Rights and responsibilities

James Hargrove assesses the current level of corporate accountability for involvement in human rights abuses

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Whether businesses may be held accountable for involvement in human rights abuses has long been the source of much academic debate but comparatively little court activity. However, in light of a recent UN report on the issue, this article considers what, if any, human rights obligations may apply to businesses and whether they face any real threat of litigation if they breach their obligations. Particular emphasis is given to the prospect of litigation in England, Europe and the US.

The UN report

On 20 April 2005, the UN Commission on Human Rights asked Professor John Ruggie (the special representative of the UN Secretary-General on business & human rights), *inter alia*, to:

(a) identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights; and

(b) elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation.

Professor Ruggie labelled this a:

> ... comprehensive mapping of current international standards and practices regarding business and human rights

He presented his report on 28 March 2007. Professor Ruggie was also asked to submit his 'views and recommendations', which, it was hoped, would give some insight into future UN policy in this area, particularly whether the UN would resuscitate its efforts to create legislation imposing direct legal obligations on all companies (its previous attempt, the 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, 2003', failed). Unfortunately, however, Professor Ruggie had insufficient time to complete the 'views and recommendations' part of his remit and has asked for a further year to do so. The insights will have to wait.

The possible grounds for bringing legal proceedings against companies alleged to have been involved with human rights breaches, most of which were considered by Professor Ruggie, are analysed below.

National law

The most likely basis for a claim against a company accused of human rights abuse is under national law. As mentioned above, this article focuses on possible claims in the US, England and the rest of Europe.

Claims in the US under the Alien Tort Claims Act

The full text of the Alien Tort Claims Act 1789 (ATCA) reads:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The ATCA was originally enacted to protect American vessels from piracy in US waters, but has subsequently been interpreted by US Courts to allow individuals harmed by acts in breach of core 'customary international law' to bring claims in US courts. Such customary law includes infringement of various human rights (for example, slavery and torture: see the case of *Doe v Unocal* [2000]), but not actions that affect human rights indirectly, such as environmental damage.

In theory at least, the ATCA is of very wide application: it is not limited in terms of jurisdiction (although in practice, as explained below, considerable jurisdictional restrictions exist) and has been held to apply to US companies indirectly involved in human rights abuses abroad, on agent/principal or vicarious liability grounds.

However, it does not follow that a company situated anywhere in the world can be sued in the US courts for alleged human rights abuses, no matter where they take place. In reality, there are considerable limitations both in terms of causes of action and jurisdiction:

- The only acts prohibited are breaches of the core 'customary' human rights.
- US courts strictly apply *forum non conveniens* principles and a plaintiff will have to show a strong connection with the US (eg defendant/plaintiffs resident in the US, a real threat that justice will not be done where the torts were carried out, etc). In practice, the place where the alleged abuse was carried out is often held to be the proper forum and a large number of the 40 human rights cases brought under the ATCA to date have been dismissed on *forum non conveniens* grounds.
- Although a number of ATCA claims are still progressing through the US courts and have survived strike-out attempts, none has yet reached full trial and a number have been settled or struck-out.

Although there is, therefore, a real possibility that companies accused of involvement in human rights breaches may face claims in the US courts under the ATCA, such claims are only likely to overcome a jurisdictional challenge if the defendant is resident in the US or other strong factors link the US to the claim. There is, as yet, no precedent for a claim succeeding through trial. However, various well known multinational companies (including, for example, ExxonMobil, Rio Tinto and Unocal) have been named as defendants in recent years.

England and Europe: claims under human rights legislation

English human rights law is governed by the Human Rights Act 1998 (the HRA), which incorporates into English law most of the European Convention on Human Rights (the ECHR). The HRA applies only to 'public authorities' (s6(1)) and does not create direct causes of action for individuals to bring claims against companies for breach of their human rights. However, English courts have accepted, particularly in relation to litigation between private parties over alleged infringements of privacy, that as public bodies they are under a positive obligation to enforce respect for the provisions of the HRA as between private parties, and not to issue judgments that are incompatible with the rights contained therein.

This has given rise to claims between private parties based on rights under the HRA, for example *Campbell v MGN Ltd* [2003]. However, this development has so far been limited mostly to privacy claims, and its general scope, particularly to wider breaches by companies, is far from certain.

In any event, a claim under the HRA is limited to acts carried out in England because the ECHR, upon which it is based, does not have extra-territorial application (except in very limited circumstances, which do not apply to claims against companies). There is, therefore, no scope for claims against a company under the HRA for acts committed outside the company's home jurisdiction.

England and Europe: tort-related human rights claims

Although the scope for claims under English and European human rights legislation is, therefore, extremely limited, claims for human rights abuses may be brought in the English courts, subject to certain requirements, in relation to a narrow band of tort-related corporate human rights abuses, whether committed in England or abroad.

