From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law

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I. INTRODUCTION

The economic power of transnational corporations (TNCs) is undoubted. They are the driving agents of the global economy, exercising dominant control over global trade, investment, and technology transfers. Flowing directly from such positions of economic influence, TNCs also manage to exercise considerable political leverage in both domestic and international spheres. The social power of TNCs is, however, a different matter. For although their social power too is enormous and global, it has been, until recently, far less obvious, little acknowledged, and minimally regulated. TNCs have the ability significantly to affect the nature, form, and extent of social relations. By virtue, specifically, of their economic and political muscle, TNCs are uniquely positioned to affect, positively and negatively, the level of enjoyment of human rights. On these bases there are abundant reasons why the legal regulation of TNCs’ activities at all levels of impact is sought, ought to be sought, and is sometimes achieved. This article is concerned with developing the arguments for, and designing the architecture of, such regulation with respect to the human rights obligations of corporations at the level of international law.

A. Corporations and Human Rights in Context

It must be acknowledged at the outset that foreign direct investment injected by TNCs into developed and developing countries alike can and does bring jobs, capital, and technology, and thereby protects and promotes the rights to work and to adequate living standards, along with such derivative rights as health, education, housing, and even political freedoms.¹ That said, it is equally certain that human rights abuses by TNCs do occur, and do so frequently in the sphere of economic, social, and cultural rights.² Many TNCs, including Nike and The Gap, have been accused of violating their workers’ rights to just and favorable conditions of work by paying unfair and inadequate wages, requiring unreasonable overtime, and providing unsafe working conditions.³ Furthermore, there is ample evidence of the involvement of TNCs in


suppressing trade unions and thereby denying workers the right to organize. It has been alleged, for instance, that Coca-Cola in Colombia and Phillips-Van Heusen in Guatemala have been associated with, or are directly responsible for, the systematic intimidation, torture, kidnapping, unlawful detention, and murder of trade-unionist employees by paramilitaries operating as both of these corporations' agents.\footnote{4} TNCs in the extractive industries have caused environmental disasters, threatening the right to adequate food and the right to an adequate standard of living. Royal Dutch/Shell’s oil production in Nigeria, and BHP Billiton’s copper mining in Papua New Guinea, for example, seriously damaged the environment and the livelihood of peoples in local communities, which depended on fishing and farming.\footnote{5}

Such instances of corporate responsibility for, or complicity in, human rights abuses are increasingly widely publicized,\footnote{6} especially by non-governmental organizations (NGOs) using the immediacy of global communications. Mounting activism by NGOs, workers and consumers in developed countries in the form of protests, product boycotts, and selective purchasing has forced many TNCs to accept some level of human rights responsibility by adopting internal codes of conduct. A growing industry of social auditing now uses these codes, as well as independently devised ones such as SA8000 and the Fair Labor Association’s Workplace Code of Conduct, as standards against which to assess a corporation’s achievements and failures in human rights and environmental protection.

\section*{B. The Legal Dimension}

What is still largely invisible in this picture is the matter of the legal accountability of TNCs, and in particular international legal accountability. To be sure, there is an established corpus of domestic

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\footnote{6} See Kamminga, supra note 1, at 553.
legal regulation of corporate activities that affect human rights, including in such areas as criminal law, anti-discrimination, health and safety at work, environmental protection, and labor rights.\textsuperscript{7} Further, there is an expanding body of extraterritorial domestic jurisprudence that focuses on the human rights implications of actions taken by corporations overseas. And this in turn has been complemented by litigation relaxing the conservative grip of the old common law rule of forum non conveniens,\textsuperscript{8} and by a number of high-profile cases under the revivified U.S. Alien Torts Claims Act.\textsuperscript{9}

At international law, however, the corporate form is barely recognized, still less directly bound, whether with respect to human rights or any other field. There is no transnational regime of human rights law governing the transnational activities of corporations. TNCs have been able to operate in a legal vacuum because international human rights law imposes no direct legal obligations on TNCs. The orthodox vision of international human rights law generally binds only states because it is principally designed to protect individuals from the excesses of state power. Thus, where infringements are caused by abuse of private power, it is still the state that will be held vicariously liable at international law, if any legal entity is to be held liable at all. Despite egregious human rights abuses committed by non-state actors, international law generally, and human rights law in particular, is still undergoing the conceptual and structural evolution required to address their accountability.

C. Structure of this Article

This article argues that TNCs’ power must be accompanied by commensurate responsibility under international human rights law and specifically examines the possibility of directly regulating TNCs at the international level. Our argument proceeds by way of three steps, which correspond with the article’s three main parts.

Part II argues that despite its accommodation of third parties, international human rights law still operates through a state-based framework, which on its own is inadequate to regulate powerful non-

\textsuperscript{7} See generally David Kinley, Human Rights as Legally Binding or Merely Relevant?, in COMMERCIAL LAW AND HUMAN RIGHTS 25 (Stephen Bottomley & David Kinley eds., 2002).


\textsuperscript{9} See generally infra note 14 and accompanying text; SARAH JOSEPH, TRANSNATIONAL HUMAN RIGHTS LITIGATION AGAINST CORPORATIONS (HART PUBLICATIONS, forthcoming 2004) (manuscript on file with author).
state actors. We therefore advocate the creation of direct international legal regulation aimed at TNCs’ activities. With this in mind, consideration is given to the capacity of the international legal personality of TNCs to bear international duties, as well as to the extent to which TNCs already have human rights duties under existing international instruments, including and especially international human rights laws. Such instruments as they stand today, we believe, do not effectively impose human rights duties on TNCs. Finally, in this part, we consider the impact corporate practice has on human rights compliance by way of examining the form, nature, and effect of corporate codes of conduct and the like. We argue that while these codes cannot be solely or even largely relied upon as a tool to enforce human rights against TNCs, they may nonetheless have an important normative impact on the development of domestic and international laws.

After establishing that it is possible—albeit largely untried—to render TNCs liable under international human rights law, Part III posits a conceptual framework within which to formulate appropriate types of human rights duties for TNCs, and then proceeds to identify and explain certain key substantive duties. It sets out minimum human rights obligations of TNCs, comprising duties to respect non-derogable personal integrity rights and rights which are most prone to abuse by TNCs, such as labor and environmental rights.

Part IV deals with the question of how the human rights duties of TNCs should be implemented and enforced. It examines various international bodies including the United Nations, the World Bank, the World Trade Organization and the International Labor Organization to assess their potential as enforcers of TNCs’ human rights duties. We conclude that the current understanding of international trade, aid, and development finance, and the roles of associated international institutions, must be re-conceptualized so that TNCs are viewed as operating within rather than without the matrix of human rights law. This requires the concerted efforts not only of states and relevant international organizations, but also of individuals, NGOs, and TNCs themselves, to promote the relevance, if not the primacy, of human rights law to corporate and commercial enterprise.
II. **TRANSTATIONAL CORPORATIONS (TNCs) AND INTERNATIONAL HUMAN RIGHTS: LAW, PRACTICE, AND LIABILITY**

A. **An Overview**

The invisibility of TNCs’ accountability at the international level, especially under international human rights law, has arisen from the combined consequences of two factors. The first is the fact that historically, international human rights law has developed as a tool to protect individuals from the arbitrary use of power by states, not corporations or other private entities. To the extent that international human rights law does embrace non-state actors, it does so very largely by way of holding states **indirectly** liable for the direct infringements of others, including corporations.\(^{10}\) Typically, this comes in the form of a fundamental treaty duty imposed on a state to ensure to all within its jurisdiction the rights contained in that instrument. Though such a vicarious route to liability may seem unnecessarily circuitous, it is not altogether illogical. To a significant degree, international human rights law relies on domestic law implementing its provisions, not only with respect to a state’s own actual or potential violations of individual rights (vertical application), but also, importantly, with respect to actions between private actors (horizontal application). Where such horizontal application of domestic law is found wanting, calls for direct regulation under international law may be heard. This leads us to the second factor. Corporations law traditionally has been almost exclusively a domestic matter.\(^{11}\) The human rights responsibilities of corporations under


\(^{11}\) Corporations law has to some extent become more internationalized in recent times, particularly in respect of matters where the increasing impact of international trade law is felt. See generally David Kinley & Adam McBeth, *Human Rights Trade and Multinational Corporations*, in BUSINESS AND HUMAN RIGHTS 52-68 (Rory Sullivan ed., 2003). Yet this has not involved concerns to protect against human rights abuses by corporations. The evolution of the human rights law of the EU on the back of its free market foundations is perhaps an exception that
domestic law are not usually couched in corporations or commercial laws themselves, but in separate anti-discrimination, workplace health and safety, and labor laws. Moreover, except in certain exceptional circumstances discussed below, these domestic human rights laws are designed to operate intra-territorially only. As a result, the extraterritorial operations of TNCs—the very feature that defines them—are substantially regulated neither by international nor domestic (home state) laws with respect to their impact on human rights. Domestic regulation by host states is, of course, theoretically possible. However, in many states, especially developing ones, such regulation may be heavily compromised by the economic considerations of the host state's unbalanced relationships with TNCs.\textsuperscript{12}

This apparent legal lacuna is precisely what we argue could and should be filled by the development of international legal obligations imposed on TNCs. Surprisingly, powerful potential support to this end comes from the only significant, if still infant, common law exceptions to the picture of domestic legal absenteeism painted above regarding the off-shore activities of TNCs. The combined force of the inventive use of extraterritorial legislation to restrict the actions of corporations operating overseas and the relaxation of the \textit{forum non conveniens} doctrine, allowing greater access to home state courts for settlement of disputes over alleged human rights violations, offer potential solutions.\textsuperscript{13}

\textsuperscript{12} Due to their unique mobility, TNCs can shop around for states that offer the most favorable conditions for profit maximization, and as host states often need TNCs' investment to develop their economies, they are under pressure to compete with each other by offering cheaper labor and lower health and environmental standards. This "race to the bottom" has caused many host states to relax or exempt altogether existing national labor standards in Export Processing Zones, thereby rendering unionization and collective bargaining nearly impossible. See J. Oloka-Onyango & Deepika Udagama, \textit{The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights}, U.N. ESCOR Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., Provisional Agenda Item 4, ¶ 32, U.N. Doc. E/CN.4/Sub.2/2000/13 (2000) (submitted in accordance with Sub-Commission Resolution 1999/8). Furthermore, host state regulation may be unrealistic where TNCs assume \textit{de facto} political power in the host state. For example, in 2001, under pressure from BHP Billiton, the Papua New Guinea Parliament enacted the Ok Tedi Mine Continuation Act 2001 which indemnifies the corporation from damages for environmental pollution at its Ok Tedi copper mine. Australian Associated Press, \textit{PNG Passes Law Indemnifying BHP Billiton}, Dec. 12, 2001.

\textsuperscript{13} On the basis of the nationality principle, home states have jurisdiction over TNCs in respect of the overseas activities of TNCs incorporated under their jurisdiction. See Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), 1970 I.C.J.
These relatively recent developments are an encouraging sign for the prospect of greater direct international regulation, for they show some recognition of the nature of the problem of human rights abuses by TNCs, and at least some degree of willingness on the part of one state organ—the judiciary—to entertain arguments for new or alternative remedies.

B. Extraterritorial Legislation

In terms of instruments of domestic law with extraterritorial reach that are capable of snaring corporations across a range of human rights breaches, there is nothing quite like the U.S. Alien Tort Claims Act (ATCA). The Act empowers U.S. district courts to hear civil claims of foreign citizens for injuries caused by actions "in violation of the law of nations or a treaty of the United States." Other U.S. federal acts—namely, the Racketeer Influenced and Corrupt Organizations Statute (RICO) and the Torture Victim Protection Act (TVPA)—have some extraterritorial competence relating to human rights abuses, but only indirectly with respect to RICO (in so far as the human rights abuses are consequent upon racketeering and corrupt activities of corporations), and largely complementary to the ATCA with respect to the TVPA, except for its extension of the plaintiff base to include U.S. citizens as well as aliens.

Similarly, extraterritorial legislation enacted to combat sex tourism such as Part IIIA of the Australian Crimes Act 1914 (Cth) is relevant only in so far as it might embrace corporate involvement in such illegal and rights abusing activity.

