International law's invisible hand and the future of corporate accountability for violations of human rights

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In May 2011, the United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG), Professor John G Ruggie, submitted to the Human Rights Council his 'Guiding Principles on Business and Human Rights' aimed at implementing his 'Protect, Respect and Remedy' policy framework. The Council unanimously adopted the Guiding Principles at its June 2011 session. Ruggie's work has been both welcomed and criticised and his Guiding Principles are likely to remain controversial. Apart from the SRSG's recommendation to the HRC to develop a process to clarify the legal obligations of business entities not to commit international crimes, his work on this issue did not include a recommendation that the future development of binding international obligations should be one of the goals of his policy framework and guiding principles.

This article argues that Ruggie's approach to addressing corporate human rights impunity was misconceived. For Ruggie, '[t]he 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'. It is argued here, however, that to address corporate impunity effectively, one cannot simply deal with the governance gaps alone. One must also identify and address the root causes of those gaps. This article contends that corporate human rights impunity is deeply embedded in the international legal system. It seeks to demonstrate the problems with the SRSG's approach by arguing that, along with the interventions of international financial institutions in the economies of developing states, one of the most significant impediments to corporate human rights accountability is the structure of the international legal system itself. The validity of this assertion is explored through an examination of the critiques of the international legal system by Third World Approaches to International Law (TWAIL) scholars, as well as insights drawn from feminist critiques of international law. It is argued that powerful states have used international law and international institutions to create a globalised legal environment which protects and facilitates corporate activity and, although the SRSG

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identified symptoms of this reality during his tenure, he did not examine the deep structural aspects of this problem. This article demonstrates that such an examination would have revealed the crucial need for binding international human rights obligations for business entities in any adequate strategy aimed at addressing corporate impunity. It concludes with some recommendations for developing such obligations incrementally.

Keywords: *corporate accountability, corporate impunity, Guiding Principles on Business and Human Rights, Protect, Respect and Remedy, Ruggie, SRSG, TWAIR, UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Entities*

[T]here is no long-term future outside of a radical cultural shift banning the self-serving Western perspective. ... the beginning is necessary of a process aimed at the development of a legal system that is much less about creating an efficient backbone for an exploitative economy and much more about a vision of civilization, justice and respect ...¹

[T]hose studying globalization must begin to consider the ways in which globalizing processes intersect with and reproduce pre-existing forms of exploitation and exclusion.²

1 INTRODUCTION

There is something very wrong with our global economic system which takes little, if any, account of the environmental and human rights costs of business activity. Such costs are neither internalised by markets nor adequately able to restrain market actors as 'external' norms or standards. As Paul Hawken notes, 'the single most damaging aspect of the present economic system is that the expense of destroying the earth is largely absent from the prices set in the marketplace'.³ Meanwhile, Upendra Baxi has remarked that '[t]he suffering of impoverished people is irrelevant to the ruling standards of the global capital, which must measure excellence of economic entrepreneurship by standards other than those provided by endless human rights normativity'.⁴ Moreover, there is a considerable unevenness of treatment between human rights and environmental concerns. While it may be possible to discern at least a rhetorical willingness among powerful corporate actors to consider binding legal obligations to address some of the environmental impacts of commerce that contribute to climate change, any discussion of binding international human rights obligations still meets with strong resistance, if not vehement opposition.⁵ This resistance has characterised the debate on business and human rights for decades.

1. International University College of Turin (IUC) Global Legal Standards Research Group, 'Executive Summary – IUC Independent Policy Report: At the End of History' (2009) 9 Global Jurist 1, 3.

2. S Marks, 'Empire's Law' (2003) 10 Indiana Journal of Global Legal Studies 449, 464.

3. P Hawken, *The Ecology of Commerce: A Declaration of Sustainability* (HarperBusiness, New York 1993) 13.

4. U Baxi, *The Future of Human Rights* (2nd edn, OUP, New Delhi 2006) 252.

5. At the British Institute of International and Comparative Law Annual Conference 2009, Richard Skinner, CEO of Rio Tinto, remarked that the 'nudge and wink' approach (referring to voluntary self-regulation by corporate actors) was not sufficient to address the threat of climate change effectively. However, when asked by the author whether he supported binding

The current iteration of this debate now occupies a central place in global politics and has been focused around the (now completed) mandate of Harvard Professor John Ruggie, the United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG).⁶ This new UN special procedure emerged out of the ashes of the controversy created by the draft UN Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights (the Norms),⁷ which were unanimously adopted in 2003 by the former Sub-Commission on Promotion and Protection of Human Rights. Their submission to the Human Rights Commission (now the Human Rights Council) sparked a heated controversy and propelled the issue to the forefront of global debate. Unlike other codes of conduct and multi-stakeholder initiatives such as the Global Compact,⁸ the OECD Guidelines for Multinational Enterprises⁹ or the Voluntary Principles on Security and Human Rights,¹⁰ the Norms were drafted in mandatory language, were designed as a basis from which a treaty could be negotiated,¹¹ and if adopted would have imposed binding human rights obligations directly on corporate actors.

There were some problems with the structure and content of the draft Norms.¹² However, as David Kinley and his co-authors point out in their analysis of the

international human rights obligations for business, he expressed strong concern about the regulatory burden and costs that would be imposed on corporations by such legal norms. See also JG Ruggie, 'Reconstituting the Global Public Domain – Issues, Actors and Practices' (2004) 10 *Eur J Int Relations* 499, 520, where he notes that 'several major oil companies lobbied the US Congress for some form of greenhouse gas limits'. On corporate resistance to binding international human rights obligations, see (n 14), (n 15) and (n 30) and accompanying text.

6. S Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' (2009) 31 *Human Rights Quarterly* 299, 300. See also, UNHRCOR, 'Report of the Special Representative of the Secretary-General [SRSG] On the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework' (2009) UN Doc A/HRC/11/13, [3–5] where the SRSG discusses how the framework is beginning to be used by governments, business and civil society.

7. UNESCO, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2; and UNESCO, 'Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) UN Doc E/CN.4/Sub.2/2003/38/Rev.2.

8. UN Global Compact <www.unglobalcompact.org> (accessed 3 September 2011).

9. OECD, 'The OECD Guidelines for Multinational Enterprises' OECD Declaration on International Investment and Multinational Enterprises (Ministerial Meeting) (25 May 2011).

10. 'The Voluntary Principles on Security and Human Rights' <www.voluntaryprinciples.org> (accessed 3 September 2011).

11. See D Kinley, J Nolan and N Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 *Companies and Securities Law Journal* 30, 34. Kinley, Nolan and Zerial make the important point that the 'Norms' were never intended to be adopted in their current form; they were rather 'explicitly in draft form, and were brought before the international community with the intention that they would be the subject of amendment, debate and reform'.

12. See, for example, LC Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2006) 37 *Columbia Human Rights Law Review* 287; M Mendelson, 'In the Matter of the Draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights": Opinion of

politics behind the draft standards, one of the most contested and polarising characteristics of the Norms was 'their apparent attempt to impose obligations directly on companies, in addition to parallel obligations on states'.¹³ In fact, the earliest critiques by the business community focused primarily on the fact that the Norms contemplated legally binding international obligations for corporate actors. Thus, the Norms were criticised for their 'binding and legalistic approach',¹⁴ and it was argued that 'any shift toward mandatory compliance would violate accepted international practices'.¹⁵ Subsequent critiques of the Norms have focused on more technical issues.¹⁶

Throughout his tenure as SRSR, Ruggie skilfully avoided the controversy created by the Norms. He made the decision early in his first mandate to leave them behind, dismissing them as a 'distraction'.¹⁷ Adopting an approach he termed 'principled pragmatism',¹⁸ he trod a careful and strategic path, consulting with a wide range of stakeholders and keeping business and government 'on side'.

In May 2011, at the end of his second mandate, Ruggie submitted his Guiding Principles on Business and Human Rights.¹⁹ These principles are intended to implement his Protect, Respect and Remedy policy framework, elaborated in his 2008

Professor Emeritus Maurice Mendelson, QC' (2004) <198.170.85.29/CBI-Annex-A-Mendelson-opinion.doc> (accessed 3 September 2011); and R Wallace and O Martin-Ortega, 'The UN Norms: A First Step to Universal Regulation of Transnational Corporations' Responsibilities for Human Rights?' (2004) 26 *Dublin University Law Journal* 304. See also, D Kinley and R Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6 *Human Rights Law Review* 447.

13. Kinley et al. (n 11) 35.

14. UNESCO 'Joint Written Statement Submitted by the International Chamber of Commerce and the International Organization of Employers, Non-Governmental Organizations in General Consultative Status' (2003) UN Doc E/CN.4/Sub.2/2003/NGO/44, 2. The ICC and IOE argued that this approach 'will not meet the diverse needs and circumstances of companies and will limit the innovation and creativity shown by companies in addressing human rights issues in the context of their efforts to find practical and workable solutions to corporate responsibility challenges. The approach taken by the draft norms is bound to conflict with company policies and practices based on history, culture, philosophy and laws and regulations of the countries in which they operate. To be effective and relevant to a company's specific circumstances, business principles and responsibilities should be developed and implemented by the companies themselves'.

15. A Boyd, 'Multinationals and Accountability' *Asia Times* (Hong Kong, 19 August 2003) <www.atimes.com/atimes/Global_Economy/EH19Dj01.html> accessed 3 September 2011.

16. See (n 12).

17. UNESCO 'Interim Report of the Special Representative of the Secretary-General [SRSR] on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2006) UN Doc E/CN.4/2006/97, [69]. See section 2, below.

18. *Ibid.*, 81. See also, UNHRCOR 'Report of the Special Representative of the Secretary-General [SRSR] On the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework' (2010) UN Doc A/HRC/14/27, [4–15].

19. UNHRCOR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General [SRSR] on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie' (2011) UN Doc A/HRC/17/31.

report²⁰ and further developed in his 2009²¹ and 2010²² reports. The policy framework and Guiding Principles focus on addressing the regulatory gaps in relation to the human rights impacts of business activity, and, in particular, business activity in so-called 'Third World'²³ states.

One cannot dispute the significance of Ruggie's contribution to the global dialogue on corporate accountability. In addition to his articulation of the policy framework and Guiding Principles aimed at the framework's operationalisation, the work of the SRSG has been invaluable for the volume of studies commissioned on key issues related to corporate human rights accountability, for the comprehensive mapping of current international standards and so-called 'governance gaps',²⁴ and importantly, for the bridges Ruggie has built to bring states and business back to the table.²⁵

However, although it was within the scope of his mandates to do so,²⁶ neither the policy framework nor the Guiding Principles elaborate a role for binding international human rights obligations for business actors. Beyond making a recommendation to

20. UNHRCOR, 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General [SRSG] on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (2008) UN Doc A/HRC/8/5.

21. SRSG, '2009 Report' (n 6).

22. SRSG, '2010 Report' (n 18).

23. In this article I adopt the term 'Third World' states as opposed to 'developing' states or the 'Global South'. The term has been embraced by Third World Approaches to International Law (TWAIL) scholars and is used in both a descriptive and normative sense (see K Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16 Wisconsin Int'l L J 353, 360). Makau Mutua explains that 'Third World' 'describes a set of geographic, oppositional, and political realities that distinguish it from the West. It is a historical phenomenon that has a dialectic relationship with Europe in particular and the West in general. The Third World is more truly a stream of similar historical experiences across virtually all non-European societies that have given rise to a particular voice, a form of intellectual and political consciousness. The term *Third World* is different from *less-developed*, *crisis-prone*, *industrialising*, *developing*, *underdeveloped*, or *the South* because it correctly captures the oppositional dialectic between the European and non-European, and identifies the plunder of the latter by the former. It places the state of crisis of the world on the global order that the West has created and dominates' (M Mutua, 'What is TWAIL?' (2000) 94 ASIL Proc 31, 35). See also BS Chimni, who states that 'because legal imagination and technology tend to transcend differences in order to impose uniform global legal regimes, the use of the category "third world" is particularly appropriate in the world of international law. It is a necessary and effective response to the abstractions that do violence to difference. Its presence is, to put it differently, crucial to organizing and offering collective resistance to hegemonic policies' (BS Chimni, 'Third World Approaches to International Law: A Manifesto' in A Anghie et al. (eds), *The Third World and International Order: Law Politics and Globalization* (Martinus Nijhoff Publishers, Boston, MA 2003) 49).

24. This term was first used in this context by G Gagnon, A Macklin and P Simons, 'Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy' (2003) University of Toronto Public Law Research Paper No. 04-07 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=557002>.

25. SRSG, '2010 Report' (n 18) [15]. The SRSG makes reference to this fact in his 2010 Report noting that his approach of '[p]rincipled pragmatism has helped turn a previously divisive debate into constructive dialogues and practical action paths'.

26. See UNHRCOR, 'Mandate of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises' Res 8/7 (18 June 2008) UN Doc A/HRC/RES/8/7, [4(a)–(c)].

the HRC for the establishment of an international process to clarify legal standards relating to egregious violations of human rights that amount to international crimes – which are already widely accepted to be applicable to business entities – Ruggie did not recommend that, going forward, the UN strategy for addressing corporate human rights impunity should include the goal of developing international legal obligations for business entities.

Both the 2008 policy framework and the Guiding Principles were well received by the HRC²⁷ and by the business community.²⁸ The fact that these documents failed to include a call for the development of new international legal obligations for corporations likely contributed to their favourable reception.²⁹ Indeed, from the adoption of the UN

27. Jerbi points out that ‘with 28 countries joining the 12 cross-regional co-sponsors of the resolution and passage without a vote, the Human Rights Council’s endorsement of the Guiding Principles could not be stronger’ (see S Jerbi, ‘UN Adopts Guiding Principles on Business and Human Rights – What Comes Next?’ (17 June 2011) Institute for Human Rights and Business <www.ihrb.org/commentary/staff/un_adopts_guiding_principles_on_business_and_human_rights.html> (accessed 3 September 2011)).

