State’s obligations in a domestic context; they offer little guidance on how to protect against abuses when domestic systems are lacking.

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105 International Labour Organisation *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (March 2017).

106 *Norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights* E/CN4/Sub2/2003/12/Rev2 (2003).

107 “Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups” [2014] L330 OJ 1 at 4.

108 De Schutter, above n 21, at 305.

109 *Ruggie Report* (2011), above n 6, at 3.

110 At 3.

111 At 4.

112 At 5.

113 John Ruggie *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (Human Rights Council, A/HRC/8/5, 2008) at [54].

114 Richard Bilton “Apple ‘failing to protect Chinese factory workers’” (18 December 2014) BBC News <[www.bbc.com](http://www.bbc.com)>.

Perhaps the primary failing of the Guiding Principles lies in their voluntary nature and the lack of enforcement mechanisms. The global community has been attempting to hold corporations accountable since the late 1970s and 1980s.<sup>115</sup> A butterfly effect of guidelines has blossomed onto the international stage, each attempting to direct players towards rights-friendly behaviour. Although claimed otherwise, the Guiding Principles may too suffer from problems of acceptance and compliance. The rules are still unclear and unenforced. And today, we are still discussing the most effective way to hold transnational corporations to account.

It is true that the world has become more rights-conscious, with even the International Monetary Fund and World Bank adopting social policies into their agenda.<sup>116</sup> Perhaps too, principles contained within soft law instruments will become common practice and eventually entrenched into customary international law. But when we look at rights that have become custom in the last 70 years, only the most serious offences against humanity are sanctioned.<sup>117</sup> Some even argue that many parties would not have signed the UDHR if they knew certain rights would become entrenched as custom.<sup>118</sup> To this day, the right to freedom of expression, to be free from exploitation at work, and the right to a clean environment are not universally recognised, which leaves corporations free to cause harm if domestic laws of the host State permit.

How many more human rights disasters must occur before enough condemnations of harmful behaviour can be entrenched into state practice and *opinio juris*? We cannot entrust the protection of human rights to the hands of state practice and business practice, in hopes that a binding norm will develop. It is clear that soft law is just too soft.

#### IV Reaching Beyond Borders: The Case for Extraterritorial Legislation

There has been little discussion about how to close the governance gap, without compromising too many interests of the stakeholders involved. Nor has there been much discussion about what effective human rights law actually looks like.

##### A *Extraterritorial legislation is the best way to protect human rights from corporate abuse*

The domestic human rights framework within developed countries seems to function well. Taking the example of New Zealand, corporations are bound by legislation such as the Human Rights Act 1993, which forms part of the network of human rights obligations they must manage, as a business operating in New Zealand. There are monitoring mechanisms and complaints processes through the Human Rights Commission, ombudsmen, judicial appeals and the possibility of civil litigation, should any rights be breached. This system should be applied to regulate corporate activity overseas.

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115 Weissbrodt and Kruger, above n 4, at 318.

116 Steinhardt, above n 54, at 209–211.

117 Weissbrodt and Kruger, above n 4, at 331: customary international law exists against slavery, murder, torture, prolonged arbitrary detention and systemic discrimination.

118 Nicola Jagers “Non-State Actors and Human Rights” (Lecture to an International Human Rights Law Class, University of Amsterdam, The Netherlands, 9 December 2015).

While international law can place direct duties on private actors, it lacks the practical capacity to enforce those duties.<sup>119</sup> It cannot match the state apparatus and domestic resources devoted to regulating rights violations by private actors.<sup>120</sup> Thus, enforcement is left to domestic law. State practice shows a strong presumption for almost all international legal duties binding on private actors to be enforced in this way.<sup>121</sup> Domestic institutions must be put into gear first, before international institutions can intervene.<sup>122</sup>

It seems hypocritical that our governments would legislate to prevent corporations from violating human rights at home, but would not curtail the actions of the same corporations when they violate the rights of other people abroad. It is not good enough to pass this responsibility onto less-resourced host States that are not in a position to put in place a comprehensive human rights protection regime. It is even less appropriate to pass the burden of enforcement onto poorer, less empowered communities that have no such regime to draw upon.

What we can do, is extend the reach of existing human rights frameworks from home States to bind their corporations abroad, and make redress mechanisms available for foreign victims of abuse.

Philip Alston argues that States have always found ways to enforce policies on their nationals, even if they have to reach beyond their own borders.<sup>123</sup> This is true. States have done so in areas of sex trafficking, bribery of foreign officials, taxation, mercenary activities, maritime activities, disclosure requirements in securities legislation and reporting requirements for parent companies with global operations.<sup>124</sup> The same can be done for compliance to international human rights norms.

