



**British Institute of
International and
Comparative Law**

The Governance Gap: Extractive Industries and Human Rights

Event Report

Date: 4 November 2014, 17:30-19:00

Venue: British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP

Speakers:

- Professor Nicholas Tsagourias (University of Sheffield) Professor Audrey Macklin, University of Toronto, Canada
- Richard Morgan, Head of Government Relations, Anglo American
- Assoc Professor Penelope Simons, University of Ottawa, Canada
- Dr Jennifer Zerk, Consultant on Corporate Social Responsibility

Chair:

- Professor Robert McCorquodale, Institute Director, BIICL

Professor McCorquodale welcomed the audience and noted that the area is leading to significant development in conceptual ideas and different advances in the integration of various kinds of law. He introduced the book entitled [*The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage \(Routledge, 2014\)*](#) written by two of the panel members, Penelope Simons and Audrey Macklin. He then introduced the four panel members individually, pointing out that the two authors were on the Harker Commission appointed by the Canadian government to look into allegations of corporate human rights abuses in Sudan. Dr Jennifer Zerk has published the book entitled *Multinationals and Corporate Social Responsibility* and is currently consulting to the UN High Commissioner on Human Rights on access to remedies for gross violations of human rights. Before joining Anglo American in London, Richard Morgan worked for a long period of time at the Foreign and Commonwealth Office and thereafter at Unilever. He brings a breadth of understanding of government practice as well as private practice.



Prof Penelope Simons

Prof Simons informed the audience that the book grew out of the authors' experiences as members of the Canadian Assessment Mission to Sudan (the Harker Mission). The mission was dispatched by the Canadian government in 1999 to investigate allegations that the government of Sudan was forcibly displacing populations from in and around the oil fields to protect these areas and the oil infrastructure from rebel attack. A Canadian oil company, Talisman Energy Ltd. was operating as a 25% partner in the Greater Nile Petroleum Operating Company (GNPOC) and the oil fields and development areas had become the main theatre of combat in the ongoing civil war. The Harker mission concluded that: oil extraction and development was fuelling the war; the infrastructure of GNPOC was being used for offensive bombing raids against civilians; and that these raids were followed up by ground troops who, with the aim of inciting terror among civilians, had been committing a range of egregious violations of human rights.

After the Harker mission submitted its report and recommendations, the authors felt an incredible frustration at the failure of the Canadian government to respond to Talisman's continued engagement in Sudan. The book addresses the persistence of the governance gap in relation to transnational corporate activity, and specifically extractive companies mainly based in developed countries and operating in what the authors call 'weak governance zones'. The governance gap refers to the lack of international and domestic law or other effective means of regulating the extraterritorial activities of companies with respect to their impacts on human rights, in light of the fact that many host states are often unable or unwilling to regulate in this regard.

While there have been significant developments over the last decade, the governance gap is far from being closed, and the need for a legal response has been side-lined. Additionally, contributions in the business and human rights literature as well as the literature on regulatory theory could be seen as undermining the utility and credibility of a legal response. Four factors support these assertions:

First, in the last decade, since the rejection of the UN Norms, the UN has continued to rely on soft norms and private self-regulation to address the governance gap, namely the important but flawed UN Guiding Principles on Business and Human Rights. The UN Human Rights Council recently adopted a resolution to develop a treaty on corporate human rights obligations, however, most developed states voted against the resolution, in contrast to the unanimous endorsement by the HRC members of the Guiding Principles.

Second, no home state has yet adopted legislation to address even the most egregious human rights violations of their extractive companies when operating overseas. States continue to encourage companies to self-regulate and may not even require them to adopt a certain self-regulatory initiative.

