Introduction

The spread of globalisation towards the end of the twentieth century has led to the rise of the transnational corporation (TNC). In 2002 the United Nations Conference on Trade and Development (UNCTA) estimated that 29 of the world’s 100 largest economies are companies. Using the metric of value added, in 2000 the world’s largest TNC was ExxonMobil, with a value added of $63 billion, exceeding the GDP of countries such as Pakistan, New Zealand, Hungary, and Vietnam. Using the same metric the 100 largest corporations account for 4.3 per cent of world GDP. The spread of globalisation has seen a rapid increase in investment in the developing world by TNCs. Too often this has become a focus for human rights abuses by States. Three notorious examples from the mid-1990s are the abuses committed by the Burmese military while providing security for the Yadana pipeline, the suppression of the protests against Shell’s activities in Ogoniland culminating in the execution of Ken Saro-Wiwa, and the environmental pollution caused by mining operations in Bougainville which led to a civil war which led to a blockade of the island during which it was claimed that an official of Rio Tinto urged the Papua New Guinea Defence Forces to “[s]tarve the bastards out, some more, and they [will] come round.”

In July 2005 the UN appointed Professor John Ruggie as its Special Representative on the issue of human rights and transnational corporations and other business enterprises. In 2008 in presenting his ‘Protect, Respect, Remedy’ framework for business and human rights to the UN, Ruggie concluded that:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.

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1 Sarei v. Rio Tinto plc, 221 F Supp 2d 1116, 1126 (CD Cal 2002).
Human rights and corporate wrongs

The governance gap is particularly acute in the activities of extractive industries in conflict areas, such as Bougainville, Colombia, Sudan, Burma, and with a depressing number of international crimes emerging from the Democratic Republic of Congo. In 2011 Ruggie completed his mandate and the UN adopted his Guiding Principles on Business and Human Rights.

The ‘governance gap’ involves three participants. Host States where the wrongful acts occur; home States where the corporations participating in the wrongful acts are based; and corporations participating in the wrongful acts. This book will consider three ways in which this governance gap might be closed. Chapter 1 will consider the position of corporations under international law. Are corporations subject to any obligations under international law? If so, how do those obligations translate into criminal and civil liabilities? What are the responsibilities of States in respect of the actions of corporations within their territory and jurisdiction? In doing so, we shall consider the effects of bilateral investment treaties (BITs) in constraining the host State’s regulatory powers over corporations. What are the responsibilities of States in respect of the actions of corporations outside their territory and jurisdiction?

We shall then move on to consider extraterritorial home State civil actions that have taken place in the US and in other common law jurisdictions, such as the UK and Canada. First, however, it is important to establish why claimants in these cases choose to proceed in the jurisdiction in which the parent company is located rather than having recourse to the courts of the jurisdiction in which the harm occurred. The obvious advantages of what is sometimes referred to as ‘forum shopping’ are the obtaining of a more favourable legal environment as regards key procedural matters such as discovery and the likelihood of obtaining a higher award of damages (particularly if the case comes before a US jury) than would be the case where the claim to be heard in the courts of the claimant’s home jurisdiction.

However, the perjorative epipheth of ‘forum shopping’ overlooks one reason why it is imperative that such claims be brought in the foreign forum if the claimant is to make any recovery at all. Usually the foreign subsidiary will have insufficient assets to meet any eventual judgment in full. Thus, in the Bhopal case, the assets of the subsidiary, UCIL, at the time of the litigation were estimated to be no more than $39 million which would clearly be inadequate for the purpose of meeting any judgment against it given the likely size of any ultimate award of
damages.\(^3\) In contrast the parent, Union Carbide, was estimated to hold some $200 million of liability cover\(^4\) and assets of $500 million realised from its recent restructuring.\(^5\) The claimant must therefore direct its fire at the parent company who in most cases will have sufficiently deep pockets to satisfy any judgment in full. Proceeding against the parent company in the foreign jurisdiction, though, entails the very real risk that such a judgment would be ultimately unenforceable. Under the general principles of private international law, for such a judgment to be enforceable, the defendant would have had to have submitted to the jurisdiction of the foreign court. Alternatively, it would have had to have been ‘present’ in the jurisdiction at the time the proceedings were started. Unless and until the parent corporation agrees to submit to the jurisdiction of the claimant’s home jurisdiction, the claimant has no alternative but to commence proceedings before the courts of the parent’s jurisdiction. Furthermore, the courts of the host State may be unwilling or unable to take on the litigation,\(^6\) and in cases involving human rights abuses the plaintiffs may be wary of litigating in the host State for fear of reprisals.\(^7\)

Since the Bhopal gas explosion of 4/5 December 1984 there has been a series of environmental tort claims brought against TNCs in their home jurisdiction.\(^3\) The Guardian, May 14 1986. ‘India to speed up Bhopal claim.’\(^4\) Financial Times. March 24 1986. ‘Union Carbide agrees tentative Bhopal deal.’\(^5\) The Times. January 22 1986, p17.\(^6\) For instance in Lubbe v. Cape plc, [2000] 1 WLR 1545 (HL) asbestosis claims by South African miners were brought in the UK against the employer’s UK parent company. There was a strong probability that the claimants would be unable to obtain both the legal representation and the expert evidence required to substantiate their claims in South Africa, and there was also a lack of any established procedures to deal with multiparty actions in South Africa. This would amount to a denial of justice, so, although South Africa was the appropriate forum, the UK proceedings were not stayed on grounds of *forum non conveniens.*\(^7\) This was particularly so in the litigation in Sarei v. Rio Tinto 221 F. Supp 2d 1116 (CD Cal 2002), which arose out of the civil war in Bougainville and where the plaintiffs had a justifiable fear of returning to Papua New Guinea to bring legal proceedings against the corporation accused of complicity in international crimes by the Papua New Guinea Defence Force.