Proposals for legislation to deal directly with overseas corporate behavior have been made in certain common law jurisdictions (Australia, the U.S. and most recently the U.K.), but none of these

3 (Feb. 5), in which the International Court of Justice affirmed that the nationality of a corporation is determined by the state of its incorporation.
17. G. Robert Blakey & Brian Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies 53 TEMPLE L. Q. 1009 (1980). In fact, the limited impact of RICO in this respect has been as an alternative cause of action in ACTA cases.
18. See discussion infra at notes 28-33.
have reached the statute book. In the civil law world, the notion of extraterritorial legislation of this kind is alien. Belgium’s brief and unsuccessful experience with its “universal competence” human rights law, which bestowed on Belgian courts the competence to try cases of alleged violations of human rights by anyone, against anybody, anywhere in the world, provides an exception that proves this rule.

For the time being, therefore, the anachronistic ATCA provides the sole source of detailed jurisprudence in this area. The growing caseload of ATCA litigation demonstrates its potential to expose corporate abuses of human rights to the rigor of curial scrutiny and ultimately to wider public criticism. That said, however, the jurisprudence is riven with inconsistency and ambiguity. No case has yet been decided on its merits and the Supreme Court of the United States has yet to determine definitively the scope and substantive content of the Act’s somewhat opaque provisions. What is more, there hangs a threat over the Act’s continued existence in its current form following reports that the Bush administration and certain members of Congress intend to curtail its reach with respect to corporations.

In terms of the object of holding corporations to account for their human rights violations overseas, the ATCA suffers from a number of procedural and substantive limitations. There are three principal limitations. Two of these stem from the fact that the now more than 200-year-old statute was never designed with the intent of capturing corporations in this way. The third is common to all domestic laws that seek to operate extraterritorially, but that fact notwithstanding, it is no less significant for the operation of the ATCA.

The first limitation relates to the courts’ restrictive interpretation of the human rights abuses that fall within the category of the “the law of nations” and which thereby establish actionable grounds under the Act. Generally, it might be assumed that human rights standards that constitute *jus cogens* norms would qualify, as would potentially all customary international laws. However, as Sarah Joseph notes in her comprehensive study of litigation under the ATCA, while certain egregious human rights breaches are deemed to fall within the ambit of

19. See JOSEPH, *supra* note 9. The Belgian Government announced in June 2003 that it would be substantially altering the law so that it would apply only if victims or the accused were resident in Belgium. See Universal Incompetence, THE ECONOMIST, June 28, 2003, at 54.


the legislation—for example, torture, summary executions, sexual assault, war crimes and crimes against humanity, forced labor, and slavery—some breaches are included only if they are systematic (racial discrimination) or prolonged (arbitrary detention), and others are not included at all—for example, terrorism, cultural genocide, environmental degradation, forced prison labor, expropriation of private property, and restrictions on freedom of expression. A particular problem of this restricted ambit is that it almost wholly excludes economic, social, and cultural rights, such as the rights to health, education, housing, and a clean and healthy environment, and protection from cultural denigration—rights which are most prone to abuse by TNCs.

Secondly, the utility of the ATCA is limited by the state action requirement. In general, non-state actors can be liable under the ATCA only where they have acted in concert with state officials or with significant state aid. The only limited exceptions to this rule are in situations of alleged piracy, slave trading, genocide and war crimes, where a non-state actor may be held liable without any state involvement. A considerable body of jurisprudence has been developed around the notion of state action, which is important in defining both the substance and the reach of the doctrine. But what is perhaps more important than knowing what the ATCA does cover in this respect is recognizing what it does not cover—namely, all those cases of egregious human rights abuses by corporations where they are acting alone or without state aid or compliance.

The third limitation is based on the need for the courts to be able to establish personal jurisdiction over foreign defendants. As with all common laws courts, American courts possess the authority to determine whether or not there are sufficient connections between the foreign corporations against which an ATCA suit has been issued and the forum jurisdiction (i.e., the United States). Such sufficient

22. JOSEPH, supra note 9, ch. 2.


24. What constitutes “state action” has in most cases boiled down to the need to satisfy one or more of five tests: public function, state compulsion, nexus, joint action, and proximate cause. See JOSEPH, supra note 9 (discussing the form and application of these tests in the context of the ATCA).


connections are necessary in order for U.S. courts to be able to establish personal jurisdiction. Again, there is a substantial and growing body of case law on this issue within ATCA jurisprudence, for even if the principle seems relatively straightforward, its application in practice is not.

Beyond the ATCA, there have been, as mentioned above, some recent and more tailored attempts to enact domestic extraterritorial legislation that would oblige corporations to meet certain human rights standards in their overseas operations. In 2000, separate but similar Corporate Codes of Conduct bills were introduced into the U.S. Congress and the Australian Parliament. Both bills sought to impose minimum environmental, labor, and human rights standards on domestic corporations employing more than a specified minimum of persons in a foreign country (set at 100 employees in the Australian bill). Despite substantial support from largely non-governmental and non-corporate sectors, both initiatives failed on the mixed grounds of their purported unworkability, their likely damage to the competitiveness of the corporations affected, and their misguided ethical foundations. More recently, in June 2003, the Corporate Responsibility bill was introduced in the Parliament of the United Kingdom as a Private Member’s Bill, but it lapsed at the end of the final parliamentary session for 2003. Like the Australian and U.S. variants, the U.K. bill also sought to impose social, environmental, and human rights obligations on corporations registered in the U.K. and their directors, with respect to their activities at home or overseas.

C. The Contraction of Forum Non Conveniens?

The common law jurisdictional rule of forum non conveniens can be

27. For discussion, see JOSEPH, supra note 9.
29. Corporate Code of Conduct Bill 2000 (Cth); First Reading, 6 Sept 2000 (Senate).
30. See id. cl. 3(1). The U.S. bill set the minimum at twenty employees. Id. cl. 3(a).
33. For the full text of the Bill, see http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/145/2002145.pdf (last visited Dec. 21, 2003).
seen as another (fourth) limitation to the application of the ATCA as discussed above. However, while it is indeed just that, the rule is much broader in its application and relevance to corporations. The deployment of the forum non conveniens principle gives a court discretion to refuse to hear a case where it may be more appropriately tried in some other forum, in the interests of all the parties and of justice.\textsuperscript{34} The doctrine is a well-established and historically very successful line of defense for TNCs when faced with litigation in their home state concerning actions taken overseas.\textsuperscript{35} Not only can the principle allow companies to avoid liability in their home jurisdictions for alleged offshore transgressions,\textsuperscript{36} but it can also be used to shield parent companies from responsibility for transgressions of their overseas subsidiaries and/or subcontractors.\textsuperscript{37}

Liberalization of the rule is taking place in the courts of the United Kingdom,\textsuperscript{38} the United States,\textsuperscript{39} and Australia,\textsuperscript{40} such that in general, the rule is now more concerned with determining which would be the most appropriate forum (taking in all relevant factors) or the one most likely to yield a just result. A potentially very significant hybrid variation on this theme has been the recent decision by the New York Court of Appeals that any judgment against Chevron Texaco in an Ecuadorian Court would be enforceable in the United States.\textsuperscript{41} Such rationales are hardly precise, and certainly they have been criticized on grounds both of allowing judges too much discretion and of Western judicial imperialism. Most significantly, many of the test cases against TNCs have hinged upon establishing the direct negligence of the parent

\textsuperscript{34} Spiliada Maritime Corp. v. Cansulex Ltd., [1987] A.C. 460 (Eng.).
\textsuperscript{35} See Andrew S. Bell, \textit{Human Rights and Transnational Litigation—Interesting Points of Intersection, in COMMERCIAL LAW AND HUMAN RIGHTS, supra note 7, at 115.}
\textsuperscript{36} Sarah Joseph, \textit{Taming the Leviathans: Multinational Corporations and Human Rights, 46 NETHERLANDS INT’L L. REV. 171, 178 (1999).}
\textsuperscript{37} Richard Meeran, \textit{Accountability of Transnationals for Human Rights Abuses—I, 148 NEW L.J. 1686 (1998).}
\textsuperscript{38} See Connelly v. RTZ Corp. Plc. (No. 2) [1997] All E.R. 335; Lubbe and Others v. Cape Plc. (No.2) [2000] 4 All E.R. 268.
\textsuperscript{39} See Bigio v. Coca-Cola Co., 239 F.3d 440, 451 (2d Cir. 2000).
\textsuperscript{40} In \textit{Oceanic Sun Line Special Shipping Co. v. Fay}, (1988) 165 C.L.R. 197 (Austl.), the High Court held that the power to strike out proceedings should only be exercised where the forum is “so inappropriate” that the continuation of the proceedings would be “oppressive and vexatious” to the defendant. \textit{Id.} at 248 (opinion of Deane, J.). Reflecting the breadth of the test, landowners of areas near Ok Tedi River, in Papua New Guinea, have been granted an option to bring a class action against BHP Billiton Ltd/Plc in Australia to recover damages for the environmental pollution caused by it. \textit{See Victoria Court Sets Path for PNG Ok Tedi Lawsuit}, \textit{REUTERS, Aug. 28, 2001, available at http://www.planetalk.com/dailynewsstory.cfm/newsid/12166/newsDate/28-Aug-2001/story.htm} (last visited Mar. 4, 2004).
\textsuperscript{41} Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).
company, rather than its responsibility for the torts of its subsidiaries.\footnote{Meeran, supra note 37, at 1687.} Accordingly, the chances of litigation may be slim where a parent company has insignificant involvement in the operation of its subsidiaries. Nevertheless, the cases at least demonstrate the contraction of the forum non conveniens principle, brought about by the courts’ willingness to focus on outcome rather than procedural pedantry. In any event, we have yet to see one of these newly available forums yield a decision on the merits in the cases before their respective courts.\footnote{Companies are keen to settle matters in order to prevent a possible judgment against them in this forum. See, e.g., Press Release, South African Asbestos Victims Finally Get Their Money (June 30, 2003), available at http://www.leighday.co.uk/cat.asp?cat=923&doc=108 (last visited Oct. 9, 2003) (discussing the settlement in Lubbe & Others v. Cape Ptc, which was finally approved by the High Court in the United Kingdom on June 27, 2003).}

From the above brief analyses it is clear that more effective mechanisms are necessary to hold TNCs accountable. Thus far, as we have outlined, innovative initiatives for reform have been focused principally on the fronts of domestic corporate regulation (both intra- and extra-territorial) and indirect international human rights regulation (by way of direct responsibility of the host—and possibly also home—state of TNCs).\footnote{Relevant in this respect to both home and host states is the common obligation placed on states by the head provisions of many international human rights instruments that signatory states must ensure to all within their jurisdiction the rights enshrined in the instruments. See European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, art. 1, Europ. T.S. No. 5, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights]; American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 1, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978); International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 2, ¶ 1, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, art. 2, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].} While those initiatives have important potential for establishing legal accountability of TNCs, they are far from providing a systematic approach due to the significant limitations identified above. In contrast, our focus is on the possibility of the regulation of corporations through international law in pursuit of ensuring more effective human rights compliance by TNCs, either alongside, or in the absence (or inadequacy) of, domestic laws.

