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The Crisis of International Human Rights Law in the Global Market Economy

Daniel Augenstein

European University Institute
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Abstract

The article argues that the facticity of the human rights impacts of economic globalisation increasingly undermines the normativity of the state-centred conception of international human rights law. The exposure of the international legal order of states to the operations of global business entities leads to a collusion of sovereign state interest and globalised corporate power at the expense of protecting the rights of victims of human rights violations. The article scrutinises two prominent attempts to address this lacuna of protection: transnational tort litigation and the UN Guiding Principles on Business and Human Rights. It is argued that both approaches are not only an expression of the present crisis of international human rights law but also risk contributing to its perpetuation. While the 'escape into tort' results in the privatisation of public human rights in the global market economy, the UN Guiding Principles entrench their territorialisation in the state legal order in the face of global economic challenges. The concluding section reflects on the future pathways of international human rights law by positing a choice between, on the one hand, a more radical departure from human rights' state-centred heritage and, on the other hand, a transformation of the international legal order of states by virtue of human rights. It highlights the importance of extraterritorial human rights obligations in recovering the state's legal accountability for human rights violations committed in the course of global business operations.

Keywords

Human rights; Business; Globalisation; Extraterritorial; UN Guiding Principles on Business and Human Rights; Tort; Governance

1. Human Rights and Business[*]

The past decade has seen an increasing public awareness of the detrimental impacts of global business operations on international human rights protection. The devastating effects of oil-drilling and gas-flaring activities by Europe and U.S.-based multi-national corporations on people and habitat in Africa and South-America are well-known and make the news at fairly regular intervals. Something similar may be said for human rights violations committed by private military contractors to protect foreign investment, or for the land-grabbing, environmental degradation and displacement of indigenous people involved in major infrastructure projects led by international consortiums. As people in the developed world become increasingly concerned about child labour and health and safety conditions in, say, the global textile and microchip industry, some businesses in developing and under-developed countries build new 'showcase factories' within easy reach of large airports to pacify international observers and satisfy enlightened Western consumer interest. Human rights defenders and trade union activists tirelessly expose best and worst corporate practices in the most remote corners of the globe, banks advertise with new socially responsible investment strategies, corporations pledge to codes of conduct saturated with human rights commitments, and states undertake to better educate 'their' businesses in human rights matters when operating abroad. In short, 'business and human rights' is on the march, not the least due to the influential work of Professor John Ruggie who was appointed Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business entities (SRSG) in 2005.

The SRSG was tasked to, *inter alia*, 'identify and clarify standards of corporate responsibility and accountability for TNCs [transnational corporations] and other business enterprises with regard to human rights'; and 'elaborate on the role of states in effectively regulating and adjudicating the role of TNCs and other business enterprises with regard to human rights, including through international cooperation'.[1] In the course of his mandate that culminated in a set of Guiding Principles on Business and Human Rights (UN Guiding Principles) endorsed by the UN Human Rights Council in June 2011,[2] the SRSG collected rich empirical evidence of the cross-cutting and trans-boundary nature of the business and human rights challenge: while business operations can impact on virtually all internationally recognised human rights across the civil/political – social/economic/cultural divide, states need to mainstream human rights concerns into all business-related legal and policy domains, both internally and externally. To meet this challenge, the SRSG developed a 'protect, respect, remedy' framework of complementary and interlocking human rights duties and responsibilities of states and business entities structured around three pillars: the state duty to protect human rights against violations by corporations through appropriate policies, regulation, adjudication and enforcement measures; the corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedies, both judicial and non-judicial, for corporate human rights violations.

This contribution argues that whereas the SRSG has been remarkably successful in forging a new political allegiance between states, business entities and civil society organisations to attend to the

[*] Parts of the research in preparation of this article were conducted during a fellowship at the Robert Schuman Centre for Advanced Studies at the European University Institute Florence, whose support I gratefully acknowledge. Earlier drafts of the article were presented at the University of Edinburgh's Scottish Centre for International Law, a Pufendorf Research Seminar at Lund University, and Tilburg's Research Colloquium of Legal Philosophy. I am indebted to participants in these events for their helpful comments and suggestions.

1 H. R. C., Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Dec/2004/116 (20 April 2004).

2 H. R. C., Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework, U.N. Doc A/HRC/17/31 (21 March 2011), hereinafter 'UN Guiding Principles'.

'business and human rights predicament',[3] the UN Guiding Principles are also the expression of a persisting failure of the international community to address the root causes of this predicament *in international law itself*. In a nutshell, the exposure of the international legal order of states to the operations of global business entities leads to a collusion of sovereign state interest and globalised corporate power to the detriment of victims of human rights violations. This collusion is rooted in a tension between the global human rights impacts of states' business-related domestic and foreign policies and their sovereign territorial rights to independently conduct their domestic and foreign affairs. On the one hand, global business operations privatise and de-territorialise the human rights impacts of state action. On the other hand, international law fails to address these impacts because it confines human rights obligations to public and territorial states. The limitations of the state-centred conception of international human rights law are clearly visible in the SRSG's approach to business and human rights. Whereas the traditional preoccupation of human rights with protecting individuals against the public power of the state is increasingly overshadowed by concerns about private power that coalesces around global business entities, the SRSG's 'corporate responsibility to respect' lacks binding legal effect as 'respecting rights is not an obligation that current international human rights law generally imposes on companies'.[4] Relatedly, the SRSG's own research shows that today the vast majority of corporate human rights violations is committed in under-developed and developing countries by business entities that are based in, and remain controlled from, states in the developed world.[5] Yet the UN Guiding Principles confine the 'state duty to protect' to violations committed on the state's territory as its extraterritorial application remains 'unsettled' in international law.[6]

Section two sketches out two consequences of the exposure of the international legal order of states to the operations of global business entities: the erosion of the substance of legal authority that states wield over their territory; and the expansion of state power beyond their borders. Section three revisits the 'Bhopal tragedy' to illustrate how these developments result in a legal disempowerment of victims of human rights violations. Sections four and five argue that prominent attempts to address this lacuna of protection – the vindication of human rights values through trans-national tort litigation and the transition from territorialised human rights law to global human rights governance – are as much an expression of the present crisis of international human rights law as they contribute to its perpetuation. While the escape into tort propels the privatisation of human rights in the global market economy, the turn to governance entrenches their legal territorialisation within the state in the face of global economic challenges. The concluding section reflects on the future pathways of international human rights law by positing a choice between, on the one hand, a more radical departure from human rights' state-centred heritage and, on the other hand, a transformation of the international legal order of states by virtue of human rights. It highlights the importance of extraterritorial human rights obligations in recovering the state's legal accountability for human rights violations committed in the course of global business operations.

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3 Indeed, the endorsement of the Guiding Principles by the UN Human Rights Council marks that first time that UN member states have agreed on a common position laying down standards of expected behaviour from business in relation to human rights.

4 H. R. C., Business and Human Rights: Further Steps towards the Operationalization of the 'Protect, Respect, Remedy' Framework, UN Doc A/HRC/14/27 (9 April 2010) para. 4.