The first requirement is that the act in question is, if carried out in England, a tort under English law or, if committed abroad, is a tort under the law of the place where the act was carried out. This has been the test since 1995, when s10(a) of the Private International Law (Miscellaneous Provisions) Act abolished the old common law rule of 'double actionability' (ie the requirement that the act in question, if committed abroad, would qualify as an English law tort if had been carried out in England).

This will certainly not cover all human rights offences (for example, discrimination, child labour and prevention of freedom of assembly, depending on the circumstances, may well not be covered) but in the right circumstances a number of abuses may be characterised as torts. Various human rights abuses may, for example, also qualify as the English torts of negligence, trespass to person or property, nuisance, and/or breach of employers' or occupiers' liability (eg abuse of employees may constitute both a breach of their human rights and a tort under the principles of employer liability, negligence and/or trespass to person).

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As noted above, if carried out abroad, the act must be a tort under the law of the place where it was carried out to be actionable. The English courts are flexible in determining whether the action is an actionable tort under the law of the country where the act was carried out. Essentially, most non-contractual breaches of a civil legal obligation (including breach of a statutory duty giving rise to civil liability), so long as they do not infringe English public policy principles, may be interpreted as a tort. This includes acts that are torts under the law of the country where they were carried out, but are not recognised as torts under English law.

This means that, subject to the further jurisdictional requirements below, the English court is prepared to accept claims for acts occurring abroad that give rise to a civil cause of action under the law of the place where the act was carried out. However, whether a particular act is a tort under the law of the place where it is carried out will, of course, depend on the laws of the country in question.

Secondly, the circumstances must be such that, applying English rules of

jurisdiction, the English court is prepared to accept jurisdiction over the claim. This issue is now considerably simplified by the decision of the European Court of Justice in *Owusu v Jackson* [2002], which provides that where a tort is committed abroad (in that case, Jamaica), under article 2(1) of Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Judgments Regulation), a claimant has the right to sue a defendant resident in an EU member state in the court of that state.

Furthermore, the claimant may join other co-defendants, not based in Europe, as 'necessary and proper parties' in the claim (CPR 6.20(3)(b)) and, so long as there are grounds for jurisdiction against one of the defendants, the English court will take jurisdiction over the parties also, notwithstanding that they have no territorial connection with England. Accordingly, in matters of tort, where the claimant is based and where the actions in question were carried out is now entirely irrelevant to the jurisdictional equation so long as the defendant is based in Europe, albeit that this means that an English court may end up trying a case under a foreign law and with various foreign parties.

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The House of Lords has also been prepared to pierce the corporate veil to take jurisdiction over parent companies in this type of claim. In the cases of *Connelly v RTZ* [1998] and *Lubbe v Cape* [1998], for example, jurisdiction was accepted by the English courts in relation to claims for negligence against English parent companies. This included failures to properly oversee and control the activities of foreign subsidiaries. In *Lubbe*, where such a failure caused asbestosis in employees based in Africa, group litigation in England ensued. In the right circumstances, therefore, this sort of derivative human rights claim also applies to companies indirectly involved in human rights abuses.

Claims that do not involve a European defendant, but are nevertheless brought in a European court, are governed by the common law jurisdiction rules of the country where the claim is brought, rather than the Judgments Regulation or Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988. In England, this means that the claim will only be accepted where there is no more appropriate forum elsewhere. In practice, the place where the act was carried out is likely to be the most appropriate place, unless, as in *Connelly* and *Lubbe* (which were decided before *Owusu*), it can be shown that justice cannot be obtained in that jurisdiction (for example, if legal funding is unavailable, but is available in England). In general, however, obtaining jurisdiction for a foreign tort will be extremely difficult.

The conclusion is that the English courts will take jurisdiction over claims relating to corporate human rights abuses carried out in England and abroad, but only if the abuse can be characterised as a tort under English law (for acts carried out in England) or the law of the country where the act was carried out (if abroad) and a defendant to the claim is resident in the jurisdiction. However, if this can be established, the court has no jurisdiction to stay the claim against any defendant, no matter where they are based.

The effect of these rules represents, in theory at least, a real option for claimants affected by tort-related human rights abuses involving companies based in Europe. In practice, however, claimants are not using these rules to bring claims against companies in England or Europe.

This may be because potential claimants are unaware of their rights; or it may be because English and European companies are not involved in human rights breaches. Of greater practical importance, however, are the considerable financial and logistical problems claimants (particularly foreign claimants) face in bringing this sort of claim against corporate entities.

The first issue is one of funding: claimants are likely to have limited means and bringing any civil claim against a company (particularly in a foreign jurisdiction) is likely to be an extremely expensive process. The fact that contingency fee arrangements are prohibited in most European jurisdictions (although some European countries, for example Italy, have recently dropped this prohibition) is a real barrier to the sort of class actions more prevalent in the US. Furthermore, the availability of legal aid differs from country to country across Europe (for example, it is not available in England for personal injury claims).

The second issue is the absence of properly developed and tested class action procedures in Europe (although class actions are permitted under English law and, for example, in the Netherlands). This means that the availability and nature of class action proceedings in Europe remains unclear. Accordingly, despite the existence of the relevant legal framework and the recent speculation about a boom in group litigation, at present European class actions remain rare and with an uncertain future.

