

Human rights and multinationals: is there a problem?

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In recent years there has been an upsurge of concern over human rights and multinational enterprises (MNEs). A number of significant cases have been documented of apparent collusion between MNEs and host governments in major violations of human rights. These have been brought to public attention in the media through the actions of concerned individuals and groups, most notably by non-governmental organizations (NGOs) concerned with human rights. Among the most publicized cases have been the operations of Shell in Ogoniland,¹ BP in Colombia,² and Unocal in Burma (Myanmar), the last of these having led to landmark litigation in the United States.³ Thus, *prima facie*, there is a problem: multinationals can take part in alleged violations of human rights. Such allegations are not really new: concerns about the complicity of corporate and/or commercial actors in human rights violations can be traced back through the era of apartheid in southern Africa, to the use of slave labour by the Nazis in the Second World War, which has itself generated recent legal action, to the exploitation of workers on colonial plantations and to the movement for the abolition of slavery in the eighteenth century. What is new is the context in which these more recent cases are being discussed. The traditional notion that only states and state agents can be held accountable for violations of human rights is being challenged as the economic and social power of MNEs appears to rise in the wake of the increasing integration of the global economy that they have helped to bring about.

This article is based on an inaugural lecture of the same title given by the author on the occasion of his appointment to the Drapers' Chair of Law at Queen Mary and Westfield College, University of London, on 14 November 2000.

¹ See Human Rights Watch, *Nigeria, the Ogoni crisis: a case study of military repression in south east Nigeria* (New York: Human Rights Watch, 1995); Ben Naanen, 'Oil producing minorities and the restructuring of Nigerian federalism: the case of the Ogoni people', *Journal of Commonwealth and Comparative Politics* 33, 1995, p. 45; Eghosa Osaghae, 'The Ogoni uprising: oil, politics, minority agitation and the future of the Nigerian state', *African Affairs* 94, 1991, p. 325; S. Skogly, 'Complexities in human rights protection: actors and rights involved in the Ogoni conflict in Nigeria', *NQHR* 15: 52, 1997; Heike Fabig, 'The Body Shop and the Ogoni', in Michael Addo, ed., *Human rights standards and the responsibility of transnational corporations* (The Hague: Kluwer Law International, 1999), pp. 309–21.

² 'BP accused of funding Colombian death squads', *Observer*, 20 Oct. 1996, pp. 1, 18.

³ See further note 45 below.

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Furthermore, the increased vigilance and sophistication of NGOs, with their global networks of information, cooperation through the Internet and skilful use of the mass media, is making ignorance of, and indifference to, the suffering of workers and others who come into contact with unscrupulous MNEs less easy to sustain. On the other hand, the vast majority of MNEs do not engage in practices or relations with states that may lead to human rights abuses. Indeed, they are becoming more sensitive to the risk of becoming parties to such actions. Thus a mood is developing which sees the subjection of MNEs to human rights scrutiny as perfectly acceptable. It is the purpose of this article to look behind this situation and to examine more closely the arguments used both to deny and to uphold an extension of human rights responsibilities to MNEs. This is necessary because if MNEs are to be subjected to direct and legally enforceable obligations to observe fundamental human rights, the grounds for doing so must be strong and conceptually unassailable.

The extension of human rights into what Andrew Clapham has called ‘the private sphere’ presumes a change in legal, political and social relations which, in turn, changes the very foundations of human rights thinking.⁴ Hitherto, the only relationship between MNEs and human rights has been that of victim and beneficiary: the corporation can be protected from intrusions into its private rights on the part of the state by reference to human rights standards.⁵ Leaving the conceptual difficulty surrounding the notion of ‘corporate human rights’ to one side, what is now expected is that corporations—not unlike states—can be holders of duties to observe human rights. This goes well beyond the furthest limits of responsibility hitherto imposed by human rights law in response to violations committed by private actors. Thus far such actors could not be held directly responsible for violations of human rights. Rather, they could cause the state to be held responsible on the basis that it had neglected to control the activities of the non-state actor which have led to the violation of the human rights of another private party.⁶

Against this background the article will address the resulting issues, first, by looking more closely at the intellectual context in which the debate is developing; second, it will deal in more detail with the principal arguments for and against the extension of human rights responsibilities to MNEs; and finally, it will consider what conclusions can be drawn, in particular, as to the relationship between states and corporations for the observance of human rights. The ensuing discussion should not be read as being necessarily confined to MNEs alone. They are, for the purposes of this paper, the main object of analysis. However, if the applicability of human rights in the private sphere is to be accepted, then these norms must extend to all forms of non-governmental human association, whether foreign or domestic, business or non-business, unincorporated or incorporated.

⁴ Andrew Clapham, *Human rights in the private sphere* (Oxford: Clarendon Press, 1993).

⁵ On which see further Michael Addo, ‘The corporation as victim of human rights violations’, in Addo, ed., *Human rights standards*, pp. 187–97.

⁶ See further text at notes 49–51.