\section{TNCs in International Law}

TNCs traditionally have not been recognized as “subjects” of international law.\footnote{Nicola Jägers, The Legal Status of the Multinational Corporation Under International Law, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 259, 262 (Michael K. Addo ed., 1999).} The creation or adaptation of international
regulatory regimes that impose human rights responsibilities upon corporations therefore appears to require a radical departure from the structure of international legal orthodoxy, which views non-state actors as mere objects of international law. Before such human rights duties can be imposed on TNCs, they must be recognized in international law as subjects of, or at least "participants in," international law, capable of bearing international legal duties. In other words, they must possess international legal personality. Since the end of World War II, international instruments or other legal initiatives have conferred international legal personality on a number of new non-state actors. For example, in Reparations for Injuries Suffered in the Service of the United Nations (Reparations case)\textsuperscript{47} the ICJ confirmed that states could confer international legal personality on international organizations such as the UN. Classically, also, individuals have acquired international legal personality via the establishment of human rights treaties, the creation of individual complaint mechanisms under various treaties, and the imposition of international responsibility for war crimes.\textsuperscript{48} In principle, therefore, there is nothing to prevent states from accepting TNCs as subjects of international law. Certainly, a very real obstacle to bringing TNCs into the international legal field in this way is that states might be reluctant to admit such powerful rival entities, no doubt fearing the dilution of their supremacy in international law.\textsuperscript{49} But, for international law to react appropriately to the effects of economic globalization, it must recognize the pervasive influence of non-state actors, and especially TNCs, in the international arena and seek to allocate rights and responsibilities to them accordingly. The emergence of new actors such as TNCs, intergovernmental organizations, and NGOs on the international stage, has led to state sovereignty becoming increasingly "pluralistic and limited."\textsuperscript{50} States are, and no doubt will remain, the key players in international legal order, but they no longer maintain a monopoly over the levers or objects of international law.\textsuperscript{51}

All this said, however, it is neither necessary nor desirable for TNCs to possess full legal personality on a par with states. As the ICJ argued

\textsuperscript{46} ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 49–50 (1994). Seeing international law as a decision-making process rather than as a set of rules, Higgins treats all non-state entities including TNCs as "participants" rather than objects.


\textsuperscript{48} Jägers, supra note 45, at 263.


\textsuperscript{51} Spiro, supra note 31, at 24–25.
in the Reparations case, "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community."\(^52\)

It is sufficient, rather, that TNCs have limited rights and responsibilities, such as the right to sue and be sued, the ability to assert a right, and the acceptance of legal responsibility in judicial forums, but not have the status of a party to intergovernmental forums or international instruments. Not only would this constitute a sound base upon which to build a regime of direct human rights responsibilities at international law, but it would also preserve the primacy of states on the international plane.\(^53\)

The extent to which TNCs already possess an international legal status may be ascertained by enquiring whether TNCs have any existing rights or duties under international law. There is, in fact, ample evidence that TNCs do possess international rights and duties, and, with respect to their rights, the capacity to enforce them. TNCs have traditionally been given rights under foreign investment law, particularly in relation to expropriation, compensation, and non-discriminatory national treatment relative to domestic firms.\(^54\) TNCs also have direct duties under some multilateral conventions. For example, both the International Convention on Civil Liability for Oil Pollution Damage\(^55\) and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment\(^56\) directly impose liability on legal persons including corporations.\(^57\) Furthermore, the UN's Norms on the Responsibilities of Transnational Corporations and Other Enterprises with Regard to Human Rights (Norms) purport not only to bind states, but also to place obligations on transnational corporations.

\(^52\) 1949 I.C.J. at 178.
\(^53\) Voon, *supra* note 50, at 247.
and other business enterprises "[w]ithin their respective spheres of activity and influence,...to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law."\(^{58}\) The Norms are, however, unclear as to how corporations could be held directly liable under international law for any breaches of these obligations, beyond implying that such a possibility exists.\(^{59}\) In this regard, the likelihood is that the liability of corporations will come indirectly through the direct liability that the Norms clearly intend to place on states.

TNCs are also empowered to enforce their rights.\(^{60}\) For example, a treaty created under the World Bank enables corporations to submit disputes to binding arbitration by the International Center for the Settlement of Investment Disputes. And under NAFTA, corporations are able to seek recompense, spectacularly, from foreign governments for breach of their right to unhindered, cross-border trade through the Agreement’s private dispute-settlement mechanism.\(^{61}\) There are many other tribunals that allow corporations to bring claims, including the Seabed Dispute Chamber, the Iran–United States Claims Tribunals, and the United Nations Claims Commission, to name a few.\(^{62}\) Evidently, therefore, as even this brief survey makes clear, it is possible to invest in TNCs sufficient international legal personality to bear obligations, as much as to exercise their rights.


\(^{59}\) Paragraph 16 of the Norms refers to the prospect of supervision of corporations by domestic or international mechanisms, whether in existence "or yet to be created." U.N. Human Rights Norms for Corporations, supra note 57, ¶ 16.

\(^{60}\) See NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 30–32 (2002).


\(^{62}\) Jägers, supra note 45, at 266.
E. Human Rights Duties of TNCs: The Current Scope at International Law

The current scope of what might be loosely called the international human rights law duties of TNCs is wide, but spread thinly and unevenly. It encompasses examples of supposed customary international law, treaty obligations, and so-called soft-law codes of conduct, guidelines, and compacts. The actual legal cover these initiatives provide is meager or non-existent. The legal (or quasi-legal) duties imposed on corporations have some potential authority, but as yet they remain ill-defined and ineffective. In short, the rudiments of an international legal framework may be discernable, but the legal content of the law is almost wholly absent.

With respect to the specific category of international human rights instruments, there is scope for the argument that the provisions of some of them can be read to apply to corporations. These are addressed in detail in Part III below. For the time being, it is sufficient that we broach the matter in relation to the Universal Declaration of Human Rights (UDHR), which is most often spoken about as a potential legal source of corporate human rights responsibilities. The Preamble’s oft-quoted provision that “every individual and every organ of society...shall strive”\(^\text{63}\) to promote respect for human rights and to secure their recognition and observance, has been interpreted by Louis Henkin as excluding “no one, no company, no market, no cyberspace.”\(^\text{64}\) Although it is difficult to avoid the conclusion that the provision expresses no more than an aspiration to “strive” to promote respect for human rights, rather than to impose a binding legal obligation,\(^\text{65}\) there is stronger language in the body of the text of the UDHR itself. Article 29 specifies that “[e]veryone [including non-state actors] has duties to the community,”\(^\text{66}\) and article 30 prohibits “any State, group or person” from engaging in any activity or performing any act aimed at the

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65. The language does not seem to be duty-creating and is contrasted with the preceding paragraph in the preamble, which states that member states have “pledged” themselves to promote respect for and observance of human rights. UDHR, supra note 64. Thus, as Rodley argues, it is “states which pledge to promote respect for and observance of human rights, the content of their pledge being spelled out in the UDHR.” Nigel S. Rodley, Can Armed Opposition Groups Violate Human Rights?, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: GLOBAL CHALLENGE 297, 306 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

66. UDHR, supra note 64, art. 29, ¶1.
destruction of any of the rights and freedoms in the Declaration. This combination can be read as constituting a statement of non-state actors’ duties not to deny or violate the human rights of others. But, even if this reading is accepted, the nature of the duties is unclear. The UDHR is a declaration, and thus is non-binding. Although it is widely accepted that some provisions in the UDHR have become customary international law, it is uncertain whether articles 29 and 30 have acquired such status. In the absence of binding effects, therefore, the duties that the UDHR imposes on TNCs may amount to ethical duties at best. Thus, in terms of international law, the UDHR may be the “most fragile basis on which to construct a doctrine of individual duties to respect human rights,” and by extension, a most uncertain ground to bind corporations.

It is true that greater certainty either way in this regard would have been possible had the drafters of the UDHR had corporations specifically in mind, but they did not. International instruments or initiatives that do specifically contemplate corporations will therefore have to speak more directly to them and also be expressly tailored to their activities. To date, however, the only examples of such tailoring are soft law, non-binding agreements, and voluntary codes of conduct.

F. Soft Law Human Rights Responsibilities of TNCs

Since the 1970s a number of intergovernmental organizations have formulated voluntary guidelines, declarations, and codes of conduct aimed at regulating TNCs’ activities. These include, notably, the Organization of Economic Cooperation and Development (OECD) and the International Labor Organization (ILO). Although, typically, these guidelines are not directed at corporations themselves (rather, they are directed at states whose task it is to apply them to the corporations within their jurisdiction), and they are not in any case binding on signatory states, the OECD and ILO instruments are the only such guidelines that contain implementation mechanisms specifically enabling corporate behavior to be scrutinized.

The OECD’s 1976 Guidelines for Multinational Enterprises (as

67. Id. art. 30.
70. Rodley, supra note 65, at 307.
71. ICHRP, supra note 69, at 99.
revised in 2000) recommend that enterprises "[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments." Specifically, they recommend that enterprises contribute to policies of non-discrimination with respect to employment, to the effective abolition of child labor, and to the elimination of all forms of forced or compulsory labor.

The ILO's 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy is addressed to governments of member states, employers' and workers' organizations, and corporations (including, of course, TNCs) operating in their territories. The Declaration urges parties to respect the UDHR and the corresponding international covenants, as well as a number of core labor-related rights.

From the point of view of the regulation of human rights abuses by TNCs, the implementation mechanisms of the OECD Guidelines and the ILO Declaration can hardly be considered intrusive on states or corporations. Quite apart from the fact that they are non-binding, the monitoring bodies do not function as judicial or quasi-judicial bodies, but rather their roles are limited to clarification of the interpretation of the instruments. They do not make specific findings of misconduct by individual companies and their identities are kept confidential, thereby shielding them from public scrutiny and potential embarrassment. Furthermore, while the Guidelines and the Declaration encourage TNCs


74. National Contact Points (NCPs) have been established under the OECD Guidelines for undertaking promotional activities and handling inquiries. NCPs are also responsible for discussing with the parties issues arising over implementation of the Guidelines. If the issues cannot be resolved at NCPs, the parties are entitled to submit the matters to the Committee on International Investment and Multinational Enterprises for clarification. ICHR, supra note 69, at 99-102. The body responsible for monitoring implementation of the ILO's Declaration is the Committee on Multinational Enterprises (CME), the main roles of which are to receive state reports on the Declaration's implementation, to conduct periodic studies on labor issues involving TNCs, and to interpret the Declaration through a dispute procedure. See Peter Muchlinski, Multinational Enterprises and the Law 458 (1999).

75. ICHR, supra note 69, at 101-03.
to respect internationally recognized human rights norms, they simultaneously uphold the primacy of national law. Thus, they can do nothing to prevent host states from adopting lax labor and environmental standards, and TNCs cannot be condemned for taking advantage of such standards.\textsuperscript{76}

The UN Global Compact is another soft law instrument directed at TNCs. Though it is not strictly a code of conduct, its object is to encourage businesses to “embrace and enact” nine core principles relating to respect for human rights, labor rights, and protection of the environment, both through their individual corporate practices and by supporting complementary public policy initiatives.\textsuperscript{77} However, again, the lack of independent monitoring and enforcement via sanctions highlights the limited ambition, and therefore, impact, of this initiative in providing protection against corporate abuse of human rights. It is true that the UN expressly acknowledges that it has neither the mandate nor the capacity to monitor and verify corporate practices.\textsuperscript{78} Yet, there is some concern as to the credibility of the Global Compact given that it is quite possible for TNCs to continue to violate human rights while enjoying the status of signatory to the Global Compact.\textsuperscript{79} At the end of the day, the Global Compact is little more than an instrument of rhetoric. It has indeed raised awareness of the issues involved, both within the corporate world and the UN itself, which is an important first step, but it is no more than that.\textsuperscript{80}

Reviewing the soft law instruments of the OECD, the ILO, and the UN’s Global Compact, one might conclude that in practice they have

\textsuperscript{76} Muchlinski, supra note 74, at 460.

\textsuperscript{77} U.N. Global Compact (2000), available at http://www.unglobalcompact.org (last visited Oct. 17, 2003). Participating companies, including Nike, Royal Dutch Shell, Rio Tinto, and Unilever, pledge to publicly advocate the Compact and post annually on the Global Compact website specific examples of the progress they make in putting the principles into practice. Id.


\textsuperscript{80} For a critical review of the impact and future of the Global Compact, see Brian Hocking & Dominic Kelly, Doing the Business? The International Chamber of Commerce, the United Nations and the Global Compact, in ENHANCING GLOBAL GOVERNANCE: TOWARDS A NEW DIPLOMACY? 203 (Andrew F. Cooper et al. eds., 2002).
achieved little of substance, due largely to their non-binding nature and the lack of meaningful implementation mechanisms. But they have at least demonstrated an increased willingness on the part of certain multilateral institutions to formulate some human rights standards against which the conduct of TNCs can be measured. Moreover, some commentators raise the possibility that such soft-law initiatives may be elevated to hard-law through the formation of customary international law. Hans Baade, for example, argues that the follow-up procedures of the OECD Guidelines constitute the requisite state practice because its monitoring body—the Committee on International Investment and Multinational Enterprises (CIIME)—is composed of the delegates of the member states.\(^{81}\) However, decisions of the CIIME are largely ignored at the national level, and only three labor cases were brought in the 1990s.\(^{82}\) The weak implementation of the OECD Guidelines seems, at the moment, to point to an absence of common and consistent state practice and *opinio juris* necessary to constitute a custom. Thus, while they may be transformed into a hard-law instrument in the future, the Guidelines do not yet provide an authoritative source of TNCs’ international duties. The position is somewhat the same for the ILO’s Declaration, and even more distant with respect to the Global Compact.