5 H. R. C., Interim Report, UN Doc E/CN.4/2006/97 (22 February 2006).

6 H. R. C., Business and Human Rights: Towards Operationalising the 'Protect, Respect, Remedy' Framework, UN Doc A/HRC/11/13 (22 April 2009) para. 15.

2. The International Legal Order of States and the Challenge of Corporate Power

Early on in his mandate, the SRSG defined the challenge that the operations of global business entities pose to the international protection of human rights:

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalisation – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.[7]

If read in isolation, this account of the corporate challenge may suggest that globalisation simply 'happens' to the state and its (domestic and international) human rights law.[8] The relationship between the 'scope and impact of economic forces and actors' and the 'capacity of societies to manage their adverse consequences' appears asymmetrical: globalisation 'creates' governance gaps and 'provides' the permissive environment in which corporations violate human rights. This resonates with broader narratives that associate economic globalisation – the increased interdependency of public and private actors across national-territorial borders brought about by global economic cooperation and competition[9] – with the demise of the sovereign state.[10] From a domestic point of view, economic globalisation erodes the substance of legal authority that states wield over their territory. Global business operations escape the regulatory grasp of territorial states while at the same time limiting states' ability 'to set the social, economic and political agenda within their respective political space', and therewith their capacity 'to secure the livelihoods of their respective citizens by narrowing the parameters of legitimate state action'.[11] Internationally, economic globalisation transforms states' external relations with each other. As de Feyter says, 'companies that organise across borders define the primary role of a state in terms of creating a space for the play of market forces. Not only should a state adopt a market-based system within its own territory ..., the same system should apply to economic relationships *among* countries'.[12] Economic globalisation asserts pressure on developed states to create a global 'level playing field' for their corporate nationals by further dismantling legal barriers to the free flow of capital, production and labour in the developing world. At the same time, developing states will be reluctant to raise national standards of social and environmental protection for fear of losing their competitive advantage in attracting foreign investment in the global market.

Granted that global business entities are important agents of economic globalisation, it would nevertheless be reductive to simply characterise the business and human rights predicament as a corporate takeover of the international legal order of states. Arguably, the rise of corporate power

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7 H. R. C., Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc. A/HRC/8/5 (7 April 2008) para 3.

8 The first pillar of the SRSG's 'Protect, Respect and Remedy' Framework gives due consideration to the role of states in protecting and violating human rights in relation to global business entities, see UN Guiding Principles (n 2) and further below.

9 See, e.g., UNGA, Report of the UN Secretary General, Globalisation and its Impact on the Full Enjoyment of All Human Rights, UN Doc A/65/171 (26 July 2010).

10 For an insightful contribution that investigates the ramifications of an emerging global 'economic citizenship' attributed to trans-national firms on sovereignty and exclusive territoriality as foundational pillars of the modern state see S. Sassen, *Losing Control? Sovereignty in an age of globalisation* (Columbia University Press: 1996); more specifically on the relationship between economic globalisation and the state-centred conception of international human rights law, see K. de Feyter, *Human rights: social justice in the age of the market* (Zed Books: 2005).

11 C. Thomas, 'International financial institutions and social and economic rights: an exploration', in T. Evans (ed.), *Human rights fifty years on: a reappraisal* (Manchester University Press: 1998) 161, 163.

12 See De Feyter (n 10) 11.

transforms, rather than marginalises, the role of sovereign states in the global market economy.[13] (Constituent parts of) global business entities continue to operate in the shadow of the territorial state legal order. 'Multi-national' corporations remain subject to the domestic laws of the states in which they reside, and often rely on these laws for the regulation and enforcement of their business transactions. Moreover, rules on extraterritorial jurisdiction under public and private international law can tie globalised corporate power back to the regulatory authority of the territorial state.[14] Hence, as Robert Wai perceptively notes, debates on (extra-) territorial corporate regulation will often turn less on *whether* the state should or could regulate than on *what interests* should be regulated:

> Predictably, the same parties which advocate an active governmental role in defending strong property rights and contractual enforcement in new areas of intellectual property and e-commerce across borders are often equally concerned to argue that governments not 'interfere' with the development and freedom of these realms through laws that regulate with respect to matters such as taxation, content (including pornographic and racist material), viewership, or the like.[15]

The flip side of this transformation of the role of the state is that increased global economic cooperation and competition enables governments to utilise the (legal) control they continue to exercise over their corporate nationals at home and abroad to assert power beyond their borders. The operations of global business entities amplify the impacts of states' business-related domestic laws and policies on individuals in other states.[16] Moreover, they enhance states' opportunities to use their corporate nationals to pursue foreign policy objectives.[17] Consider by way of example the recent U.S. government approach to 'economic statecraft':

> In increasingly competitive and dynamic circumstances, the U.S. government recognises the valuable contributions that the private sector can make in promoting key U.S. foreign policy objectives, including economic inclusion, respect for labour and human rights, and environmental protection. The State Department is using all the tools at its disposal to support U.S. economic priorities, which at the same time foster global peace, stability, security and prosperity. In part, that means crafting policies that help create – and sustain the growth of – well-paying, productive American private sector jobs. It means elevating and updating commercial diplomacy to attract investment in America and ensure U.S. companies can invest on fair terms in overseas markets. Running throughout much of the economic statecraft agenda is the need to identify and respond to a set of strategic challenges posed by state capitalism, including the ability and willingness of some states to distort markets to achieve strategic aims.[18]

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13 Muchlinski, for instance, suggests that economic globalisation diffuses the traditional state-centred focus of international relations into a transnational 'tripartite system of international interactions' involving 'the relations of governments to governments, governments to corporations [and other non-state actors], and corporations to corporations', see P. Muchlinski, *Multinational enterprises and the law* (OUP: 2007, 2nd edn.) 82.

14 For an overview of state practice on extraterritorial jurisdiction, see J. Zerk, 'Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas', *Corporate Social Responsibility Working Paper No 59* (Harvard Corporate Social Responsibility Initiative: 2010).

15 R. Wai, 'Transnational lift-off and juridical touchdown: the regulatory function of private international law in an era of globalisation', 40 *Columbia Journal of Transnational Law* (2002) 209, 266.

16 For example, when applied to global business entities the doctrine of separate legal personality regulated by states' domestic corporate laws has significant impacts on human rights protection in other states as it creates a presumption of non-liability of constituent parts of the corporation operating in different territories for wrongful acts committed by other members of the corporate group.

17 States' instrumentalisation of corporate power in foreign relations is by itself not a new phenomenon. Well-known examples include attempts of the U.S. Government to order an American parent corporation to halt sales of its French subsidiary into the People's Republic of China in the 1960s; and to prevent European subsidiaries of U.S. corporations, and European corporations using U.S. technology, from exporting equipment for the construction of a pipeline carrying gas from the USSR to Western Europe in the 1980s, see further Muchlinski (n 13) 130-132.

18 U.S. Department of State, Bureau of Democracy, Human Rights and Labour, U.S. Government Approach to Business and Human Rights (1 May 2013).

In short: states have an economic self-interest in supporting the global operations of their corporate nationals, which combines with their political self-interest in using corporate power to pursue their foreign policy objectives, including the protection of human rights.

