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Special Issue:
SPHERES OF INFLUENCE/SPHERES OF RESPONSIBILITY:
MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS

Guest Editors:
GLEN WHELAN, JEREMY MOON and
MARC ORLITZKY

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Corporate Social Responsibility and International Human Rights Law

Robert McCorquodale

ABSTRACT. The United Nations Special Representative on Transnational Corporations and Human Rights, John Ruggie, has adopted a new framework for considering this issue within the international legal system. This article examines this framework in terms of its coherence, its consistency with international human rights law and how it can be ‘operationalized’ (which is required by the United Nations). In regard to the states legal obligation to protect human rights, it is considered whether this obligation is broader and deeper than is envisaged in the framework, especially if it can include the extra-territorial activities of corporations. The corporate responsibility to respect human rights is examined in terms of its conceptual and definitional problems, and the article also questions whether there will be sufficient legal remedies available to victims under the framework.

KEY WORDS: corporate social responsibility, extraterritoriality, human rights, international law, John Ruggie

Introduction

Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business. (Ruggie, 2008, para. 22)

Regulation of the activities of corporations in relation to their impact on human rights is recommended in the important report in 2008 by Professor John Ruggie, the Special Representative of the Secretary-General of the United Nations (UN) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (the Ruggie Report 2008). As he shows in the quotation above, and in his later report (the Ruggie Report 2009), this regulation is necessary both for governments and for the corporations themselves.

There are many methods of regulation, such as social action, political activity, civil society pressure, business management and economic engagement. My focus here is on legal regulation, not the least because regulation without law and legal compliance mechanisms is rarely effective as a means of long-term social, economic or public behavioural change. For example, the lack of effective legal regulation of the national, regional and global financial systems, and the reliance instead on the markets themselves and on voluntary codes of practice as forms of regulation, clearly contributed to the severe global economic crisis beginning in mid-2008.

There have been a number of attempts at the national, regional and international levels to deal with the impacts on human rights of corporate activity through legal regulation (ECOSOC Norms, 2003; OECD, 2000). Most have not succeeded, largely through lack of political will by states or through strong resistance by corporations. A key aspect of the framework for dealing with corporations and human rights created by the Ruggie Report 2008 is that the framework is supported by a wide range of states, corporations and non-governmental organisations. Part of the reason for this was the large number of consultations that occurred around the world in the development of the Ruggie

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Report 2008. This has given the issue some essential space to enable further discussion to occur.

Framework

The initial mandate given to the Special Representative was

- (a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- (b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as 'complicity' and 'sphere of influence';
- (d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
- (e) To compile a compendium of best practices of States and transnational corporations and other business enterprises (UN Commission on Human Rights Resolution 2005/69 (20 April 2005)).

The way this mandate was dealt with in the Ruggie Report 2008 was to create a framework for further work. This framework is called 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (Ruggie, 2008). There are three elements of this framework: the state's duty to protect against human rights abuses, including by non-state actors such as corporations; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The justification for this framework is stated to be the need for

the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse, while access to judicial

redress is often problematic, and non-judicial means are limited in number, scope and effectiveness. The three principles form a complementary whole in that each supports the others in achieving sustainable progress. (Ruggie, 2008, para. 9)

There are some criticisms of this framework, including that it is not fully conceptually justified and appears to rely on a variation of the three-fold idea of a state's obligations being to 'respect, protect and fulfil' human rights under human rights treaties (CESCR General Comment 13, para. 46). There was also a decision taken in the Ruggie Report 2008 that the 'sphere of influence' of corporations as a method of considering their impacts on human rights was not to be pursued. I will not discuss these issues here and, in any event, this framework has now been adopted by the UN Human Rights Council as a way forward (UN Human Rights Council Resolution 8/7 (2008) (18 June 2008)). Accordingly, I will examine each of the three elements of the framework in terms of international legal regulation.

State's duty to protect human rights

Under international human rights law, each state has a duty to protect against human rights abuses. This is a broad duty or, as it is expressed in international human rights law, a legal obligation. Each state in the world has ratified (i.e. accepted that they have an international legal obligation) at least one of the major global human rights treaties¹ and, although none of them complies fully with their obligations, they have all acknowledged that 'the promotion and protection of all human rights is a legitimate concern of the international community' (Vienna Declaration, 1993). Therefore, how a government treats any individual (or group) – no matter that person's nationality – in their jurisdiction is a legitimate matter of international concern and is not simply a matter for that government alone. The particular human rights that the state has an obligation to protect will vary depending on the treaties which that state has ratified (and any lawful reservations), though all the states are legally bound by human rights treaty that are part of customary international law, such as the prohibition on torture, the right of

self-determination in colonial territories and the prohibition on racial discrimination. In addition, under the current international human rights law structure, corporations do not have any international legal obligations; only states have these legal obligations (McCorquodale and La Forgia, 2001).

Actions by corporations

The obligation on a state to protect human rights includes an obligation to protect against abuses by state officials. It also includes an obligation to protect against actions by non-state actors (such as corporations) within its territory that violate human rights. In relation to the activities of corporations, states have been found by the human rights treaty dispute settlement bodies to be in breach of their obligations where, for example, employees of corporations have been dismissed or victimized for joining a trade union,² the activities of corporations have polluted air and land,³ and where there have been failures by the state to protect indigenous peoples' land from harm caused by corporate activities or from corporate development.⁴ In all of these cases, the state was in breach of its obligations under the relevant human rights treaty because its acts or omissions (including its acquiescence) enabled the corporation to act as it did. Therefore, even where a state (or a state official) is not directly responsible for the actual violation of international human rights law, the state can still be held responsible for a lack of positive action in responding to, or preventing, the violation of human rights by the corporation (and other non-state actors).

