

Expanding the limits of Corporate Responsibility: An institutional approach

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Efforts to create an international system for corporate responsibility should now be concentrated not on the drafting of yet more rules and standards, but on the strengthening of existing international institutions. This paper first outlines the problems with using rules that are generally not enforceable within national courts to make global corporations accountable. It is argued that at least some of these obstacles could be overcome by strengthening already existing international institutions. Four such institutions are examined – the existing regional human rights bodies, the International Criminal Court, the International Labor Organization (ILO) and an expanded International Court of Justice.

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Introduction

A visible embodiment of globalization over the past generation has been the rapidly expanding reach and influence of transnational corporations (TNCs). According to UNCTAD's 2006 World Investment Report, 77,000 transnational firms now span the global economy, with some 770,000 subsidiaries and millions of suppliers. The largest 500 corporations in the world control approximately 25% of global economic output (Spisto, M., 2005). TNCs arguably now exert more influence than governments over the lives people live and the formation of the society their children will inherit (Fraser, M., 2001). Global business organizations also exert significant influence over the manner in which sovereign governments exercise their sovereign law-making powers (e.g., Burton, B., 2002; AmCham PRC, 2006; AmCham PRC, 2007). At the global level, TNCs are also taking their place at policy-setting and rule-making events – as they did in 2004, for example, during the (then) UN Commission on Human Rights¹ consideration of *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (Weissbrodt, D., Kruger, M., 2003; Ruggie J.G., 2007).

The second important development in the late 20th century has been the rolling back of the State. It is increasingly being realized that the State cannot and should not perform all the functions it might have attempted to perform in the past. Globalization of trade and commerce, combined with the shrinking resource base of most national and local governments has meant that while states have become increasingly concerned to regulate internal standards of governance for locally incorporated and locally listed firms, they have been equally concerned not to concern

¹ The Human Rights Commission was replaced by a new Human Rights Council in 2006.

themselves with the broader implications of corporate behavior. Thus, State regulation of corporate governance standards has not generally extended to standards for socially responsible behavior by corporations. Yet the two are closely, even inextricably, linked.

Internal corporate governance standards and corporate social responsibility are linked on a number of fronts. First, there is the obvious point – alter the internal governance of a firm, and you alter the behavior of that firm. This is the assumption behind attempts in nearly all advanced securities markets to require a minimum number of independent directors on the boards of publicly listed companies. In those countries where workers are given guaranteed representation on the boards of public companies it has been shown that employee rights are more likely to be respected. While Norway is so far the only State I am aware of to have legislated a requirement for female representation on the boards of publicly listed companies (Verma, P., et. al., 2005), research has discovered a clear link between the number of women on a firm's governing board of directors and the philanthropic behavior of that firm (Williams, R.J., 2003).

Second, it has been repeatedly shown that markets can and do respond to both internal governance standards of a firm, and the social behavior of that firm. Researchers have repeatedly reported a link between share value and corporate governance standards (e.g., Aglietta, M., 2000), and an equally strong link between good corporate behavior and share value (Loi Teck Hui, 2008). In particular, a number of studies have found that stakeholder balanced companies show considerably higher growth rates compared to companies that focus only on shareholders and profit maximization. While good corporate governance can be realized within the narrow parameters of the contractual relationship between the owners of the firm (shareholders) and their agents (managers and directors), corporate social responsibility depends upon recognition of a broader range of relationships between the firm and its stakeholders. Stakeholders are now generally recognized to include not just the employees and creditors of the firm, but all those affected by the activities and products of the firm as well.

Rules imposing duties, responsibilities and standards of behavior on TNC's have not kept up with the expanding reach of their actions. John Ruggie, the United Nations Secretary General's Special Representative for Business and Human Rights has recently mapped the standards, legal and otherwise, that currently govern the activities of business in relation to human rights, and has found considerable gaps in the protection offered by the current regime. It was partly to address these gaps that the UN Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary body of the then Commission on Human Rights established a Working Group on Business and Human Rights in 1998. In 2003 the Working Group produced the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ("Draft Norms"). According to their principle author, 'the Norms [became] the first non-voluntary initiative [in the area of business and human rights] accepted at the international level' when they were approved by the Sub-Commission in 2003 (Weissbrodt, D., Kruger, M., 2003; Ruggie J. G., 2007).

