Editorial

Veiled realities: the corporation, human rights and the environment

We ... live in an age of considerable corruption and corporate power. Perhaps, we ... should not just protest – but also re-examine fundamental issues of the nature and status of corporations.¹

This edition of the JHRE invites the reader to look behind the bland and ubiquitous corporate form as the authors interrogate the status, power and influence of corporations in a variety of contexts pertaining to the environment and human rights. The global financial crisis and the frantic search that it has initiated for new sources of economic growth, together with the resultant global ‘occupy’ protest movement, mean that this issue is now arguably more prominently fixed in the public eye than it has been for a generation. The ongoing work of the scholars whose work is included here provides ample evidence that this is an area that raises not only populist but also specialist academic concerns across a range of disciplines and is one that continues, despite its long and controversial history, to be in desperate need of review and reform. Each of the contributions suggests, in one way or another, that corporations as currently constituted and as legal subjects, far from being the servants of humanity, have effectively become the masters of the vast majority, exerting too much power and influence for our good, that of the wider environment, or indeed, in the long term, their own sustainability. It will be clear to readers, from the profoundly unedifying cases discussed herein, that current legal arrangements often serve at least to enable, and often actively to facilitate, corporate breaches of environmental and human rights norms, offering opportunities which the unscrupulous are not slow to pursue. While commercial undertakings have long fully exploited the benefits accruing from their legal personality, controversially extending their efforts to colonising human rights regimes, they seem at the same time to have been very successful in avoiding the imposition of reciprocal obligations. Thus in the controversial examples discussed in this edition it is clear that the law currently offers comparatively little in terms of securing accountability for breaches of environmental and human rights norms in an international and, most particularly, a less-developed country context. Several contributions discuss potential correctives to the inequality of bargaining power that exists between big business in its several manifestations and less-developed country governments and populations through international and domestic legal regimes and self-regulation. Given the current inability of these regimes to

1. Richard White, ‘But Corporations are People too’ at <<http://www.politico.com/news/stories/1011/67007.html#ixzz1dgFWb900>> (accessed 14/11/11) comparing the current status of corporations to that in the US’s ‘Gilded Age’ when corporations successfully exploited the 14th Amendment to the US Constitution, designed to protect the rights of former slaves, for their own ends.

deliver all that we would wish in an environmental and human rights context, it would seem that the pragmatic, if not principled, answer may lie in their combination with one another and indeed with other schemes. While this may be intellectually 'untidy', it does perhaps offer a realistic approach to the effective regulation of modern, multi-faceted, globalised business activity.

Penelope Simons considers the flawed nature of the global economic system which does not account for environmental degradation and human rights abuses. In considering the challenges posed by climate change in these contexts, she points to the fact that corporations are willing to take environmental obligations on board, albeit to a limited degree, but continue to exhibit considerable hostility towards human rights norms. In considering the effective impunity enjoyed by corporations in respect of human rights abuses, Simons points to the abject failure of the ambitious draft 'UN Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights', which sought to impose concrete obligations directly on corporations in this sphere. The main focus of her contribution considers the proposed, more limited and palatable successor regime which comes courtesy of the review carried out by UN Special Representative of the Secretary-General, John Ruggie. This resulted in the 'Protect, Respect and Remedy' policy framework and the 'Guiding Principles on Business and Human Rights'. These are carefully considered both in their own right and as part of a process that revived the stalled dialogue between business and the relevant international institutions in this area. The fact that the new regime falls short of imposing concrete human rights obligations on business actors represents, depending on one's point of view, the source of its appeal to states and business and its inherent weakness from the point of view of other, weaker stakeholders. Here, as in the other contributions to this edition, it is clear that the business community is effectively setting the agenda and Simons argues that this is ultimately damaging, as the 'Guiding Principles' lack both sufficient substance and the enforceability necessary to address the crisis of corporate accountability in a human rights context. Simons argues that by focusing on 'governance gaps', rather than their root causes, Ruggie inevitably fails to deliver a viable solution to the problems faced in this sphere. Ultimately, through employing Third World Approaches to International Law (TWAIL) and feminist critiques as lenses for analysis, Simons points to the nature and structures of the international legal system as a key source of difficulty in securing corporate accountability for human rights abuses. She concludes by pointing out that, in the absence of binding norms to ensure corporate human rights accountability, voluntary initiatives will continue to fall short and business will carry on very much as usual.

In the absence of effective international legal governance for the activities of multinational corporations (MNCs), Janet Dine adopts a rather different tack, focusing on domestic law initiatives to tackle what she terms, 'jurisdictional arbitrage'. This phenomenon allows MNCs, legal fictions themselves, to hide behind the further fiction of the 'corporate veil' and compartmentalised corporate structure, a strategy which ultimately allows them to indulge in what amounts to a game of jurisdictional tag in the attempt to thwart attempts to call them to account for environmental and/or human rights abuses, in particular in less developed countries. While CSR initiatives are considered as interesting, their voluntary nature limits their ability to generate substantive impacts and improvements in corporate behaviour and the Ruggie principles are again found wanting in terms of delivering accountability. Litigation under the US Alien Tort Act is also increasingly considered as somewhat limited in delivering corporate accountability. Dine points to the failure of legal control to keep pace with modern,

globalised, corporate realities and offers the intuitively appealing concept of 'enterprise liability' as a means to tackle the corporate hydra represented by such globalised undertakings. This device would allow the whole enterprise to be sued simultaneously, thus greatly streamlining the litigation process and enabling a focus on issues of substance rather than endless quibbling over structural questions. Dine discusses the example of the Albanian Company Law regime (specifically as it relates to groups), which she helped draft, as a possible template for the broader actualisation of an 'enterprise liability' approach.