At first sight, one may find little fault in states using corporate power to promote human rights in other states. However, the underlying 'business case' for human rights that is advanced in response to economic globalisation in effect risks surrendering the state-centred conception of international human rights law to the 'laws' of the global market.[19] The global human rights impacts of states' 'privatised' domestic and foreign policies *de facto* undermine the principle of state sovereignty that once justified the territorialisation of human rights in the state legal order. At the same time, these human rights impacts are not mitigated by corresponding state obligations to respect, protect and fulfil the rights of third-country victims of corporate power. Rather, state sovereignty resurfaces in shielding public authorities from *de lege* accountability for human rights violations committed by (constituent parts of) their corporate nationals in other states. Hence, below the surface of 'governance gaps' lies another 'business and human rights predicament' that is rooted in the *interrelation* of the international legal order of states with the global market economy and that unleashes the human rights impacts of global business operations from the constraining force of international human rights law. From Colombia to the Philippines, the crisis of international human rights law is the crisis of the victims in 'weak' host states of corporate investment that lack the capacity (and at times also the willingness) to protect human rights against business operations conducted with the active support or passive connivance of 'strong' home state governments.

3. Bhopal

The Indian city of Bhopal is remembered for one of the worst industrial accidents in recent human history that killed some 10.000 people and left more than 500.000 injured – estimates vary. Today, 'Bhopal' has become a paradigmatic example of the challenges that the operations of global business entities pose to the international protection of human rights.[20] In the night of 2/3 December 1984, a chemical plant operated by Union Carbide of India Limited (UCIL), a corporation jointly owned by the U.S.-based Union Carbide Corporation (UCC) and the Indian government, leaked massive amounts of toxic gas after water and other impurities had entered one of the plant's methyl isocyanate (MIC) storage tanks.[21] Before starting business in India, UCC had negotiated an exemption from Indian law limiting foreign investment in Indian corporations in order to acquire a controlling interest (50.9 %) in UCIL. While the course of events that led to the contamination of the tank remains contested, it transpired that UCC's centralised control- and decision-making powers over its Indian subsidiary did not translate into a diligent management of the plant necessary for its safe operation.[22] A series of previous incidents and operational surveys suggest that UCC was aware of major safety hazards at the plant site. Moreover, there is evidence that the operational and safety standards at

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19 On the emerging market contingency of international human rights law see P. Alston, 'The myopia of handmaidens: international lawyers and globalisation', 3 *European Journal of International Law* (1997) 435, 442-43.

20 For a recent critical re-assessment see S. Deva, *Regulating corporate human rights violations* (Routledge: 2012).

21 The following summary draws mainly on Muchlinski (n 13), Deva (n 20), U. Baxi & A. Dhanda (eds.), *Valiant victims and lethal litigation: the Bhopal Case* (N. M. Tripathi Pvt. Ltd.: 1990), and Amnesty International, 'Clouds of Injustice: Bhopal Disaster 20 Years On' (London: 2004). The corporation's view can be retrieved from http://bhopal.com.

22 Pursuant to its Corporate Charter, UCC's management system was designed 'to provide centralised integrated corporate strategic planning, direction and control; and decentralised business strategic planning and operating implementation', see further P. Muchlinski, 'The Bhopal case: controlling ultra-hazardous industrial activities undertaken by foreign investors', 50 *Modern Law Review* (1987) 545, 570-72. Muchlinski summarizes the plaintiff's evidence to this effect as follows: '[c]ontrol of subsidiaries is achieved … through ownership of shares, a matrix system of reporting, that requires the subsidiary to inform management at all levels of the organisation of activities, and by the presence of Union Carbide representatives on the subsidiary's board of directors.'

Bhopal were considerably lower than those employed in another UCC plant located in West Virginia, United States.[23] Unlike in the U.S., there was a mismatch between the Indian plant's high production capacity and low processing capacity of MIC, resulting in the storage of large quantities of the toxic substance over long periods of time. Parts of the technology transferred by UCC were allegedly not proven and the tank's cooling system, as well as the monitoring of the plant's instruments and processes, did not live up to the Virginia standards. Cost-cutting measures implemented one year prior to the accident further eroded the safety standards. If the training of staff had always been poor, skilled workers were now replaced by cheap labour and specialised personnel were moved around the plant to compensate for the shortage in manpower. Whereas the Virginia plant had a sophisticated emergency plan and system in place to alert public authorities and local communities of toxic emissions, in Bhopal a loud siren and MIC clouds arriving over the working class neighbourhoods built up to the factory walls did the job.

To the present day, the Bhopal tragedy stands out on two accounts: a massive and large-scale violation of human rights implicating one of the most powerful chemical multi-nationals; and a pervasive failure of the victims to obtain effective redress in India as well as in the United States. The gas leakage directly impaired, at a minimum, the Bhopal inhabitants' right to life and physical integrity, their rights to health and an adequate standard of living, their right to freedom from discrimination (particularly on grounds of gender), and their right to an effective remedy. Estimates of the death toll in the immediate aftermath of the leakage range from 2000 to 7000 people, and many more were to die in the weeks to come. Two thirds of the total population of Bhopal was affected by the toxic gas,[24] with many incurring chronic and debilitating diseases treatment of which often proved ineffective. The environmental pollution emanating from the plant before, during, and after the gas leakage had further adverse effects on people's enjoyment of their human rights. In a judgment of May 2004, the Supreme Court of India stated that as a consequence of 'indiscriminate dumping of hazardous waste due to non-existent or negligent practices together with lack of enforcement by the authorities, the groundwater, and, therefore, drinking water supplies have been damaged'.[25] The gas leakage and environmental pollution disproportionately affected the poorest and most vulnerable parts of the population. As an Amnesty International report concludes, 'it is clear that the gas leak radically altered the social fabric and economics of everyday life, and entrenched existing poverty and social disempowerment.'[26]

The scale and gravity of the human rights violations committed at Bhopal stands in sharp contrast with the inability of the victims to obtain effective redress. As Baxi says, the subsequent legal proceedings in the United States and India led to a 're-victimisation of the Bhopal victims' as they failed to produce any determination of the cause of the catastrophe; any declaration of legal liability; and 'any compensation/damages based on access to all relevant information about the post-catastrophe past, present, and future of men, women and children colonized by the MIC and related toxic substances'.[27] Having regard to UCIL's limited assets and concerned about the capacities of the Indian judicial system to handle a case of such magnitude, the victims and the Indian government opted for suing the U.S. parent corporation (UCC) in the United States. The U.S. District Court dismissed the lawsuit on grounds of *forum non conveniens* on the condition that UCC submitted to the jurisdiction of

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23 See Amnesty International (n 21) and Deva (n 20) chapter 3, with further references.

24 As estimated by the Government of Madhya Pradesh's Bhopal Gas Tragedy Relief and Rehabilitation Department, http://www.bhopal.net/oldsite/depbhopalgas.html.