The context of the debate

Modern human rights doctrine emerged historically from the struggle of the individual property holder against the autocratic monarchic state. It is, in essence, a market-based theory of rights.⁷ Thus the first human right to emerge clearly is the right to private property. This in turn gives rise, by the nineteenth century, to a conception of human rights that distinguishes different classes of actors as to the extent of their rights. It is an exclusionary theory. As Upendra Baxi has pointed out, ‘The “Rights of Man” were human rights of all *men* capable of autonomous reason and will. While by no means the prerogative of “modernity”, the large number of human beings were excluded by this peculiar ontological construction.’ It has, in his view, led to the exclusion, at various times, of slaves, heathens, barbarians, colonized peoples, indigenous populations, women, children, the impoverished and the insane from being bearers of human rights.⁸ At the same time, this conception of human rights has also led to the extension of its protection to private accumulations of capital. Thus Article 1 of the First Protocol to the European Convention on Human Rights (ECHR) makes clear that both natural and legal persons have the right to the peaceful enjoyment of their possessions. Equally, cases have been heard by the European Court of Human Rights involving alleged violations of human rights against corporations. Corporations have been held to possess, apart from the right to property in Article 1 Protocol 1, rights to free speech under Article 10, to a fair trial under Article 6 and to privacy under Article 8.⁹ Similar rights have been recognized in other jurisdictions.¹⁰ It is not the purpose of this article to argue that corporations should not have the equal protection of the law. However, the traditional conception of human rights accepts *only* this protective approach to the relationship between corporations and human rights. It is therefore a conceptual barrier to the extension of human rights *obligations* to private corporations.

A second contextual factor to be considered is the partial disembodiment of human rights theory from its liberal, possessive individualist origins in the wake of the Nazi atrocities in occupied Europe, which led directly to the adoption of the Universal Declaration of Human Rights in 1948 and the ECHR in 1950.¹¹ Although maintaining a liberal catalogue of civil and political rights, the Universal Declaration also extends to economic social and cultural rights, recognizing the indivisibility of such welfare values from the more traditional liberal conceptions

⁷ See C. B. Macpherson, *The political theory of possessive individualism* (Oxford: Oxford University Press, 1962).

⁸ Upendra Baxi, ‘Voices of suffering and the future of human rights’, *Transnational Law and Contemporary Problems* 8, 1998, pp. 126–175 at p. 135.

⁹ See Addo, ‘The corporation as victim of human rights violations’, note 5.

¹⁰ *Ibid.* See too the discussion by Phillip Blumberg of the extension of US constitutional rights to corporations in his *The multinational challenge to corporation law* (Oxford: Oxford University Press, 1993), pp. 30–45.

¹¹ See D. J. Harris, M. O’Boyle and C. Warbrick, *The law of the European Convention on Human Rights* (London: Butterworths, 1995), pp. 1–3.

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of earlier ages. This reflects the concerns of the 1940s that societies should never return to the cruelty that accompanied traditional liberal capitalist models of economic and social organization, as witnessed particularly in the Great Depression of the 1930s. Thus, in the early postwar period, at the national level economic planning and state intervention remained central to policy-making. On the other hand, in relation to the organization of international trade and commerce, the liberal approach was adopted, with the progressive liberalization of trade and, more recently, investment being at the heart of policy-making.¹²

However, as the Cold War developed, a stratification of human rights emerged based on ideological preferences. Thus Western powers emphasized the individualistic civil and political rights agenda, as shown for example by the exclusive concentration of the ECHR on such rights, while the Soviet bloc states and their allies emphasized economic, social and cultural rights as prerequisites which justified, where necessary, even the curtailment of civil and political rights for the improvement of the welfare of the people. The resulting sense of cultural and political relativism in human rights was furthered by the rise of anti-imperialist decolonization movements in Asia and Africa. Their prime opponents were the liberal Western powers. The latter had to live with the paradox of the observance of human rights at home and their denial in overseas colonial possessions.

This disintegration of human rights theory continues to this day, despite influential voices being raised to the contrary, claiming that human rights are once again indivisible.¹³ It has the effect of redefining the contemporary participants in the debate on MNEs and human rights as 'pro-' or 'anti-'capitalists, thereby making them harder to hear by the other side of the debate. The main difference from the Cold War is that the antagonists cannot be identified with specific geopolitical blocs but have taken on a transnational group character. Furthermore, the selective stratification of human rights is still possible. The Cold War rules our discourse from its grave, as does a residual consciousness of imperial supremacy. It is this that in part underlies arguments opposed to the extension of human rights responsibilities to MNEs.

A third contextual current is the rise, since the 1960s, of identity and lifestyle politics.¹⁴ This has had the effect of supplementing traditional economic/political debates with (indeed, possibly subordinating them to) those of race, gender, sexual orientation, youth culture, the 'third age' politics of the elderly, consumerism and environmentalism.¹⁵ This has led to an awareness of the need for individual space for self-identification and a growing impetus for individuals

¹² See Mark Mazower, *Dark continent: Europe's twentieth century* (London: Penguin Books, 1999), pp. 206–9.

¹³ See e.g. Clare Short, Secretary of State for International Development, 'All human rights for all', speech to the Law Society, London, 3 Dec. 1998.

¹⁴ See Mazower, *Dark continent*, pp. 356–63; Eric Hobsbawm, *Age of extremes: the short history of the twentieth century* (London: Abacus Books, 1995), ch. 11, 'Cultural revolution'.

¹⁵ See further Leslie Sklair, *Sociology of the global system*, 2nd edn (London: Harvester Wheatsheaf, 1995); Yannis Gabriel and Tim Lang, *The unmanageable consumer* (London: Sage, 1995); P. T. Muchlinski, *Multinational enterprises and the law*, rev. pb edn (Oxford: Blackwell, 1999), pp. 99–101.

