

# Multinational corporations and human rights

## QUESTIONS ABOUT THEIR RELATIONSHIP

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***A new research project studying the evolving legal and human rights responsibilities of corporations.***



*This article outlines the substance of a major three-year research project into the legal dimensions of the relationship, both present and future, between corporations and human rights beginning in January 2002. The project is being undertaken by the Castan Centre for Human Rights Law, Monash University, in conjunction with its Industry Partners, Reputation Qest and Premier Oil (UK), and is being run under the auspices of an Australian Research Council Linkage Grant. The project is international and domestic in focus. Part of the research will involve significant industry, NGO, government and community consultation and the project team would be happy to hear from organisations who might be interested in participating in or learning more about the project. Contact: <castan.centre@law.monash.edu.au>*

The protection of human rights is not traditionally considered a responsibility of corporations. The domestic laws of many states fail to impose adequate human rights duties on corporations, while it is unlikely that there are any direct duties imposed by international law. Yet corporations, especially multinational corporations (MNCs), are very powerful entities in the current world order. Their impact on the wellbeing of communities and individuals, including in terms of human rights, is evident wherever they operate. While there is considerable scope for that impact to be positive, corporate activity is often perceived to have had, and has had, a detrimental impact on human rights protection. The most notorious MNC abuses occur in the developing world, including for example complicity in the brutality of host states' police and military, the use of forced and child labour, suppression of rights to freedom of association and speech, violations of rights to cultural and religious practice, infringement of rights to property (including intellectual property), and gross infringements of environmental rights. However, infringements by MNCs also occur in developed nations typically in respect of the environment, rights to privacy, consumer rights to health and information, as well as freedom of association.

### **Accountability mechanisms**

Nevertheless, numerous methods do exist for imposing forms of human rights accountability (legal and non-legal) on corporations. Since early 1999 there has been a worldwide surge of interest in the nature and extent to which corporations are, or ought to be, made responsible for the protection and promotion of human rights. The catalogue of domestic and international accountability mechanisms, including recent initiatives and developments is numerous and diverse,<sup>1</sup> and includes the following categories:

*Legal duties: existing, potential and proposed ('hard law'):*

- domestic laws covering, for example, labour rights, anti-discrimination, environmental protection, occupational health and safety, and product safety;

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- international obligations on home states to restrain corruption by their citizens abroad, under the OECD Bribery Convention, implemented in Australia by the Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999 (Cth);
- domestic laws covering the extraterritorial operations of corporations, such as the United States federal Alien Torts Claims Act 1789 which grants rights to aliens to seek civil remedies in US courts for certain breaches of their human rights inside and outside the US;<sup>2</sup>
- the demise of the jurisdictional restrictions of *forum non conveniens* through the greater willingness of courts in Australia, the UK, and the USA to hear complaints against domestic corporations with regard to their actions, or the actions of their subsidiaries, abroad;<sup>3</sup>
- the development of the notion of ‘horizontality’ in international law which has the effect of imposing responsibilities on states for the actions of those within their jurisdiction, such that the state can be held liable in international law for human rights violations perpetrated by private entities, including corporations;<sup>4</sup>
- proposed legislation, before both the Australian and US federal legislatures, providing for mandatory codes of conduct, which include compliance with international human rights standards, to apply to the extraterritorial operations of major domestic corporations;<sup>5</sup>
- proposals for the inclusion of a human rights (‘social clause’) exception to free trade provisions under the GATT/WTO regime.

*Quasi-legal regulatory regimes (‘soft law’):*

- the EU Parliament Resolution on codes of conduct, including in respect of human rights observance, for European MNCs operating overseas;<sup>6</sup>
- codes of conduct from intergovernmental organisations such as the highly publicised ‘Global Compact’ between corporations and civil society initiated by the UN in 2000; the Draft Fundamental Human Rights Principles for Business Enterprises, formulated by a working group of the UN Sub-Commission on the Promotion and Protection of Human Rights (2000-01);<sup>7</sup> UNCTAD’s *The Social Responsibility of Transnational Corporations*;<sup>8</sup> the OECD’s newly revised *Guidelines for Multinational Enterprises* (2000), as well as the ILO’s *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977).

*Voluntarily acceded to, or self-regulatory, codes of conduct:*

- an increasing number of MNCs have developed their own human rights policies and codes of conduct or ethics;
- the adoption of industry-wide codes, such as the Apparel Industry Partnership Initiative in the USA and FairWear in Australia. Real possibilities exist to create and exploit valuable certification trade marks that would signal to consumers that marked goods had been produced in compliance with human rights obligations.
- NGO-inspired codes of conduct for human rights compliance such as Amnesty International’s *Just Business: A Framework for Australian Companies* (2000) which was the result of extensive collaboration with MNCs.