States are generally not required to legislate extraterritorially; but doing so is also not generally prohibited by international law, as long as there is a recognised jurisdictional basis.<sup>125</sup> One basis relates to conflict-affected areas: States must ensure their corporations are not involved in human rights abuses because the host State has lost effective control and will be unable to protect against abuses. Another basis could be the case discussed here, where the host State is unable to protect human rights due to a lack of resources or bargaining power against corporations.

This method is most likely to receive support from the international community. It protects human rights without putting host States at the risk of losing foreign investment. And if applied across the board, home States will not suffer a relative trade or political disadvantage because the net of obligations for corporations will tighten collectively across all developed economies.

Further, it does not threaten State sovereignty or impale corporations with direct obligations under international law. Short of laws on genocide, war crimes and crimes against humanity, governments are unlikely to support direct international enforcement over their nationals, because it would reduce their own authority.<sup>126</sup> Instead, extraterritorial legislation allows States to set the standard for compliance with their own domestic regulations.

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119 John Knox "Horizontal Human Rights Law" (2008) 102 AJIL 1 at 19.

120 At 19 and 47.

121 At 30

122 At 20.

123 Alston, above n 9, at 23.

124 *Ruggie Report* (2011), above n 6, at 7.

125 At 7.

126 Knox, above n 119, at 45.

According to Ruggie, there are “strong policy reasons” for home States to set clear expectations for businesses to respect human rights abroad.<sup>127</sup> Not only does it preserve a State’s own reputation, but it also provides predictability and consistency for corporations.<sup>128</sup> This is preferred to the unpredictable nature of litigation brought under laws such as the ATCA where the applicable law, jurisdiction, and legal standard of compliance was unclear.

The obvious counter-argument to extraterritorial legislation is that States do not have an interest in protecting human rights beyond their borders, over and above the crimes described above. This claim can be refuted by the tremendous number of ratifications for the eight core ILO conventions establishing labour rights;<sup>129</sup> the 168 ratifications of the ICCPR;<sup>130</sup> the use of sanctions by the United Nations Security Council to prevent grave human rights abuses from occurring;<sup>131</sup> participation by a number of governments in an initiative to prevent the trade of conflict diamonds;<sup>132</sup> and the use of aid as a foreign policy tool to encourage human rights development.<sup>133</sup>

Critics also claim that it would put the laws of home States above the legal system of the country in which abuse occurs.<sup>134</sup> This is fallible logic. A corporation is still bound by the local laws of foreign countries in which they operate. If these laws are more stringent than those at home, the corporation must comply. Where these laws are more permissive, home States are nonetheless entitled to hold their own to a higher standard. As long as the wrongdoing can be tied back to a corporation domiciled in the home State, there is no encroachment of sovereignty or judicial imperialism. It is well established that governments may regulate the activities of their own persons beyond national borders.

While there may be some resistance to the idea of human rights being enforced extraterritorially, all we need is a shift in society’s frame of mind. In a world where corporations benefit from operating in overseas markets, they must also be subject to greater scrutiny. Such is the philosophy behind disclosure requirements in securities legislation—the legal infrastructure for imposing domestic obligations on corporate activities abroad is already in place.<sup>135</sup> Why can the same not apply to human rights protections?

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127 *Ruggie Report* (2011), above n 6, at 7.

128 At 7.

129 International Labour Organisation “ILO ‘core’ conventions ratifications surge past 1000 mark” (press release, 22 September 2000).

130 “International Covenant on Civil and Political Rights” (3 July 2016) United Nations Treaty Collection <[www.treaties.un.org](http://www.treaties.un.org)>.

131 In 2014, the UN Security Council imposed sanctions on Yemen, which included travel bans and asset freezes on individuals engaged in planning, directing or committing acts that violate applicable international human rights law or international humanitarian law or acts that constitute human rights abuses in Yemen: *Adopted by the Security Council at its 7119th meeting, on 26 February 2014* SC Res 2140, S/Res/2140 (2014). See also: *Human Rights and the Security Council—An Evolving Role* (Security Council Report, 25 January 2016) at 14.

132 “KP Participants and Observers” Kimberley Process <[www.kimberleyprocess.com](http://www.kimberleyprocess.com)>.

133 “Our approach to aid” New Zealand Ministry of Foreign Affairs and Trade <[www.mfat.govt.nz](http://www.mfat.govt.nz)>.

134 *National Action Plan on Business and Human Rights* (Ministry of Foreign Affairs, The Netherlands, April 2014) at 39.

135 Steinhardt, above n 54, at 188.

(1) A concerted international effort is needed: Belgium—a case study

Belgium enacted a law in 1993 giving Belgian courts universal jurisdiction over war crimes, genocide and crimes against humanity listed under the Rome Statute of the International Criminal Court.<sup>136</sup> Due to politically motivated lawsuits and criticisms about the inhospitable environment it created for transnational corporations, the law was restricted in 2003.<sup>137</sup>

Many criticised Belgium's actions as being protectionist because the social policies promoted the self-interest of Belgian workers, disguised as altruism; others claimed it would scare the business world away from Belgium.<sup>138</sup> While these criticisms are valid for any one State taking up extraterritorial measures on its own, they would no longer hold true if host States adopted measures collectively. No individual State would be left paralysed or disadvantaged in trade because it imposes more stringent controls on corporations.