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to detach themselves from mass movements, mass ideologies, mass religion and mass production. The impact of these trends on the debate under discussion has been considerable. The expectation that MNEs should observe human rights can itself be seen as an identity and lifestyle statement. MNEs are purveyors of lifestyles and identities through their products, services and marketing. Consumers select their lifestyles and identities through their patterns of consumption. The 'ethical consumer' has become a target customer for the 'ethical corporation'. Through this discourse a new sense of what corporations and markets should be about appears to be emerging. We are rediscovering a need to control what an earlier generation would have referred to as 'the unacceptable face of capitalism'.

Arguments for and against the extension of human rights obligations to MNEs

Working within the context outlined above, this section will now critically assess the main arguments against and in favour of extending responsibilities for human rights observance to MNEs. Some may think it almost inconceivable to argue against such a self-evidently 'good' idea as the extension of human rights responsibilities to MNEs. Yet there are a number of strong arguments against it. First, MNEs are in business. Their only social responsibility is to make profits for their shareholders. It is not for them to act as moral arbiters in relation to the wider issues arising in the communities in which they operate. Indeed, to do so may be seen as unwarranted interference in the internal affairs of those communities, something that MNEs have, in the past, been urged not to commit.¹⁶ Second, private non-state actors, such as MNEs, do not have any positive duty to observe human rights. Their only duty is to obey the law. Thus it is for the state to regulate on matters of social importance and for MNEs to observe the law. It follows also that, as pointed out above, MNEs, as private actors, can be only beneficiaries of human rights protection, not human rights protectors themselves. Third, which human rights are MNEs to observe? They may have some influence over social and economic matters, as for example by ensuring the proper treatment of their workers; but they can do nothing to protect civil and political rights. Only states have the power and the ability to do that. Fourth, the extension of human rights obligations to MNEs will create a 'free rider' problem.¹⁷ It is predictable that not all states and not all MNEs will take the same care to observe fundamental human rights. Thus the more conscientious corporations that invest time and money in observing human rights, and in making themselves accountable for their record in this field, will be at a competitive disadvantage in relation to more unscrupulous corporations that do

¹⁶ See e.g. the UN Draft Code of Conduct for Transnational Corporations, paras 15–16, in UNCTAD, *International investment agreements: a compendium* (New York and Geneva: United Nations, 1996), vol. 1, p. 165.

¹⁷ See Ray Vernon in *Business and human rights* (Cambridge, MA: Harvard Law School Human Rights Program, 1999), p. 49.

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not undertake such responsibilities. They may also lose business opportunities in countries with poor human rights records, where the host governments may not wish to do business with ethically driven MNEs and they may not want to do business with these regimes. Fifth, unfairness may be exacerbated by the selective and politically driven activities of NGOs, whose principal concern may be to maintain a high profile for their particular campaigns and not to ensure that all corporations are held equally to account.

Such arguments assume that MNEs are no different from private persons engaging in lawful private activities; that they have no wider social responsibilities; that there are risks of unfair treatment of individual corporations; and that MNEs themselves need protection from such unfairness. Do they stand up to scrutiny? This depends, of course, on one's ideological predilections and personal prejudices. However, a significant reason for being sceptical about these 'anti' arguments lies in recent changes, first, in the perception of the corporation and its functions, which sees it as a social organization with real social responsibilities to workers and others,¹⁸ and, second, in the wider political reaction to global economic integration, with its emphasis on the 'democratic deficit' behind global business regulation;¹⁹ both of these shifts render many of the underlying assumptions behind those arguments hard to sustain, as will be shown below. On the other hand, the 'anti' arguments predate the arguments in favour of extending human rights to private non-state actors and they are based, as suggested above, on a remarkably resilient model of a liberal market society characterized by a clear distinction between the public and private spheres.²⁰ Thus their continued endurance can be expected. Against this backdrop, the principal arguments in favour of extending human rights obligations to MNEs will now be considered in turn.

The social responsibility of MNEs

The arguments for extending social responsibility standards to corporations are well known.²¹ Suffice it to say, for present purposes, that MNEs have for a long time been expected to observe socially responsible standards of behaviour, as expressed in numerous codes of conduct drawn up by intergovernmental organizations, of which the most significant have been the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977,²²

¹⁸ See further J. E. Parkinson, *Corporate power and responsibility* (Oxford: Clarendon Press, 1993); J. Dine, *The governance of corporate groups* (Cambridge: Cambridge University Press, 2000).

¹⁹ See further John Braithwaite and Peter Drahos, *Global business regulation* (Cambridge: Cambridge University Press, 2000).

²⁰ On which see further Clapham, *Human rights in the private sphere*.

²¹ See Parkinson, *Corporate power and responsibility*; Dine, *The governance of corporate groups*; Muchlinski, *Multinational enterprises and the law*, pp. 93–5; UNCTAD, *The social responsibility of transnational corporations* (New York and Geneva: United Nations, 1999); UNCTAD, *World Investment Report 1999* (New York and Geneva: United Nations, 1999), ch. XII.

²² ILO, *Official Bulletin* (Geneva, 1978), vol. LXI, series A, no. 1, pp. 49–56, reproduced in UNCTAD, *International investment agreements: a compendium*, pp. 89–102. See also ILO, *Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 18 June 1998).