Third, some of the business and human rights literature suggests that voluntary approaches are sufficient. The argument put forward is that voluntary is no longer voluntary, that self-regulatory mechanisms now interact with law and market mechanisms in such a way that companies feel compelled or are incentivized to comply. This argument, whatever its relevance at a general level, is misleading in the context of extractive companies operating in



weak governance zones. In any event the voluntariness is only one among many problems with self-regulatory initiatives, but it remains a significant failing, given that corporate directors are required to operate in the best interests of the company which has generally been held to be the maximization of profit. While each of these initiatives has valuable features, they are all flawed in different ways and incapable on their own or collectively of filling the governance gap. Such initiatives cannot replace or justify the exclusion of either international or home state laws to address this issue.

Fourth, the new governance and other regulatory theory scholarship, that considers the problems and effectiveness of state law, is useful in understanding the limits of command-and-control regulation. However, some of the literature equates all state law with hierarchical command-and-control law, and also suggests that there is a shift away from traditional command-and-control law to decentred forms of regulation. These particular contributions could be seen as undermining the credibility and necessity of a domestic legal response by home states to address transnational corporate conduct that adversely affects human rights, in the absence of host state regulation.

Command-and-control law can take different forms. It can proscribe and punish certain conduct, or be designed to facilitate a certain outcome (reflexive law). It is also still widely used by states. Moreover, all state law is not command-and-control. The authors' examination of a range of laws in a variety of jurisdictions reveals that state law includes a variety of incentive, facilitative and coercive mechanisms.

In conclusion, existing domestic laws and voluntary self-regulatory initiatives that could be used to challenge transnational corporate conduct are not sufficient to address the governance gap at this time. Home state regulation, while not a silver bullet, does have a unique and crucial role to play as part of an overarching strategy to address corporate impunity. It can provide a range of mechanisms to enforce, facilitate and incentivize corporate compliance and can also catalyse similar regulatory action by other states and thereby contribute to the development of international consensus on binding international norms.

Prof Audrey Macklin

Prof Macklin indicated that she will be introducing a policy proposal on the topic of home state regulation. The state has a legal duty, in terms of the Guiding Principles, to protect against human rights violations by companies. The Guiding Principles focus on host state duties, but the authors' proposal turns on the host state's incapacity or absence of will to regulate.

The authors ask if the home state is taken seriously as a locus of governance, what a regime of good governance would look like. They acknowledge that the home state has a limited authority over companies operating abroad. They ensure that their proposal falls within the jurisdiction of a home state. Also, they tried to devise a mechanism for describing or defining a 'weak governance zone', in order ensure that the operation of the proposal is confined to those situations where it is necessary and useful.



There are those who think that state level government is passé, and replaced by polycentric governance, and those who think that regulation should take place only at host state level. The authors therefore attempt to devise a template of home state governance which is sufficiently flexible and portable to be able to be adapted and implemented in a variety of different jurisdictions. At the same time, they tried to provide sufficient specificity in order for it not to be vague and woolly without any content.

The authors use the concepts of 'carrots', 'nudges' and 'sticks': The 'carrots' are public incentives that the state itself does to encourage transnational corporations which are considered 'citizens' of the home state to operate in a manner that respect human rights. 'Nudges' are those things that a state can do to facilitate private actors bringing companies into accountability when they fall afoul. 'Sticks' are those rules that are either 'do' or 'don't do', with consequences that are attached for the failure to abide.

'Carrots': The proposed Corporate Social Responsibility Agency is the centrepiece of the template. It is a body which the authors situate within government, but staffed with not only government actors but also representatives from different sectors. The goal is to operate independently. The job of the Agency is to deal with those companies who seek government support in their transnational activities. Companies often do seek such support, for example in the form of export credit, loan guarantees, loan deferrals or assistance from consular officers abroad. In order to obtain these benefits from the state, the companies will be vetted by the CSR Agency. It will perform an ex ante human rights assessment of planned investments abroad. The outcomes will involve a variety of factors and determine whether the corporation will obtain state support. If the risks are too high the enquiry may signal ahead of time that it is not viable to go into that jurisdiction at all. Companies could choose to ignore this and still go in, without government support. However, then there has already been an impact assessment made public, and if things do go wrong they were forewarned. In addition the authors propose ongoing monitoring to measure ongoing compliance with the human rights benchmarks. The outcome of these auditing mechanisms will be public, subject to commercial confidentiality. The mechanism is anticipatory and preventative rather than forensic.