*Changes in corporate behaviour in response to market forces:*

- the development of shareholder demand beyond the maximisation of profit, as represented by the growth in interest in ‘ethical investment’ by individual investors and (importantly) fund managers;
- the advent of the so-called ‘triple bottom line’ in corporate parlance, supposedly reflecting a fundamental concern to respect social and environmental concerns as well as profit margin in accordance with the perceived demands of consumers, the general community and shareholders;
- the utilisation by some MNCs of ‘social audits’, by which the corporation’s performance in respect of certain key social (including human rights) indicators is measured by an acknowledged or accredited independent expert.

Yet, despite this surge in interest in corporate human rights responsibilities, there remain certain important countervailing factors. Chief among these is the dissonance between the objects and practice of the globalisation of human rights on the one hand, and that of economic globalisation on the other. It is often argued, for example, that the acceleration of the process of economic globalisation under the auspices of such bodies as the WTO, the World Bank and the International Monetary Fund, has been prioritised at the expense of other goals, such as social welfare and human rights considerations. Certainly, international trade law essentially grants numerous rights to MNCs and very few enforceable duties, and few of any apparent significance in respect of human rights.

**The Castan Centre project**

The Castan Centre for Human Rights Law at Monash University has recently won an ARC Linkage grant, in conjunction with its industry partners Reputation Qest and Premier Oil plc (UK), to conduct research into the legal accountability of corporations for respect, protection and promotion of human rights norms. This issue is of crucial importance to a critique of the role of corporations within society, the changing role of the state in the guardianship of human rights, and the future of human rights protection worldwide. It also has enormous implications for the manner in which MNCs will be required to conduct their operations in the future. Compliance with human rights obligations will become a critical issue that will directly impact on their commercial profitability.

The project will essentially focus on the following four questions, to which there are currently no clear answers.

***Question 1: What legal duties do MNCs currently have regarding human rights?***

The legal duties of MNCs within the various domestic laws of states can be readily clarified in most instances. Such duties may arise for example in the context of criminal laws, civil rights laws, and consumer protection laws. However, the legislative sources of human rights pressure may be on occasion surprising. For example, trade practices laws prohibiting ‘misleading and deceptive conduct’ can perhaps be used to restrain a company from portraying itself as an ethical entity when the contrary is true.

Unfortunately, domestic laws have proven an inadequate means for controlling the human rights excesses of certain MNCs. In some instances, an MNC is more powerful,

economically and de facto politically, than a state it is operating in, particularly when that state is a developing nation which perceives that it needs foreign direct investment in order to achieve satisfactory levels of economic development.<sup>9</sup> MNCs may threaten disengagement if a state tries to increase its regulation of their activities, particularly if other states offer greater deregulation. For example, in the context of labour rights, this phenomenon has led to what is often called a 'race to the bottom', whereby states compete for foreign direct investment by offering the cheapest labour forces. MNCs are therefore in a uniquely powerful position to resist attempts by states, especially developing nations, to control their domestic operations. Hence, there is a need for other sources of MNC human rights obligations. Two such sources are extraterritorial regulation and international regulation.

Important gaps in our knowledge remain in respect of the extraterritorial reach of domestic legal standards. For example, a number of cases have been brought in the USA against corporations under the *Alien Tort Claims Act* (ATCA) for alleged violations by those corporations of human rights protected by the 'laws of nations'. However, none of these cases have been decided yet on the merits, and in many cases the jurisdiction of the relevant local court is still being contested. It is relatively certain that ATCA may prohibit corporations abusing rights which are uncontroversially recognised as *jus cogens* (a fundamental, non-derogable norm of customary international law), such as freedom from slavery, or freedom from torture. However, it is uncertain the extent to which ATCA might protect against breaches of rights which are less universally recognised, such as rights to a clean environment, or rights to join trade unions. It is also uncertain whether ATCA liability is dependent on some sort of link between a corporation and a state government (such as that alleged to have arisen between Shell and the Nigerian government regarding the former's mid-1990s oil operations in Ogoniland), or whether it can arise in respect of purely private corporate operations. The project will track the pending US cases and commentary thereof, in order to map the outer limits of corporate ATCA liabilities. It is important to note that those liabilities accrue not only to US corporations, but also potentially any company with a corporate presence in the USA.