So, while it is desirable to promulgate more effective international legal standards applicable to TNCs, it will be a complex, time-consuming process in a world of diverse interests. It is almost inevitable that there will be delay before the law can properly respond to human rights abuses by TNCs, in which case there will be victims left without legal redress in the interim.

**G. The Impact of Soft-law**

The broader social, economic, and commercial contexts within which international initiatives have emerged have been crucial to their current shape, both in the sense of what they have and have not achieved, especially with respect to their impact on private actors. Even more importantly for the purposes of this article, is the continuing development of private, soft-law initiatives directed toward private actions in these contexts that will likely influence the future shape of international human rights regulation of TNCs.

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82. ICHR, *supra* note 69, at 101.
1. Corporate Codes of Conduct

The notion of corporate social responsibility (CSR)—albeit ill-defined—has now entered the lexicons of social, political, commercial, and legal discourse. The notion finds expression in the spreading instance of CSR directorships or managers, not only in TNCs, but also in NGOs, such as Human Rights Watch and Amnesty International. One would be hard-pressed to find any major corporation today that did not make some claim to abiding by a code of conduct that comprised, at least in part, adherence to human rights standards. Indeed, more often than not, such adherence to codes is trumpeted by major corporations. The escalating demands for corporations to be more socially responsible, made by NGOs, community groups, trade unions, and consumers in developed countries, have been prompted in part by the inertia of international human rights law in tackling the problems posed by TNCs. The traditional corporate response has been that human rights are concerns of states and international bodies such as the UN, not private actors such as corporations. Their ultimate responsibility, it is argued, is owed to their shareholders, whose overwhelming (if not only) concern is with profit maximization.83 Certainly, this attitude is still prevalent, but increasing exposure of human rights infringements by corporations has clearly signaled to businesses that alongside other reasons, it may well be in their commercial interest to rethink their actions and policies in terms of their social impact. Thus, on the negative side, a tarnished brand image and loss of consumer goodwill is not good for business84; on the positive side, corporate respect for human rights will not only engender goodwill, but will eventually contribute to a stable, rule-based society in host states, which in turn promotes the smoother and more profitable operation of business.85

83. See Milton Friedman's classic enunciation of this view when, more than thirty years ago, he intoned that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game...." Milton Friedman, The Social Responsibility of Business is to Increase its Profits, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32. For an expression of that view made more recently and at greater length, though still unconvincingly, see DAVID HENDERSON, MISGUIDED VIRTUE: FALSE NOTIONS OF CORPORATE SOCIAL RESPONSIBILITY (2001). For a contrary business view, see John Hall, The Social Responsibility of Corporations, 27 ALTERNATIVE L.J. 12 (2002), and for general discussion of both sides of the debate, see Alison Hughes, Is Business Everybody's Business?, 20 ALTERNATIVE L.J. 71, 72 (1995).

84. Though impact on reputation is important, it is notoriously hard to measure and predict. As Robert McCorquodale notes, consumer pressure and its resultant impact has been "piecemeal and inconsistent." Robert McCorquodale, Human Rights and Global Business, in COMMERCIAL LAW AND HUMAN RIGHTS 89, 112 (Stephen Bottomley & David Kinley eds., 2002).

These factors have been instrumental in causing many TNCs to accede to private initiatives that urge greater corporate compliance with international human rights standards or to develop their own internal codes of conduct.\textsuperscript{86} Prominent among the former category are the forerunners of the trend—the Sullivan Principles (a U.S.-based initiative that targeted corporations working in apartheid South Africa) and the MacBride Principles (which encouraged affirmative action employment programs in Northern Ireland).\textsuperscript{87} More recent initiatives in this category include the U.S. Apparel Industry Partnership’s Workplace Code of Conduct,\textsuperscript{88} SA 8000,\textsuperscript{89} andWRAP\textsuperscript{90} (the last two being administered by bodies which accredit auditors to perform social audits on corporations for compliance with their respective program’s standards). Examples of individual corporate codes of conduct abound, but they include in particular those corporations with high-profile brand images to protect, such as Adidas, Nike, The Gap, Reebok, and Levi Strauss & Co., and those within the extractive industries sector, such as Royal Dutch Shell, BP, and Rio Tinto, because the bulk of their operations is often in developing countries.

Although the contents of individual corporate codes differ significantly, labor and environmental issues are most frequently addressed.\textsuperscript{91} The codes also vary in terms of the degree of detail,

\textsuperscript{86} For an overview of these initiatives and others, see Blanpain, \textit{supra} note 81. The U.K. Government has also developed an Ethical Trading Initiative. \textit{See Ethical Training Initiative, About the Ethical Training Initiative,} at http://www.ethicaltrade.org/Z/abiteti/index.shtml (last visited Sept. 4, 2003).


\textsuperscript{89} Social Accountability International is a nonprofit organization focusing on the development, implementation and oversight of voluntary verifiable social accountability standards. The SA8000 Advisory Board includes experts from trade unions, businesses, and NGOs. SA8000 is a way for retailers, brand companies, suppliers and other organizations to maintain just and decent working conditions throughout the supply chain. Further information is available at http://www.cepaa.org/AboutSA1.htm (last visited Oct. 17, 2003).

\textsuperscript{90} Worldwide Responsible Apparel Production (WRAP) is an independent non-profit corporation dedicated to the promotion of ethical and human manufacturing. WRAP has a certification program, requiring manufacturers to comply with 12 universally accepted WRAP Production Principles assuring safe and healthy workplace conditions, and respect for workers’ rights principles. More information on WRAP is available at http://www.wrapapparel.org (last visited Oct. 17, 2003).

\textsuperscript{91} \textbf{KATHRYN GORDON & MAIKO MIYAKE, DECRYPTING CODES OF CORPORATE CONDUCT: A REVIEW OF THEIR CONTENTS, OECD Working Papers on International Investment, Number}
ranging from brief, general principles to comprehensive guidelines. Some codes even expressly support an international human rights instrument. For example, Rio Tinto's code upholds the UDHR and states that the Rio Tinto Group "seek[s] to have international standards upheld and to avoid situations that could be interpreted as condoning human rights abuses". Even accepting that this falls far short of a declaration that the company is bound by international human rights law, it nonetheless begs to be explained what such guidance means for TNCs in practice.

The proliferation of corporate codes of conduct—which have led some to lament an already incipient feeling of "code fatigue"—has attracted considerable discussion and debate as to their practical effect in combating human rights abuses by corporations. Are such codes merely paying lip service to their stated objects, or do they constitute concrete steps towards lasting human rights protection? On top of the overarching difficulty of the general absence of enforceability mechanisms for codes, the most significant and contentious concerns

93. RIO TINTO, THE WAY WE WORK: OUR STATEMENT OF BUSINESS PRACTICE, 9 (Apr. 2003), available at http://www.riotinto.com/library/reports/PDFs/corpPub_BusPract_English.pdf. In addition, the corporation also asserts that it "seek[s] dialogue with others aimed at a practical common effort to promote respect for human rights consistent with the role of business." Id.
94. The Human Rights & Business Project, under the auspices of the Danish Institute for Human Rights, is a research-based project that primarily aims at developing tools to help Danish companies act in compliance with human rights. One of the main tools currently being drafted by the Project is the Human Rights Impact Assessment (HRIA). This is a computer program comprising indicators and questions to enable companies to audit their practices to avoid violating the human rights of employees, inhabitants of the local area and other stakeholders affected by their business practices. Further information is available at http://www.humanrightsbusiness.org (last visited Oct. 24, 2003).
95. UNCTAD, supra note 54, at 47.
96. Anderson notes that such lip-service can be seen by some to amount to mere "public relations gimmicks." John Christopher Anderson, Respecting Human Rights: Multinational Corporations Strike Out, 2 U. PA. J. LAB. & EMP. L. 463, 489 (2000). Notable exceptions—such as the Sullivan Principles, which in the particular political circumstance of a strong, international anti-apartheid movement did successfully incorporate an external monitoring system—tend to prove the rule. See Liubicic, supra note 88, at 143–44.
97. See Debora Spar's general discussion of the issue including her account of the "spotlight phenomenon," that holds that increased exposure of corporations' human rights records and resulting public pressure does indeed make corporations sensitive to the demands of codes. Debora L. Spar, The Spotlight and the Bottom Line: How Multinationals Export Human Rights, 77 FOREIGN AFF. Mar.-Apr. 1998, at 8-9. The question remains, however, how sustainable such a phenomenon is when clearly the resources that enable spotlighting are finite.
98. Anderson, supra note 976, at 489-90.
center on the myriad of problems associated with the monitoring of corporate compliance with the codes: what, if any, auditing process exists? If there is one, who undertakes the audit and how independent are they? To what extent are the results open to public scrutiny? How do they measure compliance in practice, or is it measured at all? What remedies are available for breaches of the code? How does one take account of variances in local circumstances between countries, especially, for example, when local laws conflict with code standards? How does one deal with differences or inconsistencies between codes? How far down the supply chain can responsibility be attributed and measured? And, to what extent are all stakeholders—employees, trade unions, local communities, governments, and relevant NGOs—involved in the process? Much of the considerable debate over codes of conduct revolves around these questions. At base, the principal concerns are with the voluntary, self-regulatory nature of these codes and their capacity to bring any meaningful pressure to bear on corporations. To put it bluntly, it might be asked whether the fact that codes are generally not backed by law is fatal to any aspirations they might have to influencing corporate behavior. There are two ways to address this question. One is to point out that it is not entirely true to say that such codes are utterly unenforceable in law. The other is to argue, that even without express legal form, codes might nonetheless contribute to establishing norms that are recognized as quasi-binding, and which may in fact lead to their legal incarnation.

2. The Legal Impact of Codes

With respect to the former approach, there are, as Halina Ward notes, at least three means by which “voluntary codes” may be clothed in legal

99. See Laurence Dubin, The Direct Application of Human Rights Standards to, and by, Transnational Corporations, 61 INT’L COMM. JURISTS REV. 35, 63 (1999). In fact, the prevalent means of monitoring code compliance is self-regulation. However, the ever-present specter of competitive disadvantage, borne of a perception that any more substantial and independent scrutiny would raise production costs, mitigates against many corporations taking seriously the task of monitoring their compliance with codes.

100. Anderson, supra note 976, at 489-90.

101. Id. at 490. But see Mark B. Baker, Private Codes of Conduct: Should the Fox Guard the Henhouse?, 24 U. MIAMI INTER-AM. L. REV. 399, 414-16 (arguing in favor of the flexibility that comes with such variety).