In many situations, the government of a state is less economically powerful than the corporation. For example, BHP, an Australian-based corporation, had such a strong influence over the government of Papua New Guinea and its foreign currency income, that the government passed laws (understood to have been largely drafted by BHP itself) to protect BHP from legal challenge over its activities there, even though those activities had a profound negative impact on its own citizens.⁵ However, even where there is such economic inequality, a state is still responsible for the violations of human rights that occur in its jurisdiction caused by the corporation. Indeed, a state's obligation to protect human rights

extends to situations where there is internal armed conflict and where the actions that violate human rights are committed by paramilitary or armed opposition groups,⁶ and even to parts of a state's territory where it is not currently exercising effective control.⁷

What the Ruggie Reports do not consider sufficiently is whether a state's obligation to protect human rights extends to the extra-territorial activities of both the state and of non-state actors, such as corporations. This is relevant because a state's obligation to protect human rights is not generally limited to its territory but extends to all those within its 'jurisdiction'.⁸ The difference between 'territory' and 'jurisdiction' was clarified by the Inter-American Commission on Human Rights, where it stated that:

[The Commission] does not believe ... that the term "jurisdiction" ... is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state ... may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's territory.⁹

In general, persons are 'within the jurisdiction' of a state acting extraterritorially, whether or not that (home) state is acting with the consent or acquiescence of the government of the host state (i.e. the state on whose territory the activity contrary to human rights is occurring), and whether or not the home state is in effective overall control of a part of the host's state's territory, and whether or not the host state is a party to the relevant human rights treaty. For example, the Inter-American Commission on Human Rights had to consider this issue in relation to the legal status of the persons detained by the United States (US) at Guantanamo Bay, Cuba. The Commission considered that, although the detainees were outside the territory of the US, they were subject to its jurisdiction because they were 'wholly within the authority and control of the United States government'.¹⁰ While there are limits to the extent to which a state can be held to have jurisdiction and control,¹¹ a state can be found to be in violation of its obligations under international human rights treaties for actions taken by it extraterritorially, in relation to anyone within the power, control or authority of that state, as well as within an area over which that state exercises effective overall control.¹²

State responsibility

This issue of control by a state over a corporation's activities is also relevant in a different way. While the actions by corporations (as private bodies) are not usually attributed to a state so as to make the state responsible under general international law for their actions, sometimes those actions can be attributed to a state. The International Law Commission (ILC) in its Articles on the Responsibility of States for Internationally Wrongful Acts (ILC, 2001), which applies generally to international law and the relevant articles here are customary international law (Duffy, 2006), has identified four key situations in which the acts of non-state actors such as corporations can be attributed to the state, for which the state will incur international responsibility where there is a breach of an international obligation (such as an obligation under a human rights treaty). First, a state would be responsible for the acts of a person or entity where the latter was empowered by law to exercise elements of governmental activity (ILC, 2001, Article 5). Second, a state would be responsible for the acts of a person or entity that was acting under the instructions or direction or control of the state (Crawford, 2002, paras. 91 and 121).¹³ Third, a state may incur international responsibility for the acts of a person or entity where the state adopts or acknowledges the act as its own (ILC, 2001, Article 11).¹⁴ Fourth, a state may also incur international responsibility where it is complicit in the activity of the non-state actor or fails to exercise due diligence to prevent the effects of the actions of non-state actors.¹⁵

While a fuller discussion of this issue is beyond the scope of this article (and parts of this section rely on McCorquodale and Simons (2007)), a few examples will illustrate its potential impact in relation to corporations and human rights. First, a corporation could be acting under the instructions, direction or control of a state where the corporation or its employees are 'employed as auxiliaries or are sent as 'volunteers' to neighbouring countries, or who are instructed to carry out particular missions abroad' (Crawford, 2002, para. 110). This issue has become more prominent since the beginning of the (illegal) action by the occupying forces in Iraq, where it became clear how many private corporations were contracted by the states involved to provide a wide

variety of services, from providing intelligence to re-creating state infrastructure to support such military action (Gibson, 1995; Schmitt, 2005). Indeed, the investigations after the discovery of prisoner abuse in Abu Ghraib (and elsewhere) have shown that some of these abuses were committed by employees of private contractors. With the increasing use of corporations by states in their extraterritorial military activities, as well as in trade and other areas, there is clearly the possibility that the activities of these corporations will be attributed to the state (Jones, 2009). Where such activities violate international human rights law, the state will incur international responsibility, including those situations where the corporation contravenes instructions (ILC, 2001, Article 7).

A second example arises where a corporation is exercising some form of governmental authority, as can happen with some privatised (i.e. previously public) bodies. AWB Ltd is an Australian corporation that was previously a government agency (the Australian Wheat Board), which was privatised but retained the sole responsibility for the marketing and export of Australian wheat around the world. It was active in the Iraqi Oil for Food programme managed by the UN, being the largest supplier of food to that programme, and the investigation into that programme led to allegations that AWB was involved in the bribing of Iraqi officials to sell Australian wheat, contrary to UN resolutions and with clear impacts on the human rights of Iraqis, such as the right to food (Oil for Food Inquiry, 2005). If these allegations are proved,¹⁶ then it is certainly possible to argue that some of the actions of AWB are attributable to the Australian government, as the key factor for attribution is the empowerment to exercise governmental authority and not the degree of ownership of the corporation by the state.

The state may also be complicit in a corporation's activities that have led to human rights violations. Governments are often very active in their support of their corporations, through financing, such as the provision of export credits and political risk insurance, and through developing essential contacts in other states and participating in government trade missions abroad, as well as in entering into bilateral investment treaties that assist their own corporations. This sort of active support can lead to the state being internationally responsible for the consequences of a

corporation's activities. For example, the legal (and financial) structures of the corporations (as a consortium) that operate the Baku-Tbilisi-Ceyhan pipeline¹⁷ include agreements between the consortium and the host state governments that contain stabilisation clauses, which make the host governments liable to pay compensation where they make any regulatory changes that adversely affect the 'economic equilibrium' of the project' (which could include laws that give an increased human rights protection to local people), and effectively prohibit the host governments from applying certain labour standards to the consortium members, even if this is contrary to international human rights obligations.¹⁸ It is of note that BP, the leader of the consortium managing the project, responded to these criticisms by entering into a Human Rights Undertaking, which prevents the consortium from asserting in legal proceedings an interpretation of the governing agreements that is inconsistent with the regulation by host states of their obligations under human rights treaties.¹⁹ Therefore, if a state has provided financial or other direct support for the project, then it would be wise to ensure that such undertakings by the corporations are made, as this would reduce the possibility of the state itself being found to be complicit in a host state's internationally wrongful act (e.g. a violation of its human rights obligations) in relation to the corporation's activities. Another example of this issue may be the on-going claims about the UK government's involvement in BAE Systems' activities in Saudi Arabia, which may have breached human rights.²⁰ It cannot reasonably be argued today that states do not know that their corporate nationals may engage in human rights violating activity in their extraterritorial operations, as there are an increasing number of investor and consumer campaigns in relation to corporation's human rights impacts, and of claims being brought in national courts against corporations for violations of human rights.²¹

Extraterritoriality and jurisdiction

The consequence of this extensive obligation on states in relation to corporations' activities outside their territory is that a state's legal obligations in relation to human rights are considerable. Since each state has a general duty not to act in such a way as to cause harm, such as environmental pollution, outside

its territory,²² there is growing support for the view that '[w]here a state knows that its national's activities will cause, or are causing, harm to other states or peoples, it is consistent with this [general] duty that it should prevent such harm' (Sornarajah, 2001, p. 507). Both the European Court of Human Rights and the Human Rights Committee (HRC) have considered that a state may be responsible 'because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory'²³ and for 'the extraterritorial consequences of its intra-territorial decisions' (Joseph et al., 2004, p. 94). It has also been suggested that the obligation on a state to protect under the International Covenant on Economic, Social and Cultural Rights (ICESCR) 'includes an obligation for the state to ensure that all other bodies subject to its control (such as transnational corporations based in that state) respect the enjoyment of rights in other countries' (Coomans, 2004, p. 192).