The rest of this article first explores some of the deficiencies and gaps within the current system of international rules when it comes to making TNCs accountable for breaches of human rights. Conceptual difficulties with seeking to make TNCs accountable under international rules that are generally not enforceable within local (national) courts of law are outlined. It is then argued that at least some of these difficulties could be overcome by strengthening already existing international institutions available for the enforcement of rules set down in international treaties. Four such institutions are examined – the existing regional human rights bodies, the International Criminal Court, the International Labour Organisation (ILO) and an expanded International Court of Justice.

I The current status of the private corporation in international forums

Both theory and practice have now firmly abandoned the traditional doctrine that states are the exclusive subjects of international law, capable of possessing rights and duties. By the middle of the 20th century, both international organizations and individuals had been brought under the coverage of international law (Harris, D.J., 2004, pp. 140-142). Individuals in states which have ratified the First Optional Protocol can now lodge individual complaints with the UN Human Rights Council for breaches of rights contained in the *International Covenant of Civil and Political Rights* (Harris, D.J., 2004, Chapter 9). The 1998 Rome Statute of the International Criminal Court provides an avenue for bringing individuals to account for 'the most serious crimes of concern to the international community as a whole' (article 5). So far as legal persons are concerned, bilateral and multilateral treaty provisions, such as Chapter 11 of the North American Free Trade Agreement (NAFTA), now enable transnational corporations to take action against host governments for actions amounting to 'expropriation' (article 1110; see also *Metalclad v USA* (2000) and the Australian-United States Free Trade Agreement (2004), article 11.7). Other treaties impose liabilities on legal persons. For example, article III of the 1969 *International Convention on Civil Liability for Oil Pollution Damage* imposes strict liability for oil pollution at sea on the owner of the ship, usually a company, responsible for such pollution.

A The State Duty to Protect, and Corporate Accountability for International Crime

What duties, if any, does international human rights law establish for individuals, corporations, and other private actors? For many years, the conventional answer has been that it places duties on states to respect the rights of individuals and creates few or no private duties. In other words, human rights law is aligned vertically, not horizontally (Knox, J. H., 2008). Even so far as transnational corporations are concerned, domestic laws in a single nation must be relied upon to bring them to account, and there are no existing international forms which can rule on the human rights implications of corporate actions crossing national boundaries. At most, the currently in force human rights instruments impose only 'indirect' responsibilities on corporations. Herein lies the major weakness of the current system, and this paper argues that institution-building at the international level could be one way to address such a weakness. This institution building would itself be built upon the substantive duties which international law imposes upon states to ensure that their domestic legal systems provide mechanisms to protect individuals from third party abuses of rights, including by business entities.

The main, founding human rights instruments, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights do not specifically address state duties regarding business. They do, however, impose generalized obligations on states to prevent and provide mechanisms to redress non-state abuse of such rights within the limits of national jurisdiction. Examples include the *International Convention on the Elimination of All Forms of Racial Discrimination* which requires state parties to prohibit racial discrimination by "any person, group or organization" (Art. 2.1(d)). Later treaties address business more directly and in greater detail. The 1979 *Convention on the Elimination of All Forms of Discrimination Against Women*, for example, requires state to take all appropriate measures to eliminate discrimination against women by any "enterprise" (article 2(e)).

The treaty bodies responsible for monitoring state compliance with human rights treaties have confirmed that the obligation on states to ensure treaty rights are protected is not fulfilled unless domestic legal systems protect individuals against abusive acts committed by private entities. A state can be in breach of treaty obligations if it fails 'to take appropriate measures ... to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities' (United Nations Human Rights Commission, 2004). States may, and do, also exercise extra-territorial jurisdiction over abuses committed abroad by corporations domiciled in their territory. One of the most well know examples is the US *Alien Tort Claims Act*. And US courts interpreting corporate liability for acts that amount to international crimes under the ATCS have drawn upon

international law understandings of individual responsibility (e.g., *Khulumani et. al. vs Barclay National Bank et. al.* (2007); *Vietnam Association for Victims of Agent Orange/ Dioxin v Dow Chemical et. al.* (2008)).