Olivier De Schutter agrees that uniform promotion of human rights on the level of the EU would avoid a single member State attracting all the criticism.<sup>139</sup> He rightly points out that a State acting individually, even if genuinely motivated to do good, may simply not be in a position to do so. However, even promotion on a European level might attract criticism about protectionism over the entire region. What we need is a concerted international effort by home States to hold their transnational corporations accountable to domestic human rights standards.

(2) Guiding examples of existing extraterritorial legislation

An example of extraterritorial legislation can be taken from the OECD Convention on Combating Bribery of Foreign Public Officials. The Convention requires parties to create legislation establishing the “liability of legal persons for the bribery of a foreign public official”.<sup>140</sup> All 34 members of the OECD plus 7 non-member States have signed and ratified the Convention, with the majority passing implementing legislation within one or two years of the Convention's entry into force.<sup>141</sup>

A similar effort was made to criminalise sex with children in Europe extraterritorially. The EU Framework Decision passed in 2002 requires member States to give extraterritorial effect to national criminal laws on human trafficking and sexual exploitation of children.<sup>142</sup>

Increasingly, European States have incorporated atrocity crimes (defined under the Rome Statute) into their domestic criminal codes.<sup>143</sup> France, Belgium, Germany, the

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136 De Schutter, above n 21, at 287.

137 At 288. Jurisdiction extended to cases where the perpetrator or victim was Belgian, or where the perpetrator was found on Belgian territory and customary international law confers jurisdiction to Belgian Courts.

138 At 288.

139 At 291.

140 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art 2.

141 “Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014” (21 May 2014) OECD <[www.oecd.org](http://www.oecd.org)>.

142 “European Union Legislation 2002/629/JHA: Council Framework Decision of 19 July 2002 on combating trafficking in human beings” [2002] L203/1 OJ 1.

143 Scheffer and Kaeb, above n 18, at 370.

Netherlands, Italy and Spain have created liability and punishment for legal persons.<sup>144</sup> The far-reaching extraterritorial jurisdiction in criminal matters of these States allows them to catch corporate criminal offending even if this occurs overseas. Non-European corporations doing business with European companies through joint ventures, agency relationships, licensing agreements and other contractual ties could also be implicated.<sup>145</sup>

In New Zealand, the government has made child sex tourism overseas a crime punishable under domestic law.<sup>146</sup> Laws preventing forced labour, terrorism, organised crime, bribery of an official and money laundering have also been given extraterritorial effect.<sup>147</sup>

Presumably, the global consensus against corruption, sexual exploitation of children and atrocity crimes is strong enough to override hesitation in legislating extraterritorially. Even though a consensus may not yet exist for lesser human rights abuses to be protected extraterritorially, the legal basis for States to legislate in this way exists, and simply needs to be applied in a wider context.

## B *Nuances in implementation of extraterritorial human rights law*

### (1) A domestic legal standard

The use of a domestic standard for assessing an international wrong is not a new idea. International law places duties on private actors; enforcement of those duties is left to domestic law.<sup>148</sup> Rightly, the nuances of an alleged violation is assessed against the backdrop of domestic regulations binding corporations in their home States. Murray and others argue that contrary to the court's ruling in *Kiobel*, once jurisdiction to hear the case has been established, the applicable standard should be a domestic one. It would be futile to attempt to apply international law norms to corporations.<sup>149</sup> Although this discussion took place in the context of the ATCA, it stands for the principle that using a domestic legal standard is not only feasible, but also the most logical option.

The Brussels Convention is an example of domestic standards being used to assess wrongful behaviour committed overseas.<sup>150</sup> Similar to the ATCA, it confers jurisdiction on EU member States to hear civil cases against corporations incorporated in the EU, for harm sustained in third countries. The applicable law is the domestic law of the State where the parent company is incorporated.<sup>151</sup> Although the harmful effects were felt abroad, the violation of duty was initiated in the home State and thus corporations should be held to the standard of that home State.

If the legal standard is set by domestic human rights regulations, enforcement should also follow domestic mechanisms. In most cases, this means taking a complaint to the relevant authority, commission, or civil court. It may increase the burden on national adjudicative bodies because of an increased volume of claims. However, this seems to be

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144 At 371.

145 At 371.

146 By doing so, it gave effect to the UN Convention on the Rights of the Child. See "Combating sex crimes against children" (25 September 2015) Safe Travel <[www.safetravel.govt.nz](http://www.safetravel.govt.nz)>.

147 Crimes Act 1961, s 7A. See also "Combating sex crimes against children" (25 September 2015) Safe Travel <[www.safetravel.govt.nz](http://www.safetravel.govt.nz)>.