28. On the Guiding Principles see for example the International Organisation of Employers, (Address to the UN Human Rights Council, delivered at the Palais des Nations in Geneva, Switzerland, 31 May 2011) <webcast.un.org/ramgen/ondemand/conferences/unhrc/seventeenth/hrc110531am1-eng.rm?start=01:59:04&end=02:02:45> (accessed 3 September 2011), who ‘Supports the approach taken in the principles to elaborate the implications of existing standards and practice into practical guidance rather than seeking to create new international legal obligations or seek to assign legal liability’. See also the range of letters from business actors endorsing the Guiding Principles, including Coca Cola (Statement by Edward Potter (Personal Communication 26 May 2011) <www.global-businessinitiative.org/SRSGpage/files/Guiding%20Principles%20Endorsement%20from%20Coke.pdf> (accessed 3 September 2011)); and Total (Statement by Peter Herbl (Personal Communication 23 May 2011) <www.global-business-initiative.org/SRSGpage/files/Total%20S%20A%20letter%20to%20John%20Ruggie.pdf> accessed 3 September 2011)). On the 2008 Framework, see for example, International Chamber of Commerce, International Organization of Employers & Business and Industry Advisory Committee to the OECD ‘Joint Initial Views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third report of the Special Representative of the UN Secretary-General on Business and Human Rights’ (Report) (May 2008) <www.reports-and-materials.org/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf> (accessed 3 September 2011).

29. The International Organization of Employers noted in its statement to the HRC that it supported ‘the approach taken in the principles to elaborate the implications of existing standards and practice into practical guidance rather than seeking to create new international legal obligations or seek to assign legal liability’ (International Organisation of Employers (IOE), *ibid*). See also Weil, Gotshal and Manges LLP, ‘Memorandum: Corporate Social Responsibility for Human Rights: Comments on the UN Special Representative’s Report Entitled “Protect, Respect and Remedy: a Framework for Business and Human Rights”’ (Report) (22 May 2008) <www.reports-and-materials.org/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf> (accessed 3 September 2011). The memorandum states that business should support the ‘Protect, Respect and Remedy’ framework: ‘We believe the basic concepts embodied in the Report are sound and should be supported by the business community in the United States for the reasons elaborated in this memorandum. Those reasons can be summarized as follows: ... [if] taken seriously by foreign governments and foreign companies, it will benefit U.S. corporations by leveling the playing field in placing on foreign boards and management the responsibilities to adhere to many of the same fiduciary and binding legal obligations presently applicable to U.S. companies. U.S. companies will find no new legal obligations advocated by the Report.’

Norms by the Sub-Commission on the Promotion and Protection of Human Rights, to the end of the SRSG's six-year tenure, the business community has consistently opposed the development of such binding standards.³⁰ On the other hand, the work of the SRSG has been criticised by others (mainly less powerful stakeholders such as NGOs and some Third World states) who would have liked to have seen the SRSG go further and include some reference to the role of such binding human rights obligations within his overall strategy for addressing corporate human rights impunity.³¹

This article will argue that Ruggie's approach to addressing this crucial issue was misconceived and that the product of his two mandates may now allow the HRC and the global business community (six years on) to embrace principles that remain problematic – due to their inadequate standards and the lack of oversight mechanisms³² – without having to take any real steps towards effectively dealing with corporate accountability. According to Ruggie, '[t]he 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 gaps, he has argued, create a 'permissive environment for the wrongful acts by companies of all kinds without adequate sanctioning or reparation'.³³ It will be argued here, however, that to address corporate impunity effectively, one cannot simply deal with the governance gaps alone. One must also identify and address the root causes of those gaps.

This article contends that corporate human rights impunity is deeply embedded in the international legal system. It begins (in section 2) by assessing the SRSG's approach to binding international legal obligations for business entities. Section 3 analyses the 'Protect, Respect and Remedy' policy framework and the Guiding Principles in light of Ruggie's focus on strengthening host state governance capacity. Sections 4 and 5 will then seek to demonstrate the problems with the SRSG's approach by arguing that, along with the interventions of international financial institutions in the economies of developing states, one of the most significant impediments to

30. See (n 14) and (n 15) and accompanying text, above. See also, for example, Joe Cyr, 'Talisman Energy's Comments to Draft Guiding Principles' (Submission to the SRSG on his Draft Guiding Principles for Hogan Lovells) (20 Dec 2010) <www.business-humanrights.org/media/documents/talisman-comments-on-guiding-principles-dec-2010.pdf> (accessed 3 September 2011).

31. See Mauricio Montalvo (Ecuador), (Address to the UN Human Rights Council, delivered at the Palais des Nations in Geneva, Switzerland, 16 June 2011) <webcast.un.org/ramgen/ondemand/conferences/unhrc/seventeenth/hrc110616pm3-eng.rm?start=00:13:33&end=00:16:32>; and the comments of the South African representative (UN Human Rights Council, Information Release (not an official record), 'Council holds dialogue with Experts on summary executions, independence of judges and lawyers, transnational corporations' (30 May 2011) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11082&LangID=E> (accessed 3 September 2011)). See also, Amnesty International, 'Submission to the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (Report) (July 2008) <www.business-humanrights.org/Documents/RuggieHRC2008> (accessed 3 September 2011); and 'Joint NGO Statement to the Eighth Session of the Human Rights Council: Third Report of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises' (19 May 2008) <www.hrw.org/en/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council> (accessed 3 September 2011).

32. See (n 197) and accompanying text.

33. SRSG, 'Protect, Respect and Remedy' (n 20) [3].

corporate human rights accountability is the structure of the international legal system itself. The validity of this assertion will be explored through an examination of the critiques of the international legal system by Third World Approaches to International Law (TWAIL) scholars, as well as insights drawn from feminist critiques of international law. It will be contended that powerful states have used international law and international institutions to create a globalised legal environment which protects and facilitates corporate activity. Section 6 will argue that although the SRSG identified symptoms of this reality during his tenure,³⁴ he did not examine the deep structural aspects of this problem. As will become clear below, such an examination by the SRSG would have revealed the crucial need for binding international human rights obligations for business entities in any adequate strategy aimed at addressing corporate impunity. The article will conclude with some recommendations for developing such obligations incrementally.

2 BINDING OBLIGATIONS FOR CORPORATE ACTORS AND THE APPROACH OF THE SRSG

Throughout his mandate, the SRSG implied that binding international obligations for corporate actors might be included in his strategy to address corporate human rights impunity. In his 2006 report to the Human Rights Committee, Ruggie suggested that there might be limited circumstances where it would be helpful to impose international legal obligations on business actors, particularly in situations where the host state is unable or unwilling to regulate the human rights impacts of these entities.³⁵ Making reference to the Norms and to his decision that they were unhelpful to the advancement of the mandate,³⁶ Ruggie maintained that he had not ruled out the possibility that international obligations could have a place in his recommendations:

nothing that has been said here should be taken to imply that innovative solutions to the challenges of business and human rights are not necessary or that the further evolution of international and domestic legal principles in relation to corporations will not form part of those solutions.³⁷

He also noted that: '[i]nternational instruments may well have a significant role to play in this process, but as carefully crafted precision tools complementing and augmenting existing institutional capacities'.³⁸ His policy framework, he has stated, 'offers a platform for generating cumulative and sustainable progress without foreclosing further development of international law'.³⁹ Yet, despite his contention that he had not written binding international obligations out of his plan, neither the final report of the SRSG's first mandate,⁴⁰ nor the first two reports of his second mandate (2009 and 2010 reports),⁴¹ which build on this framework, nor the Guiding

34. Ibid.

35. SRSG, '2006 Report' (n 17) [65].

36. Ibid (n 69).

37. Ibid.

38. JG Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *AJIL* 819, 839.

39. JG Ruggie, 'Treaty Road Not Travelled' (2008) *Ethical Corporation* 43.

40. SRSG, 'Protect, Respect and Remedy' (n 20).

41. SRSG, '2009 Report' (n 6); SRSG, '2010 Report' (n 18).

Principles,⁴² outline any concrete role for international legal obligations for corporations.⁴³ Admittedly, Ruggie did propose that the HRC establish a process for clarifying 'the applicability to business enterprises of international standards prohibiting gross violations of human rights abuses, potentially amounting to the level of international crimes'.⁴⁴ One of the three options which he put forward was 'an intergovernmental process of drafting a new international legal instrument to address the specific challenges posed by this protection gap'.⁴⁵ However, in his presentation of the Guiding Principles and the recommendations for follow-up on his mandate, Ruggie warned that while:

...the law must continue to evolve and keep pace with – indeed to guide – socio-economic changes and normative aspirations ... any attempt to squeeze all elements of business and human rights into an all-encompassing international legal instrument would quickly take us back to the contentious pre-2005 days, and thus be counterproductive.⁴⁶

Outside the formal UN reports, the SRSR actually pushed back against calls for binding international human rights obligations for corporate actors. He argued that short-term action was needed and that 'there are bodies of law and regulation applicable to business that have greater leverage over business practices, and in a shorter span of time, than traditional international human rights law, and that the human rights community needs to take advantage of those opportunities'.⁴⁷ He focused on measures he saw as both effective and feasible.⁴⁸ His justification for not calling for binding obligations was premised on the idea that there was an expectation among civil society organisations and other stakeholders of immediate action on such a treaty. For Ruggie, the slowness of international treaty negotiations, the risk that such a process would undermine shorter-term measures to elevate corporate human rights standards, as well as the problem of how such obligations would be enforced, were important reasons not to recommend the negotiation and adoption of a treaty that would impose international legal obligations

42. SRSR, 'Guiding Principles' (n 19).

43. Prior to his appointment as SRSR in 2005, Ruggie wrote that '[t]here is little chance of transnational firms becoming subject to legally binding regulations at the global level any time soon; the political will or even capacity simply is not there, and much of the corporate world would unite to fight it' (JG Ruggie, 'Reconstituting' (n 5) 518).

44. UNHRCOR, 'Special Representative of the Secretary-General (SRSR) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Recommendations on Follow-Up to the Mandate' (11 February 2011) 4 <www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf> (accessed 3 September 2011).

45. Ibid, 5.

46. Professor JG Ruggie, 'Presentation of Report to United Nations Human Rights Council' (30 May 2011) <<http://www.business-humanrights.org/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf>> (accessed 3 September 2011).

47. JG Ruggie, 'Response by John Ruggie to Misereor/Global Policy Forum, "Problematic Pragmatism – The Ruggie Report 2008: Background, Analysis and Perspectives"' (2008) <www.reports-and-materials.org/Ruggie-response-to-Misereor-GPF-2-Jun-2008.pdf> (accessed 3 September 2011).

48. JG Ruggie, 'Remarks by SRSR John Ruggie' Remarks for the Conference on 'Business and Fundamental Rights: The State Duty to Protect and Domestic Legal Reform' South African Institute for Advanced Constitutional, Public, Human Rights and International Law, Johannesburg (3 November 2008), 6 <198.170.85.29/Ruggie-remarks-South-Africa-3-Nov-2008.pdf> (accessed 3 September 2011).

on corporate actors.⁴⁹ While there appears to be no international consensus concerning the establishment of such international obligations,⁵⁰ this would not have prevented the inclusion of a recommendation for the future development of binding international human rights obligations as part of an overall strategy to address corporate impunity, and indeed such a recommendation could have helped to develop such consensus.

Ruggie has even urged the international community to move beyond the focus on international corporate human rights obligations.⁵¹ Such responsibilities, on their own, he observes, ‘cannot fix larger imbalances in the system of global governance’, which he notes – quoting Iris Marion Young – ‘are the product of the mediated actions of many’.⁵² Yet while such obligations are clearly not a panacea, this statement does not adequately explain why a recommendation to develop such obligations (in the future) did not find a place in his framework or in the recommendations for the follow-up to his mandate. In his critique of the UN Norms he went so far as to suggest that binding international human rights obligations could themselves *undermine* the governance capacity of states by weakening ‘domestic political incentives to make governments more responsive and responsible to their own citizenry’,⁵³ an argument that has also been made by the business community.⁵⁴

3 THE ‘PROTECT, RESPECT AND REMEDY’ POLICY FRAMEWORK, THE GUIDING PRINCIPLES AND GOVERNANCE CAPACITY

For Ruggie, an important first step in addressing corporate human rights impunity was the further elucidation and codification of the state ‘duty to protect’. This exercise, he argued, would help to clarify where direct legal obligations for corporations might be needed.⁵⁵ Accordingly, the ‘Protect, Respect and Remedy’ framework aims to provide a coherent approach to addressing governance gaps and at overcoming the problems of individual action by states and corporate actors,⁵⁶ as well as to provide a means by which to develop the normative content of corporate responsibility for human rights. The framework focuses on three pillars: the further development of the state duty to protect under international human rights law; the clarification of the moral responsibility of corporate actors to respect human rights; and the development of remedies for victims of corporate violations of human rights.⁵⁷ The

49. Ruggie, ‘Treaty Road’ (n 41), 42.

50. Jerbi (n 6), 316: ‘Legally-binding standards in the form of a comprehensive human rights treaty addressing the obligations of corporate actors seem to be completely off the agenda for the foreseeable future. Most governments still have not publicly indicated their positions on this issue or otherwise signaled that a treaty addressing business responsibilities is of particular urgency.’

51. Ruggie, ‘Evolving International Agenda’ (n 40), 839.

52. Ibid.

53. Ibid, 826, 838.

54. See Joint Written Statement of the ICC and IOE (n 14) 3: ‘The IOE and ICC strongly believe that the establishment of the legal framework for protecting human rights and its enforcement is a task for national governments. Indeed, to the extent that the draft norms divert the attention and resources of national governments away from implementing their existing obligations on human rights – obligations intended to protect all citizens not just those doing business with foreign enterprises – they would do more harm than good.’

55. Ruggie, ‘Evolving International Agenda’ (n 40) 838–9.

56. SRSG, ‘Protect, Respect and Remedy’ (n 20) [17].

57. Ibid.

framework and its further development or 'operationalization' in the 2009 and 2010 reports, along with the 'Guiding Principles', goes some way to addressing aspects of the problem of corporate human rights impunity. This includes: disentangling and clarifying the respective human rights obligations of states under international human rights law and the *moral* responsibility of corporations to respect human rights (to do no harm); suggesting a range of important policy areas on which both home and host states should focus in order to ensure that corporate actors respect human rights in their business activities; providing ideas for grievance mechanisms for victims of human rights abuses, and providing guidance to states and business on how to implement these policies.