25 Order of the Supreme Court of 07 May 2004, as cited in Amnesty International (n 21) 26.

26 Amnesty International (n 21) 18.

27 U. Baxi, 'Introduction', in U. Baxi & A. Dhanda (eds.), Valiant victims and lethal litigation: the Bhopal case (N.M. Tripathi Pvt. Ltd: 1990) i, ii-iii.

the Indian courts.[28] The ensuing lengthy and protracted litigation in India confirmed the plaintiffs' concerns about the inadequacy of the Indian forum. With the 'Bhopal Act',[29] the Indian government assumed the exclusive right to litigate on behalf of the victims, and initiated proceedings in the District Court of Bhopal in September 1986.[30] Before the Indian court, UCC contested that there was 'a concept known to law as "multi-national corporation"', and that it had any decisive influence over what it considered a domestic enterprise (UCIL) regulated and controlled by the Indian public authorities.[31] The case was never judged on its merits. Instead, in two orders of 14 and 15 February 1989, the Indian Supreme Court approved an out-of-court settlement between UCC and the Indian government concluded without participation of the victims.[32] The terms of the settlement order repudiated UCC's putative legal liability and bestowed upon the multi-national corporation without legal personality (UCC; UCIL; Union Carbide Eastern, Hong Kong; all of their subsidiaries and affiliates; and each of their present and former directors, officers, employees, agents, representatives, attorneys, advocates, and solicitors) sweeping legal immunities for all past, present and future claims, causes of action and civil and criminal proceedings *vis-à-vis* all Indian citizens and all public and private entities. Attempts of victims' representatives to overturn the settlement in Indian and U.S. courts failed.

From the late 90s to the present, a multitude of further 'Bhopal' cases have been brought in U.S. courts – thus far with little success.[33] In June 2013, the U.S. Court of Appeals for the Second Circuit put an end to a decade of tort litigation against UCC in an attempt to recover from injuries caused by exposure to soil and drinking water polluted by hazardous wastes emanating from the UCIL plant.[34] The Court recognised that plaintiffs 'may well have suffered terrible and lasting injuries from a wholly preventable disaster for which someone is responsible.'[35] Yet, while it was 'beyond dispute that UCIL generated and disposed of the waste which allegedly polluted Plaintiffs' drinking water',[36] the court found insufficient evidence to hold UCC either directly or indirectly liable for the damage.[37] In February 2001, UCC had become a wholly owned subsidiary of the Dow Chemical Company (Dow). Pursuant to the Merger Agreement, UCC did not face at the time of the merger, and was not expected to face in the future, any civil, criminal or administrative charges, which, individually or cumulatively, were 'reasonably likely to have a material adverse effect on it'.[38] While Dow regrets the Bhopal 'tragedy', it cannot accept responsibility for UCC's undischarged liabilities to which it had 'no connection', as it must strongly object on grounds of 'principles of the rule of law, due process and fundamental fairness' to attempts of the Indian government to re-open the 1989 settlement: 'The

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28 *In Re Union Carbide Gas Plant Disaster at Bhopal India*, Opinion and Order, 12 May 1986, 634 F Supp. 842 (SDNY 1986), reported in 25 ILM 771 (1986). The decision was upheld by U.S. Court of Appeals for the Second Circuit, 809 F 2d 195 (USCA 2d Cir), reported in 26 ILM 1008 (1987).

29 Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (No. 21 of 1985).

30 Union of India's Plaint in Regular Suit No 1113/86, reprinted in Baxi & Dhanda (n 21) 3-12.

31 See Baxi (n 27) xiv.

32 Union Carbide Corporation v Union of India AIR 190 SC 273.

33 For an overview see Deva (n 20) 42-44.

34 United States Court of Appeals for the Second Circuit, *Sahu et al v Union Carbide Corp. et al*, No. 12-2983-cv, 27 June 2013 (hereinafter *Sahu I*). *Sahu* took its beginnings in a class action filed in 1999 that was dismissed *inter alia* on grounds of the expiration of the statute of limitations. See *Bano v United Carbide Corporation*, No. 99 Civ. 11329, 2003 WL 1344884, 18 March 2003. Sahu and other plaintiffs whose claims were not barred filed a new case in the Southern District of New York in November 2004. After years of protracted litigation, the District Court for the Southern District of New York granted plaintiff's motion for summary judgment, see *Sahu et al versus Union Carbide Corporation et al*, No. 04 Civ. 8825 (JFK) (hereinafter *Sahu II*).

35 See *Sahu I* (n 34) 9.

36 See *Sahu II* (n 34) 26.

37 See *Sahu I* (n 34).

38 Article V Merger Agreement, as cited in Amnesty International (n 21) 55-6.

Government's ill-advised action puts at peril the image of India as a nation committed to promoting and adhering to accepted legal principles and the rule of law, with the inevitable result that confidence in investing in India will be undermined.'[39]

4. The 'Escape' into Tort

Dow's insistence on 'due process' and the 'rule of law' serves as a useful reminder that the state of India was implicated in Bhopal not only in its capacity as a party to a private tort litigation, but also in its capacity as a public and political institution acting in the name and on behalf of the people of India. Indeed, given the significant role the acts and omissions on the part of India and the United States played in the fate of the victims, it would be mistaken to simply shrug off Bhopal as a corporate disaster. Before the U.S. and Indian courts, UCC alleged joined liability of the Indian government, the State of Madhya Pradesh and the Municipality of Bhopal for having authorised the design, construction and operation of the plant without proper assessment of its hazardous nature and the safety measures provided; for having allowed residential slums to develop around the plant site; and for having failed to implement and enforce existing health, safety and environmental regulations, amongst others because the public agencies in charge were seriously understaffed.[40] The Indian state also contributed to inhibiting victims' access to justice. The government's Bhopal Act – initially justified on grounds of ensuring their quick and equitable compensation – in effect deprived victims of their right to sue and was later challenged in the Supreme Court of India for violating their constitutional rights.[41] The 1989 settlement concluded without their participation impeded the victims' quest to hold those responsible legally to account – for the mutual benefit of UCC that never admitted to legal liability and the Indian state that did not see its own regulatory failures exposed. The United States, in turn, did nothing to regulate, control and adjudicate activities of UCC on its own territory in relation to the Bhopal plant. The U.S.-based parent corporation had designed the plant on U.S. soil, had furnished it with allegedly dangerous technology from the U.S., and had failed to equip it with safety standards comparable to those at its Virginia production site. Moreover, it was UCC's headquarters in Connecticut that directed the operations of its Indian subsidiary; that determined the corporation's overall policy; and that took the key strategic decisions, including those that led to the implementation of cost-cutting measures at Bhopal one year prior to the industrial accident.[42] Finally, it was the U.S.-based parent corporation that cut the settlement deal with the Indian state for the benefit of the whole corporate group, which U.S. courts later refused to review on jurisdictional grounds.

Despite the considerable involvement of Indian and U.S. public authorities in the industrial accident that seriously impaired Indian citizens' enjoyment of their human rights, Bhopal does not easily lend itself to a human rights law analysis. That is to say, while Bhopal illustrates the potential and pitfalls of private litigation in vindicating interests and values embodied in human rights such as health or physical integrity,[43] it is less obvious what human rights *law* has to contribute to Bhopal. The public and territorial limitations of the state-centred conception of international human rights law translate into a corresponding paramountcy of private and trans-national tort litigation, leaving victims

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39 The Dow Chemical Company, Dow will Object to Government of India's Request to Reopen Bhopal Settlement (28 February 2011), http://www.dow.com.

