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## 32. MULTINATIONAL ENTERPRISES AND EMERGENT JURISPRUDENCE ON VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

### 1. INTRODUCTION

In spite of what may seem intuitively-evident connections between transnational (or multinational) corporate enterprises (TNEs or MNEs) and the capacity to violate human rights, the movement towards human rights accountability of corporate actors has been, and still is, fighting an uphill battle.<sup>2</sup> Most significantly, MNEs have, to date, been viewed in legal doctrine more as themselves beneficiaries of certain rights protections than as bearers of human rights obligations. In particular, the traditional customary law on the duty of states to protect the property and other economic interests of foreign investors arose as a legal outgrowth of the mercantile and commercial expansion of European and American states. Needless to say, the primary beneficiaries of the body of law that came to be known as ‘state responsibility for the protection of aliens’ were the companies of these states (as well as the businessmen who traveled and worked abroad as part of this imperial economic reality).

With the advent of the UN Charter era of international human rights law, the right to property did appear in the catalogue of rights in the Universal Declaration of Human Rights (UDHR) of 1948 and was shortly thereafter entrenched in treaty form in a protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR) regime,

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<sup>1</sup> The author wishes to thank the Social Sciences and Humanities Research Council of Canada for its generous financial assistance and Boris Nevelev for his excellent research.

<sup>2</sup> The acronyms TNEs and MNEs can be used as interchangeable shorthand to describe ‘a cluster of corporations or unincorporated bodies of diverse nationality joined together by ties of common ownership and responsive to a common management strategy’. S. Joseph, ‘Taming the Leviathan: Multinational Enterprises and Human Rights’, *Netherlands International Law Review*, Vol. 46 (1999), pp. 171–203, at p. 172, note 2. This chapter, brief and introductory as it must be, could be profitably read in tandem with the Joseph article.

in 1952.<sup>3</sup> However, post-war notions of the redistributive role of modern states, as well as newly-decolonized states' reactions to Western corporate power, meant that the right to property in its classical liberal form did not survive as a self-standing right within a United Nations' human rights treaty order which has come to centre on the two Covenants adopted in tandem in 1966.<sup>4</sup> From the 1960s onwards, economic, social and cultural rights have slowly but surely come to be understood as a category of rights designed to protect fundamental interests of flesh-and-blood human beings, especially the poor and those who are members of other presumptively disadvantaged social groups.

What are some of these 'intuitively-evident connections' between MNEs and the potential for violations of economic, social and cultural rights? By the very nature of their activities, corporations, alone or in association with government and other actors (like mercenaries), have the potential to impact pervasively on the interests the international human rights order has tended to categorize in terms of economic, social, and cultural rights.<sup>5</sup> Even a cursory glance through the provisions of just one UN treaty, the International Covenant on Economic, Social and Cultural

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<sup>3</sup> See Article 17 of the UDHR, and Article 1 of Protocol No. 1 to the ECHR. Thus, within the European regional human rights system, powerful companies no less than wealthy individuals may bring, and have indeed brought, claims of violation of their 'human' rights before the European Court of Human Rights. See, e.g., *Lithgow and Others*, judgment of 8 July 1986, Publications of the European Court of Human Rights, Series A, No. 102. That being said, such applicants have had very limited success invoking Article 1 of Protocol No. 1 due to the European Court's relatively 'social' conception of both the state and the function of property. See also the right to property found in Article 23 of the American Declaration on the Rights and Duties of Man (which receives institutional protection by virtue of a form of incorporation by reference into the human rights regime of the Charter of the Organization of American States) and Article 21 of the American Convention on Human Rights. On the right to property, see further C. Krause, 'The Right to Property', Chapter 11 in this volume.

<sup>4</sup> International Covenant on Civil and Political Rights (CCPR) and International Covenant on Economic, Social and Cultural Rights (CESCR). By 'self-standing', I mean to say that property is not protected *qua* property. However, various indirect protections exist, most notably via non-discrimination and fair trial norms in the various UN human rights treaties. Also, and importantly, freedom of expression and associated rights to disseminate information are protections available to corporations, including multinational media giants (albeit subject to limitations analysis such as under Article 19 of the CCPR and Article 10 of the ECHR). They may not, however, bring communications under the Optional Protocol *qua* corporation, because the Human Rights Committee does not include them (or any other associational or collective actor) as an 'individual' victim within the meaning of Article 2 of the Optional Protocol. See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, p. 659.

<sup>5</sup> This careful phraseology ('tended to categorize') is intentional. See C. Scott, 'Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights"', *Human Rights Quarterly*, Vol. 21 (1999), pp. 633–660.

Rights (CESCR), should bring to mind a seemingly infinite variety of possible corporate activities which could negatively *affect* human rights and which are at least candidates for being juridically sanctioned as *actual violations* of human rights. A very few examples of such associations will suffice for present purposes. The following discussion will be illustrative and in no way comprehensive.

According to Article 1(2) of the CESCR, 'In no case may a people be deprived of its own means of subsistence'. How should we think about the corporate patenting of the genetic material of seeds and the subsequent attempts to prevent farming communities or whole nations from selling or using seeds with the same biogenetic structure (seeds that may have been developed as hybrids and used for long periods of time by these very communities) if they have not been purchased from, or royalties paid to, the corporate holder of the patent? Under Article 7, the States Parties to the Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, in particular safe and healthy working conditions. How should we think about the needs of children whose job was to stamp down asbestos material in large shipping bags (to the point of climbing inside the bags) well after the life-threatening qualities of asbestos were known? Or all-women work forces who hover for ten and twelve-hour days over toxic fumes in electronics factories before they are forced out after several years work, crippled by the effects? According to the same article, the right of everyone to the enjoyment of just and favourable conditions of work also includes remuneration which provides all workers, as a minimum, with a decent living for themselves and their families. How should we think about wages that are inadequate to the point that a family's five and six-year old daughters and sons must also join their parents to work in their factory or go on the street to earn money in order to supplement the parents' factory wages? Article 10(2) reads: 'Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits'. How should we think about companies which administer pregnancy tests before hiring women, dismiss women once found to be pregnant, and/or do not provide paid leave even when the state itself provides no social security benefits or manifestly inadequate amounts? Children and young persons should be protected from economic and social exploitation (Article 10(3)) and primary education should be compulsory and available free to all (Article 13(2)(a)). How should we think about a corporation which sources from another company which employs nimble-fingered small children to make rugs? Or a company which in all good consciousness no longer wishes to be associated with child labour and, so, forces the source company to stop employing those children without first ensuring that alternative income and available schools are in place and without putting a monitoring system in place to make sure that the children do not

end up forced into even worse work such as quarrying or prostitution? Under Article 12(1), the States Parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. How should we think about mining or oil companies who use inferior technology and operating procedures for constructing and managing toxic tailings ponds which seep or spill over into the local water system, causing a whole range of illnesses including genetic malformations of newborns?

All of the foregoing hypothetical examples have been specifically chosen because they relate to guarantees in the CDESCR. However, it is crucial to register an important caveat. Due to the interdependence of human rights, enjoyment of civil and political rights both overlaps with and impacts upon the protection of economic, social and cultural rights.<sup>6</sup> Indeed, perhaps the most serious current protection for cultural rights is found not in the CDESCR but in Article 27 of the International Covenant on Civil and Political Rights (CCPR) ('[P]ersons belonging to . . . minorities shall not be denied the right . . . to enjoy their own culture'), a provision which the UN Human Rights Committee has interpreted to generate duties on states to protect resources and economic activities integrally tied to cultural maintenance (especially of indigenous communities).<sup>7</sup> As well, protections relevant to labour rights appear in the CCPR and not only in the CDESCR, notably in the prohibition of 'forced or compulsory labour' (Article 8(3) of the CCPR) and in the protection of 'freedom of association with others' (Article 22 of the CCPR). A corporation's use of unpaid labour conscripted by the state would fall afoul of the interests protected by Article 8(1) of the CCPR ('No one shall be held in slavery'). Or, were a company to threaten to press charges against a worker or third parties for failure to pay a debt to the company, especially if this threat is designed to coerce the person(s) into some kind of debt bondage relationship, the values underlying Article 11 of the CCPR ('No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation') would be violated. International mercenary-style security companies are

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<sup>6</sup> A fuller explanation of the division of the concept of interdependence into direct (organic) and indirect (related) interdependence can be found in C. Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', *Osgoode Hall Law Journal*, Vol. 27 (1989), pp. 769–878, at pp. 779–790. See also S. Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems', Chapter 4 in this volume, at note 69. And see D. Otto, "Last On, First Off"—Defending Women's Economic and Social Rights: Some Thoughts on Indivisibility and Equality', in: I. Merali and V. Oosterveld (eds.), *Reaching Beyond Words: Giving Meaning to Economic, Social and Cultural Rights*, (forthcoming).

<sup>7</sup> See General Comment 23 (on Article 27), at para. 7. Report of the Human Rights Committee, Vol. I, UN doc. A/49/49, pp. 107–109; and Annex 3 to this volume. See also A-C. Bloch, 'Minorities and Indigenous Peoples', Chapter 20 in this volume.

capable of violating human rights in as classical a fashion as the police state if armed violence is used to kill, detain, kidnap or otherwise coerce. Companies that use such private security firms, such as those oil and mining companies which employ virtual mini-armies, are clearly responsible for the conduct of their agents.<sup>8</sup> Companies are also more than capable of using their economic power to take advantage of both the legal system and rights conferred by that system in ways designed to muzzle dissent and the 'disinformation' of critics, as, for instance, when companies unleash no-holds-barred libel suits against critics or when companies use laws on trade secrets and confidentiality to coerce potential whistle-blowers. Freedom of expression and information can thus easily be compromised in the name of protection of corporate economic interests. Some of the most notorious activity of powerful multinationals over the decades, namely the engineering of military coups against perceived unfriendly governments,<sup>9</sup> clearly compromise the human rights related to democratic rule found in Article 25 of the CCPR as well as Article 1(1) of both Covenants. And, beyond a company's hard-nosed use of the judicial system to defend itself or to wear down opponents, companies have been known to engage in unethical tactics that plainly abuse the legal system and prevent others from having access to justice.<sup>10</sup> Finally, where companies are jointly involved with governments in typical police-state repression (such as detention and torture of environmental activists, union leaders, or political opponents of government policy regarding the company), the violations by the government should in principle create forms of accountability for the company, even when employees or contractors of the company are not the immediate agents of harm.<sup>11</sup>

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<sup>8</sup> See generally J. C. Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder', *Stanford Journal of International Law*, Vol. 34 (1998), pp. 75-162.