In the 2010 report, Ruggie developed five core policy areas 'through which states should strive to achieve greater policy coherence and effectiveness as part of their duty to protect'.⁵⁸ These are: (a) the safeguarding of state capacity to protect international human rights;⁵⁹ (b) human rights considerations for states engaging in business with corporate actors; (c) policies for ensuring a human rights sensitive corporate culture; (d) guidance for business activity in conflict zones; and (e) the problem of extra-territorial jurisdiction.⁶⁰

Sections (b) to (d) deal with domestic measures to be taken by states, and section (e) deals with the question of the authority and capacity of states to regulate extraterritorial conduct. It is in section (a) that the SRSR specifically addresses problems for human rights governance capacity associated with international law and the international legal system. The SRSR focuses on bilateral investment treaties (BITs) and host state government agreements (HGAs). With respect to BITs (and free trade

58. SRSR, '2010 Report' (n 18) 19.

59. Under international human rights, states have a three-part obligation to respect, protect and fulfil human rights. The obligation to protect is an obligation of due diligence, which obliges states to take measures to prevent, regulate, investigate and prosecute actions by private actors, including business entities which violate the rights of individuals subject to that state's jurisdiction. See, for example, *Vélásquez Rodríguez v Honduras* (1989) 28 ILM 294; *Herrera Rubio v Colombia* (161/1983), HRC Report, UNGAOR 43rd Session Supp 40 190 (1988), [11]. See also, A Clapham, *Human Rights in the Private Sphere* (Clarendon Press, Oxford 1993); A Clapham, 'Revisiting Human Rights in the Private Sphere: Using the ECHR to Protect the Right of Access to the Civil Court' in C Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing, Oxford 2001) 513.

60. SRSR, '2010 Report' (n 18) [19]. In his 2008 report, Ruggie notes that he is not advocating 'specific legislative or policy actions', but rather pointing to key problems (that 'deserve serious consideration') and innovative means addressing them (SRSR, 'Protect, Respect and Remedy' (n 20) [28]). In response to an NGO critique of the 2008 policy framework, the SRSR stated that his discussion of strategies to address the problem of transnational human rights governance was 'illustrative material, intended to throw greater light on what the three foundational principles of the framework mean and imply' and that specific recommendations would follow the HRC's approval of the framework (Ruggie, 'Response by John Ruggie to Misereor/Global Policy Forum' (n 48)). In SRSR, '2010 Report' (n 18) [17], Ruggie notes that the section sets out a variety of 'possible' measures for states 'to promote corporate respect for human rights and prevent corporate-related abuse'. However, it is clear from the wording in para 19 ('The Special Representative has identified five priority areas through which States *should* strive to achieve greater policy coherence and effectiveness as part of their duty to protect' emphasis added) that Ruggie is clearly advocating particular approaches to addressing governance capacity. At the very least, one could state that certain categories of solutions are being emphasised above others. The wording above supports this view.

agreements (FTAs) with investment chapters) the SRSG endorses the view – widely held among NGOs, international human rights scholars, as well as some international investment law scholars – that these agreements, which create strong protections for foreign investors (corporations) in host states, can also impose regulatory constraints on these states.⁶¹ In addition, under these agreements, investors usually have rights to bring host states to binding arbitration for violations of the provision of the treaty.⁶² As the SRSG observes, through arbitration or the threat of arbitration ‘a foreign investor may be able to insulate its business venture from new laws and regulations, or seek compensation from the Government for the cost of compliance’.⁶³ This, Ruggie notes, creates an imbalance between investor rights and the state ‘duty to protect’ human rights. ‘Consequently, host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge.’⁶⁴ To address this problem, the SRSG urges states that are in the process of, or considering, reviewing their policy with respect to these agreements ‘to ensure that the new model BITs combine robust investor protection with adequate allowances for bona fide public interest measures, including human rights, applied in a non-discriminatory manner’.⁶⁵

Similarly, a study carried out for the SRSG with the support of the IFC identified the potential for HGAs to constrain host state governance capacity in the area of human rights.⁶⁶ These agreements often include stabilisation clauses which impose constraints on host state regulatory change, either by freezing the law of the host state for the duration of the project, or by requiring the host state to compensate investors for the cost of compliance with any new laws that may adversely affect the ‘economic equilibrium’ of a project.⁶⁷ As with BITs, the investor corporations often have the right to take host states to binding international arbitration to seek compensation, even if the impugned regulations are introduced for the purpose of protecting human

61. See SRSG, ‘Protect, Respect and Remedy’ (n 20) [34–36]. David Schneiderman, for example, states that the key tenets of these type of agreements can operate to restrict the capacity of host states ‘to regulate and control the inflow of investment’, ‘to resist the encroachment of foreign influence and distribute the gains from economic development more evenly across a broader socioeconomic spectrum’ (D Schneiderman, ‘Investment Rules and the New Constitutionalism’ (2000) 25 *Law & Social Inquiry* 757, 758). See also M Sornarajah, *The International Law on Foreign Investment* (2nd edn, CUP, Cambridge 2004) 261.

62. JA Vanduzer, P Simons and G Mayeda, ‘Modeling International Investment Agreements for Economic Development’ in V Qalo (ed), *Bilateralism and Development: Emerging Trade Patterns* (Cameron May, London 2008) 389. See also, LE Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration* (Rights & Democracy, Montreal 2009) 15–17, <www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf> (accessed 3 September 2011).

63. SRSG, ‘2009 Report’ (n 6) [30].

64. SRSG, ‘Protect, Respect and Remedy’ (n 20) [34].

65. SRSG, ‘2010 Report’ (n 18) [23].

66. A Shemberg, ‘Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative to the Secretary-General on Business and Human Rights’ (2008) <[www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf)> (accessed 3 September 2011).

67. Ibid, vii. Shemberg identifies three categories of stabilisation clause: freezing clauses; economic equilibrium clauses and hybrid clauses. The latter, she notes, ‘share some aspects of both of the other categories [of clauses]’ and ‘require the state to restore the investor to the same position it had prior to changes in law, including, as stated in the contract, by exemptions from new laws’.

rights.⁶⁸ One of the interesting findings of the SRS-IFC report, highlighted by Ruggie, is that where contracts between investors and OECD host states contained stabilisation clauses, these provisions were 'tailored ... to preserve public interest considerations'.⁶⁹ Conversely, HGAs signed with non-OECD states had stabilisation clauses which were significantly more constraining of the regulatory powers of the host state than those signed with OECD states, and these clauses were applicable to a broader set of laws.⁷⁰ Moreover, the most constraining of these types of provisions were found in contracts with Sub-Saharan African states.⁷¹

The SRS-IFC notes that the 'imbalance' created by these agreements 'is particularly problematic for developing countries. ... [and] it is precisely in developing countries that regulatory development may be most needed'.⁷² He otherwise makes no comment on the wider significance of these findings. In his 2010 report, he simply concludes that 'one important step for States in fulfilling their duty to protect against corporate-related human rights abuses is to avoid unduly and unwittingly constraining their human rights policy freedom when they pursue other policy perspectives'.⁷³ Likewise, Guiding Principle 9 suggests that states 'maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts'.⁷⁴

Leaving aside how this might be accomplished, or whether in the case of some states it is even feasible, protecting policy space for host states will not fully address the power differential or leverage that investors can have *vis à vis* a Third World host state by virtue of these agreements. Even the most powerful states have been subject to arbitral proceedings or threats of such proceedings with respect to the introduction

68. For a short discussion of the human rights implications of these type of agreements see R McCorquodale and P Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 MLR 598, 612–13 and accompanying footnotes. See also Amnesty International, 'Human Rights on The Line: The Baku-Tbilisi-Ceyhan Pipeline Project' (May 2003) <www.amnestyusa.org/business/humanrightsontheline.pdf> Amnesty International> (accessed 3 September 2011); Amnesty International, 'Contracting Out of Human Rights: The Chad Cameroon Pipeline Project' (September 2005), 26 <www.amnesty.org/en/library/info/POL34/012/2005> accessed 3 September 2011; and T Lawson-Remer, 'A Role for the International Finance Corporation in Integrating Environmental and Human Rights Standards into Core Project Covenants: Case Study of the Baku-Tbilisi-Ceyhan Oil Pipeline Project' in O De Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing, Oxford 2006) 393–425. See also Shemberg (n 68).

69. SRS-IFC, '2009 Report' (n 6) [32]. See also Shemberg (n 68) [66–70] and Figure 6.2.

70. SRS-IFC *ibid* [32]. Shemberg *ibid* [63]. Shemberg concludes that based on the data 'the economic equilibrium clauses found in the non-OECD contracts on the whole apply to a broader set of laws (and therefore a broader set of social and environmental laws) than do the large majority of the contracts from OECD countries. This means that the contracts in this study from non-OECD countries are more likely than those from OECD countries to result in exemptions for the investor from new social and environmental laws or to provide compensation to the investor for its compliance with such laws' (*ibid* [132]). See also, *ibid* [136–142] where Shemberg discusses the relationship between stabilisation clauses and BITs; and SRS-IFC, 'Protect, Respect and Remedy' (n 20) [34–37].

71. SRS-IFC, '2009 Report' (n 6) [32].

72. SRS-IFC, 'Protect, Respect and Remedy' (n 20) [36].

73. SRS-IFC, '2010 Report' (n 18) [25].

74. SRS-IFC, 'Guiding Principles' (n 19) 12. The commentary on this principle is cursory and does not provide further guidance on how this might be accomplished.

of public interest legislation that would allegedly have an impact on investors' protected investment.⁷⁵ Traditional BITs and other international investment treaties provide the host state with few if any tools to ensure that the investment will support sustainable development.⁷⁶ Host states have no means under these treaties to address investor conduct that has a negative impact on human rights. These agreements include no obligations for investors to comply with human rights standards and there are no mechanisms to regulate investor behaviour, nor are there any means for host states to counterclaim in any arbitral proceedings brought against them where the investor has committed, or been complicit in, grave violations of human rights.

One means of addressing the power imbalance between host states and investors would be to include in these BITs and HGAs legally binding human rights obligations for investors, along with other targeted provisions, that might address a host state's sustainable development goals.⁷⁷ Indeed, a submission to the SRSG from the International Institute for Sustainable Development has called for the development of 'model language that can be included in [international investment agreements] in order to promote the articulation and implementation of human rights values in international investment'.⁷⁸ Moreover, at least two model treaties have been drafted which include such language.⁷⁹ The negotiation of a BIT creates an opportunity to include not only provisions that address policy space but provisions that proactively enhance host state governance capacity. VanDuzer, Simons and Mayeda have noted that:

Incorporating such obligations for investors into [a BIT] helps to address some of the difficulties faced by host states in regulating investor conduct since it allows for the use of treaty-based enforcement mechanisms, which can complement those available in domestic law.⁸⁰

Regrettably the SRSG did not recommend such obligations, and missed an opportunity to use the goodwill he had developed during his mandates to address this imbalance. His policy framework and Guiding Principles include only moral or voluntary responsibilities for corporations, except to the extent that certain behaviour is required by domestic law.⁸¹

Secondly, the SRSG's recommendations with respect to BITs and HGAs appear to ignore or to gloss over the power relations reflected in, and created by, these types of

75. For example see *Dow Agrosciences LLC v Government of Canada* (Notice of Arbitration under the UNCITRAL Arbitration Rules and North American Free Trade Agreement) (31 March 2009) <www.naftaclaims.com/Disputes/Canada/Dow/Dow-Canada-NOA.pdf> (accessed 3 September 2011). In its notice of arbitration, Dow Chemical claims that the province of Quebec's pesticide ban is an unfair expropriation of Dow Chemical's pesticide operations.

76. JA VanDuzer, P Simons and G Mayeda, 'Commonwealth Guide to International Investment Agreement Provisions' (Draft) (Commonwealth Secretariat, London 2010) 83ff.

77. See VanDuzer et al., *ibid.* See also, H Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' (2008) International Institute for Sustainable Development <www.oecd.org/dataoecd/45/50/40311282.pdf> (accessed 3 September 2011).

78. Mann, *ibid.* 39. See also, VanDuzer et al. (n 76), 409–10.

79. See H Mann et al., *Model International Agreement on Investment for Sustainable Development* (Winnipeg, International Institute for Sustainable Development, 2005). The Commonwealth Secretariat is also in the process of developing a guide with model treaty provisions that includes such language ('Commonwealth Guide' (n 76)).

80. VanDuzer et al., 'Commonwealth Guide', *ibid.* 11.

81. SRSG, '2010 Report' (n 18) [55], [66].

agreements, as well as the long history of exploitation of Third World states and facilitation of foreign corporate activity. For instance, in the 2008 report, he suggested that in drafting and negotiating BITs, '[s]tates, companies, the institutions supporting investments, and those designing arbitration procedures should work towards developing better means to balance investor interests and the needs of host States to discharge their human rights obligations'.⁸² This assumes that companies will change their *modus operandi* and support measures that may diminish their leverage with host states and increase the regulatory hold over their activities – something that companies have worked hard to avoid since the end of the colonial period.⁸³

In addition, in the 2008 report, the SRSR puts forward peer-learning as one means of providing guidance and support for host state regulatory control over foreign investors. In particular, Ruggie suggests that where home and host states have extensive trade and investment links, home states could provide technical or financial assistance to host states on the regulation, monitoring of compliance, and enforcement of human rights standards.⁸⁴ Not only does this fail to address the imbalance of power between many home and host states, but also past practice of technical and financial support to host Third World states (whether through international financial institutions or domestic export credit or development agencies) has often focused on economic policy and regulatory reform to create an environment more conducive to foreign corporate activity.⁸⁵ For such technical assistance to work, it cannot be left to the 'goodwill' of home states. Rather, a carefully conceived obligation on the home state would need to be embedded in a BIT along with other mechanisms discussed above.⁸⁶

In any event, BITs and HGAs are only the tip of the iceberg. Reimagining these two types of agreements, although an important step forward, does not address the long history of using international law to facilitate business activity in Third World states. As the following section aims to demonstrate, the human rights governance capacity of many Third World states has been undermined by years of economic intervention by international financial institutions and is deeply embedded in the structure of the international system. The history and current iteration of this process will be examined with reference to the work of Third World Approaches to International Law (TWAIL) scholars.