102. It was recently reported that the dominant themes that emerged from a Round Table Discussion Between Code Initiatives held in London in May 2003 and hosted by the U.K.’s Ethical Trading Initiative were “the need for local worker and civil society participation in multi-stakeholder initiatives, transparency in monitoring and reporting, and better quality workplace audits.” Maquila Solidarity Network, 14 CODES MEMO 4 (June 2003), available at http://www.maquilasolidarity.org.
garb. First, corporate or industry-sector codes “can shape the standards of care that are legally expected of businesses” in their dealings with employees, suppliers, local communities, and government through their incorporation into employment, supplier, or agency contracts. Thus, for example, a South African diamond mining industry code that provides warranties against so-called “conflict diamonds” was included in a settlement agreement made subject to a U.S. court’s approval. Contractual agreements forged by way of collective bargaining between corporations and employees that are based on aspects of a code will also have a legalizing effect on the codes. Second, standards expressed in certain industry codes can be adopted by regulatory agencies as reporting requirements, and as these bodies are invested with the legal authority of enforcement, an ability to bind is effectively bestowed on the code indirectly. This is the case, for example, with superannuation legislation in the United Kingdom, Australia, Belgium, and Germany; mandatory annual disclosure and reporting requirements for the largest corporations under French corporations law; and the adoption by the JSE Securities Exchange South Africa of a “Code of Corporate Practices and Conduct” that requires all publicly listed corporations to disclose non-financial information in accordance with the Global Reporting Initiative Sustainability Reporting Guidelines. And third, proclamations made by corporations of standards that they claim to abide by are capable of constituting grounds upon which claims of misrepresentation, false, or misleading conduct can be made. The watershed case of Kasky v. Nike illustrates how corporate codes might be used in this way. In Kasky it was asserted that Nike’s public statements about good labor conditions in its Asian factories amounted to false advertising in contravention of California’s consumer protection laws and the Federal Trade Commission Act. The case was in fact settled on September 12, 2003, a few months after the Supreme Court

104. Id. at 6.
105. Id. Note that the UN’s Human Rights Norms for Corporations expressly state that corporations shall incorporate the Norms into their contracts with contractors, sub-contractor, suppliers, licensees, and distributors. U.N. Human Rights Norms for Corporations, supra note 56, ¶ 15.
106. See Ward, supra note 105, at 3-5, where Ward discusses all of these examples.
109. See Lisa Girion, Nike Settles Lawsuit over Labor Claims, L.A. TIMES, Sept. 13, 2003, at C1. In a move that appears to confound those critics of the litigation that feared the action would
of the United States dismissed the petition for certiorari as improvidently granted. Thereby, in not deciding the question of whether Nike's statements were constitutionally protected free speech, the Supreme Court left standing the Supreme Court of California's conclusion that Nike's statements were in fact "commercial speech" and therefore subject to the limitations under that state's unfair competition law.\textsuperscript{110}

3. \textit{The Normative Impact of Codes}

Besides these limited instances of codes having legal backing, codes do possess a non-legal, norm-making capacity that can both effect corporate behavior and form a basis for future legal regulation. This is the second approach to the question of the legal enforcement of codes mentioned above.

It has been suggested in this respect that the proliferation of codes may lead to the creation of new legal standards for TNCs.\textsuperscript{111} Such an argument is underpinned by a "bottom-up" view of international law, whereby it is held that state behavior may be shaped by "the relationship of states to the domestic and transnational social context in which they are embedded."\textsuperscript{112} Under this analysis, informal social norms established and applied by non-state actors \textit{inter se} are capable of shaping the behavior of states, and hence of inter-state institutions.\textsuperscript{113} As a result, conclusions can be drawn about legal standards on the basis of compelling trends in social behavior, rather than behavior deduced from legal standards. Jennifer Johnson postulates that if TNCs conceretely implement human rights standards through market practice, domestic values supporting such standards could arise.\textsuperscript{114} Assuming domestic law responds to these values, the human rights standards in the market will

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\textsuperscript{110} Kasky, 123 S. Ct. at 2555, restating the California Supreme Court's conclusion in Kasky v. Nike Inc., 27 Cal. 4th 939, 946, 45 P 3d 243, 247 (2002).


\textsuperscript{114} Johnson, \textit{supra} note 111, at 347-8.
invite legislative support. If the standards are extensively implemented within certain domestic regimes, collective pressure will grow for their implementation at the international level and thereby to all, or many, other states. In this way, public and private laws "converge," reshaping the creation and formation of international law.  

The most significant development in this vein at the international level has been the formulation of the UN's Human Rights Norms for Corporations mentioned earlier, by a Working Group of the Sub-Commission on the Promotion and Protection of Human Rights. The Norms have been subject to extensive consultation and revision throughout their five-year history. They have drawn significantly from the form, substance, and practical experiences—not only of other international instruments and non-binding guidelines adopted by multilateral organizations, but also from industry or commodity group initiatives, framework agreements between TNCs and workers' organizations, codes of conduct of individual corporations, and NGO or union model guidelines, as well as Government and private initiatives such as the U.K.'s Ethical Trading Initiative and the SA8000, respectively. Although the Norms were adopted by the Sub-Commission, and have since been considered by the Commission on Human Rights during its sixtieth session in March/April 2004, it is, as

115. Id. For example, at the level of domestic law, see the U.S. Comprehensive Anti-Apartheid Act 1986, which was based in part on the Sullivan Principles and various state enactments in the United States, as well as, to an extent, the U.K.'s Fair Employment Act 1986, which followed the McBride Principles. See McCudden, supra note 87, at 177, 193–99. But note that the growing prominence of corporate codes of conduct was not sufficient to carry through the enactment of the two Corporate Codes of Conduct Bills 2000 that were proposed in Australia and the U.S. federal legislatures, respectively. See supra text accompanying notes 28–32.

116. This is what Peter Muchlinski sees as "veering slowly towards an acceptance of some kind of articulated set of minimum international standards for corporate social responsibility, as a trade-off for greater corporate freedom in the market." Peter Muchlinski, The Development of Human Rights Responsibilities for Multinational Enterprises, in BUSINESS AND HUMAN RIGHTS, supra note 11, at 51.

117. U.N. Human Rights Norms for Corporations, supra note 58; Commentary on the Norms, supra note 57. The Norms seek to protect "traditional" human rights such as rights to non-discrimination, security of persons, rights of workers, and environmental health, but they also cover more amorphous categories of rights such as those associated with respecting "national sovereignty" (local laws, customs, practices, and traditions) and consumer protection (including fair trading and non-restrictive practices).


119. At the conclusion of which consideration, the Commission confirmed "the importance and priority" of the Norms (para.(a)), and requested the Office of the High Commissioner for Human Rights further research and report on the "options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to
mentioned above, still unclear what will be the extent and enforceability of the obligations they stipulate. Nonetheless, their provenance clearly illustrates a "bottom-up" approach by way of which private voices can be heard in the international arena.

Suggestions that the expansion of codes as a regulatory form of corporate behavior might constitute a "second human rights revolution," shifting human rights responsibilities from states to private actors, are certainly overblown, but the movement has had some significant impact on the perspectives and practices of corporations. With regard to the whole question of the role and impact of soft-law initiatives in this area, it can be said by way of interim conclusion that their significance at present lies more in their potential rather than extant power to shape corporate behavior. This is not to damn with faint praise. In reality such potential offers an important path forward. What our brief study here reveals is that though each of the legal and non-legal (or quasi-legal) components of soft-law is significant in its own right, they are inextricably interlinked. The continuing tendency to discuss the issues along the lines of the regulatory/voluntary divide that the two parts are supposed to represent is a distraction, and if we are to make the most of the potential before us then we must, as Halina Ward counsels, focus on the "discussion of new legislation or regulation as a response to contested CSR [corporate social responsibility] issues." For it is in the solidifying of soft-law into hard law (whether domestic or international) that the whole codes of conduct movement will realize its greatest effect.

III. THE HUMAN RIGHTS RESPONSIBILITIES OF TNCs

Notwithstanding the fact that the proliferation of corporate codes of conduct and other private initiatives might lead to the bolstering of international legal human rights standards for TNCs, there remain the twin questions of how TNCs' liability arises and what their substantive duties might be. Although some TNCs are considered to be more powerful than many states and some perform many of the tasks

120. Cassel, supra note 5, at 1964.
121. Ward, supra note 103, at 1.
122. On how this can be gauged, see Baez et al., supra note 3, at 185; and on what are some of the ramifications of such power, see Robert McCorquodale & Richard Fairbrother, Globalization and Human Rights, 21 HUM. RTS. Q. 735, 742-58 (1999).
usually expected of governments, it cannot be simply assumed that TNCs should have the same human rights duties as states.\textsuperscript{123} As private entities, TNCs are designed to serve the primary economic purpose of profit maximization, not to assume broad-based welfare functions.\textsuperscript{124} Merely to extend the duties of states with respect to human rights to business enterprises, therefore, is to ignore the differences between the nature and functions of states and corporations.

An especially significant difference in this respect relates to the question of jurisdiction. Under international human rights law, a state is deemed to have a measure of responsibility for the human rights-impacting actions of all actors within its jurisdiction—that is, even those of private (non-state) actors—on the basis that the state has, at least in theory, the constitutional authority to legislate and regulate such actions to ensure their compliance with its international obligations.\textsuperscript{125} But how far, it may be asked, can any analogous jurisdictional claim be made with respect to corporations? To what extent might corporations legitimately be held responsible for the human rights infringements of their subsidiaries, agents, suppliers, and buyers? There are no easy answers to these persistently difficult “supply chain” questions in terms either of operational practice or legal regulation. The UN Human Rights Norms for Corporations call for corporations to be obliged to promote and protect the norms within their spheres of influence,\textsuperscript{126} but whether that means that corporations might be held responsible in circumstances where, though short of contractual obligation, they nonetheless wield some power (for example, through preferential treatment for suppliers to meet certain social and/or environmental standards),\textsuperscript{127} is a moot point. Insofar as the matter has been considered in domestic courts, the picture is also mixed,\textsuperscript{128} though generally speaking it would seem that a

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\textsuperscript{123} Joseph, \textit{ supra} note 36, at 175; Baez et al., \textit{ supra} note 3, at 185–86.


\textsuperscript{125} \textit{See supra} text accompanying notes 10 and 11.

\textsuperscript{126} \textit{See infra} text accompanying notes 135-137.

\textsuperscript{127} This is common practice, for example, among garment and footwear manufacturing TNCs; see for example, \textit{Levi Strauss’ Sourcing Guidelines} at http://www.levistrauss.com/responsibility/conduct/index.htm, and \textit{Reebok’s Human Rights Production Standards} at http://www.reebok.com/x/us/humanRights/text-only/business/standards.html (last visited, April 22, 2004).

\textsuperscript{128} Ranging from a requirement of “total control” in respect of an ATCA case against Coca-Cola, Inc. regarding its relations with a supplier bottling plant in Colombia, see Sinaltrainal v. Coca-Cola, Inc., 256 F. Supp. 2d 1345, 1354-55 (2003), through to the various levels of control that can be held to exist between parent corporations and their off-shore subsidiaries. For discussion of the sorts of factors that determine the extent and consequences of a parent corporation’s relationship with an overseas subsidiary, see generally Lubbe and Others v. Cape
substantial degree of operational or day-to-day control is necessary in order for a corporation to attract liability for the actions of its subsidiaries, agents, or suppliers. In any event, though the precise extent will remain a matter of some debate, it seems clear that some degree of supply chain liability is expected, and will be imposed.

There is a need to reconstruct the current form of international human rights law so that TNCs can be allocated responsibilities appropriate and proportionate to their nature and activities. We explore in this present Part the conceptual framework of TNCs’ human rights obligations at the international level and identify to which human rights standards TNCs might be legitimately, as well as realistically, expected to adhere. To this end, we discuss a catalogue of the substantive human rights duties of TNCs that can be instantiated within existing international human rights instruments.

A. The Conceptual Framework of Human Rights Duties

The disaggregation of the human rights duties of states is undoubtedly a complex business;129 the same task with respect to non-state entities, and corporations in particular, is even more challenging. Conceptual schemas and practical propositions as to how to identify and attribute duties generally range variously from Wesley Newcomb Hohfeld’s seminal work,130 to the InterAction Council’s controversial 1997 proposal for the establishment of “A Universal Declaration of Human Responsibilities.”131 Of course, none of these is complete, and gaps abound. Conspicuously absent in all of them is any established structure within which to frame the specific international human rights legal duties of TNCs.

At the most general level of this question of the appropriate conceptual architecture, it can be said that there is a single overarching

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130. WESLEY NEWCOMB HOHFE LD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (David Campbell & Philip Thomas eds., Ashgate 2001) (1919).

objective of international human rights law—that is, to protect human rights.\textsuperscript{132} Three more specific obligations flow from that objective: to prevent human rights abuses; to provide means and mechanisms for human rights compliance; and to promote the understanding, appreciation, and application of human rights standards.\textsuperscript{133} There are, of course, many dimensions to this matrix that affect the manner, form, and practical impact of the human rights duties that flow from it, but in the present context, the most important of these is the question of whether the duty applies with respect to the duty-bearer’s own conduct (what we call a “self-reflexive” duty), or the conduct of others with whom the duty-bearer might have dealings or over which it might have some control or influence (what we call a “third-party” duty).

