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# REDIRECTING HUMAN RIGHTS

Facing the Challenge of  
Corporate Legal Humanity

ANNA GREAR



# Redirecting Human Rights

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# Redirecting Human Rights

## Facing the Challenge of Corporate Legal Humanity

Anna Grear

*Senior Lecturer in Law, Bristol Law School, Bristol UWE, UK*

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*I dedicate this work to Judah and Joshua, my beloved children;  
to my 'quasi-sons', Hadlee, Guy and Luke;  
and to my 'quasi-son-in-law', Peter.*

*To them and to the many others in whose co-presence  
I have grown – and grow – I owe profound gratitude.*

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# List of Abbreviations

AI	Artificial Intelligence
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CHR	Commission on Human Rights
CSR	Corporate Social Responsibility
CSW	Commission on the Status of Women
DEVAW	Declaration on the Elimination of Violence Against Women
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GATT	General Agreement on Tariffs and Trade
ICCPR	International Covenant of Civil and Political Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
IMF	International Monetary Fund
NAFTA	North American Free Trade Agreement
NGOs	Non-Governmental Organisations
OECD	Organisation for Economic Cooperation and Development
SLAPPS	Strategic Lawsuits Against Public Participation
TNCs	Transnational Corporations
TRIPS	Trade-related Intellectual Property Rights
TRMFHR	Trade-related Market-friendly Human Rights
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
WTO	World Trade Organisation

# International Instruments and Committee Reports

African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986

The Brussels Declaration Concerning the Law and Customs of War, Brussels, 27 August 1874

Manual of the Laws and Customs of War on Land, Oxford, 9 September 1880

Convention Respecting the Laws and Customs of War on Land, 29 July 1899, 32 Stat 1803, Art XLVI

*Convention du 12 Juin 1902 pour regler les conflits de loi en matiere de mariage*

*Convention du 12 Juin 1902 les conflits de loi et de jurisdictions en matiere de divorce et de separation de corps*

*Convention du 12 juin 1902 pour regler la tutelle des mineurs.*

International Agreement for the Suppression of the White Slave Traffic, Paris, 18 May 1904

Conventions Respecting the Laws and Customs of War on Land, 18 October 1907

International Convention for the Suppression of White Slave Traffic, Paris, 4 May 1910, 211 Consol TS 45 1912 Gr Brit TS No 20

Convention No 3: Convention Concerning the Employment of Women Before and After Childbirth, Washington, 28 November 1919 (revised in 1948 (Convention No 103))

Preamble to the Constitution of the International Labour Organisation, as contained in the Treaty of Peace Between the Allied and Associated Power and Germany, Versailles, 28 June 1919

Convention No 4: Convention Concerning the Employment of Women during the Night, Washington, 28 November 1919

Recommendation No 4: Recommendation concerning the Protection of Women and Children against Lead Poisoning, Washington, 28 November 1919

International Convention for the Suppression of the Traffic in Women and Children, Geneva, 30 September 1921, 9 LNTS 415

International Convention for the Suppression of the Traffic in Women of Full Age, Geneva, 11 October 1933, 150 LNTS 431

Convention No 45: Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds, Geneva, 21 June 1935

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UN GAOR, 3<sup>rd</sup> Sess., 181<sup>st</sup>–183<sup>rd</sup> plen.mtg. at 857, UN Doc A/C.3/SR.181–183 (1948)

*Third Committee Records* (U.N GAOR, 3<sup>rd</sup> Sess. UN Doc A/C.3/ (1948) 84<sup>th</sup>–180<sup>th</sup> mtgs

Universal Declaration of Human Rights GA res. 217A (III) UN Doc. A/810 at 71 (1948)

Convention on the Elimination of All Forms of Racial Discrimination GA Res 2106 (XX) Annex, 20 UN GAOR Supp. (No 14) at 47, UN Doc A/6014 (1966), 660 UNTS 195

International Covenant on Civil and Political Rights GA res. 2200A (XXI) 21 UN GAOR Supp. (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171

International Covenant on Economic Social and Cultural Rights GA res. 2200A (XXI) 21 UN GAOR Supp. (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3

Convention on the Elimination of All Forms of Discrimination Against Women GA Res 34/180, 34 UN GAOR Supp. (No 46) at 193, UN Doc A/34/46