The direct legal human rights duties of MNCs in international law are particularly opaque, despite the existence of numerous relevant international documents. Most international law documents regarding corporate human rights duties are not strictly legally binding, though it is possible that some 'soft law' provisions have hardened into legal obligation. Furthermore, the indirect duties imposed via the doctrine of horizontality have rarely been clarified in international human rights caselaw, with only a few cases, mainly before the European Court of Human Rights, addressing the issue of a state's alleged failure to control private sector human rights abuse. In our project, we hope to tease out the nature and content of existing international legal duties, both direct and indirect.

**Question 2: What factors are driving the perceived increased need for observance of human rights, and accountability for human rights violations, by MNCs?**

Though the project is largely concerned with outlining the 'hard law' obligations, both existing and potential, of MNCs, considerable attention will be paid to the context in which

these new legal duties are evolving. There is no doubt that the late 1990s saw an upsurge in the degree of concern over the power of MNCs and their ostensible intergovernmental sponsors like the WTO, IMF, and World Bank, manifested most overtly in protests at multilateral meetings in Seattle, Davos, Genoa, and even Melbourne. NGOs such as Amnesty International and Human Rights Watch, which have traditionally focused on state governments, have started to target corporations in their campaigns as well, so as to complement the long-standing work of groups such as Greenpeace. There has been a counter-reaction from MNCs themselves, who are overtly coming to recognise that the social dimensions of their activities cannot be simply ignored or sacrificed in favour of the almighty dollar. Additional influence in this regard is being exercised by other players such as ethical management trusts and shareholdings, and the possible growth of the phenomenon of 'ethical consumers' and their market impact. These contextual factors, which are all combining to form a foundation for the necessary development of future legal obligations, will be studied.

For example, one may note how various forces coalesced to firmly focus a spotlight on the ethics of major pharmaceutical corporations throughout 2001, particularly in relation to the high prices they charge for essential drugs, especially the anti-retroviral drugs which have successfully treated HIV/AIDS in the West, but which have been generally unavailable in the developing world due to their high prices. First, a hearing began in March in South Africa where 39 pharmaceutical corporations sought to prevent the implementation of new legislation which facilitated access to lower priced drugs in a country with large poverty rates, and where 20% of adults are HIV-positive.<sup>10</sup> In April, the plaintiffs dropped the case, in part due to the public outrage that the case had unleashed. The spectre of 39 companies, whose combined profits far outweighed the GDP of South Africa, moving to stop the provision of cheap drugs to a population in dire need, particularly in relation to HIV/AIDS, did immeasurable damage to the companies' reputations. Second, the threats in October by the USA and Canada to ignore the patent protection conferred on pharmaceutical corporations with respect to anti-anthrax drugs demonstrated that the sanctity of pharmaceutical patents, which drive up the price of drugs, could give way in cases of public health emergencies.<sup>11</sup> This point was endorsed in November in a 'Declaration on the TRIPS agreement and public health', issued after the WTO Ministerial meeting in Doha.<sup>12</sup> Finally, pop culture weighed in in the form of John Le Carre's novel published in early 2001, 'The Constant Gardener', which paints a very sinister picture of the practices of 'Big Pharma',<sup>13</sup> an image magnified on Le Carre's world tour to promote the book. These events (amongst others) indicate that it is in the interests of pharmaceutical corporations and consumers to map out the appropriate human rights obligations of Big Pharma regarding drug prices and access, and the appropriateness of the current regimes, both domestic and international, for providing patent protection for pharmaceutical products.

**Question 3: What legal duties should MNCs have?**

It is commonly demanded that MNCs should be legally obliged to respect the human rights detailed in existing international standard-setting documents such as the Universal Declaration or the International Covenants, which have traditionally bound only states. While it is true that the

strict public/private divide in international law is somewhat outdated,<sup>14</sup> it is nevertheless simplistic to presume that MNCs can be equated with states in terms of the legal human rights obligations that can and should be placed on them. States have public functions and public purposes whereas MNCs normally do not, so it is inappropriate to impose the *same* duties on both entities. Yet little research has been done on how the duties presently imposed on states can be meaningfully translated into duties for MNCs. The dilemma is illustrated by the following three examples.

First, it is readily understood how states are supposed to protect freedom of expression, and there is a large body of complex case law, both domestic and international, to guide us through the finer details of those obligations. But how, if at all, is a corporation supposed to respect the right to free speech? Should for example a corporation ever be legally obliged to permit political protests by for example its employees on its own property?

A second conundrum arises regarding situations where human rights abuse is actually *compelled* by the laws of a host state as, for example, when a state forbids the employment of people on the grounds of gender or religion, or prohibits trade unions. To what extent should a corporation be somehow legally obliged to break a state's law?<sup>15</sup> Such an issue does not arise with regard to the direct imposition of duties on states.