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jurisdictions in the US,8 the UK,9 Australia,10 and Canada.11 There have also been an increasing number of claims brought in home jurisdictions in respect of alleged complicity by TNCs in human rights violations by host States. This development has principally taken place in the US federal courts under the 1789 Alien Torts Statute (ATS) since its revival in 1980 in Filartiga v. Pena Irala,12 although claims against TNCs for human rights abuses have been brought as straight tort claims in the US as well as in the UK13 and in Canada.14 Claims under the ATS are founded on the commission of a tort in violation of ‘the law of nations.’ This nascent civil liability has been achieved by transplanting the principles under which international law imposes criminal liability on individuals into the field of civil liability in tort. These are the prohibitions on war crimes, crimes against humanity, genocide, or the norms, such as the prohibitions on piracy, the slave trade, torture, for which there is universal criminal jurisdiction under national law.

This universal civil liability has been developed by reference to the international criminal law jurisprudence that has emerged from the Nuremberg and Tokyo tribunals at the end of the second world war, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court established by the 1998 Rome Statute. Liability may be based on the primary wrongdoing of the corporation, such as the use of forced labour, or may be a secondary liability based on aiding and abetting an internationally wrongful act committed by a State. The

8 Such as the claims arising out of the Bhopal gas explosion. In Re Union Carbide Gas Plant Disaster, 634 F Supp 842 (SDNY 1986).
10 In Dagi v. B.H.P (No 2), [1997] 1 VR 428, a claim was brought before the Australian courts arising out of pollution caused by the collapse of a tailings dam in a copper mine in Papua New Guinea, and was subsequently settled.
11 Recherches Internationales Quebec v. Cambior Inc, [1998] QJ No 2554, 14 August 1998. The claim arose out of an acid spill in August 1995 from the Omai Mine tailings dam into a river in the Essequibo region of Guyana which released an estimated 4,000 000 m³ of waste laced with cyanide, other heavy metals and other pollutants. The Canadian proceedings were stayed on the ground of forum non conveniens due to the fact that the preponderance of evidence was located in Guyana where the damage occurred. The case was subsequently refiled in Guyana where it was dismissed in 2006.
12 630 F 2d 876 (2d Cir 1980).
alleged complicity may be direct, as with the events in Ogoniland which led to the execution of Ken Saro-Wiwa and which formed the basis of the ATS claim in *Kiobel v. Royal Dutch Petroleum Co.*, or may be indirect as in cases arising out of human rights violations committed by private or public security forces engaged to provide security for overseas operations of TNCs. In ‘Private Empire’ Steve Coll refers to the suits brought against Exxon Mobil in respect of violations of human rights by the Indonesian military that provided security for its operations in Aceh.

Collingsworth [the plaintiffs’ lawyer] crystallised why ExxonMobil was really in the dock: that it had failed to anticipate the consequences of its operations in Aceh, and had failed to move actively to protect civilians as best it might. The corporation might not have directed any of the violence, but if its leaders had exercised sufficient care and activism, torture and killings might have been avoided.15

We shall then move on to consider the implications of the ATS jurisprudence for the potential development of similar types of suit in jurisdictions such as the UK and Canada. In both jurisdictions claims have been brought based on violations of customary international law – in the UK claims for torture were brought in *Al Adsani v. Kuwait*16 and *Jones v. Saudi Arabia*,17 and in Canada a claim for torture was brought in *Bouzari v. Islamic Republic of Iran*18 and a claim against a corporation for aiding and abetting war crimes was brought in *Bil’in (Village Council) v. Green Park Int’l Ltd.*19 Although these claims were dismissed on grounds of sovereign immunity and in *Bil’in* on grounds of *forum non conveniens*, there has been no challenge to the bringing of a civil claim based on a violation of customary international law. The book will also consider the procedural problems that such suits have encountered, such as challenges on the grounds of act of State, sovereign immunity, or *forum non conveniens*, as well as examining those aspects of a claim based on breaches of customary international law that require analysis under national law, such as the process of ascribing to a parent corporation its subsidiary’s liability for such a breach.

In the final chapter we shall conclude with an examination of non-legal methods of closing the governance gap. These comprise ‘soft law’ instruments such as the Global Compact, the Voluntary Principles on

15 Allen Lane, 2012, 404.
16 107 ILR 536 (CA,1996).
19 2009 QCCS 4151.
Security and Human Rights, the OECD Guidelines for Multinational Enterprises, and the UN Guiding Principles on Business and Human Rights.