'Nudges': One of the ways in which to facilitate private actors is simply to put out information, which consumers and investors can use in their market-based response. Another way is the potential for civil liability. In various states there are various civil liability regimes. The authors propose that the state, through statute, sets out a framework for the grounds and basis of liability as well as provide for the relevant forum. This is better done in statutory form, as there is a reluctance on the part of common law courts to devise new forms of liability or extend the understanding of form, believing that it is more appropriately done as a matter of public policy through legislation. The authors set out in the book what the content of those rules could be.

'Sticks': The authors provide for criminal prosecution, as an important mechanism of last resort. They also discuss sanctions as being very important, on trade, investment and capital market access. In their experience these are potentially far more potent than the threat of criminal prosecution, particularly anything relating to capital market access.



The challenges are: determining who is the corporate citizen which is a national of a home state. Also, they consider why a state would implement regulation, and whether the corporation would not simply pick up and move to another jurisdiction where regulation is less strict. Similarly, the question is often asked: if 'our' corporations are not in the relevant 'weak governance zone', would companies from other states not simply move in and cause the problems we are concerned about?

The authors propose a functional definition of the corporate citizen. For purposes of the Corporate Social Responsibility Agency, it is non-problem where the company is seeking benefits from the state: the corporate citizen is for that purpose whoever is eligible for those benefits. The definition is harder in the context of civil liability. Towards this, the authors have developed a functional citizenship definition in the book. Questions do arise regarding affiliates, subsidiaries and contract partners operating in other jurisdictions. Here there are at least two options: one is enterprise liability, to perceive the entire unit as the enterprise. The authors do not pursue that route, but rather a more modest route, namely parent state liability: the corporate citizen who is the parent, or in a parent-like relationship, has the obligation to exercise due diligence in relation to its supervision of the other entity. The failure of the parent to exercise that due diligence of supervision and control forms the basis for civil liability. It is accordingly not really extraterritorial at all, as the state is regulating the parent, which is its citizen.

Regarding corporate flight, the authors argue that transnational companies, particularly those in the extractive industries, are not as footloose as one would think. They are located in particular places for the resources located there, as well as the relevant secondary or tertiary services available there.

During question time, she highlighted that the template could be applied to other industries than the extractive industry. Also, authors did take into account concerns regarding the intervention into the host state's capacity to govern. They ask whether their template will attract support from host states or communities in those host states, or provide a cover for host states not to do what they should be doing. She pointed out that the concern about the undue intervention in the host state's affairs is not exclusively about home states. It is also about transnational corporations who are active in lobbying or otherwise trying to influence the direction of host state regulation and legislation. For example, the book discusses allegations of a Canadian transnational company which was heavily lobbying the government of Argentina not to implement environmental legislation.

Dr Jennifer Zerk

Dr Zerk congratulated the authors on an excellent book. She stated that it is a thoughtful and practical contribution to the debate about home state regulation and its possible role in improving accountability frameworks and increasing access to remedy. The book gives the case for greater involvement by home states in these issues a real shot in the arm.

Like the authors, Dr Zerk is concerned about the present over-reliance on the self-regulatory and soft law initiatives. She doesn't share the optimism of many people about their efficacy,

especially in particularly challenging areas and areas of weak governance. These kinds of initiatives have their uses and brought about improvements in many places, but states and governments need to step up and show more leadership. This includes home states of multinationals.

Like the authors, Dr Zerk does not have much patience for the argument that there is not much that home states can do about improving the human rights performance of multinationals abroad. She also does not agree with the argument that this would necessarily be an illegal encroaching on the sovereignty of other states or an unacceptable assertion of extraterritorial jurisdiction. She finds these arguments disingenuous given the extent to which states do resort to extraterritorial jurisdiction in other fields. It also lacks imagination, because it fails to take into account the myriads of ways in which states can and do influence corporate behaviour extraterritorially through within-territory measures.

