

CORPORATE SOCIAL RESPONSIBILITY (CSR): MARKET-BASED REMEDIES FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS?

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I. INTRODUCTION

The problem of poverty presents the opportunity of labour exploitation. Opportunities to profit out of the misery of others occur in a variety of trades,¹ including flowers,² textiles,³ oil,⁴ and diamonds.⁵

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1. See Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility By Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 881 (1999) (global capital is highly mobile and follows profit, not human need); see also Comment, *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2025 (2001) (most corporate human rights violations go unpunished due to gaps in domestic and international laws).

2. Jocasta Shakespeare, *Gardens of Shame*, WORLD PRESS REV., Oct. 1, 1995, at 42. See also Nicole J. Krug, *Exploiting Child Labour: Corporate Responsibility and the Role of Corporate Codes of Conduct*, 14 N.Y.L. SCH. J. HUM. RTS. 651, 651 (1998).

3. See, e.g., Deborah J. Karet, *Privatizing Law on the Commonwealth of the Northern Mariana Islands: Is Litigation the Best Channel for Reforming the Garment Industry?*, 48 BUFF. L. REV. 1047, 1061-69 (2000); Clean Clothes Campaign, at <http://www.cleanclothes.org/> (last visited Oct. 26, 2003).

4. It is worth noting that “no Western oil company was willing to abandon its access to crude because of political risk in the West. . . . Second, these pressures did not deter new energy investments. . . . [W]hile most MNCs stayed away from Nigeria, oil companies increased their investments.” Kenneth Rodman, “*Think Globally, Punish Locally*”: *Nonstate Actors, Multinational Corporations, and Human Rights Sanctions*, 12 ETHICS & INT’L AFFAIRS 19, 37 (1988).

5. Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 HASTINGS INT’L & COMP. L. REV. 327, 329-31 (2001); *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, International Council on Human Rights Policy, 128, 145-48, available at http://www.cleanclothes.org/ftp/beyond_voluntarism.pdf (last visited Oct. 26, 2003).

Multinational companies can make a killing on their investments—literally.⁶ Often, as in the case of conflict diamonds,⁷ the source of the commodity resulting from exploitation cannot be traced.⁸

Not only are labour exploitation patterns recurrent in several industries, human rights violations occur throughout the third world in places as diverse as Saipan,⁹ Ecuador,¹⁰ Papua New Guinea,¹¹ Indonesia,¹² Myanmar (formerly Burma),¹³ and Nigeria,¹⁴ and often implicate first-world multinational corporations.¹⁵

The violations of human rights are just as wide-ranging. Indentured servitude,¹⁶ child labour,¹⁷ and slave labour¹⁸ are typical viola-

6. "When the Ogoni Nine were sentenced to death, Shell was asked by NGOs such as Amnesty International to use its influence to win clemency. Shell's response was . . . 'It is not for a commercial organisation to interfere with the legal processes of a sovereign state.'" Rodman, *supra* note 4, at 35.

7. Conflict diamonds or, more directly, blood diamonds, are those diamonds produced in West Africa, particularly Sierra Leone and the Congo. These regions are in perpetual conflict because of the diamonds, which are used to finance the incessant barbaric civil wars often waged using child soldiers. The diamonds are both the object and means of financing the civil wars. See *Diamonds in Conflict*, United Nations Security Council, at <http://www.globalpolicy.org/security/issues/diamond/> (last visited Oct. 26, 2003).

8. Blaine Harden, *Africa's Gems: Warfare's Best Friend*, N.Y. TIMES, Apr. 6, 2000, at A1; Amann, *supra* note 5, at 330.

9. See Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalisation*, 35 U.C. DAVIS L. REV. 705, 761-64 (2002); see also *First-Ever Lawsuits Filed Charging Sweatshop Conspiracy Between Major U.S. Clothing Designers, Retailers, Foreign Textile Producers*, Sweatshop Watch, at <http://www.sweatshopwatch.org/swatch/marianas/lawsuit.html> (last visited Oct. 26, 2003); William Branigin, *Top Clothing Retailers Labelled Labor Abusers Sweatshops Allegedly Run on U.S. Territory*, WASH. POST, Jan. 14, 1999, at A14, available at <http://www.house.gov/georgemiller/cnmipostarticle.html> (last visited Oct. 26, 2003).

10. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

11. Elizabeth Amon, *Coming to America: Alien Tort Claims Act Provides a Legal Forum for the World*, NAT'L L.J., Oct. 23, 2000, at A1, microformed on UMI Microform 60537-2000 (Bell & Howell Info. & Learning Co.).

12. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

13. *E.g.*, *Doe v. Unocal Corp.*, No. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), vacated by No. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003) (appeal currently being reheard en banc).

14. *E.g.*, Jason Hoppin, *Chevron Hit with Human Rights Claim*, NAT'L L.J., Apr. 24, 2000, at B1; *Wiwa v. Royal Dutch Petro. Co.*, 226 F.3d 88 (2d Cir. 2000).