This binary structure is especially important in the context of our concern to articulate the international human rights duties that are, or might be, placed on corporations. It cuts across all three sub-categories of obligations identified above and serves to highlight the key questions that must be answered. There are both self-reflexive and third-party dimensions to the duty to prevent human rights abuses (that is, by the TNC itself, and by other parties with which it is associated); to the duty to provide the means of protection (that is, through in-house standards, facilities and procedures, and through the provision of such services outside the corporation where they are otherwise absent); and to the duty to promote the cause of human rights (that is, by advocacy, persuasion, and by example throughout the corporation’s ambit of power and authority).

It can be supposed that in so far as human rights duties are self-reflexive, the proposition that corporations are so bound is relatively unproblematic, requiring principally that the corporations refrain from interfering with the enjoyment of human rights by adopting preventive strategies to curb and scrutinize their own actions. This is a minimum duty to “do no harm” to all those with whom TNCs have contact.\textsuperscript{134} All other things being equal, the greater the proximity of the TNCs to human rights bearers, the greater will be the duties of the TNCs towards

\textsuperscript{132} The third paragraph of the Preamble to the Universal Declaration of Human Rights provides that it is essential that human rights be protected by the rule of law.


\textsuperscript{134} \textit{ICHRP}, supra note 69, at 138; \textsc{Richard T. De George}, \textit{Business Ethics} 523–24 (1999).
them.\textsuperscript{135} Thus, TNCs would owe the greatest duties to those within their "spheres of activity and influence," such as workers, consumers, and members of a local community.\textsuperscript{136} Alongside this, TNCs must also have the obligation not to be complicit in human rights abuses committed by others with whom they are working.\textsuperscript{137} For example, in joint ventures between TNCs and national (or provincial) governments, the corporation may be complicit by actively participating or knowingly assisting its partner in violating human rights when it provides financial or material assistance to security forces to protect its investments, where it knows (or should know) that the security personnel are likely to commit human rights abuses.\textsuperscript{138}

In contrast, the matters within the scope of third-party responsibility and the nature of the entities that might fall within the category of third party are much more difficult to establish. How far beyond the duty not to directly violate human rights in their everyday commercial activities ought the base requirement to protect human rights oblige TNCs to take action to prevent their violation by others? On the face of it, it might appear unjustified or inappropriate to impose on TNCs the obligation to police the conduct of the state as well as other private entities within the territories that they operate, even if it is supposed that they have the resources to do so.\textsuperscript{139} Such an obligation would appear to lie wholly within the province of governments, even if the jurisprudence on the nature and extent of these indirect, third-party responsibilities of the state is as yet undeveloped.\textsuperscript{140} However, it can be argued that TNCs do have duties to prevent human rights abuses in certain circumstances where they maintain close connections with potential victims or potential perpetrators, and where TNCs are in a position to influence the level of enjoyment of human rights.\textsuperscript{141} For instance, TNCs' proximity to

\textsuperscript{135} ICHR, supra note 69, at 138; Ratner, supra note 14 at 507-08.

\textsuperscript{136} This is the approach adopted by the UN's Human Rights Norms for Corporations, which provide that "[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law...." U.N. Human Rights Norms for Corporations, supra note 57, ¶ 1. See also U.N. Global Compact, supra note 77, Principle 1.

\textsuperscript{137} See U.N. Global Compact, supra note 77, Principles 1, 2.

\textsuperscript{138} For example, Shell in Nigeria and Unocal in Burma. For an account of the former, see DANIEL LITVIN, EMPIRES OF PROFIT 249-73 (2003), and in respect of the latter see Hall, supra note 25, at 416-22.

\textsuperscript{139} See THOMAS DONALDSON, ETHICS OF INTERNATIONAL BUSINESS 85, 94 (1989) on the limited extent to which there might be a moral (as opposed to legal) obligation on corporations to undertake such a role. See also UNHCHR, infra note 422.

\textsuperscript{140} See supra text accompanying note 10.

\textsuperscript{141} To this end the UN's Human Rights Norms for Corporations seek to oblige corporations
their employees suggests that TNCs should have a duty to take reasonable steps to protect the employees from human rights violations committed by the state.\textsuperscript{142} TNCs should also have a duty to ensure that their business partners, whether subsidiaries, subcontractors, suppliers, joint venture partners, or others with whom they work do not violate human rights.\textsuperscript{143} This duty is particularly strong where the contractual relationships throughout the supply chain allow some room for the TNCs to exert significant influence over the conduct of their business partners.\textsuperscript{144} The TNCs' obligation to protect human rights is perhaps greatest where they act as de facto governments and exercise control over the territories in which they operate. In such situations, they effectively step into the shoes of governments and should be required to fulfill duties more akin to those of states.\textsuperscript{145}

Related to such duties to prevent third-party violations of human rights are the two questions concerning the extent to which TNCs ought (i) to be required to provide means for protection where others have not, and (ii) to actively lobby others to better protect human rights. Both of these are essentially public functions, apparently going beyond what might be considered the core responsibilities of TNCs. However, the private exercise of public power is nothing new to TNCs, especially given the extent of privatization and corporatization of public utilities and services in the industrialized world over the past twenty years or so, and more recently, with equal vigor, in developing countries. What is more, TNCs are clearly able to use their considerable economic leverage (especially where they are operating in developing countries) to effect public and private conditions that are favorable to their enterprise.\textsuperscript{146} It may be the case that one readily associates the duty of providing the appropriate means for actively securing human rights (especially economic and social rights), as well as the duty of providing compliance with human rights, with the activities of the state. And to

\begin{footnotesize}
\begin{enumerate}
\item 142. Ratner, \textit{supra} note 14, at 517; ICHRP, \textit{supra} note 69, at 138.
\item 143. \textit{See} JÄGERS, \textit{supra} note 60, at 83.
\item 144. \textit{De George}, \textit{supra} note 134 at 524; ICHRP, \textit{supra} note 69, at 140.
\item 145. ICHRP, \textit{supra} note 69, at 139; Ratner, \textit{supra} note 14, at 517.
\item 146. Usha Haley comments that "[m]ultinationals strive hard to impact [sic] regulatory policies because regulation bears on virtually all aspects of their behaviors in markets including decisions on pricing, product qualities, disposition and repatriation of profits, labor relations, acquisition of finance, and health, safety and environmental standards." Usha Haley, \textit{Multinational Corporations in Political Environments} 82-83 (2001). For a specific example of the wielding of such impact, see the discussion regarding BHP Billiton’s operations in Papua New Guinea, \textit{supra} note 12.
\end{enumerate}
\end{footnotesize}
the extent that these activities fulfill this duty, then it can be said both that they cannot be transposed onto TNCs,\(^{147}\) and on strong democratic grounds, ought not to be so transferred.\(^ {148}\) But there is simply no reason why TNCs should not be obliged to take steps along the lines of these typical governmental functions to provide for and to promote human rights, when such steps are within their power and jurisdiction. Thus, for example, TNCs in developing countries can be expected to help in the human rights training of state-based security personnel,\(^ {149}\) and to provide health care and even education for workers and their families where none is accessible or would otherwise not be provided by the state. The improvement of the overall human rights situation of the population may indeed be, as Stephen Ratner argues,\(^ {150}\) a central purpose of government, but we would add that TNCs not only can, but must, provide collateral and sometimes crucial collateral support to that end.

\[\text{B. Substantive Human Rights Duties of TNCs}\]

The international human rights obligations of TNCs must, as we have already said, necessarily be narrower than those of states. But they are not to be minimal, or non-existent. They will substantially comprise the general self-reflexive obligation not to interfere with the enjoyment of human rights, but TNCs must also be required, to some extent, to positively provide means for human rights attainment and to promote third-party compliance with, and provision for, human rights guarantees. In terms of a practical frame of reference of what duties international human rights law might impose upon TNCs, the substantive dimensions of such duties are likely initially to be somewhat confined, given the primary focus of international human rights law on states. Some human rights norms may be directly applicable to TNCs, while others can be reformulated to suit the corporate circumstance.\(^ {151}\) For example, the appropriate perspective on the right to education might be that which requires TNCs to abolish or curtail child labor and to provide financial assistance or alternative employment arrangements to children so that they could return to school.\(^ {152}\) Similarly, the right to

\(^{147}\) Ratner, supra note 14, at 517–18.

\(^{148}\) Kelley, supra note 124, at 522.

\(^{149}\) Ratner, supra note 14, at 516.

\(^{150}\) Id. at 517–18.

\(^{151}\) Dubin, supra note 99, at 39–41.

\(^{152}\) For example, the “Atlanta Partnership,” comprised of a coalition of U.S. and international sporting goods industry organizations, the ILO, and UNICEF, sought to eliminate child labor from the manufacture and assembly of footballs in Sialkot, Pakistan. The partnership,
social security might require TNCs to make pension contributions and provide maternity pay.\textsuperscript{153} There are, however, certain international human rights duties which, no matter what perspective is adopted, are inappropriate, if not practically impossible, to place on TNCs. This is likely the case, for example, with protecting the right to asylum, the right to take part in government, and the right to a nationality,\textsuperscript{154} and certainly the case with many rights concerning criminal defendants, such as the presumption of innocence, freedom from arbitrary arrest, and the right to be brought promptly to trial. These rights fall squarely within the proper province of states’ responsibilities for maintaining public order and ensuring a fair trial.\textsuperscript{155}

TNCs are private actors acting on a global stage, and the very fact of their private form sets them apart from states. As legal persons, TNCs have legal rights, including in certain circumstances and under certain jurisdictions, human rights.\textsuperscript{156} To the extent that TNCs have such rights under either domestic or international law, they must be balanced against the rights of others. This clearly differs from the situation of the state. As a duty-bound protector of human rights, the state has few countervailing legal rights, and no human rights, that it might call in aid against the rights-claims of private legal persons. Corporations, on the

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which ran from 1996-2001, included a so-called “Social Protection and Rehabilitation Programme” that sought, among other things, to place children removed from the football industry into the appropriate education system. For discussion, see Bahar Ali Kazami & Magnus MacFarlane, \textit{Elimination of Child Labour: Business and Local Communities}, in BUSINESS AND HUMAN RIGHTS, supra note 11, at 185-91.


\textsuperscript{154} Dubin, supra note 99, at 41.

\textsuperscript{155} Ratner, supra note 14, at 492–93.

\end{quote}
other hand, do possess such private legal rights.\textsuperscript{157} Thus, for example, as Ratner suggests, a TNC breaking into anyone’s home to wiretap conversations or intercept mail under suspicion of their theft of company property would violate the right against arbitrary or unlawful interference with privacy, family, home, or correspondence, not least because the means are disproportionate to the ends.\textsuperscript{158} However, TNCs would likely not be violating employees’ human rights by screening their work emails for inappropriate or illegal use. What actions do and do not constitute human rights infringements are not, of course, always so clear-cut as in this pair of examples. In any event, it must be accepted that as private entities, TNCs do legitimately possess greater scope than states to pursue their self-interest.\textsuperscript{159}

In delineating certain essential, minimum categories of international human rights duties that may be appropriately placed on TNCs, we have separated our consideration of such rights into two basic categories: “core rights” and “direct impact rights,” with each being further divided into particular rights.\textsuperscript{160} With respect to core rights, we address a set of fundamental rights that comprise the right to life, liberty, and physical integrity, mindful of the need to balance rights-claims of corporations and individuals as outlined above. These rights are less likely to attract the complexities of such counterbalancing, because their protection from infringement by TNCs is as necessary as their protection from infringement by states. Under direct impact rights, we consider the human rights duties of TNCs associated with those individuals, groups, and communities who are most directly affected by the TNCs’ actions—namely, employees, their families, and members of local communities.\textsuperscript{161} From the rights-holders perspective, the very proximity and immediacy of the rights in this category mark them out as deserving of particular attention, but these rights are also those that TNCs are most ready to concede are to some extent their responsibility to protect. The rights of concern here are labor rights, environmental rights, and peculiarly, though significantly given the propensity for TNCs to operate in remote and/or developing countries, the rights of indigenous peoples.