4 GOVERNANCE CAPACITY: INTERNATIONAL LAW AND INSTITUTIONS

TWAIL scholarship considers and critiques the power relationships entrenched in the structure of international law from the perspective of Third World peoples and states.

82. SRSR, 'Protect, Respect and Remedy' (n 20) [38].

83. See, for example, Section 4.1 below, which discusses how early arbitral awards were used to remove the contracts between corporations and Third World states from the purview of domestic law. See also Baxi (n 4) 258.

84. SRSR, 'Protect, Respect and Remedy' (n 20) [44–45].

85. For example, the Canadian International Development Agency (CIDA) played an integral role in the redrafting of the Colombian Mining Code, providing both financial and technical support to the Colombian government. The new law, passed in 2001, 'weakened a number of existing environmental and social safeguards and created significant financial incentives [for foreign investors] including dramatically reduced mining royalty and tax rates'. See Canadian Network on Corporate Accountability, *Dirty Practices, Dirty Business: How the Federal Government Supports Canadian Mining, Oil and Gas Companies Abroad* (CNCA, Ottawa, 2007) 6.1 <www.halifaxinitiative.org/dirtypractices/DirtyPractices.pdf> (accessed 3 September 2011).

86. VanDuzer et al., 'Commonwealth Guide' (n 76) 151–60.

While by no means homogeneous in their critiques, TWAIL scholars (or 'TWAILers') articulate certain common concerns.⁸⁷ According to Okafor, the 'TWAIL movement within the discipline of international legal studies is best viewed as a broad dialectic (or large umbrella) of opposition to the generally unequal, unfair, and unjust character of an international legal regime that all-too often (but not always) helps subject the Third World to domination, subordination, and serious disadvantage'.⁸⁸ For Mutua, TWAIL scholarship:

is driven by three basic, interrelated and purposeful objectives. The first is to understand and deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.⁸⁹

In an increasingly globalised world 'national governments, even the most powerful among them, face growing difficulty in controlling the activities of business'.⁹⁰ However, it is the Third World states which face the greatest challenges in this regard. In addition, a significant proportion of corporate violations of human rights or complicity in such abuses take place within these states.⁹¹ TWAIL scholarship therefore provides an indispensable critical lens for examining the problem of corporate human rights impunity and governance capacity.

4.1 The post-colonial era and economic governance

In his monograph, *Imperialism, Sovereignty and the Making of International Law*, Antony Anghie undertakes an historical analysis of colonialism and international law. In doing so he unpacks and demonstrates the ways in which international law has been used from colonial times to the present to subjugate and suppress the peoples of the Third World. Unsurprisingly, the economic interests of European and other Northern states (and their corporate actors) have played a central role in this history. The desire to gain control of natural resources was the driving force

87. See Mickelson (n 23) 360, who describes TWAIL scholarship as 'a chorus of voices that blend, though not always harmoniously, in attempting to make heard a common set of concerns [and to articulate] a fundamental rethinking of international relations'. Mickelson notes in a later work that one of the aims of TWAIL scholarship is to provide 'a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped to reproduce structures that marginalize and dominate third world peoples' (see also, K Mickelson, 'Taking Stock of TWAIL Histories' (2008) 10 Int'l Community L Rev 355, 358, citing the TWAIL Vision Statement).

88. See OC Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 Osgoode Hall L J 171, 176.

89. Mutua (n 23) 31.

90. Marks (n 2) 461. Marks goes on to say that '[t]he question of the significance of this development for nation-state based systems of power is considered by many to be one of the most important political questions of our age'.

91. UNHRCOR, 'Report of Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Addendum: Corporations and Human Rights: a Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse' (2008) UN Doc A/HRC/8/5/Add 2, Figure 2, 10.

behind the conquest of non-European peoples and establishment of colonies.⁹² International legal rules were developed in relation to colonialism in order to justify and protect those interests. The underlying purpose of international law that was developed in the context of the colonial and post-colonial eras was precisely the promotion and protection of economic interests of the North.⁹³ Thus, as newly independent states emerged from colonial rule as sovereign entities and attempted to assert their sovereignty and establish control over their natural resources, Northern states responded using legal doctrines such as state succession, acquired rights, contracts and consent to protect the interests of their corporate nationals in these states and to resist the attempt by these new sovereign actors to establish a new international economic order which included their own sovereignty over their natural resources.⁹⁴

Anghie notes, for example, that former colonial powers sought new ways to justify the protection of concession agreements which had often been acquired through coercion or through dubious legal agreements based on the ostensible 'consent' of colonial peoples.⁹⁵ According to Anghie, this protectionism was accomplished through early arbitral decisions concerning disputes between Third World states and transnational oil and gas corporations. Anghie points to two key decisions, the *Abu Dhabi arbitration*⁹⁶ and the *Qatar case*⁹⁷ which were among those cases instrumental in developing international law with respect to state contracts. These cases, he states, explicitly demonstrate the techniques used by arbitrators to extend the protections for corporate investors and which had the effect of diminishing host state sovereignty,⁹⁸ and thereby host state governance capacity. This was accomplished in a number of ways. First, such contracts were removed from the purview of the domestic law of the host state on the basis that (in the case of *Abu Dhabi*) no domestic law existed or that (in the case of *Qatar*) such law that did exist was not sufficient for the purpose of interpreting the investment contract in question.⁹⁹ In these and subsequent cases, arbitrators drew on the doctrine of sources to apply 'general principles of law' in order to extend the laws, legal doctrines and principles of the home state (including acquired rights and unjust enrichment) to the contract.¹⁰⁰ Second, arbitrators began to treat these agreements as having been 'internationalised'. This conclusion, Anghie notes, was based on the asserted 'unique nature' of such agreements and on the fact that they were governed not by domestic law but by an 'international law of

92. A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge 2005) 211.

93. Ibid, 269.

94. Ibid, 211ff. See also Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962) UN Doc A/5217 (1962).

95. Anghie (n 92) 211–12.

96. *Petroleum Development Ltd v The Sheikh of Abu Dhabi* (1951) ILR 144.

97. *Qatar (Ruler of) v International Marine Oil Company* (1953) ILR 534.

98. Anghie (n 92) 236. Anghie notes that although 'these decisions have acquired a certain notoriety in the field of arbitration, and are now regarded with a certain embarrassment [they are significant examples because] they raise, in a very explicit form, the crucial issues raised by this emerging field of transnational law for the sovereignty of new states [and the techniques used] were to some extent obscured by the later, more diplomatically worded arbitration decisions' (ibid, 226).

99. Ibid, 226–7.

100. Ibid, 226ff.

contracts' drawn from general principles of law.¹⁰¹ Thus, Anghie notes, by the time the *Texaco v Libya Award*¹⁰² was decided in the late 1970s these developments had 'enabled the effortless transposition of Western concepts of law that provided for the comprehensive protection of private property'.¹⁰³

In disputes over these contracts, international law and legal argumentation were also used to alter the relative bargaining power of the corporate actors involved by bringing them onto the same plane as the sovereign states. Accordingly, the agreements, on the one hand, were held to be 'quasi-treaties' between a sovereign state and a private actor. By contracting with a private actor, it was argued, the states in these situations elevated the corporate actors to a quasi-sovereign entity. On the other hand, such agreements were characterised as private contracts, not between a sovereign state and a private actor, but between two private parties, thus negating the sovereign status of the state and removing its bargaining power as a sovereign entity.¹⁰⁴ As Anghie puts it: '[w]hether a quasi-treaty between a sovereign and a quasi-sovereign entity, or a contract between two private parties, what is common to both characterizations is the real reduction of the powers of the sovereign Third-World state with respect to the Western corporation'.¹⁰⁵

This series of developments, among others, ensured that the economies of these former colonies were kept open (by Northern states) for business as they emerged into the international community as sovereign states. This was accomplished by diminishing the sovereign powers of these states with respect to their dealings with foreign corporations, through apparently neutral rules applied by notionally independent arbitrators.

[N]ot only was the Third World attempt to reform international law [through its promotion of the New International Economic Order] largely thwarted, but it had to contend with a new set of rules, the 'international law of contracts', that sought to expand the powers of the MNCs well beyond the powers those corporations had enjoyed under the traditional law of state responsibility.¹⁰⁶

What Anghie's research makes clear is that a diminished economic governance capacity has been a reality for Third World states since their emergence as states into the international community. Put another way, these states began their life as new subjects of international law with significantly less control over foreign investment than their Northern counterparts.

4.2 International financial institutions and human rights governance

One recurring theme that emerges in the TWAIL scholarship is how this history of Third World states and international law is replicated in the contemporary international legal system. As Okafor notes, 'despite the discontinuities that exist in the exact forms and techniques that were deployed, there is indeed a historical continuity

101. Ibid, 229–30.

102. *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* (1977) 53 ILR 389.

103. Anghie (n 92), 230.

104. Ibid, 233–5.

105. Ibid, 235.

106. Ibid, 235–6.

from at least the 16th century onward in international law's tolerance of, if not active support for, the negation and/or erasure of Third World ... agency'.¹⁰⁷

For Chimni, what distinguishes more recent developments in international law from the colonial period are the means and manner through which this is accomplished. He writes:

The colonial period saw the complete and open negation of the autonomy of the colonized countries. In the era of globalization, the reality of dominance is best conceptualized as a more stealthy, complex and cumulative process. A growing assemblage of international laws, institutions and practices coalesce to erode the independence of third world countries in favour of transnational capital and powerful States. The ruling elite of the third world, on the other hand, has been unable and/or unwilling to devise, deploy, and sustain effective political and legal strategies to protect the interests of third world peoples.¹⁰⁸

This assemblage of international laws, institutions and practices, which has transformed the relationship between Third World states and international law, refers to, among other things, the lending practices and policies of the World Bank and the IMF as well as the growth of international trade and investment rules over the past two decades. Both of these have had significant implications with respect to Third World states' authority and ability to comply with their international human rights obligations.

It is well known that recipient states of IMF and World Bank loans were required by these institutions to implement a particular set of economic policies in order to restructure their economies and reduce government intervention. Voting structure in these institutions, as Chimni observes, has given Northern states 'a dominant voice in the decision-making process, with the result that third world countries and peoples [have been] unable to influence in any way the content of conditionalities imposed upon them'.¹⁰⁹ These conditionalities required, among other things, the liberalisation of domestic markets (including the lowering of tariffs, the deregulation of labour markets, privatisation, and deregulation of business activity), on the basis that such measures would stabilise their economies and enhance economic growth. In addition, the IMF and the World Bank often provided the technical support to reform legal regimes in a manner that would accomplish these objectives.

107. OC Okafor, 'Poverty, Agency and Resistance in the Future of International Law: An African Perspective' in R Falk, B Rajagopal and J Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavandish, New York 2008) 100–101. See also Anghie, *ibid* 243–4, who states: '... colonialism reconstructed itself through new techniques ... even while reproducing the fundamental structure of the civilizing mission. In this sense, the colonial encounter has ineluctably shaped the fundamental doctrines of international law – sources and sovereignty. Further, it has created an international law which, even when it innovates, follows the familiar pattern of the colonial encounter, the division between civilized and uncivilized, the developed and the developing, a division that international law seeks to define and maintain using extraordinarily flexible and continuously new techniques.' See also, Chimni (n 23) 72, 47 who argues that for Third World states, international law has not been 'an instrument for establishing a just world order' but rather 'the principal language in which domination is coming to be expressed in the era of globalization'.

108. Chimni, *ibid* 72.

109. BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *EJIL* 1, 20.

For example, a study undertaken as part of the Extractive Industry Review 2003¹¹⁰ examined the role of structural reform programmes towards sustainable development outcomes in Peru, Tanzania and Indonesia. The study found that the reform measures supported by the World Bank and the IMF in these states:

tended to concentrate on improving policies and institutions in favor of investors, mainly foreign, without commensurately strengthening policies and institutions for the poor and environment and thereby creating an imbalance. For example, new contract models with fixed environmental costs locked in environmental standards for ten to twenty years.¹¹¹

The study also found that the World Bank efforts to address the social and environmental impacts of reform were limited and that ‘the biggest constraint to the effectiveness of these programs has been the lack of leverage with governments and/or weak capacity of governments to ensure implementation of World Bank advice’.¹¹² Despite the Bank’s recognition of state incapacity in this area, the structural reform programmes were put forward on the assumption that increased foreign investment would stimulate wider economic growth and reduce poverty.¹¹³ The report also concluded that ‘market, policy, and institutional failures that were either left uncorrected or were created by structural adjustment and policy/institutional reforms’ were responsible for negative social and environmental impacts.¹¹⁴ These institutional failures included the privatisation of state hydrocarbon and mineral enterprises and assets before states had developed the capacity to regulate private sector extractive activity.¹¹⁵

In Peru, for example, the increased investment in the extractive sector, which followed the reforms, was met by a significant increase in public protest over the social and environmental impacts of both mining and oil and gas extractive activity.¹¹⁶

110. Following criticism of the World Bank Group (WBG) policies by civil society organisations at the June 2000 Annual Meeting of the World Bank and IMF, the WBG President, James Wolfensohn agreed to undertake ‘a review of the Bank’s role in oil, gas, and mining’. The Extractive Industries Review was then initiated by IFC-World Bank Mining Department and Oil, Gas and Chemicals Department (The World Bank Group, *Striking a Better Balance: The Final Report of the Extractive Industries Review* (vol 3 World Bank, Washington 2003) 2 <[irispublic.worldbank.org/85257559006C22E9/All+Documents/85257559006C22E985256FF6006891D4/\\$File/volume3annex1.pdf](http://irispublic.worldbank.org/85257559006C22E9/All+Documents/85257559006C22E985256FF6006891D4/$File/volume3annex1.pdf)> (accessed 3 September 2011).

111. H Mainhardt-Gibbs, ‘The World Bank Extractive Industries Review: The Role of Structural Reform Programs Towards Sustainable Development Outcomes’ in *Striking a Better Balance: The Final Report of the Extractive Industries Review* (vol 6 World Bank, Washington 2003) 6 <[irispublic.worldbank.org/85257559006C22E9/All+Documents/85257559006C22E985256FF700479C90/\\$File/volume6salreform.pdf](http://irispublic.worldbank.org/85257559006C22E9/All+Documents/85257559006C22E985256FF700479C90/$File/volume6salreform.pdf)>.