<sup>9</sup> As examples mention could be made of ITT's involvement in the Pinochet coup against Allende in Chile or United Fruit's earlier orchestration of the overthrow of President Arbenz in Guatemala. On the former, see, e.g., A. Angell, 'Chile Since 1958', in: L. Bethell (ed.), *The Cambridge History of Latin America: Volume VIII—Latin America since 1930, Spanish South America*, 1991, at p. 339 (on ITT's role in 'destabilizing' the incoming Allende administration). On the latter, see generally S. Schlesinger and S. Kinzer, *Bitter Fruit: The Story of the American Coup in Guatemala*, 1999.

<sup>10</sup> Just one of several examples known to the author can be cited as an example. Human Rights Watch, in a recent report on the conduct of a major US-based energy company in India, reveals that one strategy the company used to prevent use of the legal system against it was to hire on retainer all the major barristers in the relevant Indian cities (Bombay and Delhi) where litigation needed to be initiated. Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations*, 1999, p. 32.

<sup>11</sup> Two recent judgments by American courts have employed principles from the interface of US constitutional and tort law to decide whether American companies abroad could be held

The above scenarios represent a very small tip of a very large iceberg. The answers to the various rhetorical questions posed are not all straightforward in terms of whether, and how, corporations should be held directly liable for human rights infringements or whether legal responsibility should rest solely on states for failure to have the regulatory structures in place which prevent or mitigate the harms in question (indirect state responsibility). Nor are they all straightforward in terms of the appropriate juridical forms of regulation and sites of institutional scrutiny that are called for. This chapter will have served its purpose if it provokes some reflection on these questions in the course of describing the very embryonic developments that are beginning to take place in holding both states and MNEs legally accountable for human rights harms, first within human rights treaty-based regimes (section 2) and secondly in the courts of MNEs' home states (section 3).

## 2. CORPORATE ACCOUNTABILITY AND STATE RESPONSIBILITY IN RELATION TO INTERNATIONAL HUMAN RIGHTS TREATIES

Despite its preoccupation with the responsibility of states, international human rights law has forged some inroads that demonstrate the unexploited potential of indirect scrutiny of corporate activity through the network of treaties that constitute the bulk of this area of international law.

*2.1 The International Labour Organisation (ILO).* By far the most active international human rights system has been the ILO convention system which has produced 80 years of quasi-judicial assessments by expert committees and by the Conference of States Parties to the ILO Constitution.<sup>12</sup> Such assessments fit squarely into the mold of indirect responsibility of states (versus direct accountability of corporations) as it is compliance with *states'* treaty obligations that is at issue. However, by the very nature of the ILO and the fact that labour rights are its *raison d'être*, a close—albeit indirect—evaluation of corporate behaviour in a given country (although only rarely the conduct of specific, named corporations) is necessarily implicated. That being

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jointly accountable for human-rights-abusing conduct of foreign governments. *Doe v. Unocal*, 963 F.Supp. 880 (C.D. Cal, 1997) (henceforth: *Unocal No. 1*); and *Beanal v. Freeport-McMoran, Inc.*, 969 F.Supp. 362 (E.D. La. 1997).

<sup>12</sup> Two main expert committees oversee the network of ILO treaties, the Committee of Independent Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association. A more political Conference Committee on the Application of Conventions and Recommendations will debate and issue reports based initially on the reports of the Committee of Independent Experts. See L. Betten, *International Labour Law: Selected Issues*, 1993, pp. 394–413.

said, a thorough-going attention to direct legal liability of corporations for human rights violations has, it is fair to say, escaped the ILO's attention. There is, for instance, no ILO convention which has been drafted to address this issue.

One reason for the failure to make corporate actors the subject of close attention within the ILO is probably, ironically enough, that feature of the ILO which arguably constitutes its greatest institutional virtue and the reason for its record of promoting changes to labour laws around the world in a low-profile, relatively-depoliticized fashion—its tripartite membership structure according to which each country's delegation is composed of representatives of government, employers' organizations, and employees' organizations in equal proportions. The presence of corporate representation is one reason why ILO conventions and recommendations tend to be taken up with some seriousness in many Member States' domestic systems, but the price to be paid is that attempts to move beyond the formal focus on states' obligation within the ILO juridical structure would be seen by many employers' organizations active in the ILO as a kind of breach of faith and an unfair targeting of one of the two sides in labour/management relations.

*2.2 Nascent Direct Corporate Accountability Under the Tripartite Declaration.* It is, however, true that the ILO did adopt in 1977 the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy which, despite the careful reference in the title to 'social policy', does set out a wide range of labour rights, including some which are formulated with specific reference to 15 ILO conventions and 17 ILO recommendations in force as of 1977.<sup>13</sup> The Declaration's provisions are applicable not only to states but also to MNEs themselves. The Preamble states in part:

The Governing Body of the International Labour Office . . . [h]ereby approves the following Declaration . . . and invites governments of States Members of the ILO, the employers' and workers' organisations concerned *and the multinational enterprises operating in their territories to observe the principles embodied therein.*<sup>14</sup>

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<sup>13</sup> Reproduced in 17 I.L.M. 422 (1978).

<sup>14</sup> In that regard, the ILO Bureau for Multinational Enterprise Activities has stated in the introductory overview it has posted on its Internet home page that, while 'the Declaration is not an instrument which is legally enforceable' and 'is a set of recommendations', it is also 'a *normative instrument . . . provid[ing] guidelines for policy-makers and negotiators*'. The ILO Programme on Multinational Enterprises and Social Policy, found at <http://www.ilo.org/public/english/employment/multi/index.htm> (emphasis in original). See generally the ILO's database on International Labour Standards at <http://ilolex.ilo.ch:1567>.

Clause 4 then gives this ‘invitation’ operative effect by ‘commend[ing]’ the Declaration’s principles not just to the ILO partner entities but also to MNEs themselves. This operative effect is not, however, generally regarded—at least not yet—as of a legally-binding nature, but rather as having a softer form of normative force. In addition to applicability beyond states, the Declaration states in its paragraph 8 a very important general principle that, in future, could assume great importance (under the right institutional conditions) in influencing the development of the direct application of international human rights obligations to corporate actors:

All the parties concerned by this Declaration [including MNEs, *per* clause 4] . . . should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the [UN] as well as the Constitution of the [ILO].<sup>15</sup>

However, it bears emphasizing that the significance of the Tripartite Declaration—and especially of paragraph 8—continues to lie in its normative *potential* as there is little evidence to date that the Declaration has been made central to the work of the ILO.

This is not to say that the ILO has completely ignored the Tripartite Declaration. At the time of its adoption, the ILO’s Secretary General commented that the Declaration’s ‘impact could be strengthened further by a procedure for reviewing its application’.<sup>16</sup> A procedure was eventually set up, with the current version dating from 1986.<sup>17</sup> The preference is for a government to request an interpretation, but workers’ organizations and employers’ organizations are permitted to submit requests if the relevant government has declined to submit the request or has failed to indicate its intention to do so within three months of being asked by such an organization to submit the request on its behalf.<sup>18</sup> It is instructive

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<sup>15</sup> Note the reference to the Covenants without any qualification as to whether either the home states or the host states of MNEs have ratified those human rights treaties. Such a robust, non-legalistic approach would seem to be facilitated by the formal non-legally-binding nature of the Tripartite Declaration.

<sup>16</sup> F. Blanchard, Preface to the Declaration, Geneva, 30 November 1977, 17 I.L.M. 422 (1978).

<sup>17</sup> Procedure for the Examination of Disputes (Multinational Enterprises: Tripartite Declaration of Principles), adopted by the ILO Governing Body at its 232nd (March 1986) Session, Official Bulletin, Vol. LXIX, 1986, Series A, No. 3. Here it is worth noting that the Tripartite Declaration is also subject to a reporting procedure by which all three constituencies respond to a questionnaire with respect to the Declaration.

<sup>18</sup> *Ibid.*, at paras. 5 and 6.

to consider the chain of consideration envisaged by the procedure in order to get some sense of both the limitations and the potential of achieving transnational corporate accountability by way of the Tripartite Declaration.<sup>19</sup> That chain of consideration will be presented, somewhat artificially, as taking place in seven stages.

First, the request for interpretation is submitted to the International Labour Office secretariat—in essence, the Bureau for Multinational Enterprise Activities. Second, the Office then informs relevant governments and organizations of workers and employers of the request. Third, the Officers of the Subcommittee on Multinational Enterprises (the MNE Subcommittee) decide whether the request is ‘receivable’ (the equivalent of ‘admissible’ in other international human rights procedures). This is a subcommittee of the ILO Governing Body’s Committee on Legal Issues and International Labour Standards. The MNE Subcommittee is *not* an independent expert body, far less a judicial one, as are the bodies that monitor state compliance with ILO-based obligations. Rather, it is structured as all political bodies in the ILO system are, namely on a tripartite formula that requires equal representation of each of the three ILO constituencies (governments, workers and employers). The MNE Subcommittee has 18 members, six from each constituency. The ‘Officers’ consist of three persons, the MNE Subcommittee’s Chairperson (drawn from the government sector) and two Vice-Chairpersons (one from the workers’ sector and one from the employers’).