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and the OECD Guidelines for Multinational Enterprises of 1976, which have recently been revised.²³ However, too much should not be read into these instruments. They are non-binding, and so create no legal duties to observe the standards contained therein. On the other hand, they do create an expectation that MNEs will observe such minimum standards in the conduct of their operations, and they provide concerned NGOs with a benchmark against which to compare corporate behaviour.²⁴

Furthermore, MNEs themselves appear to be rejecting a purely non-social role for themselves through the adoption of corporate and industry-based codes of conduct.²⁵ At the very least, these create a moral expectation that the codes will be observed. They can also gain legal force through their incorporation into contracts, as where, for example, a retailer includes ethical supplier standards in its contracts with its suppliers.²⁶ In addition, national laws continue to display a concern for corporate social responsibility, whether through the development of protective standards, as exemplified by the social dimension of EU law, or through the extension of public law standards of accountability to privatized industries. Indeed, in certain Commonwealth countries, notably Namibia and Uganda, privatization has been accompanied by an extension of the jurisdiction of their respective national Ombudsman's Office and Human Rights Commission to the activities of the privatized entities.²⁷ Even at the multilateral level, liberalization is not the dominant value that it was, as exemplified by the rejection of the Multilateral Agreement on Investment on the basis that it constituted an unwarranted interference with state sovereignty, thereby jeopardizing legitimate regulation in the public interest in such fields as environmental protection and labour standards.²⁸ Furthermore, as the most recent revision of the OECD Guidelines for Multinational Enterprises asserts: 'Enterprises should...2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.' In relation to issues of employment and industrial relations the Guidelines expect MNEs to respect the rights of their employees to be represented by trade unions, to contribute to the effective abolition of child labour and to the

²³ OECD Guidelines for Multinational Enterprises, 27 June 2000 (Paris: OECD, 2000) and on www.oecd.org/daf/investment/guidelines/mnetext.htm

²⁴ See further Sol Picciotto and Ruth Mayne, eds, *Regulating international business* (London: Macmillan/Oxfam, 1999).

²⁵ For examples see UNCTAD, *World Investment Report 1994* (New York and Geneva: United Nations, 1994), ch. VIII; UNCTAD, *The Social Responsibility of Transnational Corporations* (New York and Geneva: United Nations, 1999), pp. 31–42.

²⁶ See e.g. the Sainsbury's Code of Practice for Socially Responsible Trading, in Picciotto and Mayne, eds, *Regulating international business*, pp. 228–34; analysis by Petrina Fridd and Jessica Sainsbury, *ibid.*, pp. 221–8. Sainsbury's is prepared to stop using suppliers who do not live up to the standards contained in its code. It is unlikely that such suppliers could sue for breach of contract, given their notice of the code.

²⁷ See John Hatchard, 'Privatisation and accountability: developing appropriate institutions in Commonwealth Africa', in Addo, ed., *Human rights standards*, pp. 289–305.

²⁸ See further Sol Picciotto, 'Linkages and international investment regulation: the antinomies of the Draft Multilateral Agreement on Investment', *University of Pennsylvania Journal of International Economic Law* 19, 1998, pp. 731–68; P. T. Muchlinski, 'The rise and fall of the Multilateral Agreement on Investment: where now?', *International Lawyer* 34, Fall 2000.

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elimination of all forms of forced or compulsory labour, and not to discriminate against their employees with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, save where this furthers established government policies of greater equality of employment opportunity or relates to the inherent requirements of the job.²⁹ Thus, the trend appears to be turning towards a social dimension to the activities of MNEs, one in which an active duty to observe fundamental human rights standards can be included.

Human rights are good for business

Writing in 1998 the UN Human Rights Commissioner, Mary Robinson, asked: 'Why should business care about human rights?' Her answer was that, 'business needs human rights and human rights needs business'.³⁰ She suggested that the rationale behind this assertion was twofold: first, business cannot flourish in an environment where fundamental human rights are not respected—what firm would be happy with the disappearance or imprisonment without trial of employees for their political opinions?—and, second, corporations that do not themselves observe the fundamental human rights of their employees, or of the individuals or communities among which they operate, will be monitored and their reputations will suffer. Such sentiments have also been echoed in the recent UN Global Compact initiative, which calls upon major MNEs to observe fundamental workers' rights, human rights and environmental standards,³¹ and in relation to the current moves towards the adoption of a human rights code of conduct for companies by the UN Sub-Commission on the Promotion and Protection of Human Rights.³²

Businesses themselves may justify the adoption of human rights policies by reference to good reputation.³³ The benefit to be reaped from espousing a stance supportive of human rights is seen as outweighing any 'free rider' problem. Indeed, this problem may be an exaggerated one. It supposes that, say, the employment of child or slave labour is actually more profitable than employing adults at reasonable wages. A firm that needs to compete at such marginal cost levels is likely to be on the brink of insolvency. Furthermore, it is likely to be in an industry where there is little, if any, investment in new technology or where such investment would make little difference to overall profitability. Very few MNEs are in such a marginal position. Generally, they can afford to be model employers. Indeed, in developing countries they are likely to be among the

²⁹ OECD Guidelines, pp. 19, 21.

³⁰ Mary Robinson, 'The business case for human rights', in Financial Times Management, *Visions of ethical business* (London: Financial Times Professional, 1998), p. 14.

³¹ See further UNCTAD, *Social Responsibility*, pp. 15–18; www.unglobalcompact.org; Carola Hoyos, 'Principled partnership with world business', *Financial Times*, 6 Sept. 2000, p. 14.

³² see <http://www.unhchr.ch>.

³³ See e.g. Simon Williams, 'How principles benefit the bottom line: the experience of the Co-operative Bank', in Addo, ed., *Human rights standards*, pp. 63–8. See also Harvard Law School, *Human Rights and Business*, pp. 19–22.

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best, offering superior wages and conditions of work as compared with local employers.³⁴ Thus MNEs are more likely to pull conditions up than to pull them down.