\textsuperscript{157} See Jägers, supra note 60, at 27-63 (discussing corporations’ rights generally, and international legal rights in particular).

\textsuperscript{158} Ratner, supra note 14, at 514.

\textsuperscript{159} See Joseph, supra note 36, at 200.

\textsuperscript{160} Nicola Jägers offers a different list of rights organized according to different criteria, though there are many common threads between the two lists. See Jägers, supra note 60, at 51-74.

\textsuperscript{161} ICHR, supra note 69, at 138; Ratner, supra note 14, at 508.
Before addressing each of these categories in turn, two further general points must be made. First, within the "duties typology" we have adopted in this essay, the duties that adhere to the rights we discuss in this part will be both of the self-reflexive and third-party protection kinds. This is so because on both counts the determining factor in binding TNCs to protecting these rights is the very fact that they fall squarely within the TNCs' most immediate spheres of activity and influence. Second, the minimum duties that we outline should provide a starting point from which higher and wider standards of human rights protection and promotion can be developed.

In the remainder of this Part we first deal collectively with the core rights of life, liberty, and physical integrity, and then address, individually, the direct impact rights associated with labor, the environment, and indigenous peoples.

1. The Rights to Life, Liberty, and Physical Integrity

International human rights laws safeguard rights to life, liberty, and physical integrity by prohibiting actions that are injurious to the inherent dignity and security of the human being. Such actions include war crimes, genocide, crimes against humanity, arbitrary killing, torture, and other cruel, inhuman, or degrading treatment or punishment. While at international law the duties not to engage in such criminal acts are not directly imposed on corporations (though they may be with respect to their officers and/or employees), they can be and are imposed indirectly, by way of states passing on their obligations through national law and policy. It is in this manner that the UN's Human Rights Norms for Corporations hold that "transnational corporations and other business enterprises, their officers and persons working for them are...obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and

162. UDHR, supra note 64, art. 3; ICCPR, supra note 44, art. 6.
163. UDHR, supra note 64, art. 5; ICCPR, supra note 44, art. 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 [hereinafter CAT].
164. A proposal by France that the Statute of the International Criminal Court include a provision that extended criminal liability beyond individuals to include legal persons such as corporations was never adopted. See Developments—International Criminal Law, 114 HARV. L. REV. 1943, 2031-32 (2001).
165. See JÄGERS, supra note 60, at 230–31. See also articles 25(3) and 28(2) of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999, which deal with individual responsibility and responsibility within non-military superior/subordinate relationships, respectively.
other international instruments.  

In most cases, these duties would focus on the matter of corporate complicity because businesses are more likely to be complicit (with their state partner) in the commission of war crimes, genocide, and crimes against humanity, rather than directly to commit those crimes themselves.  

Thus, for example, where coffee companies stored arms and equipment used by those who carried out the genocide in Rwanda in 1994, there are grounds to claim their complicity in the crime.  

Equally, there are grounds for arguing that Deutsche Bank was complicit in the Holocaust, on the basis that it financed the construction of Auschwitz despite knowing of its intended use. As the UN Norms stipulate then, TNCs should have the obligation to avoid complicity in supplying products or services or providing financial or other material support, when they are aware that such conduct would further the design to commit war crimes, genocide, and crimes against humanity.  

The right to life is one of the most fundamental human rights, from which no derogation by states is permitted even in times of public emergency. It is recognized in most international instruments, such as the UDHR and the ICCPR, as well as in regional instruments, including the European Convention, the American Convention, and the African Charter. In addition to these treaties, the right to life is recognized as a customary international right, and may well have achieved the status of jus cogens, and thus, a peremptory norm, which cannot be abrogated. Similarly, freedom from torture and other cruel, inhuman, or degrading

166. U.N. Human Rights Norms for Corporations, supra note 57, Preamble. The paragraph from which this extract is taken then goes on to list numerous examples of treaties that impose such obligations.  


170. U.N. Human Rights Norms for Corporations, supra note 57, para. 3.  


treatment or punishment (collectively "freedom from torture") is a non-derogable right, protected not only by the ICCPR, the Convention against Torture (CAT),\textsuperscript{174} and the UDHR, but also by customary international law and through its status as a \textit{jus cogens} norm.\textsuperscript{175}

Given the "universally recognized and relatively concrete" status of the rights to life and freedom from torture,\textsuperscript{176} it is appropriate to impose on TNCs the obligation to respect these rights. Indeed, abundant evidence of TNCs' activities that threaten physical integrity and security of persons clearly points to the need to make this obligation stick. One of the most direct and clearest ways in which TNCs affect the enjoyment of the rights to life and freedom from torture arises from their engagement of security personnel who are likely to commit such crimes against the person.\textsuperscript{177} Drawing upon our obligation framework above, the self-reflexive duty of corporations to respect these rights in this context would be to ensure that their own security personnel exercise restraint and caution in a manner consistent with relevant international standards, such as the UN Code of Conduct for Law Enforcement Officials\textsuperscript{178} or the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,\textsuperscript{179} which lay down strict limitations on when force and firearms can be used.\textsuperscript{180} The implications

\textsuperscript{174} CAT, supra note 163.

\textsuperscript{175} On its position as international customary law, see AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, ¶ 702, and on the strong arguments for its status as a \textit{jus cogens} norm, see Edward Hyland, \textit{International Human Rights Law and the Tort of Torture: What Possibility for Canada? in Torture as Tort} (Craig Scott ed., 2001).

\textsuperscript{176} Baez et al., supra note 3, at 222.

\textsuperscript{177} This is illustrated by Royal Dutch/Shell’s engagement of a Nigerian military hit squad to protect its investment against Ogoni protestors, leading to the massacres of about 2000 Ogonis by the military. See Cassel, supra note 5, at 1965. Similarly, in Burma, U.S. courts have determined that Unocal knew or should have known of the fact of the Military Government’s commission and likely further commission of acts of murder and rape, when the corporation entered into a joint venture with the Government to construct an oil and gas pipeline. See Doe I v. Unocal Corp. 2002 U.S. App. LEXIS 19263, 1, at 62-3; Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1306 (C.D. Cal. 2000).


of such an approach have been the subject of specific consideration under a joint initiative of the U.S. and U.K. governments, resulting in the U.S./U.K. Voluntary Principles on Security and Human Rights ("the Voluntary Principles"). Thus, it is reasoned that TNCs ought to develop policies regarding ethical conduct that meet the applicable international standards, and that they adequately train security personnel accordingly.

Alongside this self-reflexive duty to refrain from directly infringing the right to life, TNCs also have a third-party duty to guard against such infringements by others with whom TNCs are associated. This may mean, for example, that where TNCs employ or provide equipment to public or private security forces, they must consider the risk of human rights abuses, assessed against any relevant previous engagement and whether the security staff concerned have had any previous involvement in human rights violations or are likely to in the future. Indeed, such a classic example of private actors performing public (normally state) functions adds strongly to the argument for insisting upon their compliance with international human rights standards. Thus, generally speaking, TNCs should be required to take all appropriate measures to mitigate any foreseeable negative consequences. Where TNCs employ public or private security forces, there arises either the third-party or self-reflexive duty to prevent human rights abuses by the contracted security forces, depending on whether the security personnel are directly or indirectly employed by the TNC. Where they directly employ security personnel, TNCs should be able to incorporate these principles in their contracts and ensure that these employees observe the principles. Contracts could also include the term that the contract can be terminated where there is credible evidence of contravention of the principles by the public or private security personnel. Furthermore, TNCs should support efforts by governments to provide human rights training as well as aid them in establishing adequate monitoring systems, in order to facilitate investigations into allegations of abusive or unlawful acts by security personnel.

182. See Voluntary Principles, supra note 180, at 6.
183. This was precisely the problem with Shell’s engagement of security personnel to protect its installations in Nigeria which led directly to the human rights abuses that formed the base for litigation against the corporation. See Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).
185. See id. at 10.
2. Labor Rights

By virtue of their particular position as employers, TNCs' policies and practices have the most immediate impact on the enjoyment of labor rights. The critical need to formulate labor standards is reflected in the fact that the majority of existing international initiatives attempt to address TNCs' responsibility to respect labor rights more than any other set of rights. The minimum duties of TNCs in relation to labor rights should be grounded on "core" labor rights, as expressed in Article 2 of the ILO Declaration on Fundamental Principles and Rights at Work, and expanded on by the eight fundamental ILO Conventions. These core labor rights consist of the freedom of association, the right to organize and bargain collectively, and the prohibitions against discrimination, bonded and forced labor, and child labor.

There are, however, a number of factors that must be addressed in any attempt to implement TNCs' obligations regarding labor rights. Perhaps the most important of these is the fact that such attempts are sometimes resisted by those they aim to protect—namely, workers in developing countries. Most often, however, the opposition comes from governments of developing countries, who claim to fear a loss of the competitive advantage they supposedly derive from cheap labor costs and who perceive the imposition of labor standards as a disguise for protectionism of industrial countries. This is a complex and difficult issue. Some empirical studies show that observance of the core labor rights would not significantly reduce the competitive advantage of

186. See Gordon & Miyake, supra note 91.
188. For an overview of these core rights, see Hector Bartolomei de la Cruz et. al., The International Labor Organization: The International Standards Systems and Basic Human Rights 127-288 (1996) (Part 4).
cheap labor. Further, respecting the rights of workers, particularly in relation to health and welfare issues, may lead to enhanced proficiency and increased productivity, and hence attract more foreign investment. What cannot be denied is that in the long run, educated and healthy workers are vital for economic development, which in turn creates stable business environments. The key challenge is, of course, determining how to establish and maintain such benign conditions for workers, for, in reality, the mechanisms that provide, or can provide, such conditions operate beyond the workplace and even the immediate local community to include national and often international agencies. However, the fundamental tenet of our argument remains that economic development does not necessarily require a tradeoff in human rights. Therefore, it follows that developing countries should not myopically block the imposition of duties on TNCs to respect labor rights. Any comparative advantage derived as a result of violations of core labor standards cannot be promoted as a legitimate advantage that developing countries should be able to enjoy. The concept of comparative advantage, in other words, while focusing on economic efficiency, must also have regard to social ramifications if it is to be considered an appropriate doctrinal principle in promoting economic development.

Where the imposition of international labor standards is opposed by those who argue that it would hurt the very workers they are designed to help, it is often on the basis that such conditions might put them out of work. Nicholas Kristof and Sheryl WuDunn observe that developing country workers often claim that the simplest way to help them is to buy more from sweatshops, not less, because sweatshops offer an escape (albeit a precarious one) from their poverty. Premature unilateral implementation of core labor standards can have devastating

191. UNHCHR, supra note 85.
193. Thus, for example, Shell found that for it to secure the employment conditions of its workforce in Nigeria, it had to operate more like local government than local government was acting—meeting the shortfall in basic public service provisions by building schools, roads, and hospitals and providing the means for them to function. NOREENA HERTZ, THE SILENT TAKEOVER: GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACY 220–21 (2001).
195. Summers, supra note 189, at 87.
197. Nicholas D. Kristof & Sheryl WuDunn, Two Cheers for Sweatshops, N.Y. TIMES, Sept. 24, 2000, § 6 (Magazine), at 70.
consequences on workers because it may result in immediate
termination of their employment, leaving them without any alternative
means of earning an income. What must be appreciated here is the
importance of exercising a great degree of sensitivity in determining
methods of implementing TNCs' duties to respect labor rights so that
such duties are not seen merely as an imperialistic exportation of a
Western construct. To this end, TNCs should be required to implement
core labor rights with "a relativist sensibility," which necessarily entails
entering into dialogue with the workers in developing countries.
TNCs must increase consultation with workers and adopt
implementation methods that focus on actual consequences to them,
rather than unilaterally imposing universalist norms of the developed
world.