40 See Muchlinski (n 22) 575-78; Deva (n 20), with further references.

41 Charan Lal Sahu v Union of India, AIR 1990 SC 1480.

42 Deva (n 20) 28.

43 In this sense Deva, who argues that 'human rights, or at least the underlying interests, could be protected through non-human rights laws' including tort, and notwithstanding the conceptual differences between them, see Deva (n 20) 34.

with little other hope for effective redress.[44] The fact that the principal protagonists of the tragedy – a corporation that causes damage to natural persons as injured parties – were private actors seems to entail that the shortcomings in public regulation should be subsumed to a 'massive tort'. Moreover, the fact that the industrial accident implicated a 'multi-national' corporation seems to suggest that jurisdictional conflicts between public courts fall exclusively within the domain of private international law. However, and apart from the legal-doctrinal hurdles and practical problems (most prominently money, time and evidence) that victims litigating against global business entities have to overcome, as abundantly illustrated by Bhopal, there are weighty normative reasons against *assimilating* or *reducing* public human rights to private tort. The 'escape' into tort propels the privatisation of human rights in the global market economy and severs their connection to the public good once vested in the sovereign state legal order. At the same time, states' insistence on their sovereign territorial rights impede victims quest for justice *via* trans-national tort litigation.

It is debatable whether the rationale of, and remedies provided by, tort law can fully do justice to human rights. Its focus on monetary compensation for damages caused to persons and property can vindicate some, but certainly not all, fundamental interests protected by human rights law. At the same time, tort law generally only vindicates those interests that are quantifiable in monetary terms. One reason why tort law is both attractive to redress *corporate harm* to human rights and unattractive to redress corporate harm to *human rights* is that it mimics the logic of market transactions.[45] If the corporate business case for human rights is thought to rest on maximising shareholder 'value' (read: profit),[46] the monetary compensation of 'stakeholders' (read: victims) appears an appropriate remedy. However, and put crudely, this transmutation of human rights violations into pecuniary damages risks to render corporate respect for human rights contingent on the financial losses incurred in their violation, which may falsely suggest that human rights were just another market commodity – for sale at the highest bid. From there it is but a small step to surrendering the inviolability of human dignity, the categorical prohibition of torture, or the protection of freedom of expression as 'one of the essential foundations of a democratic society'[47] to a litmus test of their market-friendliness. Yet, while for corporate perpetrators, human rights violations pay off all too often, for the victims the suffering involved in the violation of their most fundamental interests is something that money cannot offset. Below the surface of this 'value for money' problem lingers an ethical and political concern with the proclaimed 'equal and inalienable rights of all members of the human family'.[48] As Anderson says, the problem with 'tort-based approaches to valuation' that treat human injury and death 'as a cost of production' is that

> [o]ur ethical understanding of human life is not purely market-based. There is another legal principle at work, which is based on the sanctity of human life and the idea that each human being is entitled to an equal measure of dignity and respect, regardless of sex, age, nationality, race, or other status.[49]

The privatisation and trans-nationalisation of human rights through tort is meant to remedy the shortcomings of their legal compartmentalisation within and between sovereign state entities. Yet this

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[44] P. Newell, 'Managing multinationals: the governance of investment for the environment', 13 *Journal of International Development* (2001) 907, 908.

[45] Which is true most forcefully but by no means exclusively of those approaches that view tort law as a tool of wealth maximisation, see R. Posner, 'Wealth maximisation and tort law: a philosophical inquiry', in D. Owen (ed.), *Philosophical foundations of tort law* (Clarendon Press, Oxford: 1995) 99–112.

[46] One of the best-known accounts of corporations as profit-maximising entities is still M. Friedman, *Capitalism and freedom* (University of Chicago Press: 1965).

[47] This is the standard formula of the European Court of Human Rights, see e.g. E. Ct. H. R., *Lingens v Austria* (Judgment of 8 July 1986) para 41.

[48] Preamble of the Universal Declaration of Human Rights, GA Res. 217A (III), U.N. Doc A/810, 71 (1948).

[49] M. Anderson, 'Transnational corporations and environmental damage: is tort law the answer?', 41 *Washburn Law Journal* (2001) 399, 421.

remedy is bought at the price of demoting the public and political thrust of human rights law into a private and 'bilateral' relationship between victim and tortfeasor.[50] Moreover, this approach obscures the way in which public human rights law (ought to) reign over private litigation. It is one (important) concern whether, as alleged by UCC during the Bhopal litigation, the Indian government should be held liable in tort for its own regulatory failures. It is quite a different concern what obligations international human rights law imposes on India and the United States to respect, protect, and fulfil the rights of the Bhopal victims.

Territorial state sovereignty resurfaces in the domestication of private international law that inhibits victims' access to justice in home states of corporate operations. As Muir Watt says,

> [i]t is through the assertion of territoriality as a governing principle that private international law has been complicit in preventing the assertion of transnational corporate social responsibility. It has kept corporate liability within the limits of compartmentalised, local law through both *forum non conveniens* and the *lex loci delicti*.[51]

Before the U.S. District Court, the Bhopal victims contended that UCC was a 'monolithic multinational' which 'controlled the design, construction and operation of the Bhopal plant through its global network of corporate planning, direction and control'; and that the United States had a public interest in encouraging 'American multinationals to protect the health and well being of peoples throughout the world'.[52] Yet, despite the fact that the government of India had pressed for litigation in the United States, the U.S. District Court concurred with UCC's view that India's sovereign regulatory interest in the chemical accident and the ensuing judicial proceedings outweighed the U.S. interest in controlling the operations of American corporations abroad.[53] The recent U.S Supreme Court judgment in *Kiobel* is a fine illustration of how concerns with public state sovereignty serve to curtail assertions of extraterritorial jurisdiction over private conduct impairing human rights.[54] The case was brought under the Alien Tort Claims Act (ATS) by Nigerian plaintiffs alleging that Anglo-Dutch Shell had aided and abetted the Nigerian military dictatorship in the 1990s in committing gross human rights violations. The Supreme Court considered that the ATS entailed a 'presumption against extraterritorial application' which could only be rebutted if 'claims touch and concern the territory of the United States ... with sufficient force'.[55] Mere 'corporate presence' of the defendant on U.S. soil is not enough.[56] This presumption against extraterritoriality is to guard U.S. courts against 'imposing the sovereign will of the United States on conduct occurring within the territorial jurisdiction of another sovereign', which can lead to clashes between U.S. laws and the laws of other nations and result in 'international discord';[57] against 'the danger of unwarranted judicial interference in the conduct of foreign policy', which would impinge 'on the discretion of the Legislative and Executive Branches in managing foreign affairs';[58] and against putting U.S. citizens at risk of equally being dragged into foreign courts for human rights violations 'occurring in the United States or anywhere else in the

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50 J. Klabbers, 'Doing the right thing? Foreign tort law and human rights', in C. Scott (ed.), *Torture as Tort* (Hart: 2001) 553, 558-59.

51 H. Muir Watt, 'Private international law beyond the schism', 2 *Transnational Legal Theory* (2011) 347, 386.

52 Plaintiff's Executive Committee Memorandum in Opposition to Union Carbide Corporation's Motion to Dismiss on grounds of Forum Non Conveniens, 6 December 1985, as cited in Muchlinski (n 13) 155.