On the other hand, failure to pursue a human rights strategy may not affect all firms in the same way. The firms with the most to lose appear to be those in high-profile, branded goods industries in which productive efficiency gains are crucial to profitability, due to the essentially mature nature of their products and productive technologies. Thus firms in the apparel industry, a relatively labour-intensive sector with strong incentives to cut labour costs, have been among the most prominent to suffer from a bad record on fundamental workers' rights. Similarly, firms with a very high market profile due to their size or centrality in their home-country markets may be more sensitive to criticism over human rights abuses. By comparison, firms operating far from the public gaze may have little to fear. Furthermore, even if a firm is identified as having a poor human rights record, and even where it is the object of a consumer boycott, the financial markets are unlikely to react. According to one study, while Shell, Nestlé, Monsanto and Nike were being subjected to very public boycotts, there appeared to be no demonstrable effect on their share prices or dividends. Even where, as in the case of Nike, chief executives have claimed an adverse effect on share prices, the empirical evidence does not back this up.³⁵ Thus, where firms are concerned about human rights, it appears that this is not because they will definitely go out of business otherwise, but because they feel that their public place on the market, and/or their brand image, require it. What is interesting is whether, in due course, financial markets will become more sensitive to the publicly perceived stance of a company on human rights and social responsibility when taking account of its likely future value.

The private legal status of MNEs is irrelevant

Central to the arguments in favour of extending responsibilities for human rights to MNEs is the view that their status as private legal persons is no longer a bar to such a development. This position involves both theoretical issues and technical legal issues. As to the theoretical perspective, this rests on an acceptance that there has been a significant change in the context in which MNEs operate which makes them liable to responsibilities in this field. Thus, Andrew Clapham has identified three trends which have forced a reconsideration of the boundaries between the private and the public spheres with the consequence that non-state actors, including MNEs, may in principle be subjected to human rights obligations.³⁶ The first of these is the emergence of fragmented centres of power—including MNEs—which extend the individual's perception of

³⁴ UNCTAD, *World Investment Report 1994*, pp. 197–203.

³⁵ See Simon Zadek and Maya Forstater, 'Making civil regulation work', in Addo, ed., *Human rights standards*, pp. 69–70.

³⁶ See Clapham, *Human rights in the private sphere*, pp. 137–8, on which this paragraph draws.

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authority, repression and alienation beyond the apparatus of the state. Second, the definition of the private sphere has undergone a transformation, due to the emergence of *inter alia* the kinds of identity politics mentioned earlier in this article. Thus the notion of a 'private' sphere, based on a paternalistic model of the domestic space, has been replaced by a more regulated sphere of private behaviour. This, in turn, has brought into question other divisions of 'private' and 'public' including the notion of the corporation as a private enterprise with no social or public obligations. Third, the supranational dimension has created new institutional centres of power which allow MNEs, among others, to bypass the state machinery and to exercise direct influence on these institutions which, in turn, directly exercise power over the individual. Thus bodies such as the EU or the WTO are perceived as being involved in a direct relationship with transnational capital, without a clear system of democratic accountability being in place to represent other, equally valid, interests. These changes, in turn, create the perception of MNEs as entities capable of exerting power over public policy and individuals without being held accountable. This coincides with the fear that such powerful entities may disregard human rights and, thereby, violate human dignity. It follows that MNEs must be subjected to human rights responsibilities, notwithstanding their status as creatures of private law, because human dignity must be protected in every circumstance.³⁷

The abovementioned theoretical position is reinforced by certain technical legal developments which recognize an emergent, albeit as yet incomplete, responsibility for human rights violations on the part of non-state actors. These start with the Universal Declaration of Human Rights, in which the obligation to promote respect for human rights and to secure their universal and effective recognition and observance is addressed not only to states but also to 'every individual and every organ of society', a formulation wide enough to encompass private corporations.³⁸ Furthermore, as established by the Nuremberg Tribunal,³⁹ corporate responsibility for war crimes and crimes against humanity may be possible, given that the Tribunal declared the Gestapo and 55 other Nazi organizations to be criminal in nature. However, it may be said that such bodies are not directly analogous to private corporations, representing as they did the Nazi state, and that therefore the Nuremberg Tribunal decision does not take us very far. It does not assert that private corporations can be responsible under international law for human rights violations, although the Tribunal made quite clear that individuals could be so responsible, a fact reaffirmed in Article IV of the UN Convention on the Prevention and Punishment of the Crime of Genocide 1948, which asserts that individuals shall be punished for this crime.

³⁷ See *ibid.*, p. 147.

³⁸ *Ibid.*, Preamble. See further Amnesty International Dutch Section and Pax Christi International, *Multinational enterprises and human rights* (Utrecht, November 1998), pp. 33–4.

³⁹ *AJIL* 41, 1947, p. 172.

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It has been argued that MNEs should not be regarded as addressees of international human rights obligations, as this would grant them a measure of international personality.⁴⁰ This view has, in turn, been questioned in more recent academic writings on the basis that various non-state actors, including MNEs, are *participants* in the evolution of international law.⁴¹ Thus their formal legal status is said not to be relevant when determining the extent of their legal rights and duties, a matter that can only be decided in relation to the issue at hand. Consequently, any formal objection to the extension of human rights responsibilities to MNEs can be avoided by an appeal to pragmatism. In strictly legal terms this may be achieved by introducing positive legal duties to observe fundamental human rights into international agreements which are directly addressed to MNEs.