CEDAW Committee General Recommendation No 12 (eighth session, 1990) GAOR, 44<sup>th</sup> Session, Supp. No 37, UN Doc A/44/38, 1989

Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its forty-third session, Geneva, 5–30 August 1991, UN Doc. E/CN.4/Sub.2/1991/65 of 24 October 1991

Vienna Declaration and Programme of Action UN Doc.A/CONF.157/24 (Part 1) at 20 (1993)

Declaration on the Elimination of Violence Against Women GA Res 48/104, 48 UN GAOR Supp. (No 49) at 217, UN Doc A/48/49 (1993)

Human Rights Committee, General Comment 28, Equality of Rights Between Men and Women (Article 3), UN Doc CCPR/C/21/Rev.1/Add.10 (2000)

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*Connecticut General Life Insurance Company v Johnson* 303 US 77, 90 (1938)

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*Irwin Toy Ltd v Quebec* [1989] 1 SCR 927

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*Porter v Commissioner of Police of the Metropolis* [1999] All ER (D) 1129

*Soloman v A Soloman & Co Ltd* [1897] AC 22

*Société Colas Est SA and Others v France* 2002-III 421; (2004) 39 EHRR 17

*The Trustees of Dartmouth College v Woodward* (1819) 17 US (4 Wheat) 581 at 636

*Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479

*Zino Davidoff SA v A & G Imports Ltd, Levi Strauss & Co v another v Tesco Stores Ltd and another; Levi Strauss & Co and another v Costco Wholesale UK Ltd* (Joined Cases C 414/99–C 416/99 [2002] CMLR 1)

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# Foreword

It is a privilege indeed to contribute a foreword to this pioneering, provocative, and promising work.

Pioneering because Anna Grear not only retrieves a lost continent of thought (peopled by jurists and social theorists who sought to solve the puzzle of the legal personality of corporations) but she also resituates it in the context of a 'critique of disembodiment' and in 'defence of embodied vulnerability as the proper foundation of human rights legal subjectivity'.

In this sense, this work marks some fresh starts towards understanding the *ontology* of human rights. It may also further excite the attention of those who continue to pioneer post-Lacanian approaches to law and jurisprudence, and also supplement Alain Badiou's *Theory of The Subject* (2009) within the contexts of his insistence concerning the forms of 'militant subjectivity', the variegated practices of 'democratic materialism.'

As concerns 'provocation,' controlled dictionary meanings guide us to understand this as that 'something', which 'incites, instigates, angers, or irritates.' To be sure, this work may irritate and even anger the votaries of globalization amongst the communities of corporate lawpersons (lawyers, justices, law academics and students) and specialists in international economic law. Yet any careful reading of this work may no longer fail to heed Grear's provocation. She fully suggests why the domains of 'international economic law' and 'international human rights law' may no longer remain hermetically sealed, if only because claims to access human rights by corporate and business entities are on the increase, as remain, also, transnational corporations' complaints of being 'victimized' by human rights and social movements.

The provocation of this work as 'incitement and instigation' enables us to rethink 'embodied vulnerability as a foundation of human rights'. In a sense, the early discourse concerning legal personality is framed by the libertarian human rights to the possession and ownership of property. In a vastly different conjuncture, the theory and praxes of human rights and social movements now reframe these very rights within the logics of new common property rights. In this way, Anna Grear thus provokes us all to revisit the aporia enunciated by Jacques Ranciere: 'They' [the communities of resistance and the revolutionary militancy of suffering people] '*acted as subjects that did not have the rights that they had and had the rights that they had not.*'

The oft-noted paradoxical and ambivalent character of human rights acquires an edge here both in terms of the power and error of human rights, if I may so put this. Despite her critical approaches to forms of human rights essentialism and human rights 'utilitarianism,' Anna Grear



remains persuasive in reading the claims to corporate human rights as 'colonizing'. Far from being a polemical gesture, Anna Grear here echoes Kwame Nkrumah's withering description of 'neocolonialism' as '*power without responsibility and exploitation without redress*'. In thus specifically addressing struggle-based contradictions, she invites us all to rethink TNC conduct in all its awesome hot pursuit of the itineraries of 'neoliberalism'. In so far as this pursuit contributes to a never-ending reproduction of the 'Third Worlds' of suffering humanity 'corporate human rights' claims may not find much legitimacy.