112. Ibid.

113. Ibid, 7.

114. Ibid.

115. Ibid, 49.

116. Ibid, 35. In June 2009 indigenous protesters who were engaged in a peaceful blockade near Bagua in Peru’s Amazon region were attacked by Peruvian Special Forces. The violence resulted in 25 civilian deaths and 150 injured. The blockade was undertaken in protest of two decrees issued by the Peruvian president to implement the US–Peru Free Trade Agreement. The decrees opened up areas of indigenous lands in the Amazon to private extractive activity, logging and large-scale farming. See G MacLennan, ‘Police Open Fire on Indigenous Blockade in Peruvian Amazon – 25 Civilians and 9 Police Dead, 150 Injured’ *Amazonwatch* (Washington 6 June 2009) <www.amazonwatch.org/newsroom/view_news.php?id=1837> (accessed 3 September 2011). See also, ‘Deadly Clashes in Peru’s Amazon’ *BBC News* (UK 5 June 2009) <news.bbc.co.uk/2/hi/americas/8086595.stm> (accessed 3 September 2011).

Extractive exploration and activity moved into more ecologically sensitive areas and onto aboriginal lands. While '[t]he structural reform program supported new mining and hydrocarbon legal codes that strengthened the rights and access of investors to extractive resources ... [it] did not address conflicting land classification schemes and thus mining and hydrocarbon rights overlap with protected areas and indigenous reserves'.¹¹⁷

The structural adjustment programmes, development policies and good governance policies were premised on addressing poverty and the needs of Third World states. TWAIL scholars, among others, have argued that the development and good governance policies allowed the World Bank to increase its intervention in these states and to give the appearance of protecting human rights while continuing the pursuit of their neoliberal policies. Thus, James Gathii observes that:

The good governance agenda recasts the neo-liberal economic policies of the World Bank in the guise of a new lingo compatible with, rather than opposed to, human rights. This conception gives preference to economic policy over human rights, unless these rights can be conceptualized within this economic logic, such as openness in international trade, finance, commerce, and reduced social spending in education and health, for example. The World Bank has, therefore, tended to support only those rights that fit within its ascendant laissez-faire commitments. Ultimately then, it is civil and political rights – those most compatible with neo-liberal economic reform, such as private property and freedom of contract – that have received the most support in the good governance agenda.¹¹⁸

The measures prescribed also served the interests of foreign investors of the states that control the World Bank and the IMF. The effect of these conditionalities was to relocate the economic governance of these states to the international financial institutions, while at the same time weakening or undermining the ability of these states to undertake social reform, including measures to respect, protect and fulfil the human rights of those subject to their jurisdiction.¹¹⁹ Moreover, these programmes have played a significant role in increasing poverty in these states¹²⁰ and causing violations of

117. Mainhardt-Gibbs (n 111), 43.

118. JT Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 121–2. See also Baxi (n 4), 262, who observes that 'in good governance stands articulated a set of arrangements, including institutional renovation, which primarily privileges and disproportionately benefits the global producers and consumers'.

119. M Salomon, 'International Economic Governance and Human Rights Accountability' LSE Law, Society and Economy Working Papers 9/2007, 10 <www.lse.ac.uk/collections/law/wps/wps.htm>. Salomon observes: 'These measures are often compulsory, despite resistance by recipient states, with human rights-holders left to direct claims to their enfeebled governments as duty-bearers under the relevant human rights treaties' See also, A Anghie, 'Civilization and Commerce: The Concept of Governance in Historical Perspective' (2000) 45 Villanova Law Review 887, 909.

120. See H Stein, 'Africa and the Making of Adjustment: How Economists Hijacked the Bank's Agenda' *At Issue* (29 September 2008) <www.brettonwoodsproject.org/art-562552> (accessed 3 September 2011). According to Stein, 'structural adjustment has been central to the making of Africa, with terrible consequences. The region has seen a marked increase in absolute and relative poverty. Closely associated with this economic deterioration is a dramatic decline in the health of the population. Average life expectancy dropped from 50 to 46 years from 1980 to 2003. No area of the world has done so poorly and no area has been subjected

human rights. As Salomon observes, '[d]isaggregated into its component parts, poverty reflects a range of violated human rights and the violation of many human rights is, in turn, a cause of poverty'.¹²¹

4.3 International trade and investment law: entrenching liberalisation measures

International trade and investment laws are also implicated in this de-territorialisation of economic governance and the facilitation of corporate activity. An increasingly sophisticated regime of direct and indirect corporate rights have been entrenched under the various free trade agreements such as North American Free Trade Agreement (NAFTA),¹²² the World Trade Organization (WTO) agreements, as well as the large number of bilateral free trade agreements and investment treaties between developed and Third World states.¹²³

An examination of WTO law, policy, practice and its impacts is essential to understanding the current state of human rights governance incapacity, particularly in Third World States. First, the relationship between the WTO, the World Bank and the IMF is entrenched in the Marrakesh Agreement establishing the WTO. The WTO has an obligation to cooperate with the Bank, the IMF and other related agencies with the aim of 'achieving greater coherence in global economic policy-making'.¹²⁴ Secondly, these agreements have had much the same effect on governance capacity as the World Bank and IMF interventions have had. As William Tabb observes: 'the thrust of international agreements on trade and investment has been almost uniformly to extend TNC freedom to operate with fewer impediments globally. It is the freedom of sovereign states to regulate economic activity which has been restricted'.¹²⁵ Studies have shown that the liberalisation requirements imposed by the trade agreements – which WTO member states were required to adopt as a complete package¹²⁶ – can and do have an impact on the ability of states to comply with their international human rights obligations.

to more conditionality or adjustment.' For a full discussion see H Stein, *Beyond the World Bank Agenda: An Institutional Approach to Development* (University of Chicago Press, Chicago 2008).

121. Salomon (n 119), 19.

122. North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States (adopted 17 December 1992, entered into force 1 Jan 1994) (1994) Can TS 1994 No 2, 32 ILM 289.

123. According to UNCTAD, there are currently more than 3000 bilateral investment treaties and other international investment treaties. See UNCTAD 'World Investment Report 2011: Non-Equity Modes of International Production and Development' (UN New York & Geneva 2011) 100.

124. *Marrakesh Agreement Establishing the World Trade Organization* (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, arts 111, 5 cited in Salomon (n 119), 16.

125. WK Tabb, *Economic Governance in the Age of Globalization* (Columbia University Press, New York 2004) 272.

126. Chimni notes that 'strategies such as the concept of a "package deal" and the "single undertaking" (as in the case of the WTO) are used to ensure that third world states cannot opt out of legal obligations that are inimical to interests of their people' (Chimni, 'International Institutions' (n 109) at 25).

The WTO Agreement on Agriculture (AoA)¹²⁷ is a case in point. Agriculture plays a vital role in the economies of many Third World states. According to the Food and Agriculture Organisation (FAO):

[s]ome 70 per cent of the poor in developing countries live in rural areas and depend on agriculture for their livelihoods, either directly or indirectly. In the poorest of countries, agricultural growth is the driving force of the rural economy. Particularly, in the most food-insecure countries, agriculture is crucial for income and employment generation.¹²⁸

For Third World states – particularly those in the early stages of economic development – state intervention in the agricultural sector is critical to ensuring agricultural growth.¹²⁹ Historically, states have protected their agriculture sectors as they move from early to middle stages of economic development.¹³⁰ They have done so by using a wide range of policy mechanisms, including state trading and export monopolies; a variety of non-tariff barriers; state marketing boards to ensure price stability for both producers and consumers; subsidies for producer inputs and credit and government investment in rural infrastructure and agricultural research,¹³¹ most of which are now prohibited under the AoA.

The AoA requires WTO members to liberalise their agricultural markets by eliminating farm subsidies (although certain minimum levels are allowed), reducing export subsidies, changing all non-tariff barriers to tariffs (a process known as ‘tariffication’) and reducing their tariffs on agricultural products. Many Third World states had already liberalised their agricultural markets under the structural reform programmes of the World Bank and IMF. Many of them therefore had few, if any, subsidy programmes in place, and are now prohibited from reintroducing them.¹³² At the same time, the AoA rules allowed certain industrialised states to keep particular subsidy programmes intact and, through the tariffication process, to set high initial tariffs

127. *Agreement on Agriculture* (adopted on 15 Apr 1994) 1867 UNTS 410.

128. Food and Agriculture Organisation of the United Nations (FAO), *The State of Food Insecurity in the World 2006: Eradicating World Hunger – Taking Stock Ten Years After the World Food Summit* (FAO, Rome 2006) at 28. See also H Thomas and J Morrison, ‘Trade Related Reforms and Food Security: A Synthesis of Case Study Findings’ in H Thomas (ed), *Trade Reforms and Food Security: Country Case Studies and Synthesis* (FAO, Rome 2006) 56, 64; and M Stockbridge, ‘Agricultural Trade Policy in Developing Countries During Take-Off’ (Oxfam Research Report, 2006) 7, 10.

129. Thomas and Morrison, *ibid* 41, state that ‘[t]here is ample evidence to suggest that the state needs to play a significant role in stimulating the transformation of agriculture’.

130. *Ibid*, 22.

131. Stockbridge (n 128) 12.

132. See C Dommen, ‘Raising Human Rights Concerns in the World Trade Organisation: Actors, Processes and Possible Strategies’ (2002) 24 *Human Rights Quarterly* 1, 35; See also Food and Agriculture Organization of the United Nations (FAO), ‘Issues at Stake Relating to Agricultural Development, Trade and Food Security’ Paper No 4 of the FAO Symposium on Agriculture, Trade and Food Security: Issues and Options in the Forthcoming WTO Negotiations from the Perspective of Developing Countries, Geneva, 23–24 September 1999, 14, Table 2 <www.fao.org/docrep/003/x4829e/x4829e04.htm> (accessed 3 September 2011). The FAO states that of a selection of 100 developing states, only 12 reported a base Total AMS above *de minimis* levels, 8 claimed positive base Total AMS but below *de minimis* levels and 80 claimed zero or negative base Total AMS. For more on the relationship between SAPs and agricultural trade, see J Madeley, *Trade and Hunger: An Overview of Case Studies on the Impact of Trade Liberalization on Food Security* (Forum Syd, Stockholm 2000) 7.

on many products crucial to the economies of Third World states 'in terms of food supply, employment, economic growth and poverty reduction'.¹³³

The impact of the AoA rules is compounded by corporate activity in global agricultural markets. These markets are dominated by small groups of corporations which control almost every sector of the agricultural industry – from farm inputs such as seeds, pesticides and fertilisers, to exporting, shipping, processing, and food retailing.¹³⁴ There are no provisions in the AoA or in any other WTO agreement to deal with market structure and concentration of corporate power.¹³⁵ Nor does the AoA, or any other relevant WTO agreement, adequately regulate the practice of selling goods at below-production costs – a practice known as dumping.¹³⁶ Transnational corporate actors, mainly from industrialised states which control the markets, have been able to benefit from, among other things, protected subsidies and then from selling onto the world market at below the cost of production, with the result that many Third World states have been unable to compete globally against such commodities with their exports. Nor have these states been able to prevent cheaper subsidised goods from undercutting the price of locally produced agricultural products in domestic markets. In both cases, the livelihoods of farmers and farm labourers are placed at risk.¹³⁷

133. Food and Agriculture Organization of the United Nations (FAO), 'Synthesis of Country Case Studies' Paper No 3 of the FAO Symposium on Agriculture, Trade and Food Security: Issues and Options in the Forthcoming WTO Negotiations from the Perspective of Developing Countries, Geneva, 23–24 September 1999, 19 <www.fao.org/docrep/meeting/X3065E.htm> (accessed 3 September 2011).

134. See B Vorley, *Food, Inc.: Corporate Concentration from Farm to Consumer* (International Institute for Environment and Development, London 2003); UNCTAD, 'Tracking the Trend Towards Market Concentration: The Case of the Agricultural Input Industry' (20 April 2006) UNCTAD/DITC/COM/2005/16; and W Heffernan, *Report to the National Farmers Union: Consolidation in the Food and Agriculture System* (5 February 1999) <home.hiwaay.net/~becraft/NFUFarmCrisis.htm> (accessed 3 September 2011).

135. It would appear that much of the consolidation of market power has taken place since the end of the Uruguay Round in 1994, see M Ritchie and K Dawkins, 'WTO Food and Agricultural Rules: Sustainable Agriculture and the Human Right to Food' (2000) 9 *Minnesota Journal of Global Trade* 9, 19. Even if the AoA has not caused or contributed to the current market structure, the fact that it is oligopolistic and thus will affect competition means that it should be addressed within the WTO.

136. This is true despite the fact that the Peace Clause (which prevented states challenging certain AoA subsidies) expired in 2003, and that subsidies can be and are being challenged in the WTO Dispute Settlement Body. For most Third World states, the use of the DSB to challenge subsidies is not a viable means to address the inequalities of the agreement, given the complexity and cost (both financial and political) of such cases and the difficulties of enforcement. See S Murphy, *Trade and Food Security: An Assessment of the Uruguay Round Agreement on Agriculture* (Catholic Institute for International Relations, London 1999) 14; and K Halverson Cross, 'King Cotton, Developing Countries and the "Peace Clause": The WTO's US Cotton Subsidies Decision' (2006) 9 *Journal of International Economic Law* 149, 192–3.

137. For a full discussion, see P Simons, 'Binding the Hand that Feeds Them: Sovereignty, the Agreement on Agriculture, Transnational Corporations, and the Right to Adequate Food in Developing Countries' in W Shan, P Simons and D Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing, Oxford 2008); CG Gonzalez, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries' (2002) 27 *Columbia Journal of Environmental Law* 433, 454; and S Murphy, *CAFOD Policy Brief: Food Security and the WTO* (September 2001) 12 <www.ukfg.org.uk/docs/CAFOD%20Trade%20Food%20security%20and%20the%20WTO.htm> (accessed 3 September 2011).