The fact that these three Officers are charged with deciding, as the first recourse, on receivability reflects a very distinctive approach that stems from both the formally non-binding nature of the Tripartite Declaration and the basic tripartite structure of the ILO. However successful good faith engagement may be in allowing the Tripartite Declaration interpretive process to be normative in a meaningful sense, that process is also resolutely political. Three points will drive this point home. One, the non-disinterestedness of the interpreters is structured into the composition of the Officers, as it is for the 18-member Subcommittee as a whole. Two, the role of each Officer as a representative of a constituency is highlighted by paragraph 4 of the Procedure for the Examination of Disputes recognizing (indeed,

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<sup>19</sup>Note that the Organization for Economic Cooperation and Development (OECD) also adopted a non-binding code of conduct around the same time as the ILO adopted the Tripartite Declaration. The OECD code is much less centred on workers’ rights and human rights. This chapter cannot discuss the normative product of the OECD guidelines which, in any event, are due for revision by mid-2000. See the discussion of OECD activity stemming from the 1976 Declaration on International Investment and Multinational Enterprises in *The OECD Guidelines for Multinational Enterprises*, Vol. V, No. 21, OECD Working Papers, 1997. And see the account of the process to revise the guidelines (including copies of two draft revisions and public comments thereon) at <http://www.oecd.org/daf/investment/guidelines/newtext.htm>.

stipulating) that the three Officers are to decide on receivability only 'after consultations in the groups' (government, worker and employer). Three, all three Officers must reach agreement on the decision on receivability—unanimity governs—and, if this proves impossible, the receivability issue must be resolved by the MNE Subcommittee as a whole. When the Officers cannot agree, a document is prepared in which each of the three Officers gives written reasons for his or her view on whether the request is receivable.

Assuming disagreement amongst the Officers on receivability, the fourth link in the chain of consideration of a request for interpretation is thus a meeting of the Subcommittee as a whole. The Subcommittee debates the competing written views of the Officers, and then votes, with an absolute majority being required for a position to prevail. If found receivable, the fifth stage is for the International Labour Office to prepare a 'draft reply' to the request for interpretation in consultation with the Officers of the Subcommittee. At the sixth stage, the Subcommittee as a whole votes on an interpretation prompted by the request, and, as the seventh and final stage, the Governing Body decides whether to approve the recommended interpretation. In the three cases in which a unanimous interpretation was reached, the Governing Body approved that interpretation. Each of these three cases involved issues surrounding job loss, either through sizeable workforce reductions (one case, the request for interpretation being submitted by a union)<sup>20</sup> or plant closure (two cases, both involving Belgium with it being the government which submitted the requests).<sup>21</sup>

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<sup>20</sup> This union-submitted case involved a US MNE bank dismissing 90 employees in the UK. Request for Interpretation of the [Tripartite Declaration] (Letter dated 2 May 1984 from the Banking, Insurance and Finance Union [BIFU] of London), ILO Doc. GB.229/13/13. The issue was whether a union in BIFU's position (having some members on staff but being unrecognized by the company) should have been notified on the basis of the Tripartite Declaration paragraph 26 requirement of 'reasonable notice of . . . changes [with major employment effects] to the . . . representatives of the workers' even though such notice to an unrecognized union was not required under national (here, UK) legislation. The Subcommittee's interpretation was elliptical in that it made the ability to identify workers' representatives 'under national law and practice' the test for whether a company had to notify. But, of normative significance is the fact that the Subcommittee invoked an ILO Convention (No. 158, Convention concerning Termination of Employment at the Initiative of the Employer of 1982) which had been adopted *after* the Tripartite Declaration.

<sup>21</sup> The first of the Belgian cases was Request for Interpretation of the [Tripartite Declaration] (Letter dated 27 January 1987 from the Belgian Government), ILO doc. GB.239/14/24 (henceforth: *Belgium (No. 1) Case (1988)*). A Belgian subsidiary of a French MNE announced, with no prior notice, that its plant would close and all the workers would be collectively discharged on the very same day as the announcement. This was in clear breach of the minimum notice requirement of 30 days under Belgium law. The Subcommittee's interpretation

A fourth case reaching the merits is the only one to deal with matters other than job loss (*ICEF Case (1995)*).<sup>22</sup> It raised issues of considerable general importance from a human rights perspective, relating to effective representation of worker interests in transnational fora (specifically, whether leave for a union representative to attend an ILO meeting on health and safety should be paid or unpaid) and to MNEs' duties to disclose to workers' representatives information related to the health and safety standards, policies and practices that are in effect throughout the corporate family of that MNE. However, a clear clash of perspectives as between worker members and employer members of the MNE Subcommittee made unanimity impossible in the *ICEF Case (1995)* such that the government members of the Subcommittee became the swing voters. In the result, three government members and all six employer members were in favour of a narrow interpretation of the Tripartite Declaration principles at stake and one government member joining the six worker representatives were in favour of a more expansive and potentially ground-breaking interpretation. However, *neither* interpretation was adopted because two government members abstained. There being 18 members of the Subcommittee, the 9 votes in favour of the narrow, employer-preferred interpretation was one vote shy of a needed absolute majority. The *ICEF Case (1995)* thus produced a saw-off or non-result, but the case was still 'reported' by the ILO—'for information only'. This is to the good, as the reasoning of both sides in this case will undoubtedly serve as the initial basis for consideration in future cases where comparison of MNE health and safety practices as between

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in this case (finding a failure of the MNE to comply with the Tripartite Declaration) then ended with the following sentence which states a principle that simultaneously censures unilateralism from within any one of the three sectors and ungenerous interpretations of the interests protected by the Tripartite Declaration: 'A reading of the Declaration by one of the parties to whom it is commended that has the effect of restricting either the scope of the interest to be safeguarded, or the means by which it is to be safeguarded, is not in conformity with the aim of the Declaration and the furtherance of social progress as defined therein.' This sentence seems to have become the first strand of a *jurisprudence constante* under the Tripartite Declaration, as it has been cited, albeit formulaically, in both cases that reached the stages of substantive interpretation after the first Belgian case. See Request for Interpretation of the [Tripartite Declaration] (Letter dated 6 March 1995 from the International Federation of Chemical, Energy and General Workers' Unions), ILO doc. GB.264/MNE/2, at para. 12 (henceforth: *ICEF Case (1995)*); and Request for Interpretation of the [Tripartite Declaration] (Letter dated 22 May 1997 from the Belgian Government), ILO doc. GB.272/MNE/1, at para. 21). Note that the ILO has digested the various stages of this latter case into one consolidated document. See <http://www.ilo.org/public/english/employment/multi/inter/casec.htm>. Apart from ILO doc. GB.272/MNE/1, which is the report on the substance of the case, the other official ILO documents that appear in this consolidation are two separate documents on receivability, GB.270/MNE/1 and GB.270/18.

<sup>22</sup> See *loc. cit.* (note 21).

subsidiaries in different countries is relevant to the Tripartite Declaration interpretation at issue.<sup>23</sup>

*2.3 Regional Human Rights Orders.* Within the three regional human rights orders, the European, the inter-American, and the African, rights most closely associated with corporate activity (labour rights) receive comparatively limited attention, partly, one suspects, because an implicit understanding seems to exist that the exegesis and the monitoring of international labour rights law is, and should be, the primary preserve of the ILO.<sup>24</sup> But, the reverse side of the equation is that the treaty bodies which monitor the human rights instruments of these regional systems are at least in a position to pass judgment on indirect state responsibility involving corporate harm to rights other than labour rights. While the combined attention paid to corporate conduct by these three systems has been exceedingly limited, some normative vistas have nonetheless been opened up over unmapped human rights terrain.

*2.3.1 Europe.* Under the European Convention on Human Rights, the relevant jurisprudence has almost exclusively been generated by Article 8 and a robust interpretation given to the right to private and family life as including rights related to environmentally-healthy community life. For instance, the failure of the Government of Spain to regulate industrial pollution activities led the Court in *López Ostra v. Spain* to find Spain's regulatory failure to constitute a violation of the Article 8 rights of persons living around the relevant factory. *López Ostra* involved the operation of a waste treatment plant that had been built in order to deal with the effluent of tanneries in the area of a town called Lorca in Spain. In this case, the European Court of Human Rights took the opportunity to express the general principle that environmental pollution could result in human rights violations stating the matter in the following terms: 'Naturally, severe environmental pollution

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<sup>23</sup> The importance of this issue for MNE accountability cannot be overstated. Those in the ILO worker group along with human rights and environmental non-governmental organizations tend to argue that a MNE must not permit differentials in health and safety protection as amongst its subsidiaries and MNEs. In opposition, most in the employer group as well as many governments tend to support the view that subsidiaries need only comply with health and safety legislation of the country in which the subsidiary operates regardless of whether sibling subsidiaries in other countries protect their workers to a greater extent.

<sup>24</sup> Unions, the primary source of claims of labour rights abuses, seem to participate in this understanding. The major exception to the ILO's virtual monopoly on labour rights is the European Social Charter which includes a critical mass of labour rights. However, the case law of the European Committee of Social Rights (formerly, the Committee of Independent Experts) suggests that, even more than the ILO, the focus is resolutely on the operation of labour laws at a very general level with only the rare allusion to corporate conduct as the entry point for assessing States Parties' compliance.

may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health'.<sup>25</sup> *A fortiori*, environmental pollution that seriously endangers health interests is even more squarely caught by Article 8 of the Convention.

In *López Ostra*, the Court did not find it necessary to decide whether this amounted to direct interference by a public authority or whether the question should be analysed in terms of a positive duty upon the state—to take reasonable and appropriate measures to secure the applicants' rights. Either way, the Court found that the government had failed to act commensurately with the harm being caused by the plant and that Article 8 had thereby been violated. The Court carefully noted that it was irrelevant whether or not the municipality in question had a legal duty to act within Spanish law or whether, if it had such a duty, it had satisfied the legal requirements. In this regard, the Court said:

At all events, the Court considers that in the present case, even supposing that the municipality did fulfil the functions assigned to it by domestic law . . . it need only establish whether the national authorities took the measures necessary for protecting the applicant's right to respect for her home and for her private and family life under Article 8.<sup>26</sup>

*López Ostra* has not generated much subsequent case law other than a second important decision, *Guerra v. Italy*.<sup>27</sup> In this case, at issue were toxic emissions from a fertilizer plant. Although, at various stages, the relevant Italian authorities did act (for example adopting conclusions on safety problems in the factory and, later, ordering a local prefect to draft an emergency plan), the overall government response was such that the factory continued to operate for a considerable period of time before being shut down. A large number of families in the vicinity of the factory, as well as workers at the factory, were exposed to large quantities of inflammable gas and other toxic substances such as arsenic trioxide which were released during the regular course of the factory's production cycles; there had been also, at one point, an explosion which sent 150 people to hospital on account of acute arsenic poisoning. Citing *López Ostra*, the European Court of Human Rights this time firmly based their decision on the failure of the state of Italy to fulfil its

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<sup>25</sup> *López Ostra v. Spain*, judgment of 9 December 1994, Publications of the European Court of Human Rights, Series A, No. 303-C, para. 51.