There are, in addition, early signs at the level of national law that a degree of direct responsibility for human rights violations on the part of MNEs is being recognized. Thus in the recent United States District Court case of *Doe v. Unocal* it was held, for the first time,⁴² that MNEs could, in principle, be directly liable for violations of human rights under the Alien Tort Claims Act.⁴³ However, on 31 August 2000 the US District Court awarded a summary judgment to Unocal on the ground that although there was evidence that Unocal knew about, and benefited from, forced labour on the pipeline project in Burma in which it was a joint venture partner, it was not directly involved in the alleged abuses. These were the responsibility of the Burmese authorities alone. Giving the court's judgment, Judge Ronald Lew followed a series of decisions by US military tribunals after the Second World War, involving the prosecution of German industrialists for their participation in the Third Reich's slave labour policies.⁴⁴ These established that, in order to be liable, the defendant industrialists had to take active steps in cooperating or participating in the forced labour practices. Mere knowledge that someone else would commit abuses was insufficient. By analogy with these cases, Unocal could not be held liable as a matter of international law and so the claim under the Alien Tort Claims Act failed.⁴⁵ Therefore, the case has failed on the facts and is subject to an appeal. However, the principle that a private non-state actor can be sued

⁴⁰ See A. Cassese, *International law in a divided world* (1986), p. 103.

⁴¹ See Menno T. Kamminga, 'Holding multinational corporations accountable for human rights abuses: a challenge for the EC', in Philip Alston, ed., *The EU and human rights* (Oxford: Oxford University Press, 1999), p. 558; Amnesty International Dutch Section and Pax Christi International, *Multinational enterprises and human rights*, pp. 23–5; Rosalyn Higgins, *Problems and process: international law and how we use it* (Oxford: Oxford University Press, 1993), pp. 49–50.

⁴² 963 F.Supp. 880 US Dist Ct, C.D.Cal, 25 March 1997, noted in *AJIL* 92, 1998, pp. 309–14. See also *Wiwa v. Royal Dutch Petroleum Company* 96 Civ 8389 (SDNY).

⁴³ 28 USC s.1350.

⁴⁴ *US v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952); *US v. Carl Krauch*, *ibid.*, vol. 8; *US v. Alfred Krupp*, *ibid.*, vol. 9; *Flick v. Johnson*, 85 US App. DC 70, 174 F.2d 983 (DC Cir 1949).

⁴⁵ *Doe v. Unocal*, US Dist Ct, C.D.Cal. 31 August 2000, 2000 U.S. Dist. LEXIS 13327. See also William Branigin, 'Claim against Unocal rejected: judge cites evidence of abuses in Burma but no jurisdiction', *Washington Post*, 8 Sept. 2000, p. E10.

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before the US courts for alleged violations of human rights was not questioned.⁴⁶ Furthermore, in the recent case of *Wiwa v. Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC*⁴⁷ the US Court of Appeal held that the US interest in pursuing claims for torture under the Alien Tort Claims Act and the more recent Torture Victim Prevention Act⁴⁸ was a significant factor to be taken into account when determining whether an action brought on such grounds before a US court against a foreign MNE should be removed to a foreign jurisdiction on the basis that it was a more suitable forum for the litigation. Thus on the facts the USCA held that an action brought against the defendant corporation for allegedly supporting the Nigerian state in its repression of the Ogoni people through *inter alia* the supply of money, weapons and logistical support to the Nigerian military which carried out the alleged abuses, could be heard in the United States. In effect, then, the US courts have set themselves up as a forum in which allegations of complicity in torture made against private corporations can be heard. However, this case was brought by US resident plaintiffs. It is not certain that US jurisdiction will be so readily accepted where the plaintiffs are from outside the United States.

Although a finding of direct responsibility for human rights violations is as yet unprecedented, there is, as noted at the beginning of this article, some support for establishing the indirect responsibility of MNEs for human rights violations. Here the state may be held liable for the conduct of non-state actors that amounts to a violation of the human rights of a third person. Such a responsibility could be established by international convention.⁴⁹ No such responsibility has ever been expressly provided for. Instead, there is some evidence from the case law under the ECHR that the state may be under an obligation to 'secure' the rights of third persons against interference by a non-state actor. Failure to do so may result in a violation of the Convention.⁵⁰ However, this case law is uncertain in its scope and too much cannot be read into it. At most, it is clear that the state cannot absolve itself of its direct human rights responsibilities by hiving them off to a privatized entity.⁵¹

From the above discussion it can be seen that, while there are compelling theoretical reasons for extending direct responsibility for human rights violations to MNEs, the legal reality is still that such responsibility remains to be achieved. None the less, in the light of the *Unocal* and *Wiwa* litigation, there are

⁴⁶ In this regard see also *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), where it was held that the Alien Tort Claims Act reaches the conduct of private parties provided that their conduct is undertaken under the colour of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties.

⁴⁷ USCA 2d Cir., 14 Sept. 2000: 2000 US App. LEXIS 23274.

⁴⁸ 28 USC s.1350 App (1991).

⁴⁹ See Kamminga, 'Holding multinational corporations accountable', pp. 559, 569.

⁵⁰ See e.g. *Young James and Webster v. UK* (1981) E.Ct.HR Series A vol. 44; *X and Y v. The Netherlands* (1985) E.Ct.HR Series A vol. 91; *Arzte für das Leben* (1988) E. Ct.HR Series A, vol. 139. See further Harris, O'Boyle and Warbrick, *The law of the European Convention on Human Rights*, pp. 19–22; A. Drzemczewski, *European Human Rights Convention in domestic law* (Oxford: Oxford University Press, 1983), ch. 8; Clapham, *Human rights in the private sphere*, ch. 7.