148 Murray, Kinley and Pitts, above n 95, at 475.

149 At 474.

150 Brussels Convention; and "Council Regulation (EC) No 44/2001", above n 99.

151 Scheffer and Kaeb, above n 18, at 369.

the least intrusive method of creating greater protection for human rights, because it does not require the State to instigate any new measures. It merely makes existing mechanisms available to foreign victims seeking redress.

(2) Rules of corporate liability are well established

De Schutter discusses the need to prove corporate liability to ensure that personal wrongdoings are not shielded by the face of the company: he stresses that either the directing minds of the company must play a role in the commission of the offence, or the company must have failed in exercising due diligence in monitoring activities of their employees.<sup>152</sup>

At least in common law jurisdictions, the rules of corporate liability are well developed and allow the law to impute acts of key decision-makers to the company. This process is governed either by direct legislation, agency law, vicarious liability rules or special rules that were intended to apply to companies.<sup>153</sup> In other legal systems, concepts such as aiding and abetting, alter ego, agency, ratification, joint venture or respondent superior can be used to attach responsibility to corporations.<sup>154</sup> There ought to be no difference between the applications of these principles to domestic corporate activity and corporate activity abroad.

(3) Which violations would be sanctioned?

De Schutter argues that only norms with almost universal recognition should be protected against violation. He claims that States are more likely to support such a framework because there is already international consensus around the issue; in this way, corporations will not be disadvantaged compared to their competitors in more tolerant jurisdictions because binding norms are universally accepted and agreed upon.<sup>155</sup>

There is an inherent contradiction in this argument: if corporations do not stand to lose any commercial interests from the new framework, then the status quo would not have changed. Corporations would continue to profit from the advantage of undetected human rights abuses and the new framework would not be working the way it should. The idea of a concerted international effort is that greater human rights policing will occur across the board; corporations will be collectively disadvantaged, but relative to one another, no single corporation would lose its place in the race.

Moreover, it is difficult to define what almost universally recognised norms are. Ignoring the *almost*, we are left with norms that *are* universally recognised: the peremptory norms against genocide, slavery, torture and the right to self-determination.<sup>156</sup> These norms are already sanctioned under most domestic jurisdictions and international criminal law. Affording them further protection would do little to achieve the change in corporate behaviour we seek.

What falls into the *almost* basket then becomes many shades of grey. According to the Guiding Principles, core internationally recognised human rights are contained in the UDHR, ICCPR, ICESCR and the principles concerning fundamental rights in the eight ILO

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152 De Schutter, above n 21, at 294.

153 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] UKPC 5.

154 Scheffer and Kaeb, above n 18, at 377.

155 De Schutter, above n 21, at 292.

156 James Crawford *State Responsibility* (Cambridge University Press, Cambridge, 2013) at 692.

core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.<sup>157</sup> However, these human rights instruments have notoriously low compliance.<sup>158</sup> It would be counterproductive to encourage the international community to agree on yet another set of human rights obligations to enforce against corporations.

More success could be achieved by identifying the key areas of human rights laws that *already exist* in host States, identifying the areas of commonality, and forming an agreement to give those laws extraterritorial effect.

The extraterritorial laws binding on each corporation might vary in their wording, interpretation and application, depending on the State in which the corporation is domiciled. But this is true of all corporate activity—corporations are regulated by the laws of their home States. Laws may differ in wording, but they will find roots in the same broad, international human rights principle.<sup>159</sup> For example, environmental pollution, dumping of toxic wastes, and unsafe working conditions can all be grounded in the right to health.

#### (4) The criminal justice system alone is not enough

The criminal law system can be used to find corporate accountability but it should not be used in isolation. Criminal sanctions are powerful because they carry the weight of a nation's resources to deter misconduct and to facilitate the burden of proving wrongdoing.<sup>160</sup> This approach has been adopted in European States, which feel that "tort remedies [do not] fit the crime".<sup>161</sup> Accordingly, European States have expanded the reach of their criminal laws abroad.<sup>162</sup>

While the criminal law is an acceptable way to find corporate misconduct, it cannot be used alone because it will not catch lesser human rights abuses that do not fall within criminal law jurisdiction.

The majority of legislation that implements human rights, or at least legislation binding on corporations, falls outside the realm of the criminal law. The Human Rights Act 1993, Employment Relations Act 2000, and the Health and Safety at Work Act 2015 are just some examples of New Zealand legislation with human rights components. Claims for violations of the rights protected in these Acts are made through civil litigation, or an adjudicating body such as the Employment Relations Authority. It would be impractical and expensive to extend criminal law jurisdiction over such matters abroad, when they do not enjoy the protection of the criminal law on home soil.