Too many images crowd my mind as I read this precious text.

First, corporate human rights talk and action suggests many an inversion of what Hugo Grotius named as *appetitus societatis*, roughly put here, the desire to live in peaceful and just society/world orderings. The *recta ratio* (good reason) practiced by the state-like, yet state-transcendent, global corporations results primarily in the destruction of nature and human life-worlds, thus expanding biopolitical regimes that Michel Foucault poignantly named as comprising the prowess of both 'hyper-profit' and 'infra-power'. One way to further name this inversion – constituting a 'nacropolitics' of corporate human rights talk and action – invites attention in a Heideggerian moment as '*being towards death*'.

Second, and related to this, the regimes of immunity and impunity thus fully constituted in turn adversely affect the possibilities of a just world ordering because these constitute what Frank Pearce and Steve Tombs memorably described as 'toxic capitalism', which Anna Grear here differently reinforces via her analyses of the law and politics of disembodiment/embodiment. If so, at stake here remains more than the juristic and juridical categories of immunity and impunity, as this work amply shows. How far then, may we engage any reconsideration of corporate human rights in terms of what Martin Heidegger named as '*nonanswerability*' and that something which Jacques Derrida later re-frames not just as '*responsibility*' but as '*response-ability*'?

Third, it is precisely on these registers that the interrogation of the inauthenticity of some new forms of multifariously articulated 'corporate human rights' occurs. No matter howsoever framed, the grammars of corporate social responsibility, ethical investment, or even bioethics, continue to conceal from view the full excision of contemporary human rights values, norms, and standards from 'business ethics' and the 'good' corporate governance languages.

For all these related reasons, I read the promise of this work as mapping, or rather emplotting, some itineraries of 'future history' (to evoke a gifted and messianic phrase of Walter Benjamin) of contemporary human rights.

Not too many works concerning 'human rights' present so much by way of a recall of Heideggerian notions of '*concernful*' engagement that articulate both the *anxiety* and the *angst* here extended and adapted to corporate

human rights talk and action. This reminder remains important if only because the now fully emergent new paradigm of trade-related, market-friendly human rights strives towards supplanting an earlier vision of the universal human rights of all human beings.

In sum, the narrative heights here scaled, and indeed in some munificently reader-friendly ways, summon admiration. Further, no critique of this work may now fully escape a new terrain of contestation thus constituted.

Upendra Baxi  
Professor Emeritus  
Warwick Law School  
December 10, 2009.

# Introduction

To some, the idea of corporate human rights will appear inherently contradictory – an oxymoron. Human rights, it is perhaps natural to assume, are for human beings – not corporations. How can it be possible that a global corporation, for example, can invoke, even discursively, a category of rights designed for the protection of living human beings and communities? To others, however, perhaps especially some lawyers, the concept of corporate human rights is relatively unproblematic. Corporations are, after all, legal persons. They represent important human interests, and there is no reason in principle why they ought not to have human rights as well as contractual, proprietary and constitutional rights. Law, as such lawyers understand, has an almost limitless facility for the production of new forms of personification, new forms of legal subjectivity. The extension of human rights to corporations is merely, in this light, another exercise of law's generative power – a not necessarily remarkable extension of human rights subjectivity that simply reflects law's facility for populating and categorising its own universe. Indeed, it has been noted that where companies have been granted 'victim status' in respect of certain human rights, 'the basis for that protection appears to have been the status of the company as a legal person'.<sup>1</sup>

While, however, it is true that the plasticity of legal subjectivity has some exciting possibilities for the generation of new rights bearers, it should be noted that throughout its history, law's talent for personification has become thoroughly imbricated with a complexly-related power and tendency to define 'humanity'. Legal subjectivity has been, to a decisive degree, shaped and conditioned by a deep legal anthropomorphism, and in a sense, law's award of legal subjectivity often amounts to an exercise of an anthropogenetic power. In fact, it is highly likely that a conceptually slippery and obfuscating conflation between legal subjectivity and humanity lies behind the emergence of corporate legal humanity – and accordingly this book will attempt to trace precisely how the conflation between legal subjectivity and humanity might be implicated in the whole idea of corporate human rights.