⁵¹ *Costello-Roberts v. UK*, E.Ct.HR (1993) Series A vol. 247.

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some signs that an emergent direct liability of this kind may be accepted, provided that it can be shown that the firm in question has taken a direct part in the alleged violation of fundamental human rights.

MNEs can observe fundamental human rights

In response to the view that MNEs cannot be subjected to human rights responsibilities because they are incapable of observing human rights designed to direct state action, it may be said that, to the contrary, MNEs can affect the economic welfare of the communities in which they operate and, given the indivisibility of human rights, this means that they have a direct impact on the extent that economic and social rights, especially labour rights in the workplace, can be enjoyed. Furthermore, although it is true that MNEs may not have direct control over matters arising outside the workplace they may none the less exercise important influence in this regard. Thus, MNEs may seek to defend the human rights of their employees outside the workplace, to set standards for their subcontractors and to refuse to accept the benefits of governmental measures that seek to improve the business climate at the expense of fundamental human rights.⁵² Furthermore, where firms operate in unstable environments they should ensure that their security arrangements comply with fundamental human rights standards.⁵³ Moreover, where companies have no direct means of influence they should avoid, at the very least, making statements or engaging in actions that appear to condone human rights violations. These may include silence in the face of such violations.⁵⁴ Finally, all firms should develop an internal human rights policy which ensures that such concerns are taken into account in management decision-making, and which may find expression in a corporate code of conduct.⁵⁵

NGOs are not the problem

Finally, the argument that MNEs may be subjected to arbitrary and selective targeting by NGOs should not be overstated. While it is true that such behaviour can arise out of what Upendra Baxi has termed 'the market for human rights',⁵⁶ in which NGOs strive for support from a consuming public in a manner not dissimilar to that of a service industry, MNEs are big enough to take care of themselves. In any case the activities of campaigning NGOs depend, in part, for their success on complicity from the mass media, which

⁵² See Amnesty International Dutch Section and Pax Christi International, *Multinational enterprises and human rights*, pp. 50–1.

⁵³ See Amnesty International UK Business Group, *Human rights guidelines for companies* (London: Amnesty International, 1998), pp. 8–11.

⁵⁴ Amnesty International Dutch Section and Pax Christi International, *Multinational enterprises and human rights*, pp. 52–4.

⁵⁵ *Ibid.*, ch. 5.

⁵⁶ Baxi, 'Voices of suffering', pp. 161–9.

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must be prepared to publicize the unacceptable behaviour of targeted MNEs. Thus the NGOs depend on one set of MNEs—the media corporations—to raise consciousness about the wrongdoing of other MNEs. As a result they may not be in full control of the process of consciousness raising, notwithstanding the claims made about the strength of direct contact between activists and concerned individuals through the Internet. However, as NGOs become more prominent as representatives of a critical approach to transnational business, calls for their regulation and increased accountability may be expected.⁵⁷

A proper balance: state and MNE responsibility for human rights compared

What, then, is the proper role of MNEs in the attribution of responsibility for human rights violations? The first thing to stress again is that, in general, corporations are unlikely to act in a manner that deliberately seeks to violate fundamental human rights. They are business organizations and on the whole they will not espouse such policies.⁵⁸ States, by contrast, are far more prone to act in a manner that violates fundamental human rights, whether due to an inadvertent and isolated abuse of power by officials or as a result of a concerted state policy. Indeed, it may be said that the extension of human rights responsibilities to corporations makes them appear more important than they should be. It appears to treat corporations as quasi-governmental public institutions. That is to give them a constitutional status that they neither deserve nor need in order to be useful social actors. They can be regulated to act in a socially responsible manner without an alteration of their status as private law entities. The whole point of the argument here is that private entities can themselves violate human rights, and can be made accountable for this through the normal operation of the law. There is no need to alter their status to do so, and it is not part of the position being taken by advocates of this extension of human rights responsibilities. Furthermore, in treating corporations as if they were quasi-public institutions there is a risk that the continuing responsibility of states, as the prime movers behind violations of human rights, will be downplayed. In all the major cases of reported corporate abuses of human rights, the host state was prominently and actively involved. It should not escape full blame for situations that it has primarily created and human rights activists must not settle for holding the corporation alone responsible.

Moreover, appeals to corporate responsibilities for human rights violations must not absolve states from the responsibility for putting into place effective regulatory systems for the protection and promotion of the social and political goals implicit in appeals to human rights. It is the duty of the socially responsible

⁵⁷ See Michael Edwardes, 'Make the protesters accountable', *Financial Times*, 20 June 2000, p. 27; The Foreign Policy Centre, 'NGO rights and responsibilities: a new deal for global governance' (2000) at www.fpc.org.uk.

⁵⁸ See 'Doing business in difficult places', *The Economist*, 20 May 2000, p. 127.

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state to adopt policies that help to foster the well-being of its citizens. A proper system of regulation which demands that corporations observe fundamental rights at work, and in their relations with the wider community, is one way of achieving this goal. It entails the adoption of detailed and specialized regulatory laws. These will give effect to the aspirations behind human rights standards through the establishment of wider regulatory regimes in areas such as labour rights, health and safety or environmental protection, to name but a few. Thus the overall content of the host country's legal system, both substantive and procedural, may be more significant than the institution of wide and general exhortations for firms to observe human rights.