There is a further issue of evidence. A State will decide whether to bring a criminal matter to trial, based on the strength of the case and available evidence. In a domestic setting, the State can issue search warrants, conduct interviews and call witnesses for questioning. But the State may not be in the best position to do this for alleged violations abroad, even if tools such as reverse burdens of proof and cooperation in supplying evidence are used. If a State decides not to prosecute for lack of evidence, it might leave victims without redress. The civil route should be made available, such that claimants who are in a better position to collect evidence and build a case may do so under existing civil frameworks in home States.

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157 *Ruggie Report* (2011), above n 6, at 13.

158 Jagers, above n 118.

159 De Schutter, above n 21, at 293.

160 At 282.

161 Beth Stephens "Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime?" (1997) 60 *Alb L Rev* 579 at 603.

162 Scheffer and Kaeb, above n 18, at 370.



Criminal law ought to sanction some human rights. But the majority of human rights policing should remain in the civil sphere, rooted in the relevant domestic legislation, applied extraterritorially. Extending the reach of current mechanisms and making them available to foreign complainants would be the least burdensome way for States to create accountability for their transnational corporations.

(5) Concerns for the civil liability route can be mitigated

The use of domestic mechanisms to police human rights violations abroad will give rise to similar problems to those discussed regarding civil liability. However, the risks of settlement, lack of a willing claimant and denied jurisdiction are less acute for three reasons.

First, courts will be less likely to deny jurisdiction, claiming that it is “not our business” where domestic legislation is given specific extraterritorial effect. Secondly, claimants are more likely to come forward if there is a precedent on which they can base a claim. An established body of precedent holding corporations to human rights standards is likely to already exist in domestic law. This is in contrast to claims brought under the ATCA, where the jurisdictional basis or applicable law was unclear, and claimants were required to take a stab in the dark to seek redress.

Finally, continual settlement of cases will suppress the emergence of a standard-setting precedent, but this only occurs when cases are few, and small victim groups can be easily placated.<sup>163</sup> If cases for wrongdoing overseas are assessed in the same pool of cases for wrongdoing in a domestic context, the volume of complaints and claims will be much higher, making it more likely that a precedent will emerge.

(6) Size does not matter

De Schutter claims that the degree to which a corporation should protect human rights may depend on its size, and political or geographical dominance.<sup>164</sup> This line of thinking might dangerously exculpate smaller scale businesses from their human rights obligations. Smaller enterprises can still severely impact the enjoyment of human rights. While it is true that these organisations have less capacity and resources to monitor the human rights effects of their activities, their operations also tend to be smaller in scale with a shorter supply chain, and more intimate engagement with workers. This idea is affirmed in Ruggie’s 2011 Report, in which he states that the Guiding Principles require business enterprises to respect human rights regardless of their size, sector, operational context, or ownership structure, and wherever they operate.<sup>165</sup>

(7) Remoteness and degrees of separation down the supply chain

While the proposed model addresses how corporations may be held accountable for their own actions, it does not account for circumstances in which violations occur several steps away. In a world of globalised commerce, corporations have production processes spread

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163 Scheffer and Kaeb, above n 18, at 375.

164 De Schutter, above n 21, at 313.

165 *Ruggie Report* (2011), above n 6, at Principle 23.

across continents, in a number of factories and through many suppliers that would not be bound by the human rights standards of home States.

Steinhardt, discussing the question of remoteness, argues that only violations reflecting the centre of the corporation's effectiveness and impact should have consequences.<sup>166</sup> The same view is reflected in *Doe v Unocal*. A corporation's mere benefit from a government's abuses of human rights is not enough to trigger liability. Aiding and abetting liability can be imposed for knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime—anything less, including moral support, is up for argument.<sup>167</sup>

This approach would protect human rights where the corporation abuses rights in the first degree. For example, where corporations mistreat their workers, or finance rebel groups,<sup>168</sup> or negotiate with governments to suspend human rights law as part of an economic contract.<sup>169</sup>

While effective in creating liability for direct involvement, we must find a way to account for the many incidents that occur further down the supply chain in the hands of subcontractors. Otherwise, corporations could continue their violations through partially owned, locally incorporated subsidiaries or by contracting out rights-violating activities to local companies.

For this reason, the complicity principle must play a part in determining liability.<sup>170</sup> Not only must corporations refrain from directly violating human rights, they must not profit from human rights abuses by their subcontractors or by the government of host State.<sup>171</sup>

In the context of international criminal law, the complicity principle is only relevant to gross human rights abuses sanctioned under the Rome Statute. A corporation must knowingly provide practical assistance or encouragement that has a substantial effect on the commission of a crime. The elements are causation, knowledge and foreseeability.<sup>172</sup>

But the idea of being complicit can be understood in a more general sense. A corporation does not have to meet the criminal standard of aiding and abetting, before bearing some responsibility for involvement in human rights abuses. The culpability of a corporation falls on a spectrum, depending on how many degrees it is removed from the rights-violating activity. This begs the question: how far down the supply chain do we look?