Although these concerns might seem rather technical to some readers, it is nonetheless vital to understand how the analytical and ideological closures of legal subjectivity form the complex conduits through which corporations move to inhabit human rights law as putative human rights claimants, beneficiaries, and even 'victims'. But these concerns, familiar to lawyers of a critical theoretical orientation, need placing within the framework of contemporary globalisation – a phenomenon that is far more than legal.

Globalisation is a context that lends pressing urgency to the need to question the very idea of corporate human rights, and it forms an indispensable backdrop to the argument of this book, for it is in the context of contemporary globalisation that the most troubling implications of corporate human rights discourse are most starkly revealed. Two major contemporary realities converge in this context. The first is the phenomenon of contemporary economic globalisation. The second is the globalisation and discursive ascendancy of rights discourse itself.

Contemporary economic globalisation, as we shall see, forms a context in which transnational corporations emerge as the dominant actors, possessing, in some cases, more economic clout and political influence than many nation-states. At the same time, globalisation has been shown to generate unprecedented levels of peril and risk for human beings and communities – and is linked to emergent new forms of systemic violence and the production and expansion of troubling forms of human vulnerability, as well as to environmental degradation.

Secondly, corporate human rights discourse needs to be considered against the backdrop of an ever-increasing global commitment to rights discourse. The discourse of human rights (arguably *the* ascendant ethical language of contemporary global law and politics),<sup>2</sup> presents an almost irresistible target for corporate desire. And, as we shall shortly see, globalised human rights discourse forms an overarching discursive domain that corporate actors exploit with ever greater influence. Indeed, so advanced is the global corporate human rights agenda that the entire Universal Declaration of Human Rights paradigm, it has been argued, is being progressively supplanted by a paradigm of trade-related, market-friendly human rights.<sup>3</sup>

There seem to be at least two results of corporate influence on international human rights discourse of profound relevance to the concerns of this book. First, the most cherished goals of the international human rights movement are reinterpreted in ways that serve a globalised capitalist agenda. In the process, human rights become less able to protect vulnerable human beings and communities from the excesses of the very same agenda. The very meaning of human rights changes, and is rendered open, at a paradigmatic level, to a globalised neoliberal ideology profoundly implicated in the production of intense human suffering, particularly in the global South. This is, as will be seen, a genuine problem facing the future of

human rights. Secondly, powerful economic actors have, in this process, somehow ‘acquired new or fuller legal identities as rights-holders, in turn influencing the character of legal systems and legal process’.<sup>4</sup> Specifically, corporations have invoked, through the discursive colonisation of international human rights law, a form of corporate humanity.

In response to the dangers presented by these complex shifts, it will be argued in this book that the very concept of human rights for corporations is now in need of urgent interrogation. It will furthermore be argued that human rights require protection from this development, and that human rights need *redirecting* towards the embodied, vulnerable human being, precisely in order to challenge the development of a form of corporate legal humanity. However, it is worth noting that the concept of human embodied vulnerability is an idea rich with possibilities for the future theorisation of human rights, and for the future theorisation of the legal and political subject more generally. Many of these possibilities, however, lie beyond the remit of the present work, though they will be briefly indicated where appropriate and particularly in the conclusory reflections offered at the end of the book.

The argument offered in this work will need to follow many twists and turns. Starting with the context of globalisation, we will need to examine the pressure that international human rights discourse is currently under (Chapter 1), before looking more closely at corporate human rights as a legal matter (Chapter 2). In order to understand law’s receptivity to corporate human rights, we will need to explore the phenomenon of legal disembodiment and its ideological role in the construction of the liberal legal person: both human and corporate (Chapters 3 and 4). We will also need to look at how disembodiment functions in international human rights law (Chapter 5). Once the main elements of a critical thesis are established, we will explore the centrality of human embodiment (Chapter 6) and the related idea of human embodied vulnerability – particularly the potential of embodied vulnerability to provide a different grounding for international human rights law and theory – one resistant to corporate humanity (Chapter 7). Our reflections will also necessarily take us into a reconsideration of the property right – so foundational to liberal legal theory and so fundamental to the ideological function of liberal law’s relationship with capitalism – and we will finish the substantive argument of the book by reflecting on how embodied vulnerability might function in legal and judicial reasoning concerning human rights claims in that most significant of legal contexts (Chapter 8).