However, such appeals may be useful where the host state lacks an effective legal order for the regulation of socially responsible corporate behaviour. In this sense, the movement towards binding corporate obligations to observe human rights is, in reality, a method for the extraterritorial extension, through the transnational management network of the MNE, of high regulatory standards to be found in democratic market economies to host countries that fail to acknowledge such standards in their national laws and practices.⁵⁹ It is this aspect of the issue that has encouraged some states to express concerns about the importation of higher regulatory standards as a form of protectionism and cultural imperialism. That in turn raises the question of the relativity of human rights, which, as noted above, has been a major problem throughout the history of human rights discourse. All that needs to be said here is that, if one accepts the indivisibility and universality of human rights, such arguments carry little weight and may be dismissed as little more than justifications for an unwillingness to espouse human rights based policies on the part of the objecting state.

Thus the argument put here insists on keeping the state at the heart of responsibilities for the protection and promotion of human rights, and on seeing the responsibility of corporations for violations of human rights as a subordinate concern, given the general unlikelihood that MNEs will deliberately and knowingly violate such rights.

However, it has also been accepted that, in certain extreme cases, the direct involvement of an MNE with the host country in violations of fundamental human rights can be shown to exist. Here, legal doctrine can develop to ensure a proper sharing of responsibility between the state and the corporation. Of particular value is the notion of the 'joint enterprise' or 'joint venture' between the state and firm. If it can be shown that an MNE obtains a material economic benefit from operating in an environment where it knows that the business venture in which it is engaged involves state-sponsored violations of human rights, or where, in extreme cases, the firm itself engages in such violations in the course of operating the venture, that firm will be directly liable for those violations on a joint and several basis with the host state. This will be so

⁵⁹ For a developed application of this argument to fundamental labour rights see Bob Hepple, 'A race to the top? International investment guidelines and corporate codes of conduct', *Comparative Labour Law and Policy Journal* 20, 1999, pp. 347–63.

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irrespective of the private legal status of the firm, or of the formal legal relationship between the host state and the firm, so long as it can be shown that the two were collaborating in the conduct of the venture.⁶⁰ That much can be gleaned from the decisions of the US District Court in *Unocal*. The remaining question arising in the light of *Unocal* is whether the threshold for liability should remain with proof of direct involvement in the violations under review, or whether indirect involvement and benefit to the corporation should be enough to ground liability. The choice depends on the extent to which the legal order sees fit to make the firm responsible. In this regard the deterrent effect of a liability based on knowledge of violations coupled with proof of a tangible benefit therefrom may be important. In addition, there is the question of where MNE liability for alleged abuses of human rights ultimately falls. Should the entire group enterprise of the MNE including, especially, the ultimate parent be liable, or only the local affiliate most directly involved in the alleged abuses? This raises complex questions of enterprise liability. Again, if a deterrent effect is sought then the entire managerial network of the MNE should be responsible for violations of human rights. The parent should not be allowed to hide behind the corporate veil that separates it from its affiliates, nor to escape liability by way of 'forum shopping' for a jurisdiction in which its defence is more likely to prevail.⁶¹ In this connection the USCA decision in the *Wiwa* case is a welcome precedent, although it is confined to the particular public policy environment of US law relating to torture claims.

Furthermore, a climate of expectation as to proper corporate conduct should be built up through both 'soft law' and 'hard law' options. Developments in 'soft law' through corporate and NGO codes of conduct are already creating a climate in which it may be expected that the management of MNEs includes a conscious assessment of the human rights implications of an investment, particularly in host countries known to have a poor human rights record. Such analysis can be expected as part of the risk assessment associated with an investment decision. If such an input is missing from the corporation's decision-making, or where the corporation deliberately accepts that it will be complicit in human rights violations, then at least moral corporate responsibility for violations of human rights will follow. This may be highlighted by concerned NGOs to the detriment of the firm's public image and social standing. Whether or not that results in financial loss is not really the issue—loss of corporate reputation is in itself the loss of a valuable asset.

Turning to 'hard law' approaches, it remains to be seen whether national laws and international instruments will develop positive duties on the part of corporations to observe fundamental human rights. Apart from the nascent

⁶⁰ See further Anita Ramasastry, 'Secrets and lies? Swiss banks and international human rights', *Vanderbilt Journal of Transnational Law* 31, 1998, pp. 325–456.

⁶¹ See Kamminga, 'Holding multinational corporations accountable', pp. 562–3; Muchlinski, *Multinational enterprises and the law*, ch. 9; P. T. Muchlinski, 'Corporations in international litigation: problems of jurisdiction and the United Kingdom asbestos cases', *International and Comparative Law Quarterly* 50, 2001, pp. 1–25.

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'joint enterprise' doctrine mentioned above, it may become common practice for national company laws to include a legally binding commitment to the observance of human rights as part of the directors' duties, supplemented by reporting obligations on corporate social policy. Furthermore, specialized laws may be passed to ensure the observance of minimum standards of human rights and social responsibility by national corporations while operating abroad. A bill to this effect is currently before the Australian parliament.⁶² Finally, provisions in international investment agreements addressed both to states and to corporations, requiring the observance of fundamental human rights in the course of their economic operations, may be included.⁶³ Thus, it is not difficult to create technical legal solutions to the question of corporate responsibility for human rights violations. The real issue is whether the political will exists to put them in place. Although the problem of violations of human rights by corporations can be overstated, in those exceptional cases where a MNE is implicated in such activities the law must not remain silent. It must be able to meet the problem head-on and to control and to deter such behaviour.

⁶² Corporate Code of Conduct Bill 2000, The Parliament of the Commonwealth of Australia, draft of 28 August 2000.

⁶³ See Kamminga, 'Holding multinational corporations accountable'.