The whole debate about the potential of home state regulation has been distorted by a very limited understanding of what extraterritorial regulation actually is. It draws from experiences from very controversial and acrimonious cases, particularly in the areas of competition and securities law, and ignores just about everything else. It is therefore very refreshing to have at last an academic contribution that is informed by a proper understanding of the richness and complexity of real-life commercial regulation and the interrelatedness of different initiatives and strategies, and also the different ways in which formal and informal sources of regulation can interrelate and support each other.

There are many things which home states could be doing. However, Dr Zerk does have a couple of lingering concerns about home state regulation.

Firstly, she asks whether there is a danger that, through home state regulation, host states could be 'let off the hook'. What about states which are not 'weak governance zones', and where there are regulatory institutions? Will they be spurred on to do more and improve their own capacity? Could this lead to an improvement in host state regulation that has a positive effect on local business and domestic companies? Or could host states feel absolved of responsibility? Could it actually undermine the efforts of host states to improve their regulatory capacity? Obviously, that is not the intention of the authors and they do give attention to this aspect in the book.

A second concern is that the debate about the proper role of home states is still dominated by voices from the global North, from NGOs, academics and business entities based in industrialized countries. We still rarely hear from developing countries on this subject. It is very difficult to say whether greater home state efforts will be welcomed or not. The authors have some empirical evidence suggesting that home state intervention will be welcomed if it supports local regulatory efforts. Dr Zerk emphasised that more effort needs to be made to encourage contributions from other voices, especially from non-OECD governments and from the global South. There is an important debate to be had about the proper role of home states, the opportunities and limits of that role, where the home states' interventions may be productive and counterproductive, and, crucially, the interplay between home state and host state initiatives and different modes of cooperation.



There is a need for a two-pronged approach. There is firstly the absolute need to achieve greater access to remedy. The book shows there are opportunities for home states to make a contribution here. However, there is also the longer term goal of building greater capacity of regulatory and judicial mechanisms at host state level.

In her report to the UN OHCHR on access to remedies in cases of alleged business involvement in gross human rights abuses (published in February 2014) Dr Zerk expresses the view that domestic judicial mechanisms are not presently responding very well to cases of business involvement in gross human rights abuses. She also argued that a lack of consensus between states on some fundamental issues may operate to impede legal development in the longer term. Key among these is the question of what the appropriate role of the interested states (home states and host states) should be and how they could work together to achieve good outcomes. Dr Zerk has recommended a process of consultation on this issue. She noted that under a Human Rights Council Resolution passed in June 2014, the UN High Commissioner for Human Rights has been requested to continue the work to facilitate the sharing and exploration of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses. Dr Zerk concluded by saying that it will be good if everyone involved in this work could take the opportunity to move the debate on in a constructive way, by thinking creatively about the potential value and utility of home state regulation, and the different forms that it could take.

Richard Morgan

Mr Morgan briefly explained the context of Anglo American: it formed about 100 years ago in South Africa, and mines *inter alia* diamonds, platinum, iron ore, nickel, copper and two forms of coal.

From Anglo's point of view, the key driver is reputation. Most of its mining (roughly 80%) takes place in the developing world rather than in vulnerable or failed states. In fact, a year or two ago it closed its office in Kinshasa in DRC because it just could not get the assurance of government accountability that would enable Anglo to operate in accordance with the company's standards. The countries where Anglo operates include South Africa, Botswana, Canada, Australia, Brazil, Peru and Chile. In those countries, Anglo certainly experiences the pushback from governments to the effect of 'do not try and decide our legislation for us, thank you very much'. Anglo has had some difficulty in persuading the relevant governments to sign up to the voluntary initiatives such as the Voluntary Principles on Security and Human Rights and the Extractive Industries Transparency Initiative, precisely because the governments tend to see them as imposition of values from the North.