<sup>26</sup> *Ibid.*, at para. 55.

<sup>27</sup> *Guerra and Others v. Italy*, judgment of 19 February 1998, European Court of Human Rights, Reports of Judgments and Decisions 1998-I, No. 64.

positive duty to give protection to the rights of private and family life. In stating the applicable duty, the Court appears to have bolstered the wording in *López Ostra* slightly by adding the word 'effective' in the following sentence: 'In the present case it need only be ascertained whether the national authorities took the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life as guaranteed by Article 8'.<sup>28</sup>

Finally, it must be said that, while *Guerra* solidifies the basic principles applicable to states' indirect responsibility to control corporate activity that causes harm to health and well-being, the Court continues to take a very conservative view about its powers under Article 41 of the ECHR with respect to the kind of remedy it is empowered to order or at least to recommend.<sup>29</sup> The Court put the matter in the following terms:

Lastly, the applicants sought an order from the Court requiring the respondent State to decontaminate the entire industrial estate concerned, to carry out an epidemiological study of the area and the local population and to undertake an inquiry to identify the possible serious effects on residents most exposed to substances believed to be carcinogenic . . . The Delegate of the [European] Commission [of Human Rights] expressed the view that a thorough and efficient inquiry by the national authorities together with the publication and communication to the applicants of the full, accurate report on all the relevant aspects of the factory's operation over the period in question, including the harm actually caused to the environment and people's health, in addition to the payment of just satisfaction, would meet the obligation laid down in Article 53 [now Article 46] of the Convention. The Court notes that the Convention does not empower it to accede to such a request. It reiterates that it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to violation of the Convention.<sup>30</sup>

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<sup>28</sup> *Guerra and Others, loc. cit.* (note 27), at para. 58. The plaintiffs also pleaded that the right to life protected by Article 2 of the ECHR had been violated with respect to those workers from the factory who had died of cancer as a result of the emissions. The Court avoided addressing this argument, invoking the fact that it had already found, by a margin of 20–0, that there had been a violation of Article 8.

<sup>29</sup> Article 41 reads in material part: '[I]f the internal law of a High Contracting Party concerned allows only partial reparation . . . the Court shall, if necessary, afford just satisfaction to the injured party'. At the time of the *Guerra* judgment and before the entering into force of Protocol No. 11 amending the ECHR on 1 November 1998, the article was still numbered as Article 50.

<sup>30</sup> *Guerra and Others, loc. cit.* (note 27), at paras. 71 and 73–74. The judgment was delivered before the entry into force of Protocol No. 11 amending the ECHR. Hence, reference is made to former Article 53 of the ECHR which is now Article 46 and reads: 'The . . . Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

The words 'just satisfaction' in Article 41 by no means textually limit the Court to the interpretation it continues to insist upon.

2.3.2 The Americas. Developments within the jurisprudence of the Inter-American Commission on Human Rights have arguably been even more significant, one reason being that the Inter-American Commission has a form of adjudicative jurisdiction over the American Declaration on the Rights and Duties of Man which, like the Universal Declaration of Human Rights, explicitly contains key economic, social and cultural rights.<sup>31</sup> One case in particular has been seen in the international legal community as something of a building block. In *Yanomami v. Brazil*, the Inter-American Commission determined that Brazil had failed to comply with a cluster of American Declaration rights by virtue of that state having failed to intervene to prevent settlers from elsewhere in Brazil moving *en masse* to various areas of the Brazilian Amazon which had, to that point, been the preserve of various indigenous peoples or communities, including the Yanomami.<sup>32</sup> Harms caused included physical violence (including, according to some accounts not directly confirmed by the Inter-American Commission's reasons, extreme brutalization that involved hunting indigenous people), general disruption of patterns of communal subsistence living, and bringing in disease which caused serious harm to health as well as significant numbers of deaths to people whose immune systems have had no previous exposure to imported viruses and bacteria. Amongst the rights Brazil was found to have violated by failing to act were the right to life and the right to health. While the case did involve economic activity (the settlers were mostly poor people from elsewhere in Brazil who hoped to make new lives around gold mining), it did not by and large involve activities of large corporations. That being said, the Inter-American Commission could not have been unaware that forestry and cattle ranching enterprises were the more serious invaders of indigenous lands; as such, the *Yanomami* case stated clearly the very basic obligations on Brazil to protect people from harm caused by economic activity in the 'private' sphere including corporate activity.

In the mid 1990s, another group of indigenous people lodged a petition with the Inter-American Commission for an analogous pattern of violations. This time the focus was Ecuador's Amazon region and the lead petitioners were the Haorani. The economic activity that lay at the centre of the allegation of widespread human rights violations, including rights to health and nutrition, was quintessential

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<sup>31</sup> See also A. Rosas and M. Scheinin, 'Implementation Mechanisms and Remedies', Chapter 23 in this volume.

<sup>32</sup> *Yanomami v. Brazil*, Res. No. 12/85, Case 7615 in: *Annual Report of the Inter-American Commission on Human Rights*, 1985.

transnational corporate activity: oil operations conducted, at various times, by Texaco, Conoco, Petro Canada, and Magnus, as well as by the government's own oil company, Petro-Ecuador.<sup>33</sup> The Inter-American Commission, after apparently doing little on the petition for some time, decided to 'convert' it from a petition into the basis for an urgent assessment of Ecuador's overall human rights record with a view then to producing a 'country report'. On-site visits by members of the Inter-American Commission who were involved in the eventual report did a remarkable job of detailing the Amazon situation, including all the legal inadequacies, legal abuses, and legal irregularities involved in Ecuador's 'regulation' of oil activities.<sup>34</sup> While the report tended to lack the focussed punch of a case decision which would have pinpointed specific violations tied to concrete facts and specific human stories, it arguably did more to analyse the situation than would have been possible if the issues had had to be slotted into the bipolar exigencies of litigation. Were the Commission to have continued to handle the matter as a petition, it would have had to adopt a wholly different style in presenting its findings and, in particular, would have been tied much more closely only to evidence passing muster through a more forensic process. The handling of the Ecuador report suggests the value of alternative kinds of juridical evaluation other than petitions leading to judicial or quasi-judicial decisions. That being said, the shunting of the Haorani petition to a more generalized investigation is worrisome if it represents a method of avoiding responding to claims brought by specific victims.<sup>35</sup> There is reason, however, to expect the Inter-American Commission will in future seek to balance the merits of country reports on the one hand, and decisions in response to specific petitions on the other hand, as it appears the Commission has very recently ruled in favour of a local community from the east coast of Nicaragua with respect to a claim that involves Nicaragua's state responsibility for corporate activities in the forestry sector, although it would not appear that transnational corporate actors were

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<sup>33</sup> See Center on Economic and Social Rights, *Rights Violations in the Ecuadorian Amazon: The Human Consequences of Oil Development*, 1994; P. Garzón and F. Falconí, *Los Daños Ambientales de la Explotación Petrolera: Se Compensan los Beneficios con los Costos?*, 1999.

<sup>34</sup> Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador* (OAS, Washington, D.C., 1997) especially Chapters 8 and 9.

<sup>35</sup> The Ecuador Report should, I hasten to add, be seen in terms of its potential. Country reports in the inter-American system have tended to be uneven, and generally do a slap-dash job on economic, social and cultural rights. Even where such issues as land reform are raised, it is not usually done in a way that highlights the contributory, even dominant, role of corporations (including transnational agribusiness) in creating resistance to and failures in land reform efforts.

involved.<sup>36</sup>

2.3.3 Africa. Finally, necessarily brief mention should be made of developments with respect to the African Charter of Human and Peoples' Rights. The African Commission, the body charged with overseeing the implementation of the Charter, has not as yet produced a significant body of jurisprudence. However, the signs are there that vigilant local and international non-governmental organizations are interested in testing the capacities, and juridical will, of the Commission by bringing challenging petitions before it. The pioneer petition in this respect is one recently brought by the New York-based Centre for Economic and Social Rights (CESR), in partnership with the Lagos-based Social and Economic Rights Action Center (SERAC).

The petition is against Nigeria with respect to the human rights effects of oil exploitation activities of a consortium formed by Shell and the Nigerian National Petroleum Corporation (NNPC) operating in the Ogoniland delta region. Amongst the rights alleged to have been violated by Nigeria are the rights of Ogoni communities to health, a healthy environment, and food.<sup>37</sup> Because of the involvement of a state corporation in the consortium, the SERAC/CESR petition is able to allege the direct state responsibility of Nigeria while at the same time descriptively associating Shell with the alleged violations by referring to conduct of the consortium and not simply of the NNPC.<sup>38</sup> It might also be noted that the value of petitions that highlight corporate harms may be especially relevant in present-day Africa. This is because, in a number of countries, it is not repression by government that is necessarily the concern, but the complete non-regulation of activity of all kinds, including transnational corporate activity, in regions subject to no meaningful

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<sup>36</sup> I say 'it appears' because I have not seen the decision. At last knowledge, it remained confidential. For an account of the situation leading to the Inter-American Commission involvement, see S. J. Anaya and S. T. Crider, 'Indigenous Peoples, The Environment, and Commercial Forestry in Developing Countries: The Case of Awas Tingni, Nicaragua', *Human Rights Quarterly*, Vol. 18 (1996), pp. 345–367.