53 *In Re Union Carbide Gas Plant Disaster at Bhopal India*, Opinion and Order, 12 May 1986, 634 F Supp. 842 (SDNY 1986).

54 Supreme Court of the United States, *Kiobel v Royal Dutch Petroleum Co.* 185 L. Ed. 2d671 (17 April 2013).

55 Ibid., at 14.

56 Ibid., at 14. *In caso*, the 'presence' of the defendants in the U.S. consisted of an office in New York owned by an affiliated corporation that was to explain their business to potential investors.

57 Ibid., at 4, 10.

58 Ibid., at 5.

world'.[59] In a rabbit-duck switch, *global* business entities reappear in (international) law as *multi-national* corporations subject to the sovereign territorial rights of the state. As the UK and Dutch governments submitted to the Supreme Court in *Kiobel* in support of their 'corporate national',

> [t]he Governments' policy is that companies should behave with respect for the human rights of people in countries where they do business. They also believe that the most fair and effective way to achieve progress in this area is through multilateral agreement on standards, achieved through multilateral cooperation with other States, and then the effective national implementation of those standards. It is then for countries to regulate and control business operations in their territories to ensure they meet the implemented standards.[60]

5. The Turn to Governance

The weakness of the state-centred conception of international human rights law in addressing the human rights impacts of global business operations also manifests itself in the transition in much of the recent business and human rights debate from territorialised human rights law to global human rights governance. The language of 'governance gaps created by economic globalisation' coupled with an appeal to states' 'policy rationales' to 'promote' human rights in relation to global business entities gives a face lift to governments' persistent refusal to accept legal accountability for human rights violations committed by their corporate nationals abroad. [61] Absent a clear recognition of legal state obligations to protect human rights against extraterritorial corporate abuse, the debate shifts from third-country victims' (putative) entitlements to have their rights respected, protected and fulfilled as provided by international human rights law to states' policy rationales to protect human rights in their external relations. At the same time, states' rebuttal of extraterritorial human rights obligations is but the mirror image of their insistence to independently conduct their domestic and foreign policies as a matter of sovereign territorial right. In this vein, the German government contended before the U.S. Supreme Court in *Kiobel* (citing to US jurisprudence) that the 'projection of U.S. laws into foreign countries' creates 'serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs'.[62] As in the case of the recent U.S. government's approach to 'economic statecraft',[63] the subsequent move to reconcile human rights and economic objectives under the umbrella of a 'business case' for human rights barely conceals that these objectives will often conflict with each other, and that (developed and underdeveloped) states will have very different views on how such conflicts should be resolved.[64]

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59 Ibid., at 13.

60 Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents, No. 10-1491 (03 February 2012) 1.

61 See UN Guiding Principles (n 2). To be fair, the UN Guiding Principles' call to close governance gaps and enhance policy coherence has been taken up by a number of states (including the United States, the United Kingdom, and the Netherlands) in their recent action plans on business and human rights and will, if effectively implemented, yield positive results. Moreover, the SRSG's hands were arguably somewhat tied as his mandate did not include developing proposals for international legal reform. For an excellent and balanced assessment of the UN Guiding Principles in this regard see R. Mares, 'Business and human rights after Ruggie: foundations, the art of simplification and the imperatives of cumulative progress', in R. Mares (ed.), *The UN Guiding Principles on Business and Human Rights* (Nijhoff: 2012) 1–50.

62 Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents, *Kiobel v Royal Dutch Petroleum*, No. 10-1491 (2 February 2012) 15, with reference to *F. Hoffmann-La Roche Ltd. v Empagran*, 542 U.S. 155, 165 (2004).

63 See above, section 2.

64 For an instructive recent collection of case studies see F. Coomans & R. Künnemann, *Cases and concepts on extraterritorial obligations in the area of economic, social and cultural rights* (Intersentia: 2012).

The UN Guiding Principles highlight the *problematique* of human rights violations in the 'state-business nexus' that concurrently implicate public and territorial states and private and globally operating business entities:

> States should take additional steps to protect against human rights abuses by business enterprises that are owed or controlled by the state, or that receive substantial support and services from state agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.[65]

The commentary to this provision recognises that 'where a business enterprise is controlled by the state, or where its acts can be attributed otherwise to the state, an abuse of human rights by the business enterprise may entail a violation of the state's own international law obligations'.[66] This tentative language of legal obligations is bolstered by an appeal to states' reputational, prudential, and business-related 'policy rationales' for ensuring that corporations respect human rights. Moreover, the Guiding Principles stress that a failure of home states to prevent and redress corporate harm outside their territory may 'add to the human rights challenges faced by the recipient state', that is the host state of corporate investment.[67] Yet, crucially, these human rights challenges faced by the host state are not met with corresponding human rights obligations of the home state to protect third-country victims against corporate violations. There are

> [s]trong policy reasons for home states to set out clearly the expectation that businesses respect human rights abroad, especially when the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.[68]

However, home states are 'not generally required under international law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognised jurisdictional basis.'[69] The assertion that states are neither 'generally required' nor 'generally prohibited' to regulate business operations outside their territories shapes the SRSG's approach to extraterritorial jurisdiction. The Guiding Principles focus on the permissibility of the extraterritorial exercise of (legislative, judicial and executive) state authority in accordance with a recognised basis of jurisdiction under public international law. What is at issue is the competence of states, as delimited by general international law, to assert authority over conduct not exclusively of domestic concern. Relatedly, the Guiding Principles are primarily concerned with the territorial location and/or nationality of the business entity as the perpetrator of extra-territorial human rights violations. The inquiry thus turns on whether a state can exercise jurisdiction over corporate actors violating human rights abroad because they reside within the state's territory (the territoriality principle) and/or because they can be considered 'corporate nationals' of that state (the nationality principle).[70]

However, the question whether states are permitted to assert extraterritorial authority over corporate perpetrators of human rights violations is *not reducible to* the question whether they are

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65 See UN Guiding Principles (n 2) para. 4.

66 Ibid.

67 Ibid.

68 Ibid.

69 Ibid, para. 2. The commentary adds that 'some human rights treaty bodies recommend that home states take steps to prevent abuse abroad by business enterprises within their jurisdiction'.