The most widely accepted situation where the exercise of extra-territorial jurisdiction is permissible, or even compulsory, under international law is where specific international crimes are concerned. A growing number of countries now provide for criminal punishment of corporations in their domestic legal systems. Although the International Criminal Court (ICC) only has jurisdiction over individuals, and not over legal persons, as more and more countries ratify the ICC statute and incorporate its concepts into domestic law, international standards for individuals may be extended to cover corporations as well.

The increasing focus on corporate abuses of human rights indicates a growing concern that states are not always able or willing to fulfill their international law duties when it comes to protecting individuals against such abuses. Herein lies the Achilles heel of the state duty to protect. States, especially developing states, are caught between a desire to attract international investment and thereby promote economic development on the one hand, and the desire to control and limit the more deleterious effects of international investor activities on the other. All too often, the desire to promote and protect international trade and investment has taken, and continues to take, priority over human rights protection. One effect of NAFTA and other bilateral trade treaties (including the US-Australia Free Trade Agreement) has been to prevent host states from explicitly considering human rights criteria in their investment promotion policies, their investment approval guidelines, their import controls or their export promotion activities (Clark, A. Dr., 2005).

Attempts to introduce legislation imposing standards of behaviour on corporations in the name of social responsibility have failed in Australia, the USA and elsewhere (e.g. *Corporate Code of Conduct Bill 2000* (Cth) (Australia); discussed in APJC-CFS, 2006). Even wide-ranging legislative reforms such as those contained in the Sarbanes-Oxley legislation have focused upon investor and creditor protection rather than social responsibility. Efforts by courts in Canada and America to render TNCs accountable through the concept of international enterprise liability have met with only limited success (Aurora Institute (2001); Sherrill, R., 1997). Attempts to bring corporations to account in national courts for activities amounting to crimes under international law have also been generally unsuccessful (e.g., *Khulumani et. al. v Barclay National Bank et. al.* (2007); *Gagarimbaru v Broken Hill Proprietary Limited & Anor* (2001)). The doctrines of separate legal entity and limited liability means that parent companies are generally not liable for the actions of business partners, whether related or unrelated (*Salomon v A Salomon & Co Ltd* (1897); *Industry Equity Ltd v Blackburn* (1977)). Cases involving well-known corporate names such as Union Carbide (see <http://www.bhopal.org/whathappened.html>), Monsanto, Texaco and (in Australia) James Hardie, provide a constant reminder of the disparity between the harm inflicted, and compensation paid, by global firms. Small developing nations are particularly vulnerable to influence by TNCs (Burton, B., 2002).

B Soft law and voluntary standards

At the international level, efforts to impose standards of behaviour on TNCs have centred around the development of voluntary codes of conduct. Examples include:

- OECD Guidelines for Multinational Enterprises (2000);
- ILO Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy (1977, revised in 2000);
- Social Accountability International's SA8000 standard for socially responsible employment practices;
- UN Global Compact (2000);
- UN Principles for Responsible Investment (2006); and
- ISO 26000 Social Responsibility, a new guidance standard currently being developed by the International Standards Organization, for publication in 2009.

However well intentioned, all of these international standard-setting instruments remain subject to three important defects:

- Lack of mandatory, effective and verifiable reporting systems;
- Lack of effective mechanisms for monitoring corporate activity and compliance on an ongoing basis; and
- Lack of enforcement mechanisms that are effective beyond national boundaries.

Efforts have been made to address these defects. So far as reporting mechanisms are concerned, for example, the Global Reporting Initiative (GRI) Sustainability Reporting Guidelines are now supported by other standards issued by the International Auditing and Assurance Standards Board and similar national bodies to regulate the independent verification by auditors of sustainability-type reports. The OECD Guidelines for Multinational Enterprises encourage voluntary disclosures of non-financial and well as financial performance, while the UN Global Compact asks participants to submit annual 'Communications on Progress' using reporting indicators such as the GRI Guidelines. The Carbon Disclosure Project and the Global Framework for Climate Risk Disclosure deal with voluntary reporting of matters related to climate change.