Therefore, it is argued here that the state has an obligation to protect human rights that includes an obligation to act in such a way that it has effective laws and practices that protect actions and omissions by state agents and by non-state actors that violate human rights. What this requires is that a state must regulate and control corporations that are incorporated or active in that state (corporate nationals), in such a way that the corporations do not violate human rights or face effective sanctions if they do. This cannot be restricted to the corporate national's activity just within the state's territory, as shown above, since, without some form of extraterritorial regulation of corporate nationals, such entities 'could easily bypass the mandate of municipal law by transferring or relocating their business operations offshore where human rights obligations are less stringent' (Deva, 2004, p. 49).

The particular difficulty of enforcing this obligation in international law is attributed to international legal principles governing nationality and jurisdiction. Basically, a state can only have jurisdiction over its own nationals and, rarely, can it enforce this jurisdiction in another state's territory. This is of direct relevance to corporations because most transnational corporations (TNCs) operate through subsidiaries incorporated in the state in which they are operating and not incorporated in the state of the headquarters of the TNC. This has a consequence in

international law because '[a] subsidiary is a separate legal entity and therefore necessarily distinct from its parent ... as a matter of international law, parent and subsidiary are each subject to the exclusive jurisdiction of their respective [States]' (Mann, 1985, p. 56).

However, state practice reflects a variety of approaches for dealing with 'the tendency of groups of companies to utilise their legal structure to avoid state regulation' (Dine, 2000, pp. 37–66; 2005). There is a long-standing practice of some national courts to look at the whole operation of a TNC, and not just its notionally separate parts, to bring a foreign parent corporation within the jurisdiction of a state. For example, a number of national courts have allowed for the possible liability on the parent corporate nationals for the acts of foreign subsidiaries that constitute violations of international human rights law (Joseph, 2004). The European Union seems to be moving towards locating the 'centre of the main interests' of the corporation, rather than its state of incorporation, in relation to the application of some areas of European Union law.²⁴ In this regard, it has been persuasively argued that

[If a TNC is regarded as] a conglomerate of units of a single entity, each unit performing a specific function, the function of the parent company being to provide expertise, technology, supervision and finance... [then if] injuries result from negligence in respect of the parent company functions, then the parent company should be liable. (Meeran, 1999, p. 170)

Indeed, it is inconceivable that decisions about many matters, such as human resource policies, marketing and finances, are made in a particular location by a subsidiary. They are generally determined at the headquarters of the parent corporation. The consequences of this for a state's obligations are considered below in the section on access to remedies.

Therefore, in relation to the first element of the Ruggie Report 2008's framework, each state does have a legal duty/obligation to protect all those within their territory from violations of human rights by both state officials and by non-state actors, for those human rights that the state has accepted legal obligations (under both treaty and customary international law). While corporations are not directly responsible for any actions under international human rights law and states are not directly responsible for the violations by the corporations as

such, states will be in breach of their international legal obligations when they fail to take appropriate steps to prevent such actions and to investigate, punish and redress the actions when they occur. This obligation extends to all those within the state's jurisdiction (i.e. extraterritorially), though the extent of the state's obligations with respect to corporate activity is largely dependent on the authority or control of the corporation, or the degree of complicity in the corporation's activities. This obligation requires a state to enact laws and establish practices to protect against human rights violations, which may include regulation of both corporate nationals and their subsidiaries. Therefore, it is evident that the state's duty to protect human rights is extensive and, with the dynamic interpretation by the human rights treaty monitoring bodies, likely to keep expanding. The next phase of the mandate needs to elaborate on the possible extent of a state's obligations to protect human rights and not be restricted to a rather narrow, conservative and static view.

Corporate responsibility to respect

The Ruggie Report 2008 made clear that corporations have a responsibility to protect human rights. This responsibility is defined as follows:

[The corporate] responsibility to respect is defined by social expectations – as part of what is sometimes called a company's social licence to operate ... [and] "doing no harm" is not merely a passive responsibility for firms but may entail positive steps. To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts. (Ruggie, 2008, paras. 54–61)

This is a strong and important statement, especially as it is supported by key business organisations. It also recognises that the responsibility to respect is expected of all corporations, and not just a few large transnational corporations.

Corporate social responsibility

There are three main areas of this element of both the Ruggie Reports that will be explored here:

corporate social responsibility (CSR) policies and human rights; the concept of 'responsibility'; and the content of 'due diligence'. As noted above, under the present structure of the international human rights legal system, corporations cannot be directly responsible for violations of that law, and this element of the framework does not seek to alter that position.

Many corporations and business organisations have supported this element of the Ruggie Report 2008 framework (ICC, 2009). Much of this support stems from the view that corporations do not have the same legal obligations that states do in relation to international law and also that almost all corporations operating across state boundaries have some type of CSR policy, usually dealing with social, environmental and ethical issues. Indeed, many of these corporations see their CSR policies as being the equivalent to a human rights policy and/or as making them compliant with human rights norms (McBeth and Joseph, 2005).

However, having a CSR policy is not the same as providing protection for all human rights. While there are a variety of definitions of CSR, there are:

[T]wo broad types of definitions of CSR: first, those that focus on outcomes – including outcomes in terms of “business impacts”, “commercial success” and wider societal goals; and, second, those that stress the voluntary nature of CSR (“voluntary” in that CSR relates to business activity that is not mandated by legislation...). (Ward, 2008, p. 10)

What is important about all the definitions is that essentially CSR are management-driven and corporate-determined policies that are designed to assist the corporation's business, including in terms of its reputation, even if it is genuinely aimed for a positive social end. In contrast, human rights protections are person centred and have legitimate compliance mechanisms (even if these are not strong). Human rights are not voluntary. Human rights are an expression of human dignity and the right to be protected in that human dignity. In addition, most CSR policies tend to refer to, or focus on, a limited range of human rights, such as the right to privacy or freedom from torture. Yet, as the Ruggie Report 2008, to its credit, does make clear, all human rights are relevant to corporations. This includes economic, social, cultural and collective rights, such as the right to educa-

tion and labour rights, as well as civil and political rights. Therefore, it is vital that this distinction between CSR policies and human rights protections is made forcibly to corporations and that they introduce human rights protection policies and practices.