In short, it will be argued that human embodied vulnerability, understood as the foundation of the human rights universal and the foundation of the human rights legal subject, embraced as the value underlying the ethical heart of human rights discourse, yields both a theoretical foundation for international human rights law, and a value for judicial deployment possessing

vigorous potential for the protection of human beings and communities in the face of corporate rights claims. Embodied vulnerability also provides a limit concept against which the corporation-driven logics of privatisation and commodification can be evaluated and challenged by courts. So rich, indeed, are the theoretical possibilities provided by embodied vulnerability that, in its light, even the concept of property itself is rendered open to reformulation on the basis of a carefully recalibrated understanding of the relationship between property and human rights.

### **Preliminary caveats**

When a legal theorist sets out to write a book that embraces so many different realms of thought and theoretical concern, it is extremely daunting to think of all the likely points at which the interdisciplinary nature of the work might result in misunderstandings or the unintended invocation of much more complex and specialist debates underlying, for example, the choice of a term. While it is impossible to anticipate the many ways that this work will be read and misread, it seems important to underline a few key caveats.

First, this is not an argument that corporations should not have legal rights, nor is it an argument that human beings should be the sole recipients of legal rights protection. In fact, it seems vital, in the light of increasingly urgent concerns to protect animals, eco-systems, and a host of other putative rights-subjects, to generate a broad and all-embracing theory of legal subjectivity. However, this important aim is not the aim of the present work – though it will be the subject matter for a future book: *Law, Persons and Vulnerability: A New Theory of Legal Subjectivity*. The present work is focused on one very particular problem: the issue of corporate legal humanity and how it might be resisted in human rights law and theory, most especially within the corporation-imperilled and highly symbolic UDHR paradigm.

Secondly, while the argument will focus on the ideological role of disembodiment and embodiment in the genesis and theory of rights, it is important to note that neither the human body nor vulnerability is intended to be read as monolithic or purely ‘natural’ categories. While embodied human vulnerability will be presented as an ontic matter and emphasis placed upon the body’s complex incarnate materiality in its context-mediated location in material and social space, this emphasis should not be understood to entail a denial of the role of social construction in the forming of bodily life. Both the body and vulnerability emerge from a convergence between human social construction and the biological and material templates and conditions of ontic life. Both the human body and vulnerability are dynamic, mutable and capable of a whole range of variant and even competing conceptualisations. In a sense, both are moving targets

with a complex core. The argument of this book is not, therefore, that the human body or human vulnerability are fixed or monolithic givens. But it *is* the argument of this book that human materiality, the ontic dimension of existence, and the vulnerability emerging from it, should be understood as being conceptually and ethically foundational to a satisfying theory of international human rights.

Thirdly, a focus on vulnerability should not be read as an attempted valorisation of human suffering, despite the ethical urgency that human suffering brings to the task of this work. Embodied vulnerability can also be embraced and celebrated as a value intrinsic to multiple forms of human flourishing, as will be seen. Additionally, vulnerability is not a uniquely human condition, although there may be uniquely human forms of vulnerability. Ontic vulnerability seems to provide a theoretical value that unites human beings with other putative rights-holders: other living species, the environment, social institutions – even corporations. But vulnerability also reflects clusters of characteristics and nuances that enable us meaningfully to speak of relevant distinctions between bearers and putative bearers of rights. Minimally, and focally in the context of the present argument, human embodied vulnerability is, in central and decisive ways, of a different order and kind to any putative corporate vulnerability – as will become clear – particularly, it will be argued, for the purposes of human rights attribution.

Fourthly, it is not the argument of this book that the ‘human’ is a fixed category. The emergence of post-human discourse, the advent of genetic enhancements, cybernetics, and so on, challenge our ability to think about the already blurred boundaries of the human – even as an ontic matter. But, notwithstanding the deepening complexity of the notion of the human, this book focuses on the continuing urgency of protecting the billions of clearly recognisable, central-case, living human beings and communities who remain in a profoundly material and thoroughly incarnate vulnerability to exploitation, exclusion and immiseration. These themes, again, are particularly compelling in the context of contemporary globalisation – a reality that produces new forms and intensities of human vulnerability. Indeed, it may even be the case that precisely *because* of the emergence of the discourse of the gene, cybernetics, robo-culture etc, that those human beings who are not admitted, for economic or other reasons, to the privileged interior of an emergent post-human techno-culture will require new forms of legal protection and ever greater levels of ethical attentiveness.