De Schutter goes as far as claiming that corporations should not conduct operations in places where unions are banned or discrimination is practised; in which the corporation would benefit from a government's human rights abuses.<sup>173</sup> While this proposition is unlikely to achieve much support, it speaks to an underlying principle: corporations should

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166 Steinhardt, above n 54, at 216–217.

167 *Doe v Unocal Corp*, above n 15, at 951.

168 A South African corporation, Anglogola Shanti operating in the Democratic Republic of the Congo during the civil war was alleged to have financed a rebel group, leading to village massacres. Allmann, Hilly and Harris, above n 17.

169 BP has negotiated with the Turkish government for the contract to build a pipeline to override all social, human rights and environmental law for 40 years: Hannah Ellis “The Baku–Ceyhan Pipeline: BP’s Time Bomb” (2 June 2005) CorpWatch <[www.corpwatch.org](http://www.corpwatch.org)>.

170 De Schutter, above n 21, at 313.

171 At 262.

172 *Corporate Complicity & Legal Accountability: Facing the Facts and Charting a Legal Path* (International Commission of Jurists, 2008) at 8.

173 De Schutter, above n 21, at 313.

be able to demonstrate that their raw materials and production lines are ethically responsible.<sup>174</sup>

A report from Amnesty International revealed the existence of child labourers and harsh working conditions in the cobalt mines of the Democratic Republic of Congo, which supplies half the world's demand for cobalt. Cobalt is found in the batteries of smart devices.<sup>175</sup> Yet, Samsung, Microsoft, Sony and Apple have all denied knowledge that cobalt in their products is sourced from these mines; they claim that it is too hard to trace the source of the mineral due to non-disclosure clauses in supplier contracts or due to the complexity and resources required to do so.<sup>176</sup>

One might conclude that corporations have put it in the “too hard” basket and turned a blind eye. However, this could be an oversimplification of the issue. Using the garment manufacturing industry as an example, mega-suppliers and advanced logistics companies such as Li and Fung will pull together raw materials and production of garments for clothing brands, while deliberately keeping the factories and even the country of production secret from their customers. This is to prevent the customer from liaising directly with the factory and keeping the margin for itself.<sup>177</sup> Branded clothing from Wal-Mart was found in the factory that collapsed at Rana Plaza, owned by Tazreen. Although Wal-Mart had inspected the factory and banned its suppliers from using Tazreen, a chain of sub-contracting through suppliers of suppliers meant that clothing ended up being made there anyway.<sup>178</sup>

In a similar vein, Apple suppliers based in China have consistently failed to meet safety standards.<sup>179</sup> Apple has put in place a supplier code of conduct, audited the China-based supplier and made investigations. The failings are also breaches of Chinese regulation; yet workers continue to be exposed to toxic chemicals, long hours and unsafe working conditions.<sup>180</sup> It appears that at some point, transnational corporations lose control of their suppliers. But should they?

Patagonia, an environmentally and socially-minded manufacturer of outdoor clothing has developed a policy that reaches to the bottom of its supply chain.<sup>181</sup> It audits suppliers in accordance with a zero-tolerance policy for exploitation; suppliers are required to certify that products are made consistently with domestic labour laws; they are subject to disciplinary action for breaches; and staff are trained on identifying and mitigating risky behaviour in the supply chain. When Patagonia discovered slavery in its supply chain in 2011, it took immediate steps to remedy the situation—first by disclosing to the public, then by working closely with the supplier and the Taiwanese government.<sup>182</sup>

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174 “*This Is What We Die For: Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt* (Amnesty International, January 2016) at 41.

175 At 15.

176 David Kravets “Amnesty International report: Children mine cobalt used in gadget batteries” *Ars Technica* (online ed, 20 January 2016).

177 Michael Hobbes “The Myth of the Ethical Shopper” *The Huffington Post* (online ed, 15 July 2015).

178 Hobbes, above n 177.

179 Michael Blanding and Heather White “How China is Screwing Over its Poisoned Factory Workers” (6 April 2015) WIRED <[www.wired.com](http://www.wired.com)>.

180 Blanding and White, above n 179.

181 “California Transparency in Supply Chains Act of 2010 (SB 657)” Patagonia <[www.patagonia.com](http://www.patagonia.com)>.

182 Rosie Dalton “How Patagonia Responded to Finding Slavery in Their Supply Chain” (27 June 2016) Well Made Clothes <<https://wellmadeclothes.co.nz>>.

Patagonia's actions embody the requirement in the Guiding Principles and OECD Guidelines for transnational corporations to conduct human rights due diligence down the supply chain "to identify, prevent, mitigate and account for how they address their adverse human rights impacts".<sup>183</sup> Patagonia's actions prove that it is not only possible, but also doable within the means of a single corporation. Arguably, it would fail the negligence duty of care to ban a supplier from rights-abusing practices, and not make further inquiries to ensure that the ban was being adhered to. Given Patagonia's example, and remembering that many transnational corporations have incredible economic might,<sup>184</sup> it is hard to accept that they do not have the bargaining power to influence governments and subcontractors to improve conditions for workers in their supply chains.