<sup>37</sup> Petition to the African Commission on Nigeria, at <http://www.cesr.org>. The linkages between oil exploitation and economic, social and cultural rights are expressed succinctly in the first paragraph of the petition: 'Predominantly farmers and fisherfolk, the livelihood and welfare [of the Ogoni ethnic minority] is intricately bound to the health of surrounding rivers, streams and soil'. On the evolving role of the African Commission, see also R. Murray, 'Decisions of the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights', *International and Comparative Law Quarterly*, Vol. 46 (1997), pp. 412–434.

<sup>38</sup> On occasion, Shell's special role is highlighted as in the third paragraph of the petition: 'The NNPC-Shell consortium, with Shell as the operator, has caused massive and systematic environmental and social problems as a result of irresponsible operations and faulty infrastructure'.

structures of government, or throughout the entire territory of the state, as in some 'failed states'.<sup>39</sup>

*2.4 Fledgling UN Treaty Body Jurisprudence.* It is hoped that some sense has been provided of how the international human rights systems of the ILO, Europe, Africa, and the Americas have offered a modicum of juridical leadership on the question of indirect state responsibility for corporate conduct. Within the UN system, no human rights treaty body has assumed leadership on this question, although reports have emerged elsewhere in the UN system on the role of MNEs in environmental and human rights harms.<sup>40</sup> Whether approached in terms of a duty to 'ensure' or duties to 'protect and fulfil', there is no doubt that the general framework of obligations under the treaties squarely places preventive obligations on States Parties to protect persons and communities from the harmful conduct of private sector actors like corporations, and to respond in order to rectify resulting harms once they occur. However, little direct discussion of corporations as causal agents of harms or participating actors alongside states appears in the treaty bodies' normative pronouncements. The Committee on Economic, Social and Cultural Rights, for example, has yet to draft a general comment specifically addressing states' obligations in relation to MNEs or corporations generally. I am not aware of any concluding observations in which the Committee has commented on corporate

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<sup>39</sup> Indeed, the argument could be made, that in the absence of meaningful governmental capacity, corporations could themselves be impleaded under the African Charter itself as *de facto* governing authorities, at least in some contexts. One example might be the plunder of fisheries off the coast of Somalia by international long-distance trawlers.

<sup>40</sup> Elsewhere in the UN human rights system, a new, and potentially-significant, juridical initiative has just got under way. The Sub-Commission on the Promotion and Protection of Human Rights (a sub-body of the UN Commission on Human Rights) created, in August 1999, a five-member sessional working group to examine the activities of transnational corporations, adopting this decision in the context of an agenda called 'The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations'. The working group will have a three-year life span and had its first session in August 1999. The subject of a code of conduct for transnational corporations is a central feature of the report on the first session. See Report of the sessional working group on the working methods and activities of transnational corporations on its first session, UN doc. E/CN.4/Sub.2/1999/9 (12 August 1999), at paras. 5(a), 26, 27, 32 and 34. Working group member David Weissbrodt has been delegated to 'prepare such a code of conduct in cooperation with NGOs having expertise on the subject' (para. 32) and working group Chairman-Rapporteur El-Hadji Guissé is charged with preparing a paper that would include discussion 'on a draft mechanism for the implementation of the code of conduct to be prepared by Mr. Weissbrodt' (para. 34). The groundswell of attention by the UN human rights system can also be seen with the report of the Office of the United Nations High Commissioner for Human Rights, entitled 'Business and Human Rights: A Progress Report', January 2000.

actors as co-agents of harm.<sup>41</sup>

That being said, there is one significant body of jurisprudence. In a series of cases brought by indigenous communities, the Human Rights Committee (which oversees the CCPR) has begun to sketch the outlines of state obligations to protect rights to cultural life from corporate activity.<sup>42</sup> After establishing in the case of *Kitok v. Sweden* that certain kinds of economic activity, especially livelihood-gaining activity, are protected by Article 27 of the CCPR, where that economic practice is sufficiently connected to cultural maintenance, the Committee later went on to find, in the *Länsman* cases, that economic activity by other agents could impinge on these minority group cultural interests in a way that triggered positive duties on the state to take reasonable steps to prevent the harm or to respond to it if prevention fails.<sup>43</sup> The two *Länsman* cases should be read in tandem with General Comment No. 23 adopted by the Human Rights Committee with respect to Article 27 in approximately the same period that the *Länsman* communications were being considered by the Committee. The General Comment reads in material part:

[A] State party is under an obligation to ensure that the existence and the exercise of this [Article 27] right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party . . . [T]he Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially [sic] in the case of indigenous peoples . . . The enjoyment of those rights may require

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<sup>41</sup> One example of a finding of a violation where corporate conduct may well have been part of the picture is the Committee's earliest clear finding of a violation due to the situation of the wholesale community displacement and accompanying housing evictions (of 15,000 families) in the Dominican Republic designed to clear land for the building of a 500th anniversary commemorative monument to Christopher Columbus. See the concluding observations of the Committee on the Dominican Republic, Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/1991/23, at para. 249.

<sup>42</sup> See Communication No. 167/1984, *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, *Official Records of the Human Rights Committee 1989/90*, Vol. II, pp. 381–391; Communication No. 511/1992, *I. Länsman et al. v. Finland* (known as *Länsman No. 1*), Human Rights Committee, Final Decisions, UN doc. CCPR/C/57/1, pp. 74–85; Communication No. 671/1995, *J. Länsman et al. v. Finland (Länsman No. 2)* and Communication No. 549/1993, *Francis Hopu and Teopaitu Bessert v. France*, Report of the Human Rights Committee, Vol. II, UN doc. A/52/40, pp. 191–204 and pp. 70–83, respectively.

<sup>43</sup> Communication No. 197/1985, *Kitok v. Sweden*, *Official Records of the Human Rights Committee 1987/88*, Vol. II, pp. 442–445. In *Kitok*, reindeer herding was the culturally-valuable, and thus protected, practice. *Länsman* cases, *loc. cit.* (note 42). Both cases involved the activity of quarry companies which do not appear to have been transnational enterprises.

positive legal measures of protection and measures to ensure the effective participation of members of minority communities and decisions which affect them.<sup>44</sup>

The more serious harms that are known to have occurred at the hands of corporations worldwide can clearly be caught by the duties the Committee outlines. However, it is equally clear from the *Länsman* cases that the Committee requires a threshold of seriousness of harm before a state's duties to seek to prevent the harm are triggered, and, even then, the states' duties tend to have a significant procedural element with a special emphasis on the state being obligated to consult with the affected groups. Furthermore, the duties tend to be process-oriented in another respect, namely in that the Committee has not yet interpreted the protection of human rights from corporate activity (at least where cultural rights are the issue) to create what would be called 'obligations of result'. That is to say, the state is not responsible for human rights violations simply because serious harms to human rights occur. Were a result-based responsibility to be found, this would amount to the vicarious liability of the state for the conduct of non-state corporate actors, or, in other words, the equivalent of a form of direct responsibility. The Committee does not appear willing at this time to treat states as guarantors of human rights in the private sphere in this strong sense.<sup>45</sup> Rather, the matter has been approached as a continuation of the approach taken by traditional customary international law on the duty to protect 'aliens' from harm at the hands of private actors. This body of law expected 'due diligence' from the state, or, in other words, the exercise of reasonable care in the context at hand (taking into account such variables as resources reasonably at the disposal of the state) and especially as a function of the knowledge state officials had, or should have had, of the potential for harm. By going this route, and adding to the Article 27 context the potentially-significant component of 'effective participation' of the affected groups, the Human Rights Committee has, however, clearly laid the ground for a relevant body of jurisprudence

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<sup>44</sup> General Comment 23 on Article 27, *loc. cit.* (note 7). The quotes are from paras. 6.1 and 7.

<sup>45</sup> Again, at least not with respect to protection of culturally important economic practices. The matter could be different if the rights were of a different sort, for instance torture, where it might make sense to make states strictly liable. For other rights, like the right to adequate food, 'obligations of result' might be achieved by another route, namely the duty of the state to fulfil human rights. If corporate activity impacted on food provision, some combination of 'a duty to protect' and a 'duty to fulfil' might be the way to approach the responsibility of the state for harm caused by corporate activity. See also A. Eide, 'Economic, Social and Cultural Rights as Human Rights', Chapter 2 in this volume.

if the right cases continue to come this way in the future.<sup>46</sup>

Here it is worth noting that, even before the *Länsman* cases, the Committee had already reached one 'view' in which a breach of Article 27 was found as having resulted from the effects of oil and gas leases 'for the benefit of private corporate interests' on indigenous lands in Alberta, Canada.<sup>47</sup> Due to the complexity of the case and the sheer difficulty of clearly discerning the full facts (due to the antagonistic way in which the two parties presented their written arguments to the Committee), the Committee seems to have chosen a course of not detailing the links between the facts and its finding of a violation. Instead, in a breathtakingly-brief dispositive section of its view in the *Lubicon Lake Band* case, the Committee found Canada to have breached Article 27 for two reasons, both phrased elliptically: 'Historical inequities, to which the State party refers, in certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue'.<sup>48</sup>

From the context of the case and the nature of the pleadings reproduced by the Committee in its reasons, Canada's failure to give effect to the terms of an 1899 treaty which applied to the Lubicon Lake Band (Treaty No. 8) was one source of the violation, namely the violation referred to as 'historical inequities'. The second source phrased as 'certain more recent developments' which, in the context of the case and the Lubicon's pleadings, could only have referred to the pulp and paper activities of Daishowa.<sup>49</sup>

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<sup>46</sup> The term 'effective participation' comes from the general comment on Article 27. However, the Committee's application of this concept, especially in *Länsman No. 1* seemed to be a very watered-down version that came much closer to something like 'consult by listening'. That being said, the Committee did take into account the potential for the quarrying activity that was at issue in the case to constitute a future violation of Article 27 and exercised its jurisdiction to put the state of Finland on notice of this fact: 'With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones'. Para. 9.8 of *Länsman No. 1, loc. cit.* (note 42) (emphasis added).

<sup>47</sup> The case of the *Lubicon Lake Band, loc. cit.* (note 42), at paras. 2.3 and 29.1.