## **And so we begin**

It is now time to begin our exploration of the nature and sources of corporate legal humanity and its relationship with rights discourse, especially international human rights discourse. The urgency of challenging corporate

humanity is underlined by the stark fact that if international human rights discourse is not rescued, somehow, from the plausibility structures and agendas of global corporate power, then entities as powerful, in some cases, as quasi-states, will effectively have become dominant international human rights 'insiders'. Human rights have long been ambivalent in their relationship with power, especially, the power of property and capital – but the commodified colonisation of international human rights discourse in the context of economic globalisation, at the height, arguably, of the global power of rights discourse itself, is a deeply troubling contemporary reality with urgent implications.

What we now face is the danger to human rights futures presented by the genesis of a corporation-friendly human rights legal sensibility. It is entirely possible that human beings, vulnerable and embodied, may find themselves almost irreversibly unprotected in the face of global corporate self-interest and the burgeoning political power of corporate humanity. Something has to change. This is but one modest theoretical contribution to a far wider and deeply urgent critical task.



# 1

## Human Rights under Pressure?

### **The Universal Declaration of Human Rights paradigm under pressure**

#### **The matrix of globalisation**

This book is primarily a response to deeply troubling contemporary shifts in international human rights discourse in favour of corporations<sup>1</sup> and to the related idea that the corporation is an appropriate beneficiary of human rights.<sup>2</sup> The very idea that international human rights discourse could be colonised by the interests of corporate entities, and the related idea that the corporation can be thought of as some kind of human rights ‘victim’<sup>3</sup> are, to most non-lawyers, genuinely puzzling and counterintuitive. There are various complex factors that come together to explain the law’s openness to corporate human rights discourse. Some of the most important of these factors will be explored in this book. But before we explore them, it is essential to grasp the seriousness of pressures facing international human rights law through the development of corporate human rights discourse. In order to do this, we need to locate corporate human rights discourse within the matrix of contemporary globalisation.

We live in an era of rapidly accelerating globalisation. Although globalisation and its meanings, implications and processes are the subject of fierce contemporary contestation, there is a sense in which globalisation is nothing new. Historically, processes of globalisation can be traced back to well-established transnational flows of people, goods and religious ideas, from at least the sixteenth century,<sup>4</sup> in a period of marked European expansion – and perhaps even earlier, to the thirteenth century emergence of the Mongol Empire.<sup>5</sup> However, the marked contemporary intensification of transnational interactions has led a range of commentators to see a qualitative departure from earlier forms of global interaction.<sup>6</sup> What seems to characterise the contemporary phase of globalisation (which arguably began with European colonial domination in the nineteenth century) is the sheer scale, speed, density and content of the transnational flows.

Overviews of the available studies on globalisation reveal it to be a multi-faceted phenomenon, 'with economic, social, political, cultural, religious and legal dimensions intertwined in most complex ways'.<sup>7</sup> The term 'globalisation' captures, therefore, a wide and dizzying range of diverse and even contradictory processes, events and developments.<sup>8</sup>

The contemporary intensification and increased complexity of global transnational flows takes place, moreover, in the context of a widening global gap between rich and poor, a global population explosion, the looming threat of environmental disaster, the emergence of new anxieties about global security post-9/11, the privatisation of organised violence, fears about 'peak oil' and a range of apocalyptic misgivings about the future survival of the human race. Indeed, themes of escalating violence and deepening human vulnerability have been compellingly linked to the dynamics of globalisation.<sup>9</sup>

The range and pace of transnational interactions is reflected in a disorientating 'rush of products, ideas, persons and money [stimulated by] jet transportation, electronic telecommunication, massive decolonization and extensive computerization'.<sup>10</sup> Add to this the flows associated with techno-scientific progress (including bio-technologies and nanotechnology), popular culture and global commodity brands, and what emerges is a fairly comprehensive and familiar snapshot of some of the more immediately recognisable plausibility structures of the pivotal phenomenon of contemporary globalisation: the ascendancy of transnational corporations (TNCs).<sup>11</sup> It is notable that while the complexities of contemporary globalisation have generated an industry of commentators and analysts and while reductive or unilateral accounts of globalisation will be inadequate to capture its nature, it seems broadly accepted, nonetheless, that *economic* globalisation is a significant (for many, the dominant) strand of its contemporary meaning. In fact, contemporary globalisation is widely recognised as being dominated by TNCs, which function in meaningful respects as the 'key agents of the new world economy'.<sup>12</sup>