### *C The way forward*

The doors for extraterritorial legislation are open. Conceptual barriers were removed long ago when States reached beyond their borders to police corruption, sex crimes and money laundering. Hurdles of corporate liability, civil litigation, scope, and remoteness can be overcome just as they would if a case arose in a purely domestic setting. The net of criminal and civil rules safeguarding human rights in developed States is effective and durable. It is capable of reaching further.

## **V Bridging the Gap**

The international community must shape an environment in which it is unacceptable for corporations to abuse or facilitate the abuse of human rights in their activities abroad, with accompanying enforcement mechanisms.

### *A Guiding principles do not fill the gap*

Developed States have rallied around the Guiding Principles but they are not enough. The Guiding Principles are voluntary, and built on the premise that each State is responsible for protecting its own pocket of territory. This is evidenced by principles 1 and 2, which focus on a State's duties within its *territory or jurisdiction*.<sup>185</sup> Although Ruggie advocates for extraterritorial regulation in his commentary to principle 2, it is not reflected in the wording of the principle itself.<sup>186</sup> Furthermore, he conflates extraterritorial measures with lesser initiatives, such as soft-law instruments or reporting requirements for parent companies—this dilutes the case for hard enforcement of domestic standards abroad.<sup>187</sup>

Accordingly, States have somewhat missed the point. National action plans developed by governments for implementing the Guiding Principles make no real commitments to

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183 *Ruggie Report* (2011), above n 6, at Principles 15(b) and 17.

184 It is estimated that transnational corporations control over 80 per cent of world trade with the corporate revenues matching the gross domestic product of States. Jed Greer and Kavaljit Singh "A Brief History of Transnational Corporations" (2002) Global Policy Forum <[www.globalpolicy.org](http://www.globalpolicy.org)>; and United Nations Research Institute for Social Development, above n 13, at 77.

185 *Ruggie Report* (2011), above n 6, at Principles 1 and 2.

186 At 7.

187 At 7.

bridging the governance gap in human rights policing with real laws and enforcement measures.<sup>188</sup> A recent resolution adopted by the United Nations Human Rights Council in support of the Guiding Principles voiced concerns that “weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies or derive maximally the benefits of activities of transnational corporations”.<sup>189</sup>

These States have failed to understand the crux of the issue: host States are not in a position unilaterally protect human rights so long as transnational corporations exert power and influence in their region. As such, these corporations need to be regulated just as stringently abroad as they are at home. The failure to recognise this issue has caused fundamental dissonance between those who welcome the Guiding Principles as a complete solution to the problem, and those who claim they are not enough.

### B *Divide over a Binding Treaty on Transnational Corporations*

Many have called for a binding treaty on corporations as the only way to close the governance gap, and some would advocate for enforcement through a global court or monitoring mechanism.<sup>190</sup> In 2014, 20 States in the United Nations Human Rights Council passed a resolution to form a working group to lay down the ground rules for negotiating such a treaty.<sup>191</sup> State supporters of the treaty previously issued a statement, drawing attention to the increasing cases of human rights violations by some transnational corporations.<sup>192</sup> They point to the need for a binding framework with clear obligations for corporations and remedies for victims. The group has endorsed the Guiding Principles as a first step, but maintain that without further action, it will only ever remain a soft law instrument with no kick.

The United States and EU member States have opposed the idea. They claim it would dismantle the support for and progress made under the Guiding Principles. The opponents have refused to cooperate with an intergovernmental working group.<sup>193</sup> Many feel that obligations in a treaty form would be a return to old, failed tricks.<sup>194</sup> If hard binding

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188 They pledge to lodge inquiries about the effectiveness of existing legal measures and whether new measures should be adopted to: guide and educate businesses and investors on human rights compliance; monitor compliance; and lobby foreign States to support the Guiding Principles. *Action plan for business and human rights* (Ministry for Foreign Affairs, UD 15.021, August 2015) at 27; *National Action Plan on Business and Human Rights*, above n 134, at 41; and *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (Secretary of State for Foreign and Commonwealth Affairs, Cm 8695, September 2013) at 11–12.

189 *Human rights and transnational corporations and other business enterprises* HRC Res 26/22, A/HRC/Res/26/22 (2014) at 2.

190 Allmann, Hilly and Harris, above n 17; and Jagers, above n 118.

191 *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* HRC Res 26/9, A/HRC/Res/26/9 (2014).

192 “Statement on behalf of a Group of Countries at the 24[th] Session of the Human Rights Council” (1 September 2013) Business & Human Rights Resource Centre <<https://business-humanrights.org>>.