Responsibility

The second issue relating to this element of the Ruggie Report 2008 framework concerns the term 'responsibility'. The Ruggie Report 2008 draws a deliberate distinction between the state's 'duty' to protect and the corporate 'responsibility' to respect, perhaps trying to sharpen the difference between legal and moral obligations (Eisenberg, 1997). This 'responsibility' is called a 'social expectation' in the Ruggie Report 2008, as quoted above. In the Ruggie Report 2009, it is called a 'social norm' on which a corporation's 'social licence to operate is based' (Ruggie, 2009, para. 46). The distinction in terminology between a 'duty' of state (which is a legal obligation) and a corporate 'responsibility' (which appears to mean a moral obligation) is confusing. Yet, the concept of corporate responsibility, as Ruggie himself noted in an earlier report, is that it is 'the legal, social or moral obligations imposed on companies' (Ruggie, 2007, para. 6, my emphasis). That earlier view is consistent with the general understanding that:

[T]he concept of corporate *responsibility* is based on the expectation that private companies should no longer base their actions on the needs of their shareholders alone, but rather have *obligations* towards the society in which the company operates. (Morgera, 2009)

In fact, when the Human Rights Council endorsed the framework of the Ruggie Report 2008 in its 2009 Resolution, it used the term 'responsibility' for both states and corporations (Human Rights Council Resolution 8/7 (2008), Preamble).

Further, there is a real difficulty in determining a 'social expectation' or a 'social norm' in this instance. It may be the case that

[CSR means] operating a business enterprise in a manner that consistently meets or exceeds the ethical, legal, commercial, and public expectations society has of business. (Business for Social Responsibility, 2007)

Yet, even if a 'social expectation' can be discerned through empirical evidence, which society is the relevant society for determining the expectation? Is it all the international community (however that is defined) or only the industrialised, consumer-active North? Does it include the rural poor in non-industrialised states? Is it meant to include all human rights (as the Ruggie Report 2008 claims correctly that all human rights are relevant for corporations) as part of this global social expectation? If there is such a 'social licence' for a corporation to operate, then it is highly unlikely that those who are oppressed and those whose human rights are violated by a corporation will be in a position to withdraw that social licence.

There is also the concern that these 'social expectations' could be defined or manipulated to serve only some entrenched economic interests or selected social partners (Crane et al., 2008). As there is usually a lack of full and transparent information by corporations on these matters, it would be difficult to see whether there is really compliance with any human rights by a corporation. In order to base such an important distinction between a state's obligations and a corporation's obligations in relation to human rights on the nebulous idea of a social licence to operate and on vague social expectations is deeply unsatisfactory. It is hoped that this will be rectified in the further reports of the UN Special Representative.

Due diligence

The final aspect of this element of the framework is that the core aspect of the corporate responsibility to respect is a responsibility of 'due diligence'. This concept of due diligence appears to be an integration of the human rights obligation of due diligence in relation to the actions of non-state actors (such as corporations) and the general business practice of due diligence.²⁵ For example, in *Vélásquez Rodríguez v. Honduras*, the IACtHR held that the international responsibility of a state may arise:

[B]ecause of a lack of due diligence to prevent the violation [of human rights] or to respond to it as required by [the human rights treaty].... If the state apparatus acts in such a way that the violation goes

unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the state has failed to comply with its duty to ensure the free and full exercise of those rights to persons within its jurisdiction. The same is true when the state allows private persons or groups to act freely and with impunity to the detriment of the rights.²⁶

In relation to the general business practice, the Ruggie Report 2009 notes:

Businesses routinely employ due diligence to assess exposure to risks beyond their control and develop mitigation strategies for them, such as changes in government policy, shifts in consumer preferences, and even weather patterns. Controllable or not, human rights challenges arising from the business context, its impacts and its relationships can pose material risks to the company and its stakeholders, and generate outright abuses that may be linked to the company in perception or reality. Therefore, they merit a similar level of due diligence as any other risk. (Ruggie, 2009, para. 52)

Thus the Ruggie Reports aim to use a terminology that is familiar to both human rights law and business management practices. This could be helpful, except that the terminologies are based on different types of obligations.

Under international human rights law, the obligation of due diligence is a positive legal obligation on a state, demanding considerable state resources, such as to undertake fact-finding, criminal investigation and to provide redress, even when the original act was by a corporation.²⁷ There is a clear standard established by the human rights dispute settlement bodies to determine whether this legal obligation to have due diligence about individual's and group's interests has been breached. In contrast, the business practice of due diligence, which is often undertaken as a form of audit, especially during mergers and acquisitions, is a procedural practice to reduce risk in relation to the corporation's own interests. Whilst the reality of the regulation of risk is a vital part of corporate activity – and poorly conducted due diligence audit can have adverse consequences (especially to the legal and accounting advisors to the corporation), it is difficult to establish a clear standard of business due diligence that is adjudicated by dispute settlement bodies (Ripinsky, 2008). There is no necessary legal obligation in

relation to the business practice.²⁸ It is, therefore, puzzling that the Ruggie Report 2009 adopts a definition of due diligence that includes a legal aspect:

Due diligence is commonly defined as “diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation”.... The Special Representative uses this term in its broader sense: a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks. (Ruggie, 2009, para. 71)

Nevertheless, as seen in the quotation above, the Ruggie Reports adopt a view of the due diligence requirement of the corporate responsibility to respect as requiring positive actions by a corporation and not merely a requirement to do no harm. This is seen in the four core elements of due diligence outlined in the Report: having a human rights policy, assessing human rights impacts of company activities, integrating those values and findings into corporate cultures and management systems, and tracking as well as reporting performance. Each of these requires both policies and effective practices in accordance with those policies. These should also be applied in ways that enable access to remedies.

Therefore, in relation to the second element of the Ruggie Report 2008's framework, there is an attempt to draw a distinction between the legal obligations on a state and the social expectations on a corporation in relation to human rights. While this distinction in the framework may have some basis in the lack of direct legal obligations on corporations under international human rights law, it has the potential to cause severe problems when it is operationalised. The initial problems are in the terminology of a 'duty' on a state and the 'responsibility' on a corporation and the use of 'due diligence' as they are confusing and that determining 'social expectations' is fraught. This is compounded by the apparent merging of CSR policies and human rights when each of them operates fundamentally differently. The next phase of the mandate, which is meant to 'operationalize' the framework, will need to clarify each of these terms and concepts.