70 In his earlier work, the SRSG has also explored other bases of extra-territorial jurisdiction under general international law, including the nationality of the victim (i.e., the passive personality principle), see, e.g., H. R. C., Corporate Responsibility under International Law and Issues of Extra-territorial Regulation, A/HRC/4/35/Add.2 (15 February 2007).

obligated to protect third-country victims against corporate violations.[71] Otherwise, a state could circumvent its obligations under international human rights treaties by exceeding its jurisdictional competences under public international law. Whereas extraterritorial jurisdiction in general international law is a function of state sovereignty and concerns the state's entitlement to exercise jurisdiction abroad,[72] extraterritorial jurisdiction under international human rights treaties is a function of protecting the rights of the individual and concerns the state's obligations when exercising jurisdiction abroad. And what matters for the purpose of the latter is not the state's *de lege* competence but its assertion of *de facto* power and control over an area or individual outside its territory. As the European Court of Human Rights held in *Loizidou v Turkey*, 'the responsibility of a Contracting Party could also arise when as a consequence of military action – *whether lawful or unlawful* – it exercises effective control of an area outside its national territory.[73] Similarly, for the UN Human Rights Committee, 'a State party must respect and ensure the rights laid down in the [International Covenant on Civil and Political Rights (ICCPR)] to anyone within [its] power or effective control ..., even if not situated within the territory of the State Party … and regardless of the circumstances in which such power or effective control was obtained'.[74] And according to the Inter-American Commission of Human Rights, 'any person subject to [a state's] jurisdiction' in Article 1 of the American Convention of Human Rights refers to

> [c]onduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.[75]

The Guiding Principles' preoccupation with states' competences to exercise extraterritorial jurisdiction in effect privileges states' sovereign territorial rights over the human rights entitlements of third-country victims of global business operations. However, as in Bhopal, it is one question – often discussed under the heading of 'home state' or 'parent-based' regulation[76] – whether the United States had an overriding policy interest in regulating and controlling the operations of UCC in India. It is quite a different question whether international human rights law imposes obligations on the United States to protect the rights of the Bhopal victims against violations committed by its own corporate national operating from its own territory.

The ramifications of the transition from states' territorialised legal human rights obligations to their policy rationales to promote human rights in relation to business operations of their corporate nationals

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71 This argument and its implications for the conceptual foundations of states' extraterritorial human rights obligations in relation to global business operations is further developed in D. Augenstein & D. Kinley, 'When human rights "responsibilities" become "duties": the extra-territorial obligations of states that bind corporations', in S. Deva & D. Bilchitz (eds.) *Obligations of business: beyond the corporate responsibility to respect?* (CUP: 2013) 271–294. For a good overview of the doctrinal state of the art see M. Langford, W. Vandenhole, M. Scheinin & W. van Genugten (eds.), *Global justice, state duties: the extraterritorial scope of economic, social and cultural rights in international law* (CUP: 2013).

72 F. A. Mann, 'The doctrine of jurisdiction in international law', 111 *Collected Courses of the Hague Academy of International Law* (1964) 1, 15. In Mann's view, the concept of jurisdiction fulfils 'one of the fundamental functions of public international law', namely 'the function of regulating and delimiting the respective [legislative, judicial and administrative] competences of States'.

73 E. Ct. H. R., *Loizidou* v. *Turkey, Preliminary Objections* (Judgment of 23 March 1995) para 61 (emphasis added), confirmed at the merits stage, E. Ct. H. R., *Loizidou v Turkey* (Judgment of 18 December 1996) para 52.

74 H. R. C., 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 10.

75 Inter-Am. C. H. R., *Coard et al* v. *The United States*, Case 10.951, Report No. 109/99 (29 September 1999) para 37.

76 See, e.g., S. Joseph, 'Taming the Leviathans: multinational enterprises and human rights', 46 *Netherlands International Law Review* (1999) 171–203; and S. Deva, 'Acting extraterritorially to tame multinational corporations for human rights violations: who should 'bell the cat'?' 5 *Melbourne Journal of International Law* (2004) 37–65.

abroad are not dissimilar from those of the 'escape' into tort discussed in the previous section. The turn to governance resolves the tension between the human rights impacts of economic globalisation and states' sovereign territorial rights to independently conduct their economic affairs at the expense of protecting the legal human rights of third-country victims against corporate violations. On the one hand, the global human rights impacts of home states' domestic and foreign business-related policies *de facto* undermine the capacity of host states to protect human rights within their territorial borders. On the other hand, the territorialisation of human rights in the state legal order shields home states from *de lege* accountability for human rights violations committed by their corporate nationals in other states. This leaves victims of human rights violations in 'weak' host states of corporate investment at the goodwill of 'strong' home state governments and at the mercy of corporate social responsibility. Bhopal illustrates why – on its own – this approach is unlikely to succeed in protecting and indemnifying the victims. The host state of corporate operations (India) will often be unable or unwilling to live up to its territorial human rights obligations due to low regulatory and judicial capacity or collusion with business out of fear of discouraging foreign investment. These problems are aggravated by failures of home states to prevent and redress corporate harm to human rights outside their territory. Yet the home state (US) will generally have little policy incentive to regulate and control the human rights impacts of its corporate nationals abroad.[77] Whereas much of the profits of corporate undertakings accrue on the home state's territory, the prevention and redress of corporate human rights violations falls within the sovereign right and legal and political responsibility of the host state.

6. International Human Rights Law at the Crossroads

The point of the foregoing considerations is not to downplay the importance of transnational tort litigation in vindicating human rights values, nor is it to challenge the desirability of states mainstreaming human rights concerns into their business-related domestic and foreign policies. It is only to query how these developments reflect on the state of international human rights law in the global market economy. In an important contribution to the debate, Craig Scott complains about the tendency of lawyers to 'organise the normative world of human rights in terms of (unduly) dichotomous ways of thinking'.[78] On the one hand, the '(stylised) restrained conservative' maintains that 'international human rights standards are a matter of public law (vertical) applicability wherein corporate conduct is regulated through indirect state responsibility which attaches only to corporate harm caused within a state's own territorial space'. On the other hand,

> [t]he (stylised) activist radical insists that international human rights standards are (not only, but) also a matter of private law (horizontal) applicability wherein corporate conduct may be regulated through direct civil liability which is capable of attaching to harm caused by corporate conduct outside the state's own territorial space.[79]

To thus construe the public and the private, and the territorial and the extraterritorial, as binary oppositions conceals that the relationship between 'torture' and 'tort' involves a 'two-way normative traffic' in which one system of norms becomes translated into, and accommodated within, the other.[80]

There is much to commend in Scott's analysis and his call to move beyond dichotomies to explore the benefits of mutual translation and cross-fertilisation between 'torture' and 'tort'. However, the

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77 Indeed, research conducted in support of the SRSG's mandate indicates that whereas states fairly frequently resort to extraterritorial regulation in some policy areas, this is typically not the case in the area of business and human rights, see H. R. C., 2010 Report (n 4) para 46, with reference to Zerk (n 14).

78 C. Scott, 'Translating torture into transnational tort: conceptual divides and the debate on corporate accountability for human rights harms', in C. Scott (ed.), *Torture as Tort* (Hart: 2001) 45.

79 Ibid., at 46.

80 Ibid., at 61.

appeal of mutual accommodation should not distract from the fact that such translations are not normatively innocent but driven by the exposure of the international legal order of states to the operations of global business entities. This path dependency explains why the human rights responses to economic globalisation considered in this contribution are both an expression of the present crisis of the state-centred conception of international human rights law and risk contributing to its perpetuation. The political economy of tort and private international law as applied to global business entities hampers the effective realisation of victims' rights in private litigation and relegates the regulatory risks of private human rights harm to host countries of corporate operations often ill-equipped to prevent and redress violations. At the same time, the turn to global human rights governance reinforces the territorial constraints state sovereignty imposes on international human rights law and shields home states of 'multi-national' corporations from legal human rights accountability for violations committed in other states. The result is a collusion of sovereign state interest and globalised corporate power that disempowers victims of human rights violations in the global market economy. The distinction between the 'public' and the 'private' that once aspired to protect the human rights of private individuals against the public power of the state is transformed to defend the trans-national economic interests of corporate rights holders against political interventions in the name of the public good. Relatedly, the distinction between the 'territorial' and the 'extraterritorial' that was once premised on the equal sovereign entitlements and responsibilities of states to protect human rights within their territory unleashes global market forces from the constraints of international law.