It cannot be denied that the recent financial crisis has added an additional dimension of complexity to debates concerning the contemporary character and trajectory of globalisation. But there are no signs that global TNC dominance is on the wane. Indeed, recent moves in response to the crisis by the globalised economic institutions (the International Monetary Fund, the World Trade Organisation etc), themselves 'both a symptom of and a stimulus for globalisation',<sup>13</sup> suggests that there is no room for optimism concerning the future implications of the contemporary financial crisis for any genuine power shift in the world economic order. More than one commentator has noted that while leaders such as Merkel and Sarkozy have called for a re-invention of capitalism, redistribution in favour of capitalism's dominant institutions is intensified. There are reasons to suspect that the current crisis is not so much a crisis *of* neoliberalism but a crisis

within neoliberalism concerning the best way to retain and protect some of its fundamental tenets, structures and institutions. Meanwhile, the cost of the crisis is being 'socialised' by a strategy in which the private risks of the owners of capital are underwritten by the state, the losses of corporations and banks are mitigated and the ordinary tax-payer is left holding future debts that in effect, simply pass the impact of the crisis to ordinary citizens.<sup>14</sup>

The globalised economic institutions widely regarded as the engines of the neoliberal world order (particularly the International Monetary Fund (IMF) and the World Bank) continue to remain linked to an ideologically informed institutional separation between politics and economics in the service of the agenda of global capitalism, in which the state continues to play a facilitating role. Gill has argued that the worldwide amendment of old constitutions and the formation of new ones under the influence of the IMF, the World Bank and other institutional agencies of global capitalism, amounts to the construction of a '*de facto* constitution for global capital', operative in a range of contexts: international, regional and national.<sup>15</sup> Pointing to the collapse of the Eastern bloc and the emergence of arguments about the 'end of history', Gill suggests that '[t]o a greater or lesser extent new forms of possessive individualism re-emerged worldwide and social institutions were re-defined to create an emergent market civilization – a monoculture of both social development and mind that is associated with a new political economy of disciplinary neoliberalism'.<sup>16</sup> Beck, however, suggests a more fractured reality in which the power of global business is engaged in a meta-power struggle with nation-states – a reality in the light of which 'globalisation needs to be decoded' in rather insidious terms – as 'a creeping, post-revolutionary, epochal transformation of the national and international state-dominated system governing the balance of power and the rules of power'.<sup>17</sup>

The emergence of a relatively hegemonic capitalist global political economy is, therefore, a principal feature of contemporary globalisation. And while this form of globalisation is not unopposed by countervailing conceptions,<sup>18</sup> nor untroubled by its own internal crisis to a contestable and as yet undetermined extent, it presents a profound and complex challenge to the future of human rights. The sheer reality of global corporate dominance has produced a situation in which human rights discourse struggles to retain critical distance from the human rights-colonising activities of formations of global capital. So profound is this problem that some scholars accuse human rights discourse of being, in effect, a Trojan horse for neoliberal capitalist values.<sup>19</sup> Evans and Ayer, for example, have argued, along similar lines, that the idea of universal human rights is currently forced to serve a hegemonic neoliberal approach to rights which has effectively 'co-opted' human rights 'in support of processes associated with capitalist globalisation'.<sup>20</sup>

Quite simply, it is essential not to underestimate the influence of TNCs in the current world order. Beck characterises contemporary globalisation as 'one

of the most important changes there has been in the history of power<sup>21</sup> – a complex set of shifts and struggles in which TNCs emerge as ‘private sector *quasi-states*’<sup>22</sup> wielding unprecedented levels of power and influence. Despite all the theoretical complexity and variation in scholarly understandings of globalisation, the one thing that scholars of the global political economy are almost univocal on ‘...regardless of their disciplinary, analytic or ideological inclinations... [is the fact that] corporate global rule is already here’.<sup>23</sup>