Access to remedies

The third element of the framework is the need for access to remedies. The Ruggie Report 2008 indicates that there should be 'effective grievance mechanisms' for the actions of both states and corporations, and that these can be judicial and non-judicial (Ruggie, 2008, paras. 82–103). The obligations that this element (which is considered as access to 'remedies' and not access to a 'remedy') imposes on states and corporations, and within the international legal system, will be briefly considered.

States' actions

A state has an obligation under international human rights law to provide a remedy where there is a violation of human rights. While there is some discretion in a state as to how to provide a remedy, it must be 'accessible and effective... [with] appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law' (HRC General Comment 31, para. 15).

As shown above, a state's obligation to protect human rights includes an obligation to regulate, through law and practice, the actions of corporations that violate human rights. This obligation requires states to regulate their corporate nationals as part of the state's responsibilities under international law. There is substantial state practice in which national laws have been extended to regulate the conduct of corporate nationals operating extraterritorially through foreign subsidiaries, such as in areas of competition law, shareholder and consumer protection, anti-bribery and corruption, and tax law. In relation to bribery and corruption, states have concluded treaties imposing obligations on them to regulate extraterritorial conduct of corporate nationals and their subsidiaries.²⁹

It is argued here that states, as part of their obligation to enable access to remedies, should amend their corporation/company law, including in areas such as directors' duties, to regulate the activity of a corporation in relation to any of the corporation's activities (including extraterritorially and for its subsidiaries) that could adversely impact on the protection of human rights. Many states are now doing this,³⁰ and some states are also extending the criminal law to include corporate activity.³¹ Laws

should be developed so that parent corporations are clearly legally responsible in their home state for the actions of their subsidiaries in other states that occurred due to the subsidiary operating the policies of the parent corporation (for example, on human resource policies, marketing and finances). This may also be a means to enable appropriate capacity building support to occur in some economically weaker states.

Corporations' actions

In relation to corporations' obligations for access to remedies, many corporations have committed themselves to global, sectoral or other statements about CSR, some of which include reference to human rights.³² These are all voluntary commitments and none of them has any compliance mechanisms with independent dispute settlement bodies.³³ This prevents access to legally effective remedies. For example, US-based chemical corporations have had a voluntary code on labelling that requires them to make clear on the containers of chemicals that they must not be reused to carry drinking water. However, those same corporations have at times exported containers of chemicals to non-industrialised, non-English speaking states with this label only in English, with consequent impacts on the lives of people in those states (Colopy, 1994/1995; Gottlieb, 1995). The lack of effective grievance mechanisms in these voluntary codes indicates why it is necessary to have regulations that have legal sanctions. Indeed, most corporations respond better to preventative regulation by a state than to reactive litigation, not the least because it reduces uncertainty and risk. There is an essential requirement – currently missing in the Ruggie Reports – that the due diligence responsibility of corporations be directly linked to effective, legitimate monitoring and compliance mechanisms regulated by law and not left to regulation by a self-reviewing system. This is especially necessary in zones of conflict (as will be discussed shortly).

When there is reference to legal regulation of corporations in the Ruggie Report 2008, it tends to focus on the possibility of criminal sanctions for corporations, especially in relation to corporate complicity. A discussion of this issue is outside the

parameters of this article. Nevertheless, this issue of corporate criminal responsibility is particularly problematic because of the requirement in criminal law of showing intent. This requirement usually necessitates that there be a specific individual in a corporation to whom the obligation would attach (ICJ, 2008; Silver, 2006). As noted above, this is an issue that can be dealt with appropriately by states in their national laws, as well as in developments in international criminal law.

However, the requirement of individual responsibility to enable an access to a remedy for a corporate act is not necessary in many areas of civil liability. Corporations as legal entities have been held to be legally responsible around the world for actions that violate aspects of human rights, such as in consumer protection areas and environmental damage (Scott, 2001). There is also the possibility of joint liability at the international level for a state and a corporation, in the same way as it can occur within many states' national laws (Morgera, 2009). All these civil liability aspects of a corporation's responsibility in relation to access to remedies should be explored in future Reports.

International legal system

It is necessary to consider access to remedies for corporations' activities that impact on human rights within the current international legal system, as there are a number of existing international instruments that could be developed to establish more effective remedies. The most useful of these are the OECD Guidelines on Multinational Enterprises (Guidelines) (OECD Guidelines, 2000), especially as most transnational corporations have their home state in an OECD state (UNCTAD, 2006). A recent case brought by Global Witness against a UK corporation, Afrimex Ltd, before the UK National Contact Point (NCP), being the relevant supervisory body under these Guidelines, bears this out.³⁴ In that case, it was alleged that Afrimex paid bribes to a rebel group and purchased minerals from mines in the Democratic Republic of Congo where child labour and forced labour were being used. Despite the fact that some of this activity occurred through corporations not registered in UK, the UK NCP found Afrimex in violation of the Guidelines, as there had

been insufficient 'due diligence' (for the definition of which they looked to the Ruggie Report 2008) in their supply chain, and it requested that Afrimex formulate an appropriate CSR policy and put it into effective practice.

This is a clear and important decision. However, there are no effective compliance mechanisms in the Guidelines to enforce this decision. It relies more on 'peer pressure' of other OECD states or a corporation's own willingness to act.³⁵ These compliance mechanisms need to be stronger and with effective sanctions. These could, for example, link the NCPs more directly into the OECD state's existing national human rights institutions, require the state of the corporation in breach not to allow that corporation access to government contracts and export credits or create a distinct OECD Guidelines legal committee with enforcement powers. There is a particular need for these types of powers where corporations are operating in conflict zones and regions where there is weak governance (OECD Risk Awareness Tools, 2006).

Other possible means to ensure increased access to remedies under the current international legal system can be found in areas such as trade, finance and investment, especially as all these areas facilitate global corporate activity. Therefore, it is necessary to include more effective and pro-active application of human rights law by the international financial institutions (Darrow, 2003). This could mean greater transparency and accountability of governments in terms of how they have used international loans, as well as an increase in transparency of corporate activity, including where there is bribery.³⁶ In addition, all stabilisation clauses that could restrict the ability of a state to act to protect human rights should be removed from bilateral investment treaties (and similar treaties) (see Ruggie, 2009, paras. 32–36).

It is feasible to devise a treaty that would encompass corporations' obligations with respect to human rights, in the same way as there are aspects of international law, such as international criminal law and international humanitarian law that encompass non-state actors' obligations. Yet this is unlikely to occur without the political will of states – both the host states who gain the investment of corporations and the home states who gain the returns on this investment – and the acceptance by the economi-

cally powerful lobby of corporations that this would be in their interest, or that some public pressure occurred for this to come into effect. This acceptance is not impossible, as seen in the international tobacco regulation (WHO Tobacco Control Convention, 2003), and the process of drafting a treaty, even if slow, and can be an important factor in allowing many ideas and voices to be heard, and can operate as part of a pull towards compliance with recognised international human rights standards by corporations.