Referring to the Marikana massacre in South Africa, the first reaction was to ask what were the underlying failures and it has been the subject of an enquiry by the South African Human Rights Commission. In Anglo's case, it is a signatory to the Voluntary Principles on Security on Human Rights, and does its annual returns across its various business units. But it has teamed up in partnership with International Alert and visited some of its business units to ask what it looks like in reality on the ground. This accountability through a third party is helpful in that it shows Anglo has examined current and best practice in an open way.



Mr Morgan emphasised that this is an evolutionary process, and its voluntary nature is an important element. He stated that it is no coincidence that he is speaking at the event from the government relations side, rather than the legal side. He stated that they try to deal with these problems upstream by consensus, rather than from the legal side, where things will tend to be more limited to the technical interpretation and lead to a mentality that is more about compliance, and can as a result become a tick-box exercise.

The same applies to the transparency legislation. The EITI is an important part of the issue, but now that the EU has passed a transparency directive, it becomes a question for the tax people. They will by definition be more technical about it, and they will say 'that's what it says, that's what we'll do.' Mr Morgan's department works with them so that it is possible to meet the wider moral challenge that the collective community is setting for the company. Otherwise it is not sustainable. Mining is dependent on permission, which comes from various sources, and most governments feel that they need to do right by their communities. A mine takes five years to map out whether it is going to work, another five to ten to build, twenty or thirty to exploit, so one is talking about a long-term relationship that needs to be based on the right things from the outset.

Mr Morgan stated that his company would see merits in the combination of carrots, nudges and sticks referred to by earlier speakers. With voluntary initiatives, one gets the engagement to sit around with NGOs who say 'this is what we want to see', from where one can evolve. The trouble with the legal aspect is that it tends to be more rigid and one cannot advance it in the same evolutionary way. Mr Morgan stated that we have certainly seen how these things have evolved. For example, one could argue that the EITI has evolved in response to the Dodd-Frank/transparency directive. As these requirements get tighter and more demanding, the companies get better at responding and consulting communities. He stated that we should keep that process going in a responsive way.

Product stewardship is a good example of either a carrot or a nudge. Very few people in Europe realise how much of their electricity is still derived from burning thermal coal. Even fewer realise that it is coming from as far away as Colombia. After the blood diamond film was done, there was a blood coal documentary made in the Netherlands. The reputational aspects triggered the relevant extractive companies and utilities providers to become part of a multi-stakeholder initiative. As part of that, they ask how to audit the fact that the Cerrejón mine in Colombia is meeting human rights standards. Thereafter, one is able to state that the coal from Cerrejón is certified as sufficiently ethical. This initiative has now morphed into another organisation called Better Coal.

From Anglo's point of view, any regulation which is passed in Brussels, it implements everywhere. Such regulation is therefore by definition for them extraterritorial. But it needs to be taking things forward, not duplicating them. The directive requiring CSR reporting, for example, will only be helpful if it brings about better practice across the board. The reporting aspect is only part of the engagement, and one has to work with the people in the community. However, he agrees that reputational incentives do not apply to every company.



During question time Mr Morgan warned against overly negative assumptions about the intention and impact of companies. He mentioned that there appeared to be a feeling that if you let extractive companies loose in places, they are going to do all kinds of awful things. This does not correspond to his experience, or that of the majority of the companies in the ICMM. While there may be examples of egregious abuses, they are not the norm. One should also think about positive impact. Anglo American's mine in Colombia represents 60% of the GDP for the relevant area of La Guajira. That is an economic motor that one ought to be able to harness for wider good. Clearly it is a complicated process achieving that and assuring that the people who have been affected by the mine are compensated, but one should not assume that companies go in there with bad faith.

Regarding human rights due diligence, it must be done both for new countries which a company considers entering as well as existing projects. A company must be able to satisfy itself that it can operate to its own standards with benefit to the community.

This Report was prepared by **Lise Smit**, Intern at the British Institute of International and Comparative Law.

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