<sup>48</sup> *Ibid.*, at para. 33. The Lubicon Lake Band had also alleged harm caused by operations of a pulp and paper company (Daishowa, a Japanese MNE), but the Human Rights Committee is less clear on whether 'certain more recent developments' extend to those operations.

<sup>49</sup> One has to read the entire case to gain this impression. However, the following sentence, in paragraph 2.3, gives a clear indication of the nature of the Lubicon's concern: 'Despite

The most recent case emerging from the CCPR is *Hopu and Bessert v. France*.<sup>50</sup> Hopu and Bessert involved a claim by a local community in one of France's overseas territories (Tahiti, part of the Territory of Polynesia) that a luxury hotel development project violated various CCPR rights. The land in question encompassed, according to the complaints, 'the site of a pre-European burial ground and . . . [the] lagoon [bordering the land] remains a traditional fishing ground and provides the means of subsistence for some thirty families living next to the lagoon'.<sup>51</sup> The two main actors in the development were the governing authority and a corporation called *Société hôtelier RIVNAC*. RIVNAC's status was not made clear in the Committee's reasons, but it seems it was a private company; however, RIVNAC held the land on sub-lease which originated with a company which was 100 per cent government owned and which had secured an order of dispossession against the complainants' claimed ancestors before leasing. Due to a French reservation to Article 27, the Committee determined that it could not be applied against France but also determined that Article 17 can serve to protect similar interests due to the connection between family life and preservation of ancestral burial grounds.<sup>52</sup> In the result, France's activity had violated Article 17, with the Committee saying:

[T]he construction of a hotel complex . . . did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable . . . and nothing . . . shows that the State party duly took into account the importance of the burial grounds for the authors when it decided to lease the site for the building of a hotel complex.<sup>53</sup>

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[aforementioned] laws and agreements, the Canadian Government has allowed the provincial government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g., leases for oil and gas exploration) . . . Furthermore, energy exploration in the Band's territory allegedly [is] . . . destroying the environment and undermining the Band's economic base, [resulting in] the Band . . . allegedly being deprived of its means to subsist'.

Note that originally the Lubicon Lake Band pleaded their case as a matter of self-determination under Article 1 of the CCPR but the Committee converted this claim to one under Article 27 of the Covenant after ruling claims of violations of Article 1 of the CCPR could not be brought under the Optional Protocol procedure because the right was a collective right.

<sup>50</sup> See *loc. cit.* (note 42).

<sup>51</sup> *Ibid.*, at para. 2.3.

<sup>52</sup> Article 17 reads: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . . Everyone has the right to the protection of the law against such interference or attacks'.

<sup>53</sup> *Hopu and Bessert, loc. cit.* (note 42), at para. 10.3.

The Committee's words are quite evidently carefully chosen. They can be interpreted as saying that the state of France had breached its positive duty not to permit a private actor to do something which the state has knowledge will harm human rights. Or, it could just as easily be interpreted as holding that, due to the leasing arrangement, the private company of RIVNAC was in effect acting as the government corporation's agent, thus placing direct responsibility for the interference on France itself. What might be most significant about the careful wording chosen by the Committee is its decision not to make clear whether this is indeed a case of direct or indirect responsibility, choosing rather to avoid entirely juridical semantics about the status of the corporation carrying out the actual construction project (this is never clarified) and about the significance of the lease relationship (as to whether or not this invests a governmental character in the corporation holding the sub-lease).

That being said, it is undoubtedly the case that the existence of a lease connecting the hotel construction to a government corporation and the clear government policy of building a hotel merges the public with the private to such a great extent that it would not necessarily matter for the results in the case were the Committee to have first found that RIVNAC maintained its private character throughout the entire sequence of events. Read at its broadest, however, *Hopu* could be interpreted as saying that there is no relevant difference between activity of public corporations and private corporations where human rights interests are harmed, at least where the state is on notice of the activity that the private corporation is carrying out or is planning to carry out. An arguably-arbitrary difference in formal status of a company (arbitrary from the perspective of the degree of harm to the interests protected by human rights) should not make the difference between responsibility and non-responsibility.

Yet, all that being said, there remains a question after *Hopu* of whether less immediate governmental involvement would have changed the outcome. Assume hypothetically that the hotel project at issue in the case had *no* government involvement (other than perhaps the fact of zoning laws permitting a certain kind of project to go ahead and a building permit being issued in conformity with those zoning laws) and that the cemetery land was purchased from someone who had had private legal title to the land beforehand. Would the mere fact of a government regulatory role in permitting the hotel project to go forward be sufficient government knowledge of that project to render irrelevant the status of the corporation carrying out the construction? The most human-rights-sensitive interpretation would indeed say that government authorization of a building project should put constructive knowledge on the government of the harms that will be caused by that project. Yet, where the alleged human rights violations do not flow from an overall project but rather from discreet acts by the corporate actor, this is

where the status of that corporate actor will remain extremely relevant. This is because it cannot be assumed that the government, by sole virtue of having authorized the construction project, will know enough for its duty to prevent harm to be triggered in a timely way. While *Hopu* commendably does not get caught up in the semantics of public versus private status, as it does not need to, it would thus appear that the relevance of this bifurcation has not gone away. Were RIVNAC to be deemed a governmental actor (either because, hypothetically, it is 100 per cent government owned or because a lease is sufficient to give it that character) then each and every act that infringes on human rights interests by RIVNAC would constitute a violation by the government. In contrast, where RIVNAC remains purely private in status, the state's duty is generally considered to be more attenuated: the duty to take reasonable care in the circumstances to prevent harm caused by RIVNAC. The simple fact of harm by a corporation, where the government does not have adequate prior or concurrent knowledge of that harm, will not necessarily be sufficient to trigger state responsibility.

Whatever ambiguities are left after *Hopu*, the case remains very significant. It is proof positive that there is nothing inherent that stands between corporations and the juridical capacity to violate human rights. And it is also a very important precedent for having moved CCPR jurisprudence outside of the situation of corporate harm to interests protected only by Article 27 of the CCPR, suggesting that, in principle, corporate activity can engage state responsibility under the CCPR with respect to violation of any of the rights in the Covenant.

It should finally be said that none of these embryonic Human Rights Committee cases touches in the least on whether it will be possible to attribute extraterritorial responsibility on the state for harm caused by a corporation in another state where that corporation has a close connection to the first state. However, the Human Rights Committee, very early on in its jurisprudence (1981), indicated that the geographical scope of application of the Covenant is not limited to the territory of a Contracting Party. In the case of *de Casariego v. Uruguay* the Human Rights Committee noted:

Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it . . . [I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which

violations it could not perpetrate on its own territory.<sup>54</sup>

The immediate context of this case was the abduction of a person in Brazil by agents of the state of Uruguay so direct responsibility was clearly at issue, but the broader sense of the comments of the Committee suggests that the duty is one not 'to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'. Thus, if a state can violate the Covenant by failing to exercise sufficient diligence with respect to corporate activity on its own territory, and it has sufficient knowledge to be able to do at least something to prevent harm on the territory of another state by a corporation that is in some respects subject to its regulatory powers, then it would seem that there is, at least *prima facie*, a duty on that state to do what it can to prevent such violation.

### 3. ALTERNATIVE AVENUES: THE BUMPY ROAD FROM BHOPAL

*3.1 Actions Brought in the United States.* We move now from the public international (treaty) law of human rights to look at the nascent movement to make corporations liable before the courts of one country for human rights violations alleged to have been committed in other countries.<sup>55</sup>

In the famous *Bhopal* case, the pesticide plant run by Union Carbide India Limited (U.C.I.L.), a subsidiary of US-based Union Carbide (U.C.), malfunctioned and clouds of toxic gas were released, killing thousands and crippling many more.<sup>56</sup> The Government of India responded by passing a statute which permitted it to take carriage of the civil claims against both U.C.I.L. and U.C. on behalf of all the

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<sup>54</sup> Communication No. 56/1979, *Lilian Celiberti de Casariego v. Uruguay*, *Yearbook of the Human Rights Committee 1981–1982*, Vol. II, pp. 327–329, at paras. 10.1–10.3.

<sup>55</sup> The discussion in this concluding section is necessarily selective and descriptive in nature. For a useful recent overview of US litigation up to 1999, see S. Zia-Zarifi, 'Suing Multinational Corporations in the US for Violating International Law', *UCLA Journal of International Law and Foreign Affairs*, Vol. 4 (1999), pp. 81–147.

<sup>56</sup> *In re. Union Carbide Corporation Gas Plant Disaster at Bhopal, India, in December 1984*, 634 F.Supp. 842 (S.D. New York, Keenan J.) (henceforth: *Bhopal*). The judgment was upheld on appeal: 809 F.2d 195 (2nd Circ. 1987). For the most penetrating critique of Judge Keenan's judgment, see U. Baxi, 'Introduction: Towards the Revictimization of the Bhopal Victims', in: Indian Law Institute, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case*, 1986, pp. 1–34. And, for a leading article linking the Bhopal events to a discussion of transnational corporate accountability for human rights violations, see R. Kapur, 'From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations', *Boston College Third World Law Journal*, Vol. 19 (1990), pp. 1–41.

victims. India promptly filed a civil suit before a federal court in the United States against the parent company, Union Carbide, claiming that specific decisions and conduct taken in the United States by U.C. justified holding the parent company liable for the massive number of physical injuries and deaths that the Bhopal leak had caused—notwithstanding the separate legal identity of U.C.I.L., a company incorporated under Indian law. India's theory of the case, which it called 'multinational enterprise liability', was that Union Carbide was liable both because (on the existing evidence as well as on evidence India expected to be able to turn up in the discovery process) U.C. and U.C.I.L. functioned in all material respects as a single 'enterprise' regardless of formal separations of corporate personality and because, beyond this general relationship, conduct specifically connected to the causes of the Bhopal disaster had occurred in the United States (for example, decisions that the Bhopal plant would not use the same safety technology as another U.C. family plant producing the same product in Virginia).