International law: state obligations

A number of treaties, covenants and declarations oblige states to protect human rights, including, for example, the Universal Declaration of Human Rights; the International Convention On All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child.

Such instruments either apply to all states as a matter of 'customary international law' (eg, the Universal Declaration of Human Rights) or apply specifically to their participants and signatories.

Although they do not give private parties direct rights against companies, these legal instruments do provide a comprehensive set of obligations on states to prevent abuse, including abuse

A copy of Professor Ruggie's report is available at: www.business-humanrights.org

by companies. In reality, however, does this mean that companies involved or alleged to be involved in human rights abuses are likely to be exposed to state legal action as well as private civil claims?

In short, state action is rare and, particularly in countries of 'weak governance' (ie developing countries where abuses are most likely to be carried out), unpredictable. This has three causes:

(a) many states are unsure of their obligations and therefore have no coherent policies;

(b) it is not clear if international law obliges states to protect breaches outside their jurisdiction; and

(c) states often choose not to fulfil their obligations under international law, for example, the recent decision to terminate the enquiry into the BAe/Al Yamamah arms deal, despite the obligations contained in the OECD convention on combating bribery of foreign public officials in international business transactions, article 5 of which provides that states should 'not be influenced by considerations of national economic interest [or] the potential effect upon relations with another state'.

Although there is more prospect of state action in the countries with strong governance systems, generally the prospect of such action against companies in relation to human rights abuses is low and difficult to predict.

International law: direct obligations on companies?

Do the same international instruments create direct legal obligations on companies separate from national law? Professor Ruggie observes that there is little basis for the argument that the obligations contained in these instruments apply to private entities directly; and that although some arguments about direct liability may exist, the instruments themselves do not refer directly to companies. Their application under international law to companies is, at best, ambiguous. He therefore concludes that:

> ... it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations.

The prospect of a company being faced with such a claim, alleging direct obligations under international law (save to the extent that such a claim can be brought under the application of an ATCA claim for breach of 'customary' rights) is remote.

Corporate liability for international crimes

Various human rights abuses are, of course, also crimes. Is there any prospect of a company being sued for a human rights abuse under international criminal legislation, as opposed to under the human rights framework referred to above? Professor Ruggie notes that various ATCA claims relate to actions that are prohibited under 'customary' international law and are also crimes (see, for example, the various criminal allegations against Unocal Corp and the Myanmar military in *Doe v Unocal*). This does not, however, create a separate framework for corporate civil liability based purely on breach of criminal legislation over and above that already existing in relation to human rights abuses.

Corporations may be the subject of criminal action for acts constituting human rights abuses (or for 'aiding and abetting' them) under the international jurisdiction of the statute of the International Criminal Court 2002, which provides a forum for punishment for genocide, crimes against humanity and war crimes; and also under domestic criminal law. Again, however, this does not create a separate forum or cause of action for corporate civil liability for human rights breaches.

Campbell v MGN Ltd
[2003] 2 WLR 80
Connelly v RTZ
[1998] AC 854
Doe v Unocal
110 F Supp 2d 1294 (CD Cal 2000)
Lubbe v Cape
[2000] 1 WLR 1545
Owusu v Jackson
[2002] ECJ C-281/02

Non-binding mechanisms

A large part of Professor Ruggie's report focuses on what he terms 'soft law' mechanisms for controlling corporate human rights compliance. That is, non-binding international instruments, such as the OECD Guidelines for Multinational Enterprises, voluntary processes such as the Kimberley process (a particularly successful voluntary programme of prohibition and certification of 'conflict diamonds') and the steps taken by individual companies to include human rights principles in their company charters, drawing on, for example, the principles set out in the UN 'Global Compact' (which has been adopted by over 2,800 businesses – see www.unglobalcompact.org). However, participation in these mechanisms is purely voluntary and none of them provide a binding framework for legal accountability.

Conclusion

Professor Ruggie's conclusion – that he could identify 'no comparably consistent hard law developments' – is correct in respect of consistent international principles of corporate responsibility under national or international law, and the lack of uniform adherence to international obligations by states. It is clear, however, that in the US and Europe at least, a limited framework for civil claims against corporate entities for involvement in human rights abuses does exist, albeit that considerable legal and practical hurdles stand in the way of such claims. ■

Key points

- A limited framework exists for civil claims against corporate entities but there are significant practical and legal hurdles.
- Although state obligations under international instruments exist, state action is rare and unpredictable.
- In the UK, the scope for claims between private parties based on the HRA is still uncertain and, so far, limited to privacy claims. However, the law is developing quickly.
- Human rights claims in tort are possible but limited. There is no scope for claims against a corporate entity under the HRA or ECHR for torts committed outside the home jurisdiction.
- Nonetheless, the House of Lords has accepted that English parent companies may face action in negligence for failing to control the activities of foreign subsidiaries.