In this way, the AoA has contributed to undermining the ability of these states to protect important economic and social rights, including, significantly, the right to food.¹³⁸ The FAO has noted that:

[o]pening national agricultural markets to international competition – especially from subsidized competitors – before basic market institutions and infrastructure are in place can undermine the agriculture sector, with long-term negative consequences for poverty and food security.¹³⁹

Thus the AoA not only restricts government capacity to regulate and implement policy measures in the area of agriculture (measures with important implications for human rights), but it also facilitates corporate behaviour contributing to the erosion of human rights governance capacity. As Orford observes, such measures have further 'entrench[ed] a relationship between states and transnational corporations that privileges the property interests of those corporations over the human rights of local peoples and communities.'¹⁴⁰ The impact of international trade and investment law on human rights governance capacity – and therefore upon the ability of these states to comply with the obligation to protect human rights – is layered over the governance inadequacies created or exacerbated by World Bank and IMF structural reforms.

5 FEMINIST INSIGHTS: CORPORATE ACTORS AND THE STRUCTURE OF INTERNATIONAL LAW

The preceding sections illustrate some of the ways in which international law and international financial institutions can be understood to have undermined the ability of states to regulate foreign economic activity in compliance with their human rights obligations. This section will engage in a closer study of the structure of international law and its implications for corporate human rights accountability, and will do so by drawing on feminist insights.

Many of the TWAIL critiques of the international legal system have their analogues in feminist international law scholarship. For example, feminist scholars explore how international law and legal argumentation have been used in ways that continually recreate or reinforce a patriarchal and/or a colonial international legal system.¹⁴¹

138. Numerous studies have assessed the impact of the AoA on the right to food. See, for example, J Morrison and A Sarris, 'Determining the Appropriate Level of Import Protection Consistent with Agriculture Led Development in the Advancement of Poverty Reduction and Improved Food Security' in Morrison and Sarris (eds), *WTO Rules for Agriculture Compatible with Development* (FAO, Rome 2007); Gonzalez, *ibid* 454; Dommen (n 132); Murphy, *ibid*; FAO Paper No 3 (n 135).

139. Food and Agriculture Organization of the United Nations (FAO), *State of Food and Agriculture 2005: Agricultural Trade and Poverty – Can Trade Work for the Poor?* (FAO, Rome 2005) 6.

140. A Orford, 'Contesting Globalization: A Feminist Perspective on the Future of Human Rights' (1998) 8 *Transnational Law & Contemporary Problems* 171, 183. See also Chimni who notes that '... an unjust globalization process ... has resulted in the erosion of the autonomy of third world states in taking crucial decisions of national economic and social life' (Chimni, 'International Institutions' (n 109) 28).

141. See, for example, H Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester 2000); D Buss and A Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing, Portland 2005); Orford, 'Contesting Globalization' *ibid*; D Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' (1997) 18 *Australian Ybk Intl L* 1.

Feminist structural bias critiques, in particular, provide a useful approach to exploring the power dynamics and partiality embedded in the structure of international law.

Feminist structural bias critiques of international law¹⁴² are premised upon the notion that international law protects male interests and that therefore its structure is biased against women.¹⁴³ In their monograph, *The Boundaries of International Law*,¹⁴⁴ Hilary Charlesworth and Christine Chinkin, show how the gendered structure of international law marginalises or excludes women:

Permeating all stages of the [examination into the layers of gender bias in international law] is a silence from and exclusion of women. This phenomenon does not emerge as a simple gap or vacuum that weakens the edifice of international law and that might be remedied by some rapid construction work. It is rather an integral part of the structure of the international legal order, a critical element of its stability. The silences of the discipline are as important as its positive rules and rhetorical structures.¹⁴⁵

International legal discourse, they contend, is founded on dichotomies such as ‘public/private’, ‘international/domestic’, ‘action/passivity’, ‘binding/non-binding’, ‘independence/dependence’. These ‘binary oppositions’ are gendered in the sense that the first term represents male or objective or higher-value characteristics, while the second represents female or subjective or lower-value characteristics.¹⁴⁶ Examining these dichotomies is one means of exposing and exploring the silences of international law.¹⁴⁷ Drawing on these insights, it is suggested that this conception of the structure of international law and its silences provides a valuable analytic tool for understanding how international law and the international legal system operate to privilege and protect commercial activity.

Charlesworth and Chinkin observe that ‘a variety of distinctions, ostensibly between “public” and “private”, shape international law and that many of them have gendered consequences’.¹⁴⁸ For example, while international law ‘formally removes “private” concerns from its sphere, the international legal system nevertheless strongly influences them. One form of influence is the fact that “private” issues are left to national, rather than international, regulation’.¹⁴⁹ Certain concerns that may have an impact on women, therefore, may be left to be dealt with by the domestic law of the state, even where this may result in, or allow for, the subjugation of women.¹⁵⁰ Thus, these public/private distinctions, they argue, not only ‘characterise the reality of the international community ... they are also connected with political choices of whether or not to intervene legally’.¹⁵¹

In a similar way, international law generally leaves the regulation of corporate actors (private capital) to the domestic sphere.¹⁵² International human rights law

142. For a full discussion of various forms and critiques of structural bias scholarship see K Engle, ‘International Human Rights and Feminisms: When Discourses Keep Meeting’ in Buss and Manji, *ibid* 47–66.

143. *Ibid*, 52.

144. Charlesworth and Chinkin (n 141).

145. *Ibid*, 49.

146. *Ibid*, 49–50.

147. *Ibid*, 49.

148. *Ibid*, 57.

149. *Ibid*, 56.

150. *Ibid*, 57.

151. *Ibid*.

152. An exception might be bribery and corruption, for example.

speaks to the actions of states and does not directly address the activities of non-state actors.¹⁵³ It also imposes no clear obligations on states to regulate the extraterritorial human rights conduct of their corporate nationals. Nor does it clearly require states to deal with corporate groups in a way that protects the human rights of individuals outside the state's jurisdiction. International law itself views transnational corporate actors as disaggregated entities – each parent, subsidiary and affiliate as a separate legal entity – each subject to the laws of the state within which they are incorporated or operate,¹⁵⁴ even though these entities may, and often do, act as an integrated whole. This lack of direct international oversight has an important impact on how the domestic sphere deals with these actors.

Although a number of national legislatures have considered laws to regulate the extraterritorial impacts of their corporate nationals, no state has yet enacted such legislation.¹⁵⁵ State reticence in this regard is likely due to (or at least bolstered by) pressure from powerful domestic and international business lobby groups and arguments that such regulation would disadvantage their corporate nationals in the global marketplace. This was certainly the case in Canada with the defeat of Bill C-300 in October 2011, which, had it been enacted, would have imposed obligations on extractive companies to comply with certain human rights and environmental standards when operating in Third World states. It would also have established a system of sanctions and a complaints mechanism. The lobbying effort against the bill was led by major Canadian mining companies and mining industry associations, and it was reported that 'dozens of meetings took place' with ministers, MPs and civil servants.¹⁵⁶

153. It is now widely accepted, however, that corporate actors can incur international criminal liability for complicity in or commission of violations of human rights that constitute international crimes. See A Clapham, 'State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations' in L Bomann-Larsen and O Wiggen (eds), *Responsibility in World Business: Managing Harmful Side-Effects of Corporate Activity* (United Nations University Press, Tokyo 2004) 68. The SRSG has also recognised such liability, see UNHRCOR, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Entities: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (2007) UN Doc A/HRC/4/35, [19–32].

154. J Crawford and S Olleson, 'The Nature and Forms of International Responsibility' in MD Evans (ed), *International Law* (2nd edn, OUP, Oxford 2006) 453–4.

155. The most recent example is the Canadian Bill C-300, dubbed the 'Responsible Mining Bill' which survived to its third reading but was defeated by six votes on 27 October 2010 (see Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, 3rd Sess, 40th Parl., 2010–2011).

156. See, Bill Curry, 'Lobbying Blitz Helps Kill Mining Ethics Bill' *Globe and Mail* (Ottawa 27 October 2010) <<http://www.theglobeandmail.com/news/politics/ethical-mining-bill-defeated-after-fierce-lobbying/article1775529/>> (accessed 3 September 2011). See also Carl Meyer, 'Opposition MPs Who Skipped C-300 Vote Were Targeted by Industry Lobby' *Embassy* (3 November 2010) who states: 'According to the Office of the Commissioner of Lobbying, this effort was led by Barrick Gold, IAMGold, Vale Canada, the Mining Association of Canada and the Prospectors and Developers Association of Canada, all of which were vehemently opposed to Bill C-300.' See also the testimonies of corporate representatives against the Canadian Bill C-300 (Canada, Standing Committee on Foreign Affairs and International Development, *Evidence*, 40th Parl, 2d Sess, No 032 (9 October 2009) and No 042 (26 November 2009)).

Moreover, in domestic law, the integrated nature of the corporate group generally remains legally unrecognised,¹⁵⁷ a factor which has significant implications for human rights accountability. Under domestic corporate/company laws, corporate actors may legitimately use a subsidiary in order to shelter the parent company and other members of a corporate group from activities that may attract legal liability.¹⁵⁸ Even in cases where a subsidiary is found liable for egregious human rights abuses, 'the liability will not necessarily attach to related companies and therefore it will not necessarily be the case that a successful claimant can access the assets of the corporate group ... or the assets of its members and directors'.¹⁵⁹ Domestic courts are reticent to 'pierce the veil' of corporate groups to impose liability on parent companies for the acts of their subsidiaries.¹⁶⁰ This reticence becomes all the more problematic in cases where the subsidiary (which allegedly committed, or was complicit in, the impugned acts in the host state) is held by the parent corporation in the home state through a number of subsidiaries, each one incorporated in a different national jurisdiction.¹⁶¹

157. It should be noted, however, that certain states have long sought to regulate these groups in areas of taxation, competition law, shareholder and consumer protection. The US, for instance, 'has developed very broad theories of the unity or integration of the enterprise, of acting as "alter ego" or whatever other phrases may have been employed to establish that the foreign parent is in fact present, resident or "found" in the United States' (FA Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years', in *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff, Dordrecht 1985) 63). See also J Dine, *The Governance of Corporate Groups* (CUP, Cambridge 2000) 65, who notes that the European Court of Justice has taken the approach in competition cases of investigating 'the parameters of the [corporate] group structure and the reality of the interrelationships within the group'.

158. R Nicolson and E Howie, 'The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil – An Australian Perspective' (2007) Paper for the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, 11 <<http://www.hrlrc.org.au/files/icj-paper-e-howie-and-r-nicolson-final-0207.pdf>>.

159. Ibid.

160. International Commission of Jurists, *Corporate Complicity & Legal Accountability: Volume 3 – Civil Remedies: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* (International Commission of Jurists, Geneva 2008) 47. The jurisprudence of the courts on this issue is uneven, however they will often disregard the separate legal personality in situations where the latter is 'being abused to perpetrate fraud or avoid existing legal obligations' (ibid).

161. Talisman Energy's operations in Sudan, for example, were conducted through TGNBV, which was a 25 per cent owner of the consortium, Greater Nile Petroleum Operating Company (GNPOC). Talisman Energy held TGNBV through four other subsidiaries incorporated in two other of jurisdictions. TGNBV was a Dutch company, owned by Goal Olie-en-Gasexploratie BV (also a Dutch company), which in turn was owned by two UK companies Supertest and Igniteserve, both of which were owned by Talisman (UK), a subsidiary of Talisman Energy. In *Presbyterian Church of Sudan v Talisman Energy, Inc.* 453 F Supp. 2d 633 (SDNY 2006), the defendant's motion to dismiss was granted and the plaintiffs' motion to amend their complaint was dismissed. The court, however, went on to analyse the amended claim stating, among other things, that the plaintiff had not demonstrated in the case of GNPOC and the various subsidiaries of Talisman Energy Ltd, that it was appropriate for the court to pierce the corporate veil to find Talisman Energy liable for the acts committed by GNPOC or the various members of the consortium, including TGNBV. Talisman had been accused of aiding and abetting the Government of Sudan to commit genocide, torture, war crimes and crimes against humanity. These acts included the creation of a *cordon sanitaire* around GNPOC's oilfields

Feminist theoretical insight suggests that the structure of international law is such that these entities can exploit its silences, remaining on the margins and navigating between two dichotomously constructed regulatory spheres. In this way corporate entities avoid both international and domestic oversight, while at the same time gaining robust legal protections for their trade and investment activities. Karen Engle draws an interesting comparison in this regard between women and market actors. Both, she argues, inhabit the margins of international law. But unlike women who seek to be included and protected by international law, corporations and other business entities, operating from a position of power, have *chosen* to remain on the unregulated periphery, seeking precisely to avoid public international law's interference in their activities.¹⁶²

However, contrary to Engle's conclusion that global business actors operate solely in the private or unregulated sphere,¹⁶³ it is clear that these powerful actors are able to play on both sides of the public/private fence. Thus, the regulation of trade and investment – which addresses and circumscribes governmental conduct in order to facilitate and protect the activities of private capital – is deemed an appropriate matter for international law to address.¹⁶⁴ Unlike women, transnational corporate actors are the privileged insiders of the international legal system, playing key roles in the promotion, negotiation and drafting of these trade and investment regimes¹⁶⁵ and enjoying remarkable success in resisting and avoiding the 'imposition of new human rights norms on their structure and operations'.¹⁶⁶ The public/private, international/domestic, regulated/unregulated

to facilitate the exploration and extraction of oil, forcibly displacing some of the plaintiffs, supplying fuel to and transporting the Sudanese military and allowing Sudanese forces to use the consortium airstrips for offensive bombing raids.

162. K Engle, 'Views from the Margins: A Response to David Kennedy' (1994) *Utah Law Review* 105, 108–109. Engle draws this comparison with the aim of critiquing the public/private dichotomy and arguing that like market actors, women can seek refuge, or find their power, in the private sphere.

163. Engle *ibid*, argues that trade and other business activities fall outside the regulatory space of public international law, and within the private or unregulated sphere at the margins of the international legal system. Yet, as Buss points out, this view is misconceived: 'Far from being unregulated and marginal, however, international trade operates within numerous legal limitations and may exercise influence over aspects of international law. ... International law in this context is not seen as repressive, but as necessary to the effective conduct of international trade.' (D Buss, 'Going Global: Feminist Theory, International Law, and the Public/Private Divide' in S Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press, Toronto 1997) 372–3).