In the area of labor relations, the International Labour Organisation's (ILO) Tripartite Declaration, adopted by the ILO Governing Body, creates a procedure that requires governments, workers' and employers' organizations to respond at regular intervals to questions relating to its implementation. It also provides for publication of a summary of the questionnaire results. However, it contains no mechanism for making either reporting or monitoring compulsory, and no mechanism for enforcement (Leary, V., 2003).

So far as enforcement is concerned, the Draft Norms provide an important step forward. This is because they are "non-voluntary". Written in treaty-like language, the text comprises 23 articles setting out human rights standards for companies in areas ranging from international humanitarian law, through civil, political, economic, social and cultural rights, to consumer protection and environmental practices. Acknowledging that states are the primary duty bearers in relation to human rights, it stipulates that transnational firms and other business enterprises, within their "spheres of activity and influence", have corresponding legal duties. It also requires that corporate compliance be monitored by national and international agencies, and victims provided with effective remedies (Ruggie, J.G., 2007, citing articles 1, 15-18 of the Draft Norms).

2 Addressing conceptual flaws through a process of institution building

A What are the problems with seeking to impose international law on TNCs

The Commission was not prepared to adopt the Draft Norms, and instead finally decided to request the UN Secretary General to appoint a Special Representative to clarify and elaborate on key concepts in the Norms and submit 'views and recommendations' for consideration by the Commission. The Special Representative, John Ruggie, was appointed on 25 July 2005 for an initial 2-year term and has so far submitted a number of reports and findings (see especially Ruggie., J.G. (2008) *Promote Respect and Remedy*). In doing so, he has identified two major conceptual flaws with this first attempt to impose "non-voluntary" standards on TNCs. The first problem is how to identify the scope of coverage of the Norms. To what extent should businesses operating only *within* national boundaries be exempt? The other problem is created by the complexity of the world in which TNCs operate. TNCs increasingly operate in socio-political contexts that post entirely novel human rights challenges for them. In addition, for many companies, going global has meant adopting net-work based operating models involving multiple business entities spread across and within countries. As the number of participating entities in a

supply network chain increases, so also does the TNC lose control over the full range of activities required to bring a product or service from conception to end use.

One way to think about these concerns is to remember the essentially voluntary nature of all international law. Sovereign states are always free to sign up to or not international standard-setting instruments, and may withdraw from or denounce a treaty at any time. They may also, in most cases, sign up to only part of a treaty or enter reservations to those parts of a treaty they feel unable to ascribe to. The only exception involves those international rules which are so important that they have attained the status of fundamental norms (*jus cogens*) which are universally applicable and not capable of derogation.

So also should TNCs be free to decide whether or not to sign up to international standard-setting instruments. They should self-select, in effect. Market forces should be left to motivate corporations when deciding whether to participate in international instruments. When selecting network partners (suppliers and supply-chain intermediaries), TNCs should exert market power in selecting only those business partners which, by signing up to the same international standard-setting instruments, can demonstrate a shared set of values. And when they do sign up, TNCs and their business partners should be bound by those standards.

Ruggie's second criticism is harder to address. He points out that while the boundaries of state responsibility can be established under international rules, it is less easy to establish the "sphere of activity and influence" within which TNCs' obligations should operate. He argues that the concept of corporate spheres of influence, though useful as an analytical tool, has no legal pedigree, so that the boundaries within which corporations' duties would take effect remain unknown. One answer to this criticism is that all modern legal concepts had to start somewhere. There was even a time where such well established concepts of international law as 'statehood' had no legal pedigree. The answer is not to discard an inchoate concept, particularly a useful one, but to establish international institutions within which the concept can be developed, as commonly occurs within common law court systems.