193 Thalif Deen “After Losing Vote, US–EU Threaten to Undermine Treaty” (28 June 2014) Inter Press Service <[www.ipsnews.net](http://www.ipsnews.net)>.

194 “UN Human Rights Council sessions” Business & Human Rights Resource Centre <[www.business-humanrights.org](http://www.business-humanrights.org)>; and “ICC disappointed by Ecuador Initiative adoption” (30 June 2014) International Chamber of Commerce <[www.iccwbo.org](http://www.iccwbo.org)>.

rules are imposed just as corporations are beginning to improve behaviour voluntarily, it may dampen their motivation and derail their efforts.<sup>195</sup> Talks of a treaty have raised concerns about how it would apply to corporations,<sup>196</sup> and have even attracted criticism for being too narrow in addressing only transnational corporations.<sup>197</sup>

There is a sharp divide between developed countries, home to many of the world's largest corporations, and developing countries, host to such corporations.<sup>198</sup> Of the 14 votes against the United Nations Resolution for a binding treaty on corporations, most were from western States, with the addition of South Korea and Japan. Some claim that the developed world will not be able to ignore for too long the influences of rising economic giants such as China and India who voted in favour of the resolution.<sup>199</sup> Regardless, one questions the effectiveness of an initiative that lacks support from important players such as the United States and the EU. Particularly so when a treaty only has a binding effect on its signatories. The division lends itself to the conclusion that the international community is not ready for a binding treaty on corporations.

### *C A middle ground*

The proposed treaty seeks to bind transnational corporations directly. This is a big step, and perhaps an unnecessary one. It requires the crafting of a new body of laws, a new adjudication body, and adaptation of certain conflict of laws principles. More potently, the primary source of resistance from developed States may be rooted in the fear that their corporations will be subject to unknown standards imposed by an outside international body, over which they have little control.

The solution need not lie at either extreme: of entirely voluntary Guiding Principles, or a hard binding instrument on corporations. In the middle is the idea that States can agree to widen the reach of their domestic human rights frameworks. In this way, States retain control over their corporations, while corporations are bound by proven domestic human rights standards and enforcement mechanisms. No upheaval of the international legal order is needed. In a treaty *binding on States*, States can identify the key areas of human rights laws that already exist in their domestic systems, and agree to give those laws extraterritorial effect.

### *D Paving the way forward on familiar territory: the ILO model*

The formation of the ILO can be used as a model for paving the way forward. The ILO was formed because governments were reluctant to unilaterally improve labour conditions, fearing that it would put them at a competitive disadvantage.<sup>200</sup> But the international community recognised that reform was necessary. In a collective effort, State parties agreed to put in place minimum labour standards at the same time, such that all States

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195 Steinhardt, above n 54, at 218–219.

196 Deen, above n 193.

197 “UN Human Rights Council sessions”, above n 194.

198 “26th session of the Human Rights Council (10–27 June 2014)” United Nations Human Rights Office of the High Commissioner of Human Rights <[www.ochchr.org](http://www.ochchr.org)>.

199 Jagers, above n 118.

200 Steinhardt, above n 54, at 203.

remained on an equal footing with one another. Anti-discrimination, anti-child labour, anti-forced labour and anti-exploitation initiatives flourished.<sup>201</sup>

A similar method could be used to develop an internationally agreed framework for protecting human rights from the glaze of transnational corporations. This is a better alternative to States slowly worming their way forward in the name of the Guiding Principles, but never committing with real laws.

An agreement to legislate extraterritorially collectively, would remove issues of competitive trade disadvantage or accusations of protectionism. It would also enable host States to climb out of their stalemate. If the expectation is set for transnational corporations to comply with human rights regulations of their home States, host States and communities will be in a better position to demand compliance.

## VI Conclusion

There is a global consensus that more needs to be done to protect human rights in communities where transnational corporations operate. The governance gap is real.

Although human rights safeguards in certain parts of the globe are lacking, it is time for developed States to stop reaping benefits from this. The attention must shift to how these States are controlling their corporate players abroad. Remembering that States have enacted laws to regulate international commerce, and have legislated extraterritorially in other areas, home States cannot claim that it is too difficult to also regulate human rights compliance.

Initiatives involving voluntary codes of conduct, civil litigation and soft law instruments have not been effective. The case for extraterritorial application of domestic human rights law is strong; it also cooperates with the way that international law norms are currently enforced through domestic legislation.

The infrastructure for protecting human rights is ripe in the domestic sphere. It works. The same net of criminal and civil rules should be cast wider to bind corporations that operate abroad. This is the least invasive but effective method, allowing States to retain control over the laws binding on their nationals. And from a position of principle, it is time to call out the hypocrisy of allowing corporations to cause harm abroad, in ways that we would not tolerate at home.

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201 “Labour standards—Conventions and Recommendations” International Labour Organisation <[www.ilo.org](http://www.ilo.org)>.