Sarah Joseph's contribution provides a graphic practical example of how 'jurisdictional arbitration' operates in the current legal context in her treatment of the ongoing grossly complex 'lawfare' undertaken in respect of Chevron Texaco's (used here as shorthand for the very complex history of corporate ownership of the offending business in this case) activities in the Ecuadorian Amazon. In this case the indigenous peoples of Lago Agrio, who bear the ongoing adverse environmental and human health impacts of the pollution generated by Chevron Texaco's historic petrochemical operations in Ecuador, have sought to pursue claims in the courts in Ecuador and the United States. Whilst the US courts, as would be expected given the usual judicial reluctance to pierce the corporate veil, side-stepped the issues on jurisdictional grounds, the Ecuadorian courts have, in 2011 after almost eight years of litigation, taken a proactive stance towards imposing liability on Chevron Texaco, to the tune of an impressive US\$8.6 billion in respect of damage for the environment, health and indigenous culture. A further US\$8.6 billion in punitive damages was also awarded against the company unless it publicly acknowledged its misconduct (which included attempting to entrap a judge) during proceedings. Nonetheless, as Joseph points out, encouraging as this is in principle, the practical results of the litigation to date have proved spectacularly unedifying. The company does not hold sufficient assets within Ecuador to meet its liabilities and current law enables it to continue to avoid payment elsewhere.

Sally Wheeler looks at quite a different manifestation of the corporate accountability question, specifically as it pertains to harnessing corporate behaviour to address climate change. She argues that, given the magnitude of the problem, climate change may be regarded as a matter of central concern for corporate activity and may promote significant changes in business praxis. Wheeler envisages these changes being further motivated and pressed home by developing a responsibility-based participatory model (after Hans Jonas) harnessing the active expectations of indirect shareholders, i.e. those corporate investors who are beneficiaries of interests in pension funds, life assurance policies, annuities, etc. The fact that these indirect shareholders enjoy a beneficial but not legal ownership of shares severely limits their influence under current company law regimes. Wheeler argues that the system of corporate governance can in fact be refashioned through a new business ethic to promote and accommodate their participation. Legal control is seen as most logically located at a global level where climate change is concerned, though the very real challenges posed in this regard by the fact that climate change is largely corporate driven and linked to individual consumption are manifest. Wheeler sees the adoption of an ethic of responsibility geared at changing both individual and corporate culture and behaviour as the key driver of necessary change. She points out that in the modern market lobbying institutional investors constitutes an underused, if not unproblematic, means to these ends.

Fiona Cunningham and David Kinley provide us with an interesting insight into the rather opaque arena of activity in the Chinese banking sector and the adoption

(or otherwise) of international voluntary self-regulation standards therein. Given the increasingly globalised nature of the activities of the financial services sector, it is fast becoming vital to understand what drives the behaviour of the Chinese banks and to appreciate the limited extent to which voluntary global human rights and environmental corporate social responsibility initiatives, in particular the Equator Principles, penetrate this distinctive state-fashioned economic sector. The sheer weight and influence of Chinese economic power in this context on a global level is considered as potentially challenging to the established Western orthodoxy applicable to this branch of corporate behaviour. Cunningham and Kinley also document the fascinating emergence of distinctive Chinese State-driven initiatives in respect of the environment, which stands in marked contrast to the rejection of mainstream human rights ideology and praxis. One of the most intriguing areas covered in this contribution considers the highly proscribed nature of NGO activity in China and explains the paucity of influence that it is capable of exerting in environmental and human rights matters. The ability of the state to shape corporate praxis is something that has fallen from prominence in the Western world, where the power of the market and its denizens has prevailed for a generation or more, and an examination of the very different operation of the banking sector in China provides us with a salutary reminder that this is not inevitable.

In a particularly provocative contribution, David Nibert, writing from a sociological perspective, offers a radical historical materialist critique of the impact of elite behaviour through a complex of entangled and mutually reinforcing oppressions made manifest in what he terms, after Quinney, the ‘crime of economic domination’ of other species, the environment and the human rights of non-elites. In a challenging piece, he focuses on the exploitation of sentient animals as sources of labour and more particularly food, a practice which has long featured in human history and development, and which has swiftly accelerated and expanded with the advent of corporate capitalism. In contrast to the situation in China discussed by Cunningham and Kinley, Nibert points to the ability of corporate elites to influence and control state behaviour in their own interests and in ways that are inimical to the health and welfare of the environment and its animal and human inhabitants.

That the power and influence of corporate actors is disproportionate to their responsibility and accountability and that this has long been the case, seems clear. The potential solutions on offer range from working within the existing system, orientating voluntary corporate behaviour towards more sound environmental and human rights ends, through improving the operation of existing legal regimes by recourse to more effective enforcement, to fundamental reorientation of current law and policy, and even of society itself. Given the nature of the modern polis, incremental change is most viable. Nonetheless, while business will undoubtedly favour an expanded voluntarism, experience makes it clear that this alone cannot deliver what is needed. Thus it is imperative to augment legal intervention though, given the immense and entrenched power and influence of the business community and the weaknesses of both domestic and international law in this regard, achieving anything like this would require a paradigm shift of unprecedented proportions – it may ultimately be the case, however, that environmental constraints and their human impacts will provide this.

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