Ruggie also points out that the draft Norms appear to require that within corporations' "sphere of influence" they would have exactly the same range of duties as states – from respecting to fulfilling rights – the only difference being that states' duties would be primary and corporations' duties secondary. Nor is the distinction between primary and secondary duties elaborated. Like Philip Alston, former Chair of the UN Committee on Economic, Social and Cultural Rights, Ruggie asks:

If the only difference is that governments have a comprehensive set of obligations, while those of corporations are limited to their 'spheres of influence'... how are the latter [obligations] to be delineated? Does Shell's sphere of influence in the Niger Delta not cover everything ranging from the right to health, through the right to free speech, to the rights to physical integrity and due process? (Ruggie J. G., 2007)

The concern is that imposing positive international law obligations on corporations could simply serve to "undermine corporate autonomy, risk-taking and entrepreneurship". In addition, argues Ruggie,

[i]mposing the full range of duties on transnational corporations under international law by definition reduces the discretionary space of individual governments within the scope of those duties (Ruggie J. G., 2007).

Ruggie concludes that focusing upon individual corporate liability for wrongdoing cannot fix the problem of larger systemic imbalances in the global systems of governance. In his view, international efforts should be focused, at least in the first instance, upon strengthening the ability of states to effectively protect human rights against corporate violations. Second, Ruggie agrees with political philosopher Iris Marion Young that what is needed is not a system for assigning individual blame for discrete acts, but rather a system of "political" or "shared responsibility" based upon collective action (Ruggie, J. G., 2007; citing Young I.M., 2004). Soft law hybrid arrangements involving multi-stakeholder groups and based upon voluntary compliance represent

important innovations which deserve attention, support and emulation in other domains. For Ruggie, many elements of a successful strategy lie beyond the legal sphere altogether:

... any successful regime needs to motivate, activate and benefit from all of the moral, social, and economic rationales that can effect the behavior of corporations. This requires ... building social movements and political coalitions that involve representation from all relevant sectors of society, including business ... [in a way that] look[s] “beyond compliance” (Ruggie J. G., 2007, 29).

The arguments put forward by Ruggie are both convincing and valuable. The first point to be made in response is that the draft Norms do not, or at least do not need to and probably should not, impose “the full range of duties on transnational corporations directly under international law”. They do not need to “[saddle corporations] with all of the constraints, restrictions, and even positive obligations which apply to governments” as Alston and Ruggie fear. To the extent that they might do so, the draft Norms are admittedly in need of clarification.

My second point is that acting on Ruggie’s recommendations need not, and should not, detract from efforts to build upon the existing international law infrastructure in order to bring TNC’s within its ambit. The rest of this paper explores four ways in this could be achieved – four avenues through which TNC’s could be rendered internationally accountable for their international breaches of human rights obligations. In developing and strengthening these institutions, mechanisms would thereby be created for considering and deciding upon the nature of the ‘personhood’ or status enjoyed by TNCs under international law, and the corresponding nature of their rights and obligations. This status, and these obligations would presumably be lesser than that enjoyed by states, and principles would need to be worked out for determining the boundaries of such obligations.

B Institution building for jurisprudential development

1 Strengthened UN and regional human rights bodies

A growing number of countries have signed up to international or regional human rights standards, and have provided their citizens with access to regional or international human rights forums as a means of asserting such rights. Regional human rights courts now operate in Europe, America and Africa (on the European Court of Human Rights, see <http://www.echr.coe.int/ECHR/EN/>; on the Inter-American Commission and the Inter-American Court of Human Rights see <http://www1.umn.edu/humanrts/iachr.html> and on the African Court of Human Rights see Amnesty International, <http://www.scoop.co.nz> and Anaba, I., 2006). The ASEAN member countries have also recently signed a human rights charter which contains a pledge to establish a regional human rights body (*The Age* (Melbourne), 19 November 2007; *The Nation* (Bangkok) 15 April 2008).

In addition to hearing individual petitions, the existing human rights bodies can and do also undertake the public examination of the human rights records of individual states (Kinley, D., Tadaki, J., 2004). While it would be both conceptually difficult and practically impossible to require *all* TNCs to submit regular human rights reports in the same way that sovereign states do, it would be possible for the various human rights bodies to become more insistent on states providing them with details of measures (including private initiatives) taken to improve the human rights behavior of corporations operating or established within their territory. This could include a collective mechanism for bringing TNC’s to account for human rights breaches in front of an international or regional human rights body. Such a body would be able, unlike most national courts, to consider TNC activities as involving a network of international supply chains and other relationships.