However, the trial judge, Judge Keenan, accepted U.C.'s jurisdictional argument of *forum non conveniens*. The appropriate forum, in his view, was an Indian court. Indian judges were urged to 'stand tall before the world' and show that they could handle this kind of litigation.<sup>57</sup> Despite the fact that the Government of India was before him as (representative) plaintiff, the US judge emphasized that India's (true) 'interests' lay in having its own legal system adjudicate such an India-centred industrial catastrophe. According to the judge, US citizens had limited 'interest' in hearing a case like this which would inconvenience local jury members and crowd an already-congested court docket. Judge Keenan's analysis reveals no trace of any acceptance of the notion that home-state societies have not only 'interests' but also responsibilities in relation to harms caused in, or to, other societies by corporations closely associated with the home state—including associated by way of flows of wealth that contribute to the affluence of the home-state society. Subject to one condition left standing after appeal (that U.C. must accept jurisdiction of the Indian courts), the *Bhopal* litigation was sent back to India.<sup>58</sup> In relatively short order after the case was dismissed in the United States, the Indian Supreme Court had brokered a \$500 million settlement, relatively large by previous Indian standards (even given the number of plaintiffs, it seems) but paltry when compared to what monetary awards would likely have been given if a US civil jury had heard the case and had found U.C. liable. Some commentators saw a silver lining in the outcome, pointing to the fact that (a) bringing the case in the United States had resulted, along

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<sup>57</sup> *Bhopal*, *loc. cit.* (note 56), at 867.

<sup>58</sup> The case was dismissed subject to the following condition: 'Union Carbide shall consent to submit to the jurisdiction of the courts of India, and shall continue to waive defenses based upon the statute of limitations'.

with dismissal, in a precedent-setting condition on that dismissal (that a TNE parent company must submit to jurisdiction in a country where it had no legal presence) and that (b) the *de facto* precedent established by the settlement (acceptance by a TNE parent of liability for harm caused by a subsidiary, given that it was U.C., not U.C.I.L., that entered into the India settlement and it was U.C.'s insurance coverage that was tapped to pay the \$500 million award).

The comparative ease with which the US court in *Bhopal* had found itself to be an inappropriate forum for the litigation cast a pall over other plans to use US courts to seek justice against US-based MNEs. A decade later a new series of forays began as foreign plaintiffs sought to take a run at the *Bhopal* precedent in various state and federal district courts around the United States. The majority of these cases have been against natural resource extraction companies, most notably oil companies but also mining companies. The alleged harms have ranged from harm to the environment to harm to human health to corporate complicity in physical brutality (such as forced labour, torture and slavery). The early results before a series of trial judges in the various cases suggested that *Bhopal* was alive and well.<sup>59</sup> At trial, judges accepted the corporate defendants' arguments that they should not take jurisdiction even though the plaintiffs in each case had established the requisite formal jurisdictional links (notably the corporate presence of the defendant in this seized jurisdiction) and even though, as in *Bhopal*, it had been carefully argued before the judges that there were relevant links between the US parent and the overseas subsidiaries and that there was specific conduct (and records thereof) in the United States at issue. Three separate actions against Texaco were dismissed, two of which had been brought for harm in Ecuador (one before a Texas federal court and one before a New York federal court) and one for harm caused to Peruvians by the cross-border effects of harm originating in Ecuador from Texaco's alleged activities.<sup>60</sup> As well, an action against Southern Peru Copper Corporation (SPCC) brought in Texas for harm caused by toxic emissions in Peru was also

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<sup>59</sup> The exceptions early on were the two Memoranda of Opinion decisions of US District Judge Broderick in the *Aguinda* case. *Aguinda v. Texaco, Inc.*, 1994 U.S. Dist. LEXIS 4718 (April 11, 1994) and *Aguinda v. Texaco, Inc.* 850 F.Supp. 282 (S.D.N.Y. 1994) (April 29, 1994). He seemed to be leaning towards keeping the case in his court rather than dismissing it in favour of Ecuador courts, at least as regards the injunction remedy being sought by the plaintiffs. After he died, the case eventually made its way to the court of Judge Rakoff.

<sup>60</sup> *Sequihua v. Texaco, Inc.*, 847 F.Supp. 61 (S.D. Tex. 1994); *Aguinda v. Texaco, Inc.* 945 F.Supp. 625 (S.D.N.Y. 1996); *Ashanga v. Texaco*, S.D.N.Y. Dkt. No. 94 Civ. 9266 (August 13, 1997). The two cases with Ecuadorian plaintiffs were *Sequihua* and *Aguinda*. The Peruvian case was *Ashanga*. These three cases are all trial level decisions by federal district judges (Judge Black for *Sequihua* and Judge Rakoff for *Aguinda* and *Ashanga*).

dismissed, like the Texaco cases, on *forum non conveniens* grounds.<sup>61</sup>

Shell Oil was sued, again in Texas, but not, like Texaco, for environmental and health harm caused by oil activities but for alleged harm, including sterilization, caused to plantation workers exposed to a pesticide (DBCP) manufactured by Shell.<sup>62</sup> The lawsuit on behalf of the agricultural plantation workers was massive, involving thousands of plaintiffs from 12 different countries who had worked on plantations where DBCP was used in 23 different countries.<sup>63</sup> Instead of looking at the case from a perspective of comparative access to justice in order to retain jurisdiction over what amounted to a case consolidated into a global class action, Judge Lake in *Rodriguez* held, in an almost surreal application of *Bhopal*-style reasoning, that the plaintiffs would have to sue Shell in each of the 12 countries from which they hailed. As part of the *forum non conveniens* analysis, he carried out an extremely perfunctory assessment of the adequacy of the court system in each of the 12 countries and found an action for harm to their health could be brought and heard in each.

However, since 1997, there have been at least three significant reversals of this trend. In 1998, a federal court of appeal and a state court of appeal overturned lower court dismissals in *Aguinda v. Texaco* (jointly decided on appeal with *Ashanga*) and *Alomang v. Freeport-McMoran*, respectively.<sup>64</sup> And, in mid-1997, the first major breakthrough in a trial-level judgment occurred in *Doe v. Unocal*, a case dealing with an oil pipeline construction project linked to serious human rights abuses in Burma.<sup>65</sup> In the consolidated appeal of *Aguinda* and *Ashanga*, the federal Court of Appeal (Second Circuit) in *Jota* reversed because the lower court judge (the same in each case, Judge Rakoff) had relied either on an inadequate basis or an erroneous basis for dismissal with respect to each of the three doctrines the judge had relied upon as reasons for him to decline jurisdiction.

*3.2 Australia: Negligence Claims and Economic, Social and Cultural Rights Enforcement.* In the case of *Dagi v. Broken Hill Properties [BHP] and Ok Tedi Mining Limited [OTML]*, proceedings were brought by four groups of plaintiffs living in an area of Papua

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<sup>61</sup> *Torres v. Southern Peru Copper Corporation*, 965 F.Supp. 895 (S.D. Tex. 1995). SPCC was a Delaware company which operated directly in Peru and not through a subsidiary.

<sup>62</sup> *Rodriguez v. Shell Oil Company*, 818 F.Supp. 1013 (S.D. Tex. 1993).

<sup>63</sup> There had been a multitude of separately-initiated cases that were all consolidated into this single case now known as *Rodriguez*.

<sup>64</sup> *Jota v. Texaco, Inc.*, 157 F.3d 153 (2nd Cir. 1998); *Alomang v. Freeport-McMoran Inc.*, 718 So.2d 971 (LaApp. 4 Cir. 1998).

<sup>65</sup> *Unocal No. 1*, *loc. cit.* (note 11).

New Guinea.<sup>66</sup> They alleged harms caused by toxic pollution into a river and a flood plain stemming from a copper mine run by a major Australian mining TNE (BHP and its subsidiary OTML). The defendant corporations sought to have the actions brought in Australia dismissed for want of jurisdiction over the subject matter of the claims. The significance of *Ok Tedi* resides in the fact that the judge held that he *did* have jurisdiction over certain causes of action related to negligence alleged by three of the four groups.<sup>67</sup> In the course of his reasoning, Judge Byrne observed:

In the present case the allegation of the plaintiffs is that the defendants discharged a large quantity of pollutant into a river which flowed into the sea. Let us assume that the pollutants were poisonous. *To my mind, it is not at all improbable to suppose that the law imposes a duty of care in favour of persons who may use the water downstream as a food source or for a livelihood.* The magnitude of the potential danger to the environment which may be caused by such conduct imposes a heavy responsibility on the defendant in such a case . . . in terms of the ambit of the duty of care.<sup>68</sup>

Expressed in these terms, the Australian judge has formulated the interests that are protected from negligent harm in a way that clearly involves the same interests as are protected by economic, social and cultural rights. In the process, he has helped show how basic common law tort categories can be understood in terms of remedies for human rights violations without necessarily the need to develop specific 'human rights' civil causes of action.

The three remaining actions against BHP did not go to trial. Instead, after Judge Byrne assumed subject matter jurisdiction over the negligence claims, BHP agreed to settle the claims. The settlement was significant, including \$400 million (Australian dollars) for the construction of a tailings containment system and up to \$150 million as compensation for environmental damage.<sup>69</sup> BHP did not even follow up its failed motion to dismiss for want of jurisdiction with a *forum non conveniens* application. One commentator has identified as the reason for BHP not trying the *forum non conveniens* course the adherence of the Australian High Court to

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<sup>66</sup> *Dagi; Shackles; Ambetu; Maun and Others v. The Broken Hill Proprietary Company Ltd. and Ok Tedi Mining Limited (No. 2)*, [1997] 1 Victoria Reports [V.R.] 428, at 441 and 439 (henceforth: *Ok Tedi*).

<sup>67</sup> The *Dagi* group was the only group of plaintiffs whose claim was dismissed on the ground of having fallen afoul of a doctrine which bars Australian courts from taking jurisdiction where the essence of the cause of action is harm to property rights in foreign land.

<sup>68</sup> *Ok Tedi, loc. cit.* (note 66), at 456, 457.