This crisis of the state-centred conception of international human rights law – the 'business and human rights predicament' – stems less from a marginalisation of sovereign states than from a transformation of their international relations in the global market economy. Accordingly, as Andrew Clapham notes, 'it is not simply the development of the global market, deregulation, or privatisation which is threatening the enjoyment of human rights; but rather, it is the ways in which governments are responding to these developments'.[81] Let me therefore conclude by briefly sketching out two (again rather stylised) views on the future pathways of the state-centred conception of international human rights law under conditions of economic globalisation. According to one view, the collusion of sovereign state interest and globalised corporate power that unties the human rights impacts of global business operations from the human rights accountabilities of public and territorial states leads to the emergence of new private and trans-national human rights regimes that further undermine the hegemony of states' (constitutional and international) human rights law. In a memorable lecture, Neil Walker has captured the tentative correlations between the rise of the global and the fall of the international legal order of states. [82] At one end of the national-international continuum, state law 'is increasingly rivalled by law otherwise spatially extended, including … transnational domain-specific private ordering, hybrid public-private ordering and, increasingly, new forms of global legal regime that neither claim universality nor obviously emanate from or respect the aggregative sovereign will.' At the other end of the continuum, the emergence of trans-national regimes and new forms of private and hybrid ordering threatens to undermine 'the idea of a shared "public" concern joining the various elements of international law'.[83] For some, this de-centring of law from the public and territorial state emplaces human rights in sectorally differentiated private and transnational regimes that claim global validity.[84] However, the ensuing de-territorialisation of human rights comes at the price of their further

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81 A. Clapham, Human rights obligations of non-state actors (OUP: 2006) 5.

82 N. Walker 'Out of place and out of time: law's fading coordinates', 14 *Edinburgh Law Review* (2010) 13.

83 Ibid., at 36-7.

84 A. Fischer-Lescano & G. Teubner, 'Regime collisions: the vein search for legal unity in the fragmentation of global law', 25 *Michigan Journal of International Law* (2004) 999–1046.

privatisation and de-politicisation in a 'global law without a state' that has 'no legislation, no political constitution, and no politically ordered hierarchy of norms'.[85]

According to another view, the collusion of sovereign state interest and globalised corporate power calls for a recovery of the public nature of human rights beyond the international legal order of territorial states. In this vein, global constitutionalism strives to compensate for negative externalities of economic globalisation on the territorial state and its citizenry by re-constituting public human rights law at the global (UN) level.[86] However, while the attraction of a global constitutionalisation of human rights lies in the shortcomings of their emplacement in the sovereign state, global constitutionalism cannot lay claim to a political community akin to that of the state which could render human rights law legitimate in the light of a global public good.[87] This discrepancy between highly globalised economies and weakly globalised political structures, in turn, has led to a revival of state sovereignty to fence off new waves of (market-driven) Western imperialism on the back of human rights.[88] An arguably more promising way to address the bifurcation between the human rights impacts of global business operations and the territorial limitations of the state-centred conception of international human rights law is the recognition of extraterritorial state obligations to protect the human rights of third-country victims against corporate violations. For more than a decade now, the UN Human Rights Treaty Bodies have called upon state parties to regulate and control their 'corporate nationals' to prevent human rights violations in third countries, and to ensure effective redress in home-state courts of corporate operations. For instance, in its early General Comment No. 14 concerning the right to health, the Committee on Economic, Social and Cultural Rights noted that 'to comply with their international obligations in relation to Article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.'[89] With regard to the right to water, the same Committee called upon states parties 'to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries … [w]here States parties can take steps to influence other third parties to respect the right, through legal or political means.'[90] The Committee's more recent General Comment on social security provides that 'state parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries'.[91] The other UN Treaty Bodies,[92] as well as the recent Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,[93] express similar views.

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85 G. Teubner, 'Foreword: legal regimes of global non-state actors', in G. Teubner (ed.), *Global law without a state* (Dartmouth: 1997) xiii–xvii; see further G. Teubner, 'Transnational fundamental rights: horizontal effect?', 40 *Rechtsfilosofie & Rechtstheorie* (2011) 191–215.

86 For example, Anne Peters' 'compensatory global constitutionalism' and Jürgen Habermas' call for the development of a world domestic politics. See A. Peters, 'Compensatory constitutionalism: the function and potential of fundamental international norms and structures', 19 *Leiden Journal of International Law* (2006) 579–610; J. Habermas, *The postnational constellation* (Polity Press: 2001).

87 For a balanced and well-conceived critique of Habermas' cosmopolitanism see R. Fine & W. Smith, 'Jürgen Habermas theory of cosmopolitanism' 10 *Constellations* (2003) 469–487.

88 See, e.g., M. Koskenniemi, 'The future of statehood', 32 *Harvard International Law Journal* (1991) 397–410; J. Cohen, 'Whose sovereignty? Empire versus international law', 18 *Ethics & International Affairs* (2004) 1–25.

89 CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, E/C.12/2000/4 (11 August 2000) para 39.

90 CESCR, General Comment No. 15: The Right to Water, E/C.12/2002/11 (20 January 2003) para 33.

91 CESCR, General Comment 19: The Right to Social Security, E/C.12/GC/19 (4 February 2008) para. 54.

92 For a more in depth discussion see Augenstein & Kinley (n 71).

93 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (September 2011) published with extensive commentary in 34 *Human Rights Quarterly* (2012) 1084-1169.

The 'governance gaps' in business and human rights identified by the SRSG are but symptoms of a deeper crisis of the state-centred conception of international human rights law in coming to terms with the human rights impacts of economic globalisation. The operations of global business entities effectuate an increasing bifurcation between, on the one hand, territory-based forms of public legal authority that lose their regulatory grasp over global developments and, on the other hand, a privatisation and de-territorialisation of legally unfettered state power in the coattails and the service of the market. Extraterritorial human rights obligations can contribute to redressing the ensuing collusion of sovereign state interest and globalised corporate power by legally empowering third-country victims of human rights violations committed by private and globally operating business entities with the passive acquiescence or active support of public and territorial states. John Ruggie (the former SRSG) intervened in *Kiobel* warning that should Shell succeed in 'destroy[ing] an entire juridical edifice for redressing gross violations of human rights … its road back to the corporate social responsibility fold will be long and hard.'[94] Home states of global business entities should begin pondering the corresponding challenge: so long as they refuse to accept legal accountability for the global human rights impacts of their business-related domestic and foreign policies, there remains the nagging suspicion that the new business and human rights talk is but the old emperor with new clothes. *Honi soit qui mal y pense*.

[94] J. Ruggie 'An issues brief: Kiobel and corporate social responsibility', John F. Kennedy School of Government (Harvard: 2012) 6.

Author contacts:

Daniel Augenstein
Associate Professor
Department of European and International Public Law
Tilburg Law School
Netherlands
Email: D.H. Augenstein [D.H.Augenstein@uvt.nl]