Many things will need to change, however, before it becomes politically feasible for the UN community to expand the powers and resources of a UN human rights body to publicly investigate the activities of TNCs as well as states. Likewise, proposals for broadening the monitoring powers and capacities of existing regional human rights bodies remain entirely

dependent upon the political will of the state governments concerned – their willingness to cooperate and their ability to commit the significant resources required.

2 The global firm and the international criminal court

The recently created International Criminal Court (ICC) may be ideally placed to take on some significant responsibility for the prevention and punishment of at least some of the most the human egregious rights abuses when private commercial operations are involved.

At present, the ICC has jurisdiction over ‘the most serious crimes of concern to the international community as a whole’ (Rome Statute, article 5), but this jurisdiction is limited to ‘natural persons’ (Rome Statute, article 25). There is, as yet, no provision for the Court to exercise jurisdiction over corporate persons. But there is historical precedent for creating such a jurisdiction, in the Nuremberg tribunal discussions of corporate liability under international criminal law (Field, A., 2006).

The jurisdiction of the ICC should be expanded to cover legal (corporate) persons as well as natural persons. This should be done to facilitate justice for those affected by the criminal behaviour of MNCs. It should also be done as a means of helping to unify the different standards and rules of corporate criminal liability currently found within diverse jurisdictions around the world. Such diversity simply helps to perpetuate forum-shopping, as well as creating a hotch-potch of conflicting decisions.

3 The global firm and a stronger International Labor Organization (ILO)

In the area of labor standards, Virginia Leary has convincingly argued that ‘the focus in international law on state action alone fails to address the influence of the activities of non-state actors, such as transnational corporations, on labor and other social issues’ (Leary, V., 2003, p. 194). International law’s pre-occupation with the nation state is reflected in the fact that the ILO Tripartite Declaration and other instruments adopted by the ILO Governing Body (where workers’ organizations and employer bodies participate alongside governments), have a lesser legal status than instruments adopted by the ILO Annual Conference, which comprises all ILO member states (Leary, V., 2003).

If TNCs were recognized as having international legal personhood, they could then become an integral part of the Annual Conference and the various sub-committees of the ILO. TNCs would then have greater incentive to subscribe to ILO standards, and to negotiate with recognized worker organizations. Once an individual enterprise had agreed to abide by the standards established in an ILO instrument, that firm would then bring those standards with it wherever it set up business, and in all its business relationships. If compulsory mechanisms for reporting and monitoring were also established for signatory firms, enforcement would also become a possibility. One enforcement mechanism which might be both acceptable to MNCs, and effective in resolving labor disputes, is mandatory ILO arbitration through agreed arbitration procedures.

4 The global firm and the ICJ

A similar process could be applied in the area of international environmental law. Just as TNCs should be invited to subscribe to obligations spelt out in key ILO treaties, so also should global corporations be able to participate in the creation and maintenance of relevant environmental treaties. TNCs should also be bound by those tenets of environmental law which have attained the status of *jus cogens*. Customary environmental legal principles which have attained this status include concepts such as the preventive principle, the principle of sustainable development, the precautionary principle, the polluter pays principle and the concept of intergenerational equity (Fitzmaurice, M. Dr, 1995).

As Dr Fitzmaurice has noted, issues which arise under international environmental law are undoubtedly 'global' in nature – that is, they 'cannot ultimately be dealt with at a national or even a regional level'. Moreover, the ICJ, 'because of its dual role in both settlement of disputes and development and elaboration of international law, is especially suited to deal with all aspects of environmental law' (Fitzmaurice, M. Dr, 1995, pp. 400-401).