15. See, e.g., Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), available at <http://www.hrw.org/reports/1999/enron/> (last visited Oct. 26, 2003).

16. Kimberly Gregalis Granatino, Note, *Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability?*, 23 SUFFOLK TRANSNAT'L L. REV. 191, 191 (1999) (describing poor-quality working conditions in the third world).

17. Krug, *supra* note 2, at 651.

tions; however, even charges of murder or genocide are sometimes alleged.¹⁹ Quite simply the fact is that consumers want cheap goods, and third-world labour, particularly child and slave labour, is cheap. Companies exploit third-world labour because exploitation is profitable.²⁰

These facts, and the instability of local governments,²¹ often put corporations doing business in the third world into questionable positions. Usually these ethical problems are resolved quickly by looking to whether profit is hindered or aided.²² While we may expect a corporation to behave ethically when it costs nothing, we should realistically expect the corporation to maximise its profits when behaving ethically will reduce profits, even when that means exploiting sweatshop labour, for example.²³ Partially, this is because the company will become less competitive with other businesses that do not renounce exploitative profits.²⁴ The fact that competition, whether among corporations or states, can lead to sub-optimal outcomes explains why law rightly imposes limits on market transactions.²⁵

This Article explores market forces that may contribute to controlling corporate behaviour and the internal regulatory structure of the corporation. The Article particularly looks at nonbinding regulation of the corporation *via* codes of conduct and guidelines estab-

18. Maria Ellinikos, *American MNCs Continue to Profit from the Use of Forced and Slave Labor Begging the Question: Should America Take a Cue from Germany?*, 35 COLUM. J.L. & SOC. PROBS. 1, 1 (2001).

19. *See* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).

20. *See* Robert J. Liubicic, *Corporate Codes of Conduct and Product Labelling Schemes: The Limits and Possibilities of Promoting International Labour Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 112-13 (1998) (outsourcing to take advantage of cheap unregulated third-world labour); *see also* Krug, *supra* note 2, at 658.

21. "[Shell's] general manager explained the irrelevance of human rights to the economic opportunities in blunt terms: 'For a commercial company trying to make investments, you need a stable environment. Dictatorships can give you that.'" Rodman, *supra* note 4, at 35.

22. David P. Forsythe, *The Political Economy of Human Rights: Transnational Corporations*, 14 HUMAN RTS. WORKING PAPERS (Mar. 14, 2001), at <http://www.du.edu/humanrights/workingpapers/papers/14-forsythe-03-01.pdf> (last visited Oct. 26, 2003).

23. Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*, 11 MINN. J. GLOBAL TRADE 101, 117 (2002).

24. JOEL MAKOWER, *BEYOND THE BOTTOM LINE* 30 (Simon & Schuster 1994).

25. Jeremy Lehrer, *Trading Profits for Change*, 25 HUM. RTS. 21, 23 (1988). *See also* Douglas Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963, 1977 (1996).

lished by the company itself,²⁶ the industry,²⁷ pressure groups,²⁸ the state, or by international organisations,²⁹ such as the International Labour Organisation (ILO)³⁰ and the Organisation for Economic Cooperation and Development (OECD).³¹ The corporate social responsibility movement seeks to influence directly or indirectly or control corporate behaviour through a combination of (1) marketplace activism (influence over or via capital structure and sales of the corporation), (2) internal self-regulation (codes of conduct),³² and (3) shareholder activism. Accordingly, this Article examines indirect influence via market forces affecting capital and sales, and direct control or influence *via* the corporation's internal organisation through codes of conduct and shareholder activism.

Individually the soft-law norms explored here are generally not very effective.³³ However, in concert with other regimes, they can encourage improved human rights protection.³⁴ Thus, although the state still plays a key role in the spectrum of international legal entities, it is increasingly supplanted by sub-state and supra-state normative regimes.

26. See Su-Ping Lu, Comment, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 611 (2000) (over 100 companies have voluntarily adopted codes of conduct).

27. Thus, "[t]he World Diamond Congress, meeting in 2000 in Antwerp, proposed the creation of an international diamond council made up of producers, manufacturers, traders, governments, and international organizations to oversee a new system to verify the provenance of rough diamonds." Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L. COMP. L. REV. 273, 314 (2002), available at http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_2/06_TXT.htm (last visited Oct. 26, 2003). This is an example of nonstate actors taking over the role of states—namely, proposing new international norms, the very core of the distinction between "object" and "subject" of international law. *Id.*

28. See Liubicic, *supra* note 20.

29. Macek, *supra* note 23, at 107-09.

30. Tripartite Declaration of Principles Concerning Multinational Enterprises and Special Policy, 17 INT'L LEGAL MATERIALS 422 (1978).

31. Organisation for Economic Cooperation and Development, *The OECD Guidelines for Multinational Enterprises*, 40 INT'L LEGAL MATERIALS 236 (2001). See also Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399 (2002).

32. See Lance Compa & Tashia Hinchcliffe Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 674-83 (1995) (analyzing various corporate codes).

33. Macek, *supra* note 23, at 110.

34. *Id.* at 119-24.