164. Buss, *ibid*.

165. According to the UNDP, for example, the agricultural industry in the US was able to exert significant influence on 'national positions in international trade negotiations' (UNDP, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (OUP, New York 2002) 68). See also, Murphy, *Trade and Food Security* (n 136) 11, who notes that a former vice-president of Cargill (which controls about 60 per cent of global trade in cereals and 30 per cent of the global corn market) acted as the US negotiator on agriculture in the initial stages of the Uruguay Round before returning to work in the grain industry. Chimni (citing Joseph Nye) states that 'the transnational corporations and offshore fund managers are playing a larger-than-ever role in establishing rules and standards. Their practices often create de facto governance' (Chimni, 'International Institutions' (n 109), 35–6).

166. Baxi (n 4) 258. This, Baxi notes, 'is clearly manifest in the recent successful efforts excluding multinationals from the jurisdiction of [the] International Criminal Court, and since the 1970s preventing all United Nations-based efforts at a Code of Conduct for Transnationals' (*ibid*). See also, A Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7 *HRLR* 511, 514.

distinctions are interdependent¹⁶⁷ and operate to facilitate rather than restrain corporate activity.

Charlesworth and Chinkin as well as Rochette¹⁶⁸ and others have also pointed to the gendered consequences of the distinction in international law between binding/non-binding obligations. Matters of concern to women such as the environment and human rights, for example, are treated as 'soft' issues, that are deemed appropriately regulated by 'soft' non-binding instruments. As Charlesworth and Chinkin state:

States use 'soft' law structures for matters that are not regarded as essential to their interests ('soft' issues in international law) or where they are reluctant to incur binding obligations. Many of the issues that concern women thus suffer a double marginalization in terms of traditional international law-making: they are seen as the 'soft' issues of human rights and are developed through 'soft' modalities of law-making that allow states to appear to accept such principles while minimizing their legal commitments.¹⁶⁹

A consistent feature of the business and human rights debate has been the insistence by states and corporations on 'soft' or 'voluntary' forms of regulation,¹⁷⁰ and this approach has characterised the work of the SRSRG. In the same way, therefore, the human rights of those subject to corporate abuses (or business complicity in such abuses) are doubly marginalised by being treated as a soft issue and by the regulation of extraterritorial corporate activity by 'soft' law. In the end, this soft-law approach becomes binding in its result on the victims of human rights abuses.¹⁷¹

167. Buss and Manji (n 141).

168. A Rochette, 'Transcending the Conquest of Nature and Women: A Feminist Perspective on International Environmental Law' in Buss and Manji (n 141) 220–22.

169. Charlesworth and Chinkin (n 141) 66. Baxi makes reference to the hard/soft dichotomy in the context of the effects of economic globalisation, which requires both hard and soft states. A soft state or 'progressive' state 'is one that is a good *host state* for global capital ... that protects global capital against political instability and market failures ...[and one] that represents accountability *not* so much directly to its people, but one that offers itself, as a good pupil, to the World Bank and International Monetary Fund.' Hard states 'must be market-efficient in suppressing and de-legitimizing human rights-based practices of resistance or the pursuit of alternative politics. Rule of law standards and values need to be enforced by the state on behalf, and at the behest, of formations of global economy and technology. When, to this end, it is necessary for the "host" state to unleash a reign of terror against its own people, it must be empowered, locally and globally, to do so' [emphasis in original] (Baxi (n 4), 249, 252).

170. See, for example, Joint Written Statement of the ICC and IOE (n 14) 3; *Canada, Standing Committee Evidence No 32* (n 156) 10 (G Peeling) in which the president and CEO of the Mining Association of Canada testified that there already exist 'a wide range of international guidelines and standards that provide appropriate reference points for the CSR-related processes and issues'. See also Canada, 'Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector' (2009) <www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-strategie.aspx> (accessed 3 September 2011), which puts forward a voluntary self-regulation scheme for Canadian companies, with no reporting requirements or sanctions. It includes a complaints mechanism. However, the mechanism allows for investigation into allegations of human rights abuses by a Canadian company only in cases where the company consents.

171. Baxi puts it another way: '[The proponents of economic globalization, have pushed for] the creation of a borderless world for global capital, even though it stands cruelly bordered for the violated victims subject to practices of the politics of cruelty, even barbaric practices of power. Myanmar is thus borderless for Unocal though not for Aung San SuuKyì and the

6 INTERNATIONAL LAW'S INVISIBLE HAND AND THE FUTURE OF CORPORATE HUMAN RIGHTS ACCOUNTABILITY

The preceding sections suggest that the root causes of corporate impunity for violations of human rights are deeply embedded in the international legal system. International law has been used progressively since colonial times to protect and facilitate foreign investment and trade activity while at the same time undermining the ability of Third World states to control and regulate transnational corporate actors. The policies and practices of international financial institutions have played a central role in this process. In addition, the structure of international law itself and international law's relationship with domestic law are also implicated.

During his tenure, the SRSR identified certain aspects of this reality but failed to examine the deep structural roots of this problem. Ruggie's focus on state governance capacity, for example, did not lead to any meaningful consideration of the impact of the policies and practices of the World Bank and IMF, despite their important implications for human rights governance.¹⁷² His 2010 report alludes only to the human rights obligations of member states of these institutions, among others, and to the need for changes in the policies of these international organisations.¹⁷³ This recommendation is only slightly further developed in Guiding Principle 10, which states:

States, when acting as members of multilateral institutions that deal with business-related issues, should:

- (1) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
- (2) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
- (3) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

The commentary to General Principle 10, *inter alia*, reminds states that they 'retain their international human rights obligations when they participate in such institutions' and notes that 'collective action' through such international organisations 'can help States level the playing field with regard to business respect for human rights'. The commentary also suggests that 'capacity-building and awareness raising through such institutions can play a vital role in helping all States to fulfil their duty to

thousands of Burmese people she symbolizes. India is borderless for Union Carbide and Monsanto but not for the mass disaster-violated Indian community. Ogoniland is borderless for Shell but becomes the graveyard of human rights and justice movements led by Ken SaroWiwa' (Baxi (n 4), 247).

172. Some civil society organisations called on Ruggie to address this issue. See Canadian Network on Corporate Accountability, 'Submission to the UN Secretary General's Special Representative on Business and Human Rights (SRSR)' (21 July 2008), 4–5 <www.halifaxinitiative.org/updir/CNCA_statement_re_Ruggie_report-July_08.pdf> (accessed 3 September 2011).

173. SRSR, '2010 Report' (n 18) [52].

protect'.¹⁷⁴ Yet, given the role of the World Bank and IMF in undermining human rights governance capacity, Ruggie's approach to this issue appears misconceived. A significant cultural and structural transformation of these financial institutions would need to occur for these suggestions (and in particular the latter recommendation) to have any credibility.¹⁷⁵

For example, an ethnographic study of the World Bank's organisational culture by Galit Sarfaty¹⁷⁶ shows that, despite the Bank's mandate to address development and poverty reduction, there is a range of obstacles that have kept the issue of human rights marginalised within the organisation. These include the decision-making structure at, and the organisational culture of, the Bank. The Board of Executive Directors, made up of member states, acts as the policy-making organ of the Bank. Decision-making is generally by consensus. Where the member state governments fail to attain consensus they have to delegate authority to Bank officials. Human rights are an issue over which the Board has 'been deeply divided', and Bank officials have consequently been hesitant to propose a human rights agenda.¹⁷⁷ In addition, Sarfaty notes that there are perceived legal constraints in the Bank's Articles of Agreement and that efforts for reform have failed largely due to bureaucratic obstacles.¹⁷⁸ Consensus building has been difficult among Bank employees 'from different sectors and disciplinary backgrounds, who held divergent views on how to define human rights and interpret them with respect to the Bank's operations'.¹⁷⁹ Sarfaty also points to the organisational culture at the Bank, which is dominated by economists and in which the prospects for promotion are based on 'the approval of projects and the size of those projects in terms of money lent'.¹⁸⁰ Thus, the Bank's safeguard policies, (which address some human rights-related concerns) are perceived by many employees 'as impediments to lending because they add constraints to the tasks and thereby reduce efficiency and opportunities for promotion'.¹⁸¹

With respect to international economic law, Ruggie's consideration of the human rights implications of BITs and HGAs has been discussed in detail above. However, it should be noted that the work of the SRSR does not address concerns raised by the international trade regime's impact on human rights governance capacity, despite the fact that Ruggie flagged this as an issue in his 2009 Report, and stated that he was engaged in extensive consultations with experts 'on whether and how the trade

174. SRSR, 'Guiding Principles (n 19) 12. See also, SRSR, '2010 Report' (n 18) *ibid*.

175. Similarly, Ruggie has suggested that there should be policy alignment between a home state's export credit agency and its development agency. Thus, where an export credit agency (ECA) provides support for a particular project that has 'a large physical and social footprint' the host-state development agency could provide support to local authorities in managing the project (SRSR, 'Protect, Respect and Remedy' (n 20) [41]). This recommendation raises serious concerns, given the history of ECA support for projects with significant negative human rights and environmental impacts, their inadequate screening methodologies and the fact that national development agencies have a history of supporting a neo-liberal or business friendly form of 'development'. See CNCA (n 172) 3–4, above.

176. Galit A Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank' (2009) 103 *AJIL* 647.

177. *Ibid*, 655–6.

178. *Ibid*, 658–9.

179. *Ibid*, 662.

180. *Ibid*, 669.

181. *Ibid*.

regime may constrain or facilitate the State duty to protect'.¹⁸² Notwithstanding this, there was no further consideration of international trade law in the 2010 report. The Guiding Principles do not directly discuss international trade law, although they do recommend that states protect policy space 'to meet their international human rights obligations when pursuing business-related policy objectives with other States'.¹⁸³ Although, General Principle 10 would apply with respect to the WTO, there is no specific commentary on how states should go about recovering policy space constrained by the WTO agreements such as the AoA, discussed above. In his role as the SRSG, Ruggie did not publicly articulate a clear rationale for why he did not investigate the role of IFIs and the global trade regime in undermining host state governance capacity.¹⁸⁴

In his work to develop and operationalise a framework capable of increasing state governance capacity and addressing corporate impunity, the SRSG pushed back against calls for international legal obligations for business entities and cautioned that we should

resist succumbing to what ... Max Weber called a 'means-ends reversal,' turning the quest for binding legal obligations into an end in itself before sorting out what means – legal and non-legal, different bodies of law, various areas of public and self-regulation – are most promising for which contexts.¹⁸⁵

While the state obligation to protect in the SRSG's framework and Guiding Principles is anchored in international human rights law and includes both binding and non-binding norms, the norms applicable to business actors rely on soft or voluntary forms of regulation at the international level. As noted above, beyond domestic law, Ruggie's framework conceives of a moral or voluntary 'responsibility to respect human rights'.¹⁸⁶ General Principle 11 states that '[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.¹⁸⁷ To fulfil this responsibility, corporations are to develop a corporate policy commitment and to self-regulate, through corporate-defined due diligence and remediation processes.¹⁸⁸ The key elements of the human rights due diligence process are set out in General Principles 17 to 21. This process is to be ongoing and initiated at the earliest possible opportunity. It should include assessment of actual and potential human rights impacts, corporate integration and action based on the findings, tracking the effectiveness of the corporate response to the impacts and communicating on action taken to address such impacts.¹⁸⁹ In relation to impacts amounting to egregious violations of human rights, the SRSG recommends that business actors treat this risk 'as a legal compliance issue'.¹⁹⁰ Beyond voluntary observance of these principles and except where activities violate domestic

182. SRSG, '2009 Report' (n 6) [37].

183. SRSG, 'Guiding Principles' (n 19), 12, GP 9.

184. Ruggie was certainly aware of some of the implications of international economic law for human rights and governance (see Ruggie, 'Reconstituting' (n 5), 511–12).

185. SRSG, 'Remarks' (n 48).

186. The responsibility to respect consists of an obligation to do no harm. According to the SRSG this 'is not merely a passive responsibility for firms but may entail positive steps' (SRSG, 'Protect, Respect and Remedy' (n 20) [55]).

187. SRSG, 'Guiding Principles' (n 19), 13.

188. Ibid, 15. See also, SRSG, 'Protect, Respect and Remedy' (n 20) [56–9].

189. SRSG, 'Guiding Principles' (n 19), 16–20.

190. Ibid, 21.

law, compliance with such responsibilities is to be monitored and enforced by the ‘courts of public opinion’.¹⁹¹

Responding to critics, Ruggie has contended that the distinction between mandatory and voluntary obligations is misleading. For example, he asserts that ‘there is nothing “voluntary” about conducting due diligence for companies claiming to respect rights, because there simply isn’t any other way to demonstrate it. This is not a matter of law’, he argues, ‘but of logic’.¹⁹² However, it is difficult to see how, without the complement of international legal obligations, this privatised voluntary process will be significantly more effective than other voluntary self-regulation regimes in regulating and enforcing the compliance of corporations with human rights norms.¹⁹³ The articulation of the business responsibility to respect, including the components of human rights due diligence, is an important improvement on what previously existed, in so far as it creates a single universal standard and will likely ensure more universal uptake, and is, in that sense, a step forward, albeit, as this argument implies, an insufficiently progressive one. Ruggie himself remarks that the normative contribution of the Guiding Principles ‘lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template’,¹⁹⁴ thus implying (or conceding) that there is insufficient movement here beyond ‘business-as-usual’.

Indeed, the Guidelines and the follow-up mechanism endorsed by the HRC suffer from some of the same shortcomings found in other multi-stakeholder and voluntary initiatives: inadequate standards and lack of effective oversight. In a Joint Civil Society Statement to the HRC, a group of NGOs (including Amnesty International, Human Rights Watch and the International Commission of Jurists), while welcoming the progress made during the SRSG mandate, expressed concern that the Guiding Principles were a step back in some respects from the 2008 Framework. They also noted that:

[While the GPs do] provide some useful indication [*sic*] of how states and companies can begin to apply the UN Framework, [they] do not adequately reflect or address some core issues including extraterritorial obligations and responsibilities, the need for more effective regulation ... the right to remedy and the need for accountability in a manner fully consistent with international human rights standards. Thus the Guiding Principles alone cannot serve as an overarching set of standards to address the full range of business and human rights issues.