On the few occasions where the ICJ has been asked to deal with environmental matters, however, it has proven remarkably reluctant and timid in its approach (e.g. ICJ Reports (1996) *Legality of the use by a State of Nuclear Weapons in Armed Conflict* (WHO) Advisory Opinion). If the Court is to remain relevant as the principal judicial organ involved in the development of international law, it is going to have to find way to grapple with issues raised by the environment. One way the Court has sought to achieve this is by establishing, in July 1993, a special Chamber for Environmental Matters, consisting of the ICJ president and vice-president, and five judges who are elected every three years. Recourse to the Chamber is, however, purely voluntary, and no cases have yet been submitted to it (Bekker, P.H.F., 2006).

The other important feature of contemporary international law relating to the environmental is its fragmented and de-centralized nature. 'There are now more than 400 regional and universal multilateral environmental treaties in force, covering a broad range of environmental issues, including biodiversity, climate change and desertification. The sectoral character of these legal instruments and the fragmented machinery for monitoring their implementation make it harder to mount effective responses across the board' (United Nations Secretary General, 2005).

In 2002, the World Summit on Sustainable Development, held in Johannesburg, emphasised the need for a more coherent institutional framework of international environmental governance, with better coordination and monitoring. As the UN Secretary General recognized in his 2005 report, *In Larger Freedom*, it is now high time to consider a more integrated structure for environmental standard-setting, scientific discussion and monitoring treaty compliance. This should be built on existing institutions, preferably at the UN level (United Nations, Report of the Secretary General *In Larger Freedom*, 2005, p. 51). One of the most powerful institutions which could be given a role in protecting the environment is the Security Council.

What is needed are procedural reforms to the ICJ aimed at facilitating access to the Court by NGOs and MNCs. These reforms include allowing greater use of the *amicus curiae* brief in both contentious and advisory cases, and allowing MNCs and NGOs to have access to the advisory jurisdiction of the Court in cases of international importance. This latter proposal in particular would be part of enabling the ICJ to act as a global 'court of appeal', able to begin the process of harmonizing international jurisprudence in the area of environmental law.

Existing forums to which MNCs already have access – such as the NAFTA Chapter 11 arbitration procedures, and the International Centre for the Settlement of Investment Disputes (ICSID) – should be brought into an integrated global environmental-law regime. This could be achieved through relatively simple amendments to their individual charters. These amendments would be aimed at ensuring that for decisions having potentially significant environmental implications, either party to a dispute could appeal on matters of law to the ICJ.

Other international dispute-settlement regimes, such as the WTO's Dispute Settlement Understanding, and the relevant provisions of the UN *Convention on the Law of the Sea*, would require two kinds of amendments – first to allow NGOs and MNCs to participate in dispute resolution proceedings, and second to facilitate appeals on points of law to the ICJ. This kind of linking international forums through a common line of appeal should initially be restricted to environmental cases, for which it is most suited, and where it could be of most use.

Nor is this a radical or new idea. Dr Fitzmaurice, speaking in 1995, envisaged a time when organisations, including non-government organisations (NGOs) and even private organisations could be permitted to access a global system of courts and tribunals, possibly headed by the ICJ. Her vision was of an international legal system where specialised courts would 'exist within a single, or at least linked, system of international courts, within which the ICJ would maintain an

appellate position, enabling it to guide the unified development of general rules of international law' (Fitzmaurice, 1997, pp. 413-416).

3 Conclusion

It is increasingly apparent that there is a need for greater clarity at the international level on the nature and extent of business responsibility for respecting, promoting and protecting human rights. If corporate responsibility is to be given meaning, then a common framework that identifies the rights relevant to business and the limits of a company's responsibility to implement them is required. In this essay, I have argued that by building upon and strengthening existing institutions of international law jurisprudence, mechanisms for defining and clarifying the boundaries of international law when applied to TNCs can also be created. Some proposals, such as expanding the work of international human rights tribunals to include scrutinising the activities of TNCs may be somewhat idealistic in the face of political and resource constraints, but that does not mean they should not be tried. What might be more immediately feasible is to expand the jurisdiction of the International Criminal Court (ICC) in cases of grievous abuses of human rights to cover not just natural persons, but legal (corporate) persons as well. Similarly hopeful are proposal for strengthening the supervisory powers of the ILO, and for continuing the gradual reform of ICJ procedural rules to allow increased access to the Court by civil society organizations.

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