A third example concerns the extent to which, if at all, MNCs should be legally responsible for promoting the enjoyment of human rights beyond those directly relating to their commercial operation. Should they be expected to substantially contribute to the enjoyment of economic and social rights by the wider community (ie, beyond that directly employed or affected by the enterprise), so as to mirror the obligations imposed on states under the International Covenant on Economic Social and Cultural Rights?

It may be that human rights duties should vary across industry groups. For example, issues of freedom of expression, particularly rights of reply and access, would probably arise more frequently with regard to media groups than other industries, so special duties (to accompany their rights) concerning free speech could perhaps be imposed on the media sector, particularly media conglomerates with dominant market positions. Specific positive duties concerning respect for rights to adequate standards of health care could possibly arise in the pharmaceutical sector due to the peculiar characteristics of some of its commodities: the fact that they are not merely desirable but necessary for some. Some human rights issues would of course appear to cut across all sectors, such as labour rights.

A final example of an issue to be addressed regarding Question 3 is to unravel the appropriate human rights duties that should attach to an MNC for the behaviour of its subsidiaries, and its business partners. The complexity of the multinational corporate structure cannot simply be ignored in one's attempt to formulate legal principles to guide MNCs. For example, many of the allegations of exploitative labour conditions recently aimed at Nike relate to the business practices of its business partners in developing nations: to what extent in law should an MNC such as Nike be legally responsible for the actions of its business partners?<sup>16</sup> We hope to develop a comprehensive answer to this question, and the other questions cited above, over the life of the project.

#### **Question 4: How should such duties be enforced?**

This question would have to be analysed separately from a domestic and an international perspective. The most obvious form of domestic enforcement would entail the imposition of duties enforced in courts of law in civil suits or criminal prosecutions, so the relative merits of civil and criminal models need to be addressed. However, unique remedies could perhaps be proposed, such as the stripping of a trademark under intellectual property laws in extreme cases.

In international law, there are multiple potential avenues for 'enforcing' duties on MNCs. An international court to address MNC abuses would be possible, but could be unwieldy unless its jurisdiction was confined to the most egregious of abuses, as is the case with the proposed International Criminal Court (which in its current proposed form will only have jurisdiction over natural persons). The appropriate remedies of any such tribunal would have to be discussed (eg, criminal versus civil jurisdiction). Alternatively, bodies like the UN Commission on Human Rights could develop a practice of investigating and, if necessary, censuring the human rights practices of corporations, as such bodies currently do with states. The effect of such a 'shaming' mechanism on a rogue state has often been minimal, but one perhaps should not underestimate the effect such a sanction might have on a corporation, given that a corporation's success is often bound up with its image and reputation.<sup>17</sup>

Finally, it may (or may not) be advisable to attempt to develop, or develop further, mechanisms within apparently economically-oriented international bodies to enforce human rights obligations on corporations. Such obligations would extend to cover bodies like the World Bank and the IMF, whose activities clearly can and do affect the levels of the protection of human rights of the people in the countries where they operate. They might encompass the WTO, where already the WTO Dispute Settlement Panel has upheld a ban by France on the importation of asbestos products on public health grounds.<sup>18</sup> Such obligations might also have to form part of any revisions to the North American Free Trade Agreement, following the startlingly and unexpectedly successful use of its provisions by corporations to sue governments for loss of earnings after their polluting activities have been curtailed by environmental protection legislation.<sup>19</sup>

Together, these questions throw up a multitude of problems, both practical and conceptual, that are as yet a long way off from being adequately answered; that is despite the recent growth of interest in the area in the Academy, in the Boardroom and on the street. We hope that the outcomes of this project will take some initial steps in that direction.

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4. See Joseph, Sarah, 'An Overview of the Human Rights Accountability of Multinational Enterprises', in Kamminga and Zia-Zarif, above, ref 3, pp.77-9.

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7. UN doc. Addendum 1, U.N. Doc. E/CN.4/Sub.2/2002/X/Add.1, E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1 (Draft for Discussion November 2001).
8. UN doc. UNCTAD/ITE/IIT/Misc.21 at 6 (1999).
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10. UNAIDS, *Table of Country-Specific HIV/AIDS Estimates and Data*, June 2000
11. Ultimately, the USA and Canada respected the anti-anthrax patents after negotiating significant discount prices for the relevant drugs.
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16. See also Davies, Martin, 'Just (don't) do it: Ethics and International Trade', (1997) 21 *Melbourne University Law Review* 601, 614.
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18. WTO doc. WT/DS135/R, decision of 18 September 2000.
19. See Greider, William, 'The Right and US Trade Law: Invalidating the 20th Century', *The Nation*, 15 October 2001.