Hence, the last element of the Ruggie framework is essential but, as it is built on the other two elements, it has flaws, not the least in whether there can be an effective access to a remedy from a corporation when there is no legal obligation on that corporation. It is hoped that the future Reports will be able to deal with this issue and offer suggestions of access to remedies within the broader international legal system.

Conclusions

The framework created by the Ruggie Report 2008 has made a significant change in the debate about the responsibility of corporations for violations of human rights, as has the method of active consultation. There is still a great amount of work to be done to 'operationalize' this framework effectively, as is required by the Human Rights Council (Human Rights Council Resolution 8/7 (2008) Preamble), especially to ensure that the obligations and standards recommended are not the very minimum but are a platform for dynamic change, and to support capacity building initiatives to assist governments and corporations around the world on the relevant obligations.

All states have a legal obligation to protect human rights. This is a broader and deeper obligation than it appears in the first element of the framework, as it includes obligations with respect to the activities of corporations that can be attributed to the state and where those corporations (and/or their subsidiaries) operate outside the territory of the state. The second element, of the corporate responsibility to respect, has serious flaws in its terminologies and consequent legal obligations. This needs to be clarified because the third element of access to remedies requires legal

obligations to operate effectively and to ensure credible monitoring by dispute settlement bodies based on international human rights standards. It is also necessary to ensure that states comply with their obligations in terms of applying national laws and practices to corporations in relation to those corporate activities that can impact on human rights.

A major aspect of this operationalization will need to include legal regulation. Business activity is assisted substantially by the operation of a rule of law. A rule of law requires good governance consistent with justice and human rights, to ensure that all actors are accountable to the law (including governments and those with power), that all actors can have disputes settled in an independent and accessible way, and that there are compliance-checking mechanisms (Bingham, 2007). A rule of law is different from a rule by law or a rule by power. Where there is an effective rule of law then corporations can conduct their business fully aware that there is likely to be a large degree of stability, certainty and recourse, and hence reduce their risks (Kaufmann et al., 2005). Therefore, as noted in the opening quotation, it is essential for the interests of both states and corporations that there is effective legal regulation in this area.

Notes

¹ The major global human rights treaties include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Prohibition of Torture and other Cruel, Inhuman and Degrading Treatment and Punishment (CAT), the Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

² *Young, James and Webster v. United Kingdom* (App no 7601/76) (1982) 4 *European Human Rights Reports* 38.

³ See, for example, Commission on Human and Peoples' Rights (ACommHPR): 2001, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, African, Communication No 155/96: '[Nigeria is in violation] of local people's rights to... health... and life [by] breaching its duty to protect

the Ogoni people from damaging acts of oil companies' (para. 59). See also *Lopez Ostra v Spain*, (App no 16798/90) (1994) 20 *European Human Rights Reports* 277, *Guerra v. Italy* (App no 00014967/89) (1998) 26 *European Human Rights Reports* 357.

⁴ See *Yanomani v. Brazil* (1985) Inter-American Court of Human Rights (IACtHR) Res No 12/85 Annual Rep Inter-American Commission on Human Rights (IACommHR) 1985–1984; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001) IACtHR Series C No 79; and *Hopu and Bessert v. France* (1997) HRC, UN Doc CCPR/C/60/D/549/1993/Rev.1.

⁵ The effect of these laws led to the Papua New Guinea landowners bringing a claim against BHP in Australia: *BHP v Dagi* [1996] 2 VR 117 (Victorian Court of Appeal). For other examples, see ITT, a US-based corporation, which was involved in the overthrow of the Allende Government in Chile, and the United Fruit Co. which allegedly masterminded a coup in Guatemala. For a more recent example, see 'Banana Company "Armed Guerrillas"', *The Times*, November 16 2007, 50, in relation to the activities of the US company Chiquita in Colombia.

⁶ See for example, *Ergi v. Turkey* (App 23818/94) (1998) 32 *European Human Rights Reports* 388; and *Timurtas v. Turkey* (App no 23531/94) (2000) ECtHR 13 June 2000.

⁷ See *Ilascu v. Moldova and Russia* (App no 48787/99) ECtHR 8 July 2004 and the position in Colombia, on which see, for example, Centre for Humanitarian Dialogue: 2003, *Humanitarian Engagement with Armed Groups: The Colombian Paramilitaries*, Geneva, and McCorquodale, R.: 2006, 'Beyond State Sovereignty: The International Legal System and Non-State Participants', *Revista Colombiana de Derecho Internacional*, 8, 103.

⁸ See for example, the American Convention on Human Rights 1969 (ACHR), Article 1(1) and the European Convention on Human Rights 1950 (ECHR), Article 1.

⁹ *Saldaño v. Argentina* (Report no 38/99) IACommHR (11 March 1999) para. 17. The same approach has been taken by the ECtHR. See *Drozdz and Janousek v. France and Spain* (App no 12747/8) (1992) 14 EHRR 745 para. 91) and the HRC (General Comment No. 31(80) Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004 para. 3.

¹⁰ *Detainees at Guantanamo Bay, Cuba*, (see endnote 19 for referencing details), 533.

¹¹ See, for example, *Banković v. Belgium* (App no 52207/99) (2002) 44 *European Human Rights*, ECtHR. In that case, a claim was brought against NATO with respect to the bombing of Radio Television Serbia

during the Kosovo intervention. The Grand Chamber of the European Court of Human Rights held that NATO forces had insufficient control of the territory in question for the applicants to be considered within their jurisdiction. This remains a contentious case. See Lawson, R.: 2004, 'The Concept of Jurisdiction in the European Convention on Human Rights', in P. J. Slot and M. Bulterman (eds.), *Globalisation and Jurisdiction*, 201.

¹² This extraterritorial application of human rights would apply in relation to all types human rights – economic, social, cultural, civil, political and collective – that a state is legally obliged to protect under a treaty or customary international law: see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, (Merits) (2006) 45 ILM 271, para. 217, where the International Court of Justice (ICJ) held that the African Charter of Human and Peoples' Rights (ACHPR) and the Convention on the Rights of the Child (CRC) applied extraterritorially, even though both treaties include a wide range of economic, social and cultural rights.

¹³ Interestingly, non-state actors such as corporations may wish their actions to be attributable to the state to avoid national legal claims, and yet, at the same time, claim that they are private entities.

