

# Expert Targets Corporations Behaving Badly Overseas

Public Lecture: Professor Robert McCorquodale Asks “Where does State responsibility lie?”

By Sarah Schnider

There is an old saying that reality is often worse than fiction. In John Le Carre’s novel, *The Constant Gardener*, a British diplomat questions whether the government has any role in preventing human rights abuses by corporations overseas, because the government is “supposed to be greasing the wheels of British industry.” Professor Robert McCorquodale opened his lecture to students at Monash University with reference to Le Carre’s novel, regretting that in the realm of governments, corporations and human rights, reality is indeed often worse than fiction. Governments not only fail to prevent human rights abuses but actively assist in the violation of human rights by corporations.

In the mid-1800s “The Corporation” was created in legislation. It has since emerged into the real world in much the same way that Frankenstein emerged from the laboratory, as a force which now appears beyond the control of its creators, exercising its power in ways that the creators may never have intended. The question of how to control and account for the acts of these corporations has become a vital issue for the global community, particularly in the case of human rights abuses committed by corporations acting extra territorially. The potential for States to take responsibility for the acts of corporations in this circumstance, in order for some degree of control to be exercised over their operation, was explored by Professor McCorquodale.

Robert McCorquodale is Professor of International Law and Human Rights, as well as Head of the Law School at the University of Nottingham. One of Professor McCorquodale’s primary research interests is international human rights law, and he is a co-author of one of the leading texts in international law. He has provided advice and training to governments, corporations, organisations and individuals concerning international law and human rights issues. During the course of his lecture Professor McCorquodale passionately advocated bringing home responsibility to States for the human rights violations of their corporations abroad.

The elusive nature of transnational corporations (TNCs) was the starting point for Professor McCorquodale’s lecture. Under international law, a TNC becomes the responsibility of the State in which it is incorporated, however it may have subsidiaries incorporated in different States. Professor McCorquodale addressed the slippery issue of accountability by outlining various ways in which responsibility can be pinned to a particular State, for example the EU approach which examines where the main centre of operation is.

Professor McCorquodale explained that under various human rights treaties, States have an obligation to protect the human rights of all those in its jurisdiction. The concept of “jurisdiction” is distinct from the concept of “territory”: a State’s obligations extend beyond its own “garden” to actors within the State’s effective control, including TNCs. Professor McCorquodale outlined three circumstances un-

der the general law of State responsibility where a State will be held internationally responsible for the acts of its TNCs.

The first case is where a TNC is exercising governmental authority, including where the corporation has exceeded that authority. It is not necessary in these situations to show that the State was directing the corporation, or even knew of the human rights violations. Second, a State will be responsible where the TNC acted under the State’s instruction, direction or control, even if the corporation contravened or ignored instructions. A poignant example of this is the human rights violations that have occurred at Abu Ghraib where some offenders were employed by a corporation. Third, a State will be responsible where it knowingly aids the TNC to undertake an unlawful activity. This includes signing a bilateral investment treaty with the country in which the TNC is operating illegally (eg. an agreement whereby foreign investment is encouraged at the expense of national laws such as occupational health and safety).

Continuing the garden analogy, Professor McCorquodale explained that States can no longer pretend they are stuck within their garden. A State’s obligations extend to not allowing potentially dangerous plants and weeds to propagate beyond its garden. Professor McCorquodale argued that a State should use national regulation to control the extraterritorial activities of corporate nationals and their subsidiaries. There is already a State practice of extraterritorial regulation of corporate nationals in competition law and shareholder and consumer protection – therefore how a State uses its garden will have implications beyond the garden fence.

Professor McCorquodale then responded to issues raised by the audience. For example, can a State contract out of its obligation by contracting with a TNC? Even where a contract operates between a State and its corporation, the activities are still within the State’s jurisdiction, and therefore the State will be responsible internationally. A contract however would render a TNC indirectly responsible for its acts – for example by incorporating a clause requiring the corporation to pay damages.

A further issue was whether it is realistic to expect States to actually take action in this area, considering that corporations will be likely to lobby governments to avoid such obligations. Professor McCorquodale reminded us that corporations are vulnerable to public pressure – they want to appear socially responsible and also wish to reduce the threat of litigation. Finally, State regulation is preferable for corporations than the alternative: direct responsibility for corporations under international law. Professor McCorquodale concluded by reminding us that as international lawyers we need to be good gardeners.

*Professor McCorquodale’s forthcoming article “Spreading weeds beyond their garden: Extraterritorial responsibility of States for Violations of Human Rights by Corporate Nationals” will be published in the coming edition of the Proceedings of the American Society of International Law.*