Transnational corporations, quite simply, dominate the current world order. In 1996, of the world’s 100 largest economies, 51 were corporations – outnumbering the 49 states included on the list.<sup>24</sup> The top 200 corporations generate 27.5 per cent of the world gross domestic product and ‘their combined annual revenues are greater than those of the 182 states that contain 80 per cent of the world population’.<sup>25</sup> More than one third of the world’s industrial output was produced by TNCs in as early as 1995, and although ‘the organizational novelty of the TNCs may be questioned from a world system perspective, it seems undeniable that their prevalence in the world economy, and the degree and efficacy of centralized direction they manage to achieve, manage to distinguish them from older forms of international business enterprise’.<sup>26</sup> TNCs have increasingly shaped the global economy. They have exercised *de facto* political power over a wide range of international institutions, processes and discourses – and continue to – and that includes, troublingly, the semantically overstretched but ethically ascendant language of human rights.

### **TNCs and human rights discourse**

Such is the decisive influence of TNCs on human rights discourse that Baxi has argued that the entire Universal Declaration of Human Rights (UDHR) paradigm stands imperilled by the development of a new paradigm of ‘trade-related, market-friendly human rights (TRMFHR)’. In fact, he suggests, the UDHR paradigm is ‘being steadily, but surely, *supplanted*’ by the new paradigm and that it

seeks to demote, even reverse, the notion that universal human rights are designed for the attainment of dignity and well-being of human beings and for enhancing the security and well-being of socially, economically and civilizationaly vulnerable peoples and communities. The emergent paradigm insists upon the promotion and the protection of the collective human rights of global capital, in ways which ‘justify’ corporate well-being and dignity even when it entails continuing gross and flagrant violation of human rights of actually existing human beings and communities.<sup>27</sup>

And this process is not in its infancy. Baxi insists that human rights discourse has already been ‘critically appropriated by global capital’ – and that

a comparative sociology of human rights 'leaves us with no other credible option' in terms of a conclusion.<sup>28</sup> This is a stark claim. It implies that the 'human rights of global capital'<sup>29</sup> pressurise the UDHR paradigm in a way that effectively threatens to displace it, perhaps even irrevocably.

It is important to contextualise this claim by briefly noting the key characteristics of the UDHR paradigm and some inherent weaknesses that make corporate encroachment on the paradigm all the more problematic. The international human rights regime is built around the UDHR, and its two related covenants, the International Covenant of Civil and Political Rights (ICCPR)<sup>30</sup> and the International Covenant of Economic, Social and Cultural Rights (ICESCR).<sup>31</sup> It comprises a system of standards and implementation procedures centred on the United Nations – in particular the Human Rights Council, supported by a small group of regional human rights regimes, key among which is the European Convention on Human Rights (which will be discussed in more depth in the next chapter). Fundamentally, the UDHR paradigm, which emerged in response to the Nazi holocaust,<sup>32</sup> produced the invocation of an 'international consensus on substantive norms with high moral voltage'<sup>33</sup> and a re-conceptualisation of national human rights violations which transposed them into matters of international concern. However, the rights regime spawned by this moral outrage emerged (perhaps predictably<sup>34</sup>) with a strong commitment to state sovereignty and concomitantly weak enforcement mechanisms. The much-vaunted commitment to the high-minded ideals of the human rights standards promulgated by the UN still, in fact, await the genesis of strong implementation and enforcement practices. The UDHR is, accordingly, 'a regime with extensive, coherent and widely accepted norms, but extremely limited international decision making powers – that is, a strong promotional regime'.<sup>35</sup>

The fact that the international human rights law regime is, in effect, predominantly a *promotional* regime makes the undermining of that regime by the appropriation of human rights discourse by global corporations all the more troubling. The regime is being subverted at its only real point of purchase: its ethical and rhetorical appeal. This ethical and rhetorical appeal has in any case a poor track record of preventing human rights abuses, as the global record of human rights violations reveals. When nation-state interests or the paramount imperative of national sovereignty seem to require the violation of human rights, then the apparent normative consensus around human rights tends to collapse,<sup>36</sup> and the language of human rights is exploited by the state in the service of its own interests. The inherent state-centrism of the regime means that it is ill-equipped to prevent human rights violations justified, for example, in the name of national interest or 'national security' objectives,<sup>37</sup> a tendency dramatically exacerbated post 9/11.<sup>38</sup> Furthermore, as the concepts of national interest and national security are colonised by the market-friendly agenda of the powerful global economic actors that dominate the current world order, it is likely that 'enhanced