¹⁴ See ILC, Article 11. The early global corporations, such as the Dutch East India Company and the Newfoundland Company, were granted charters as a delegation of powers by the monarch, and many of their activities were attributable to the state. See Bottomley, S.: 1997, 'From Contractualism to Constitutionalism: A Framework for Corporate Governance', *Sydney Law Review*, 19, 277.

¹⁵ See *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran)* [1980] ICJ Rep 3, paras. 57, 69–71: 'a receiving state is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it'.

¹⁶ The Australian Royal Commission that reported on these allegations against AWB did not deal with the attribution issue. See <http://www.ag.gov.au/agd/www/UNoilforfoodinquiry.nsf>.

¹⁷ The consortium members include, Amerada Hess, AzBTC, BP, Chevron, ConocoPhillips, Eni, INPEX, Itochu, Statoil, Total and TPAO. See BTC Co. Partners at <http://www.bp.com/managedlistingsection.do?categoryId=9007998&contentId=7015010>.

¹⁸ Thus, for example, in its Host Government Agreement for the Baku pipeline, the Turkish government is prevented from requiring any consortium members to

comply with labour standards 'that (i) exceed those international labour standards or practices which are customary in international Petroleum transportation projects, or (ii) are contrary to the goal of promoting an efficient and motivated workforce'. See Amnesty International: 2003, 'Human Rights on The Line: The Baku-Tbilisi-Ceyhan Pipeline Project', London, at <http://www.amnesty.org.uk/content.asp?CategoryId=10128>. See also Lawson-Remer, T. E.: 2006, 'A Role for the International Finance Corporation in Integrating Environmental and Human Rights Standards into Core Project Covenants: Case Study of the Baku-Tbilisi-Ceyhan Oil Pipeline Project' in O. De Schutter (ed.) *Transnational Corporations and Human Rights*, Hart Publishing, Portland, 393, 410–411. Note that Ruggie (2008), recommends that stabilization clauses be ceased (at para. 36) and see 'Stabilization clauses and human rights', available at <http://www.reportsandmaterials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf>.

¹⁹ The Human Rights Undertaking was entered into by BP in September 2003 and is available at <http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf>. I am grateful to Oliver Jones for alerting me to this direct response by a corporation to issues of potential complicity in human rights violations.

²⁰ See, for example, 'The BAE-Saudi Allegations', BBC, July 30, 2008 <http://news.bbc.co.uk/1/hi/business/6729489.stm>, and <http://www.corporatewatch.org/?lid=185>.

²¹ The impact of this approach and the Ruggie Report framework has already been seen in, for example, the announcement of Canada's export credit agency's new 'Statement on Human Rights': 'New statement sets out EDC's principles for the consideration of Human Rights', April 30, 2008: http://www.edc.ca/english/docs/news/2008/mediaroom_14502.htm.

²² See for example, *Trail Smelter Arbitration (US v Canada)* 3 RIAA (1941) 1905 and *The Rainbow Warrior (New Zealand v France)*, (Arbitration Tribunal) (1990) 82 ILR 449.

²³ *Loizidou v. Turkey* (Preliminary Objections) (App no 15318/89) (1995) 20 EHRR 99, para. 62.

²⁴ See the European Community Regulation on Insolvency Proceedings 1346/2000, as implemented in the national law of the member states of the European Union: see Ronen-Mevorach, I.: 'The Road to a Suitable and Comprehensive Global Approach to Insolvencies within Multinational Corporate Groups' (published at www.iiiglobal.org). See also the Bank Melli cases before the European Court of Justice: T-246/08, T-332/08 and T-390/08.

²⁵ I am grateful for the insights of Jonathan Bonnitca in relation to this section on due diligence.

²⁶ *Vélásquez Rodríguez v. Honduras*, (1989) 28 ILM 294, paras. 172, 176.

²⁷ See, for example, *Jordan v. UK* (App no 24746/94) ECHR 4 May 2001, where the ECtHR considered that the conduct of the investigation, the coroner's inquest, delay, the lack of both legal aid for the victim's family and the lack of public scrutiny of the reasons of the Director of Public Prosecutions not to prosecute, was a violation of Article 2 of the ECHR. See also *Halimi-Nedzibi v. Austria* (8/1991), UN Committee Against Torture, (1994) 1(2) IHRR 190, para. 13.5.

²⁸ There are a series of cases before international arbitration tribunals that have considered that corporations must act with due diligence in deciding whether to invest and that bilateral investment treaties 'are not insurance policies against bad business judgments' – *Waste Management Systems v. Mexico* (Case no. AR-B(AF)/00/3, at para. 114) – see Ripinsky (2008).

²⁹ See, for example, the UN Convention Combating Bribery of Foreign Public Officials in International Business Transactions 2003 (adopted 31 October 2003, entered into force 14 December 2005) (2004) 43 ILM 37. The Convention imposes obligations on states parties to establish laws and criminal sanctions with respect to the bribery of foreign public officials and officials of public international organisations (Article 16) and to extend liability (whether criminal, civil or administrative) and sanctions to legal persons.

³⁰ See, for example, the UK Companies Act 2006 that requires directors to 'have regard' to such matters as 'the impact of the company's operations on the community and the environment' as part of their duties (Section 172 (1) (d)), and the South African Companies Act 2008 that allows the Government to prescribe social and ethics commitments for companies (Section 72 (4)).

³¹ See, for example, Italian statute Decreto Legislativo 231#, 2001, and Australian Commonwealth Criminal Code 1995.

³² See for example, the UN Global Compact, www.unglobalcompact.org. The Global Compact includes the following principles that corporations should adopt: 'World Business should *Principle 1*: support and respect the protection of human rights within their sphere of influence; *Principle 2*: make sure that their own corporations are not complicit in human rights abuses'. See also the promotion of CSR by the International Council on Mining and Metals (<http://www.icmm.com/our-work/sustainable-development-framework>).

³³ Note the caption to cartoon by Khalil Bendib for Landman, A., 'Absolving Your Sins and CYA: Corporations Embrace Voluntary Codes of Conduct', August 18, 2008 on www.corporatewatch.org (and see <http://www.prwatch.org/node/7724>): 'Nothing like a good

corporate code of conduct, as long as it remains voluntary and one remains free to do with it as one wishes'.

³⁴ *Global Witness v. Afrimex Ltd*, UK National Contact Point, August 28, 2008, <http://www.berr.gov.uk/files/file47555.doc>.

³⁵ See the ECCJ, Fatal Transactions, Cafod, Global Witness, European office of the Jesuits, IPIS, *Briefing for the European Parliament Human Rights Sub-Committee*, April 16, 2009 at 5, available at <http://www.business-humanrights.org/Links/Repository/409429/jump>.