191. SRSG, ‘Protect, Respect and Remedy’ (n 20) [54]. Ruggie notes that the ‘courts of public opinion [include]’ employees, communities, consumers, civil society, as well as investors – and occasionally [compliance will be enforced by] charges in actual courts. Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations – as a part of what is sometimes called a company’s social licence to operate’ (ibid).

192. See JG Ruggie, ‘Opening Statement to UK Parliament Joint Committee on Human Rights’ Address, UK Parliament, London, United Kingdom, 3 June 2009, 2–3 <www.business-humanrights.org/Documents/Ruggie-statement-UK-3-Jun-2009.pdf> (accessed 3 September 2011).

193. Corporate actors have become very savvy in their CSR reporting. For a discussion of reporting standards and practices and their effectiveness see P Simons, ‘Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes’ (2004) 59 *Relations Industrielles/ Industrial Relations* 101.

194. SRSG, ‘Guiding Principles’ (n 19) [14].

We therefore urge that the follow-on mandate assess the implementation of the Framework as a whole with reference to the proposed Guiding Principles where relevant but also to wider standards and issue recommendations accordingly.¹⁹⁵

The HRC did not heed this advice. In its resolution adopting the Guiding Principles, it established a Working Group to follow up on the work of the SRSG.¹⁹⁶ The Working Group's mandate does not include a complaints mechanism or the power to assess the implementation and efficacy of the Guiding Principles. In a strongly worded press release, Human Rights Watch stated that in endorsing the Guiding Principles and their shortcomings and by failing 'to put in place a mechanism to ensure that the basic steps to protect human rights set forth in the Guiding Principles are put into practice ... the council endorsed the status quo: a world where companies are encouraged but not obliged, to respect human rights'.¹⁹⁷

It is important to concede that voluntary self-regulatory mechanisms and multi-stakeholder initiatives are, nonetheless, important tools with which to address corporate human rights impunity and that these softer norms and forms of regulations can offer flexibility that is not available in the development of binding legal obligations. For instance, as Mutua points out, the Special Representative on Internally Displaced Persons (IDPs) had argued that rather than pursuing a treaty or declaration that could get mired in protracted state negotiations and preclude the possibility of using the international human rights law standards to protect IDPs in the near future, developing guiding principles on IDPs would allow him to develop a normative framework relatively quickly.¹⁹⁸ As noted in section 2 above, the SRSG has made similar arguments with respect to the development of binding international obligations for corporate actors.¹⁹⁹ The point here, however, is not to dredge up the voluntary versus mandatory debate²⁰⁰ and argue for the development of international legal obligations over other non-legal means of regulation. Rather, the aim of this article is to demonstrate that binding legal obligations have an important place *alongside* voluntary or soft forms of regulation in any comprehensive framework to address corporate human rights impunity, and that the consideration of this important fact remains underdeveloped in Ruggie's approach.

195. 'Joint Civil Society Statement to the 17th Session of the Human Rights Council: Amnesty International, ESCR-Net Human Rights Watch, International Commission of Jurists, FIDH, RAID' (30 May 2011) <www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council> accessed 3 September 2011. See also FIAN, 'Resolution of Human Rights Council on Business and Human Rights Fails Victims of Transnationals' Press Release' (17 June 2011) <www.fian.org/news/press-releases/copy_of_resolution-of-human-rights-council-on-business-and-human-rights-fails-victims-of-transnationals> (accessed 3 September 2011).

196. UNHRCOR, 'Human Rights and Transnational Corporations and Other Business Enterprises' (16 June 2011) UN Doc A/HRC/17/L/17/Rev 1.

197. HRW, 'UN Human Rights Council: Weak Stance on Business Standards' Press Release (16 June 2011) <www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> (accessed 3 September 2011).

198. M Mutua, 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 HRQ 547, 560–61.

199. Ruggie, 'Treaty Road' (n 39).

200. See SRSG, 'Opening Statement' (n 194). See also M Kerr, R Janda and C Pitts, *Corporate Social Responsibility: A Legal Analysis* (Lexis Nexis, Markham 2009) 271ff, who claim that the distinction between voluntary and mandatory obligations is misconceived.

Ruggie has also called for pragmatism, 'identifying the specific attributes of the different challenges we face, laying out the full array of tools, and then selecting the ones that provide the best mix of effectiveness and feasibility'.²⁰¹ A truly pragmatic approach, however, must look carefully at the deep structural aspects of the problem. The 'Protect, Respect and Remedy' policy framework and the Guiding Principles will go some way in tackling the complex problem of corporate human rights impunity, but, as presently conceived, they fail to take into account the diminished governance capacity of Third World states, which is the result of years of intervention by international law and international financial institutions. Legal obligations are necessary in order to begin to redress the power imbalance created by these developments as well as to address the structural bias of international law.

Ruggie himself has acknowledged that 'it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations, especially where host Governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended'.²⁰² Indeed, as noted above, he recommended to the Human Rights Council that one means for clarifying the legal obligations applicable to business entities where their acts or complicity in abuses might amount to international crimes would be the development of an international legal instrument.²⁰³ While the SRSG in making these suggestions was concerned with business activity in conflict zones, situations of diminished governance capacity, such as those discussed in the preceding sections, mean that many Third World host states may be unable to fulfil their 'duty to protect'. It is clear, therefore, that in these latter situations, the current international human rights system is also dysfunctional and requires international legal measures to address this failure.

However, given that international law has been used to create an enabling and protective environment for business activity, even as it has removed governance capacity from Third World states, one might ask whether international law is an appropriate means by which to address this imbalance and to protect individuals effectively from the activities of corporate actors. TWAIL scholars are critical of the way international law has been used as a hegemonic tool,²⁰⁴ and how international human rights law itself has been co-opted in the service of economic globalisation.²⁰⁵ Indeed, as Sara Seck notes, the work of Balakrishnan Rajagopal and Anthony Anghie suggests that human rights, among other things, 'may be viewed as mass resistance that feeds international law and international institutions with a new agenda [which while] giving a human face to neo-liberal globalization ... does not challenge the underlying structure of the system'.²⁰⁶

Nonetheless, many TWAIL scholars do see the potential of international human rights law to help to reconstruct a just legal order. Indeed, Anghie and Chimni have argued that TWAIL scholars are not in a position to forgo international law despite the injustices suffered by the Third World. For TWAILers, international

201. SRSG, 'Remarks' (n 48), 6.

202. SRSG, 'Interim Report 2006' (n 17) [65].

203. SRSG, 'Recommendations on Follow-Up' (n 44), 5.

204. Chimni (n 23), 72.

205. See Gathii (n 118). See also Baxi (n 4), 252ff.

206. S Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?' (2008) 46 *Osgoode Hall Law Journal* 565, 589.

law has 'transformative potential' and they believe 'in the ideal of law as a means of constraining power'.²⁰⁷ In addition they contend that:

international law has now become an extraordinarily powerful language in which to frame problems, suggest fault and responsibility, propose solutions and remedies. International law rules matter and must be taken seriously. It is not simply a distinctive style of argumentation but has serious consequences for how ordinary people live.²⁰⁸

With respect to international human rights law specifically, Chimni has argued elsewhere that, '... even as [international human rights law] legitimizes the internationalization of property rights and hegemonic interventions, ... [i]t holds out the hope that the international legal process can be used to bring a modicum of welfare to long suffering peoples of the third and first worlds'.²⁰⁹

A small but important step towards addressing the long-standing structural bias discussed above would be to bring transnational corporate actors in from the margins; to bring them within the purview of international human rights law. The rights and protections enjoyed by these powerful actors were created by international law and facilitated by the interventions of international financial institutions. These rights are often enforceable in international arbitral tribunals. The creation of international corporate human rights obligations and effective enforcement/compliance mechanisms could go some way to addressing the structural bias created by these developments and interventions. Properly conceived, enforceable human rights obligations for corporate actors could begin to shift the balance of power between transnational corporate actors on the one hand, and Third World host states and victims of corporate human rights abuses, on the other.

7 CONCLUSION

Currently, there does not appear to be the requisite consensus among states or among business actors for developing a treaty with corporate human rights obligations. However, consensus does not simply appear. It needs to be built and nurtured. Transnational corporate actors and their home states will remain opposed to binding legal obligations as long as they are allowed to do so. Ruggie amassed significant goodwill among states and the business community during his tenure. His normative framework had been widely endorsed by these two powerful constituencies, but by limiting his recommendations to the clarification of legal norms applicable to business where they engage in behaviour that violates international criminal law norms, while at the same time cautioning against the adoption of a more general international treaty, Ruggie missed the opportunity to push states and business actors out of their comfort zone. At the very least, a statement that the necessary follow-up to his work would be the eventual development of an

207. A Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 Chinese JIL 77, 101.

208. Ibid.

209. Chimni (n 23), 73. See also B Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' in Falk *ibid* (n 107), 71, who states that human rights discourse 'can serve as an important tool in developing and strengthening a counter-hegemonic international law'.

international instrument (or a range of instruments) imposing binding obligations on corporate actors and requiring home states to regulate their corporate nationals would have helped to push the global debate forward.

There are constituencies in OECD governments that support the idea of developing legal obligations for corporate actors.²¹⁰ The UK Joint Committee on Human Rights, for example, has stated 'that an international agreement should be the ultimate aspiration of any debate on business and human rights' and has called on the UK government to work collaboratively both on the regional and global level to this end.²¹¹ In Canada, there were five private members bills before Parliament in 2010 addressing various aspects of corporate human rights accountability,²¹² and one of them, Bill C-300 (discussed above), was defeated in its third reading by only six votes.²¹³ Perhaps most importantly, some Third World members of the HRC spoke of the need for binding human rights obligations. Thus, the South African representative noted that Ruggie's Guiding Principles 'were a first and complementary step in the definition of an internationally binding framework that would require States to regulate activities of business enterprises'.²¹⁴ The Ecuadorian representative stated that his government would 'not stand in the way of consensus on ... [the HRC resolution adopting the Guiding Principles, but] the United Nations must continue to work to establish binding international legal standards to govern the activities of transnational corporations'.²¹⁵

The development of binding obligations can be incremental. There is already global recognition that corporate actors have obligations under international law not to commit international crimes, and that they can, therefore, incur international criminal liability for complicity in, or commission of, egregious violations of human rights that amount to such crimes.²¹⁶ The SRSg has recognised this liability.²¹⁷ This could serve as a starting point for an international agreement. Although the HRC did not adopt Ruggie's recommendation on clarifying these legal standards, this does not mean that this goal should not continue to be pursued.

210. The Canadian, Australian, UK and US, legislatures have considered regulation of extra-territorial corporate human rights impacts.

211. Joint Committee on Human Rights, 'Any of Our Business? Human Rights and the UK Private Sector' HC and HL (2009–2010) 1-I (The Stationery Office Ltd, London 2009) [106], <www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf> (accessed 3 September 2011).

212. See Bill C-300 (n 157); Bill C-298, An Act respecting Corporate Social Responsibility for the Activities of Canadian Mining Corporations in Developing Countries, 3rd Sess., 40th Parl., 2010; Bill C-438, An Act respecting the extraterritorial activities of Canadian businesses and entities, establishing the Canadian Extraterritorial Activities Review Commission and making consequential amendments to other Acts, 3rd Sess., 40th Parl., 2010; Bill C-571, An Act respecting corporate practices relating to the purchase of minerals from the Great Lakes Region of Africa, 3rd Sess., 40th Parl., 2010; and Bill C-354, An Act to amend the Federal Courts Act (international promotion and protection of human rights), 3rd Sess., 40th Parl., 2010 (this bill was reinstated from: 2nd Sess., 40th Parl.).

213. House of Commons, *Journals*, 40th Leg., 3rd Sess., No. 88 (27 October 2010) Division No. 125.

214. UN Human Rights Council, Information Release (n 31).

215. Mauricio Montalvo (Address to the UN Human Rights Council), (n 31). Mr Montalvo also noted that the lack of independent complaint mechanism for victims of corporate human rights abuse associated with the GPs was problematic.

216. See (n 153).

217. *Ibid.*

In addition, as discussed above, human rights obligations, as well as treaty-based compliance mechanisms, could be introduced into BITs and other international trade and investment agreements, as well as HGAs.²¹⁸ Such agreements might include specific investor human rights obligations including obligations not to commit or be complicit in human rights violations amounting to international crimes and might also include labour obligations, as well as obligations relating to environmental impact, bribery and corruption, for example. Compliance mechanisms could include requirements to ensure civil and criminal liability for foreign investors both in the home and host state, as well as a right of the host state to counterclaim in any arbitral proceeding initiated by an investor corporation where that corporation has allegedly violated its obligations under the treaty.²¹⁹ These incremental steps would also help to build international consensus for a broader multilateral agreement.

The problem of corporate impunity for extraterritorial human rights violations is deeply complex and needs to be tackled creatively and intelligently at a variety of jurisdictional and normative levels. The SRSB has made significant inroads on a number of fronts. Nevertheless, binding international human rights obligations for transnational human rights actors must form a part of the global strategy going forward. Robert McCorquodale has noted that '[t]here are many methods of regulation ... [but] regulation without law and legal compliance mechanisms is rarely effective as a means of long-term social, economic or public behavioural change'.²²⁰ Without engaging international law as an integral part of the strategy to address corporate human rights impacts and accountability, as well as state governance capacity, there remains the fear that, despite some changes in state policies, business policy, due diligence and reporting, we will more or less continue business as usual.

218. These types of provisions in HGAs would obviously be contractual and not based in international law but would serve the same function of addressing the power imbalance between investors and host states.

219. For a full discussion of the scope and content of these types of provisions see VanDuzer et al., 'Commonwealth Guide' (n 76) 83ff, above. In addition to these types of obligations and compliance mechanisms, core investor protection provisions such as those relating to national treatment, most favoured nation treatment and expropriation found in BITs and other international investment agreements can be modified to ensure that they do not preclude the introduction of non-discriminatory regulatory measures designed to achieve the protection of human rights (ibid, 38–45, 54–7, 109–10).

220. R McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (2009) 87 *Journal of Business Ethics* 385, 385.