<sup>69</sup> *The Australian*, 25 March 1997, as cited in P. Prince, 'Bhopal, Bougainville and Ok Tedi: Why Australia's *Forum Non Conveniens* Approach is Better', *International and Comparative Law Quarterly*, Vol. 47 (1998), pp. 573–598, at p. 595, note 120.

a very pro-plaintiff *forum non conveniens* test. Prince has offered the following observations:

Australia's *forum non conveniens* approach has much to commend it. In particular, by retaining harassment as the standard against which to judge inconvenience to the defendant, it makes it difficult for Australian residents and companies to escape local jurisdiction if taken to court in Australia by a foreign plaintiff. Thus it acts as an incentive for companies based in Australia to adopt similar industrial safety and environmental standards in their overseas activities as they are required to domestically . . . [F]oreign environmental damage cases have done much to create the perception that the law of the United States allows its multinationals to avoid US legal standards when operating overseas. Apart from ensuring a peaceful resolution of the *Ok Tedi* case through legal means, the willingness of the Australian courts to hear the case meant BHP could not escape the application of Australian legal standards in its mining operations in Papua New Guinea. Hence the negotiated settlement in the *Ok Tedi* case applied Australian environmental standards to determine appropriate remedial action by BHP and other compensation.<sup>70</sup>

Viewed alongside the above observations about the negligence cause of action against BHP being a surrogate economic, social and cultural rights claim, the significance of the outcome in *Ok Tedi* cannot be overstated.

*3.3 The UK: Effective Access to Justice as an Emerging Human Rights Premise.* In the United Kingdom, a series of civil liability human rights cases have been launched against UK-based MNEs for harms (primarily to health) caused by their subsidiaries and their subsidiaries' activities in foreign countries. The firm of London solicitors that is spearheading this new development appear ready to operate on a contingency basis if plaintiffs cannot fund the litigation and are not otherwise eligible for legal aid.<sup>71</sup> It was in this context that a major breakthrough occurred in the House of Lords' decision in *Connelly v. RTZ Corp Plc.*<sup>72</sup> Connelly, by birth a Scotsman, had ended up working outside the United Kingdom in various mining operations, including a uranium mine in Namibia run by a subsidiary within the Rio Tinto Zinc

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<sup>70</sup> P. Prince, *loc. cit.* (note 69), at pp. 574, 595.

<sup>71</sup> See the cases outlined in R. Meeran, 'Accountability of Transnationals for Human Rights Abuses: 1', *New Law Journal*, Vol. 148, No. 6864 (13 November 1998), pp. 1686–1687; and R. Meeran, 'Accountability of Transnationals for Human Rights Abuses: 2', *New Law Journal*, Vol. 148, No. 6865 (20 November 1998), pp. 1706–1707. Meeran of Leigh Day & Co. is the lead solicitor in the firm conducting this form of litigation.

<sup>72</sup> [1997] 4 All ER 335 (H.L.). The *Connelly* case appears to have come down after Prince's article was published.

(RTZ) empire. He contracted throat cancer after his return to the United Kingdom where he received medical care. There he launched proceedings in tort for harm to his health caused by RTZ's alleged negligence in failing to provide a reasonably safe system of work affording protection from uranium ore dust. The defendant TNE argued the case should be dismissed in favour of Namibian courts on grounds of *forum non conveniens*. The House of Lords held that either of two financial disadvantages to suing in Namibia (the lack of legal aid funding and the unavailability of contingency fee funding) were sufficient to override the factors that were otherwise pointing to Namibia being the more appropriate forum.<sup>73</sup> The Lords were relatively careful in reasoning that it was not the simple loss of such funding, but rather it was the loss coupled with the evidence that it was highly unlikely that the plaintiff would be able to go forward with the case in the foreign jurisdiction.

Although there is no direct mention made in the House of Lords judgment as to international human rights law, there is a clear parallelism between the Lords' reasoning and the 'access to court' cases under Article 6 of the European Convention on Human Rights with respect to civil rights claims.<sup>74</sup> In particular, in *Airey v. Ireland*, the European Court of Human Rights has ruled that the absence of state financial assistance rendered illusory an economically-disadvantaged women's formal right to go to court in separation proceedings.<sup>75</sup> In *Connelly*, it was as if the Lords treated the Namibian and the English courts as a fused judicial system (fused by the transnational litigation context) and then applied the *Airey* principle: in other words, there must be an effective right to a court in at least one of the two candidate systems for the European Convention's right to a court, in a private international law context, to be respected.<sup>76</sup> With this ruling, the interconnectedness of civil and political rights and economic, social, and cultural rights inscribes itself in the context of transnational corporate accountability. It was in *Airey* that the

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<sup>73</sup> Contingency fee funding refers to cases 'funded' by lawyers who carry the costs of the case and receive payment for their work only if their client succeeds in the case. Their fee is an agreed percentage of the award made to the plaintiff.

<sup>74</sup> See further section 3.2 in M. Scheinin, 'Economic and Social Rights as Legal Rights', Chapter 3 in this volume.

<sup>75</sup> *Airey v. Ireland*, judgment of 9 October 1979, Publications of the European Court of Human Rights, Series A, No. 32.

<sup>76</sup> It is relevant that the House of Lords' reasoning in *Connelly* could well have been influenced by the second of the two Court of Appeal judgments in the *Connelly* case, in which the Court did make reference to Article 6 of the European Convention on Human Rights, the provision on which the 'access to court' case law has been built. *Connelly v. RTZ* (No. 2) (1996), 12 July 1996, Times Law Reports. Yet, the Lords did not choose to repeat the reference, instead noting that 'financial assistance for litigation is not necessarily regarded as essential'.

European Court of Human Rights first acknowledged that reading a right to a fair trial to include civil legal aid took the court into the terrain of what some might consider to be social and economic rights, but did not shirk from pronouncing that the two (so-called) categories of rights are not 'water-tight division[s]'.<sup>77</sup> The promise of *Connelly* must, however, not be overstated as the English Court of Appeal has recently interpreted it very narrowly in a major class action (some 2000–3000 plaintiffs) against an English MNE with respect to alleged asbestos-caused harms to health and life in South African mining communities.<sup>78</sup> In the course of the judgment in *Group Action Afrika (Lubbe No. 2)*, both Judge Keenan and the federal Court of Appeal (2nd Circuit) in *Bhopal* were quoted enthusiastically and at length.

The road from Bhopal is proving very bumpy indeed.<sup>79</sup>

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<sup>77</sup> *Airey, loc. cit.* (note 75), at para. 15.

<sup>78</sup> *Lubbe & Others v. Cape Plc.*, Unreported (Court of Appeal, Civil Division; judgment of 29 November 1999) (*Lubbe No. 2*). This case is also referred to as *Group Action Afrika* because of the style of cause before the judge of first instance: see *Group Action Afrika & Others v. Cape plc*, Unreported (Queen's Bench Division, Buckley J; judgment of 30 July 1999). The name *Group Action Afrika* is also helpful because of how clearly it brings to mind the class-action nature of the case. In *Group Action Afrika (Lubbe No. 2)*, not only did the Court of Appeal interpret *Connelly* to the vanishing point, but it also engaged in a rare judicial exercise by reversing its own judgment of only a year before in *Lubbe v. Cape Plc.*, Unreported (Court of Appeal, Civil Division; judgment of 30 July 1998) (*Lubbe No. 1*). *Lubbe No. 1* had been brought as a test case and involved only five plaintiffs. One of the five plaintiffs in *Lubbe No. 1* worked at one mine and lived in the on-site hostel since age 12 from which age he packed asbestos fibres with his bare hands: recall one of the examples given in section 1 of this chapter. After obtaining a favourable jurisdictional ruling for these five in *Lubbe No. 1*, the solicitors then initiated the *Group Action Afrika (Lubbe No. 2)* class action. Some issues directly overlapped with *Connelly's* financial accessibility focus while the general spirit of *Connelly* was relevant to how the new jurisdictional issues raised in the *Lubbe* cases should have been approached. Two key issues were, one, the relevance of the lack of amenability of the defendant to suit abroad (with the defendant only agreeing to submit voluntarily to the jurisdiction of South African courts *after* suit had been brought in the United Kingdom) and, two, the weight to be accorded to the fact that the plaintiffs would have to sue in several foreign courts (here, several South African judicial districts), should the case be dismissed by an English court. The three judges in *Group Action Afrika (Lubbe No. 2)* (Pil, Tuckey and Aldous) were not the same three who had decided *Lubbe No. 1* the year before (Evans, Millett and Auld). It is far from clear that the second panel of judges properly understood the main basis for the judgment of the first panel of judges.

<sup>79</sup> The two cases, *Lubbe No. 1* and *Group Action Afrika (Lubbe No. 2)*, will be heard as a joined appeal by the House of Lords. Oral pleadings before the Lords is to take place in mid-June 2000 with judgment likely some time before the end of 2000. A significant development since the two Court of Appeal cases is the fact that the government of South Africa had been granted the right to intervene in the House of Lords proceedings. In its application for leave to intervene, South Africa stated it would argue that the case should stay in England and that it would be

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erroneous for English courts to follow the *Bhopal* precedent by failing to embrace South Africa's reasons for wanting the case to stay in England in the way the US court had discounted India's reasons for wanting the earlier case to stay in the United States. See Republic of South Africa, Petition for Leave to Intervene, House of Lords, April 2000, unpublished but public document. In this respect, the more recent US federal Court of Appeal (2nd Circuit) decision in *Jota* (*loc. cit.* (note 64)) will likely be of greater persuasive value to the Lords than *Bhopal*. In *Jota*, the court found it very significant that the government of Ecuador had reversed its previous position which had been opposed to US courts hearing cases against Texaco; Ecuador was now supporting the plaintiffs' argument that US courts should hear the case. For an appreciation of how litigation in the United States contributed to increasing transparency in political debate in Ecuador and then to the change in Ecuador's position, see J. Kimmerling, 'The Story from the Oil Patch: The Under-Represented in *Aguinda v. Texaco*', *Human Rights Dialogue*, Series 2, Number 2 (Spring 2000), pp. 6–7.