³⁶ See, for example, the approach of the Extractive Industries Transparency Initiative, <http://eitransparency.org/> (last visited 03.03.09).

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References

- Bingham, T.: 2007, 'The Rule of Law', *Cambridge Law Journal* **66**, 67–85.
- Business for Social Responsibility: 2007, available at <http://www.bsr.org/resourcecenter>.
- CESCR General Comment 13: UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13 on the Right to Education.
- Colopy, J.: 1994/1995, 'Poisoning the Developing World: The Exportation of Unregistered and Severely Restricted Pesticides from the United States', *UCLA Journal of Environmental Law and Policy* **13**, 167–223.
- Coomans, F.: 2004, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in F. Coomans and M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp and Oxford), p. 183.
- Crane, A., D. Matten and J. Moon: 2008, *Corporations and Citizenship* (CUP, Cambridge).
- Crawford, J.: 2002, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge).
- Darrow, M.: 2003, *Between Light and Shadow, The World Bank, The International Monetary Fund and International Human Rights Law* (Hart, Oxford).
- Deva, S.: 2004, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should "Bell the Cat"?', *Melbourne JIL* **5**, 37–65.

- Dine, J.: 2000, *The Governance of Corporate Groups* (CUP, Cambridge).
- Dine, J.: 2005, *Companies, International Trade and Human Rights* (CUP, Cambridge).
- Duffy, H.: 2006, 'Towards Global Responsibility for Human Rights Protection: A Sketch of International Developments', *Interights Bulletin* **15**, 104–108.
- ECOSOC Norms: 2003, 'United Nations Economic & Social Council, Sub-Commission on Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August, 2003).
- Eisenberg, M.: 1997, 'The World of Contract and the World of Gift', *California LR* **85**, 821–866.
- Gibson, S.: 1995, 'Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem', *Military Law Review* **148**, 114–136.
- Gottlieb, R., et al.: 1995, 'Greening or Greenwashing?: The Evolution of Industry Decision Making', in R. Gottlieb (ed.), *Reducing Toxics: A New Approach to Policy and Industrial Decision Making* (PPER/C).
- ICC (International Chamber of Commerce): 2009, 'Joint Views of the International Chamber of Commerce and the International Organisation of Employers to the 8th session of the Human Rights Council of the [Ruggie Report]', available at www.ioe-emp.org.
- ILC (International Law Commission): 2001, 'Articles on the Responsibility of States for Internationally Wrongful Acts', Report of the International Law Commission on the Work of its 53rd Session, A/56/10, August 2001, UN GAOR. 56th Sess. Supp. No. 10, UN Doc A/56/10(SUPP).
- Independent Inquiry Committee into the UN Oil-for-Food Programme: 2005, 'Final Report ("Manipulation of the Oil-for-Food Programme by the Iraqi Regime")', at <http://www.iic-offp.org/documents/IIC%20Final%20Report%2027Oct2005.pdf>.
- International Commission of Jurists (ICJ): 2008, *Corporate Complicity and Legal Accountability* (ICJ).
- Jones, O. R.: 2009, 'Implausible Deniability: State Responsibility for the Actions of Private Military Firms', *Connecticut Journal of International Law* **24**, 239–290.
- Joseph, S.: 2004, *Corporations and Transnational Human Rights Litigation* (Hart, Oxford and Portland).
- Joseph, S., J. Schultz and M. Castan: 2004, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials*, 2nd Edition (OUP, Oxford).
- Kaufmann, D., A. Kraay and M. Mastruzzi: 2005, 'Governance Matters', <http://www.worldbank.org/wbi/governance>.
- Mann, F. A.: 1985, 'The Doctrine of International Jurisdiction Revisited After Twenty Years', in *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff, Dordrecht).
- McBeth, A. and S. Joseph: 2005, 'Same Words, Different Language: Corporate Perceptions of Human Rights Responsibilities', *Australian Journal of Human Rights* **11**, 95.
- McCorquodale, R. and R. La Forgia: 2001, 'Taking off the Blindfolds: Torture by Non-State Actors', *Human Rights Law Review* **1**, 189–218.
- McCorquodale, R. and P. Simons: 2007, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', *Modern Law Review* **70**, 598–625.
- Meeran, R.: 1999, 'The Unveiling of Transnational Corporations: A Direct Approach', in M. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer, The Hague), p. 161.
- Morgera, E.: 2009, *Corporate Accountability in International Environmental Law* (OUP, New York).
- OECD: 2000, 'The OECD Guidelines for Multinational Enterprises', in OECD (ed.), *OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts* (DAFFE/IME).
- OECD Risk Awareness Tools: 2006, 'Risk Awareness Tools for Multinational Enterprises in Weak Governance Zones', <http://www.oecd.org/dataoecd/26/21/36885821.pdf>.
- Ripinsky, S.: 2008, *Damages in International Investment Law* (BIICL, London).
- Ruggie, J.: 2007, 'Mapping International Standards of Responsibility and Accountability for Corporate Acts', Report of the Special Representative of the Secretary-General On the Issue of Human Rights and Transnational Corporations and Other Business Enterprise, UN Doc A/HRC/4/35.
- Ruggie, J.: 2008, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc A/HRC/8/5 (7 April 2008).
- Ruggie, J.: 2009, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/11/13.
- Schmitt, M.: 2005, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees', *Chicago JIL* **5**, 511–546.
- Scott, C. (ed.): 2001, *Torture as Tort* (Hart, Oxford).
- Silver, D.: 2006, 'Collective Responsibility, Corporate Responsibility and Moral Taint', *Midwest Studies in Philosophy* **30**, 269–278.

- Sornarajah, M.: 2001, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States', in C. Scott (ed.), *Torture as Tort* (Hart, Oxford), p. 491.
- UN Commission on Human Rights Resolution 2005/69 (20 April 2005) UN Doc E/CN.4/2005/L.10/Add.17.
- UNCTAD: 2006, *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D* (UN, New York and Geneva).
- UN Human Rights Council Resolution 8/7 (2008), 18 June 2008.
- Vienna Declaration 1993: UN World Conference on Human Rights: 1993, 'Vienna Declaration and Programme of Action', *International Legal Materials* **32**, 1661.
- Ward, H.: 2008, 'Corporate Social Responsibility in Law and Policy', in N. Boeger, R. Murray and C. Villiers (eds.), *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham), p. 8.
- WHO (World Health Organisation) Framework Convention on Tobacco Control: 2003, available at <http://www.who.int/fctc>.
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