Having established these basic general points, we turn now to analyze
the content of certain core labor rights—namely, freedom of
association, the right to collective bargaining, and prohibitions against
discrimination, bonded and forced labor, and child labor—by asking
how they do, can, and should apply to corporations.

a. Freedom of Association and the Right to Collective Bargaining

The right to freedom of association is widely recognized in
international instruments, including the UDHR, ICCPR, ICESCR, and the ILO Convention No. 87. In truth, freedom of association is
inextricably bound up with the right to collective bargaining, as the
former would be meaningless if trade unions were deprived of their
right to engage in collective bargaining with management. Collective
bargaining enables workers to negotiate better working conditions, such
as safe and healthy working environments and living wages, and
provides workers with a means to resolve disputes with employers. For

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198. See Claire Moore Dickerson, Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers, 53 F.L.A. L. REV. 611, 614 (2001). Dickerson discusses the experience of Wal-Mart to illustrate the point. Embarrassed by the negative media publicity, Wal-Mart cancelled its agreements with Bangladeshi suppliers who used child labor. This unilateral action of Wal-Mart to respond to developed countries' anti-child labor norm had disastrously affected some child workers, who were forced to find new jobs working for underground subcontractors or to become beggars or prostitutes. Id.
199. Id. at 629–30.
200. Id. at 615–16.
201. UDHR, supra note 64, art. 23.
202. ICCPR, supra note 44, art. 22.
203. ICESCR, supra note 44, art. 8.
204. Freedom of Association and Protection of the Right to Organize Convention, No. 87, supra note 187.
these reasons, the freedom of association and the right to collective bargaining are often said to be "a cornerstone for the basic rights of workers." 205

Due to the deeply embedded political, social, and economic implications, TNCs are often very reluctant to give effect to the freedom of association and the right to collective bargaining, especially in developing countries. 206 Nevertheless, the crucial significance of these rights to the enjoyment of other labor rights necessitates that there be a minimum obligation on TNCs to recognize and respect the rights of workers to form and join trade unions of their choice and to bargain collectively. 207 This entails TNCs refraining from discriminating against workers on the basis of trade union membership or participation in trade union activities. TNCs should also have the positive obligation to provide workers and their representatives access to information (including information regarding labor conditions in other parts of the enterprise in the same country or in other countries), 208 facilities, and other resources necessary for effective negotiation. Furthermore, TNCs' immediate connection with workers suggests that they have the third-party obligation to protect their workers from human rights abuses by others, in addition to the self-reflexive duty to curtail their own infringing actions. This may be particularly relevant to situations where national laws of a host state ban or restrict trade unions, thereby raising the complex issue of whether TNCs should effectively be obliged to contravene the national laws of the host state for the sake of protecting the rights of workers. Such an obligation may seem unfair to TNCs because it would potentially jeopardize their relationship with the host government. In many cases, however, the TNCs have considerable economic and political leverage over their host governments, which means they have the power to encourage the development of organized labor. In this way they might act not only in their own self-interest, but

205. Baez et al., supra note 3, at 267.
206. See GORDON & MIYAKE, supra note 91.
208. See MUCHLINSKI, supra note 74 at 351.
also possibly as catalysts for change.\textsuperscript{209} At the very least, TNCs should have the third-party duty to facilitate the development of alternative means for free association and collective bargaining. Such means could include, for example, establishment of single-issue committees, such as worker Health and Safety Committees and Complaint and Resolution Committees.\textsuperscript{210}

In a similar vein, TNCs should take steps to ensure that their joint venture partners, contractors, or suppliers have a comparable policy with respect to the rights to association and collective bargaining; for example, by incorporating labor rights as a term of their contracts.\textsuperscript{211}

b. Non-discrimination

Given its status as one of the most important principles imbuing and inspiring the concept of human rights,\textsuperscript{212} it is unsurprising that the principle of non-discrimination is enshrined in numerous international human rights instruments, including the UDHR, ICCPR, and ICESCR, as well as ILO Convention No. 111 (Convention concerning Discrimination in respect of Employment and Occupation).\textsuperscript{213} For example, the ICCPR prohibits discrimination on the grounds of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”\textsuperscript{214} Importantly, the obligations imposed on states include requiring them to take appropriate measures to prevent discrimination by private as well as public entities.

As employers, TNCs can be immediately implicated in discrimination when dealing with issues arising in the workplace, such as recruitment, conditions of work, access to training, remuneration, promotion, termination, or retirement.\textsuperscript{215} TNCs should have the minimum obligation to refrain from discriminating against their

\begin{itemize}
\item \textsuperscript{209} That is, by creating goodwill between employer and employees, as well as facilitating the means of communication between the parties.
\item \textsuperscript{210} The SA8000 Certification and Corporate Involvement Program help consumers and investors to identify and support companies that are committed to assuring human rights in the workplace SA8000 Standard Elements. See Social Accountability International, Corporate Involvement Program (CIP), at http://www.cepaa.org/SA8000/CIP.htm (last visited Mar. 22, 2004).
\item \textsuperscript{211} See U.N. Human Rights Norms for Corporations, supra note 57, ¶ 15 (requiring that corporations “shall apply and incorporate these Norms in their contract or other arrangements and dealings with contractor, subcontractors, suppliers, licensees [and] distributors....”).
\item \textsuperscript{212} MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 458-79 (1993).
\item \textsuperscript{214} ICCPR, supra note 44, arts. 2, 26.
\item \textsuperscript{215} ICHRCP, supra note 69 at 23.
\end{itemize}
employees not only on these enumerated grounds, but also on the grounds of disability, age, union membership, marital status, capacity to bear children, pregnancy, sexual orientation, genetic features, or any other characteristic unrelated to the individual’s ability to perform his or her job. TNCs should also have the third-party duty to ensure that the policies and practices of their business partners, contractors, or suppliers prevent discrimination on those grounds.216

The expanded prohibited grounds of discrimination are appropriate, as they reflect the fact that TNCs, in pursuit of their global operations, encounter many different cultural practices and traditions, and political and social conditions that have an effect on the workplace environment. Particular attention should be paid to the special needs of women, who as a group are often victims of systemic discrimination. Inequality in the enjoyment of rights by women both within and outside the workforce is deeply embedded in tradition, history, and culture, including religious attitudes.217 As observed by the UN Human Rights Committee, a large proportion of workers employed in areas which are not well-protected by labor laws are women, and these women are often discriminated against with regard to access to better paid employment and to equal pay for work of equal value.218 In particular, gender discrimination is widespread in the Export Processing Zones (EPZs) where women provide up to eighty percent of labor requirements. For example, Human Rights Watch reports that Guatemalan “maquilas” (export-processing factories) routinely discriminate against women on the basis of pregnancy by requiring female job applicants to state whether they are pregnant as a condition of employment.219 To the extent that TNCs often contract directly with those export-processing factories and have significant bargaining power to dictate the content of their recruitment policy, TNCs should have the third-party duty to prevent their contractors from discriminating against women.

The obligation to adopt affirmative action policies in order to reverse historical discrimination and disadvantage ordinarily falls within the province of governments. While it would certainly be desirable for...

218. Id., ¶ 31.
TNCs to apply special measures to overcome past discrimination against certain groups, the potential problem is that TNCs may not be equipped with in-depth knowledge of historical circumstances of the countries in which they operate. It may be difficult and even illegitimate for TNCs to assess the appropriate extent to which such special measures should be taken. Still, it is reasonable to expect that TNCs not only be required to respect and promote the policies, but also that they be proactive in this respect and, like any other “good citizen,” act as an agent of beneficial change.

c. Forced or Bonded Labor

Forced labor is defined in ILO Convention No. 29 as “all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” Although the prohibition of forced labor is essentially directed at states, states are obliged to take legal and other positive measures to prevent private entities from exploiting forced labor. Article 5 of the Convention specifically provides that no concession granted to private individuals or companies should involve any form of forced or compulsory labor for the production or collection of products. ILO Convention No. 29 is one of the two most widely ratified instruments of the ILO, and the prohibition of forced labor is recognized as customary international law. Bonded labor is a condition arising from a debtor’s pledge of his or her personal services, or those of one under the debtor’s control, as security for a debt, where the reasonable value of those services is not applied towards liquidation of the debt, or the length and nature of the personal services are not defined. As such, bonded labor is recognized as a contemporary form of slavery. Freedom from slavery or servitude is one of the most fundamental human rights, guaranteed in many international

220. Forced Labour Convention, No. 29, supra note 187, art. 2.
221. NOWAK, supra note 212, at 150.
222. The other is ILO Convention No.100 on Equal Remuneration.
223. Daes, supra note 156, at 267.
225. U.N. ECOSOC Sub-Commission on the Promotion and Protection of Human Rights, Report of the Working Group on Contemporary Forms of Slavery, 26th Sess., U.N. Doc. E/CN.4/Sub.2/2001/30 (2001). It is argued further that forced labor also constitutes slavery. We believe such an argument is harder to sustain on the dual basis that forced labor does not necessarily entail ownership of a human being (which slavery seems to imply) and that freedom from forced labor is a derogable right under Article 8(3) of the ICCPR while freedom from slavery under article 8(1) is non-derogable.
instruments including UDHR, ICCPR, the Slavery Convention, and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. It is not only a part of customary international law, but also a jus cogens norm, and is an international crime for which private actors can be held responsible. To the extent that slavery often functions as a means of economic oppression for the benefit of private interests, it would be clearly appropriate to impose on TNCs the obligation to refrain from exploiting forced or bonded labor. Thus, the UN’s Human Rights Norms for Corporations provides that corporations “shall not use forced labor or compulsory labor as forbidden by relevant international instruments and national legislation.”

TNCs must also avoid being complicit in violations of this norm. In *Doe v. Unocal*, the United States Court of Appeals for the Ninth Circuit found that Unocal could be held responsible for aiding and abetting the Myanmar government in exploiting forced labor given the fact that the corporation knew (or should have known) of such exploitation, notwithstanding that there was no evidence of active participation or cooperation by the corporation itself. Unocal’s mere knowledge that the government was likely to commit the violation, therefore, was sufficient to give rise to liability. Beyond such complicity, we maintain that TNCs must also have the third-party obligation to prevent others from using forced or bonded labor where the potential victims or perpetrators are within the reach of TNCs’ influence. Thus, again, TNCs should have the third-party duty to prevent their business

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228. NOWAK, supra note 212, at 145.


231. Recall, in this regard, the stipulation in the UN’s Human Rights Norms for Corporations that TNCs and other business enterprises are obliged to promote and protect internationally recognized human rights “within their respective spheres of activity and influence.” U.N. Human Rights Norms for Corporations, supra note 57, ¶ 1.
partners, suppliers, or contractors from using forced or bonded labor.\textsuperscript{232} Consequently, Unocal's proximity to both the workers in the pipeline project and the Myanmar government strongly points to Unocal's responsibility to protect the workers from the abuse, especially when Unocal must have known that the violations were likely before entering into a joint venture contract with the government.\textsuperscript{233} In such situations, TNCs should have the obligation to take positive actions to protect proximate populations from violations of their freedom through forced or bonded labor.

d. Child Labor

The prohibition on child labor is stipulated in various forms in a number of international instruments. The Convention on the Rights of the Child provides that the child has the right to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with his or her education.\textsuperscript{234} States are obliged to take legislative, administrative, social, and educational measures to ensure that the right is implemented.\textsuperscript{235} To this end, states are particularly expected to provide for a minimum age for admission to employment and to regulate the hours and conditions of employment appropriately. The ILO Convention No. 138 (Minimum Age for Admission to Employment) gives some guidance in this respect, providing that the minimum age for entry in the workforce should not be less than 16 years, and, in any case, not less than the age of completion of compulsory schooling.\textsuperscript{236} The minimum age stipulated in the Convention for any type of employment that is likely to jeopardize health, safety, or morals of young persons is eighteen years.\textsuperscript{237}

In combating child labor, the traditional focus has been on the abolition of child labor per se.\textsuperscript{238} However, it has been recognized that the imposition of blanket bans on child labor is often harmful to the children and their families. For example, a total prohibition on child labor in Bangladesh's garment industry has caused the children to move into "crime and prostitution" to support their families who are

\textsuperscript{232} See U.N. Human Rights Norms for Corporations, supra note 57.
\textsuperscript{233} Unocal, 2002 U.S. App. LEXIS 19263 at 54-5.
\textsuperscript{235} Id. art. 32(2).
\textsuperscript{236} ILO Convention No. 138, supra note 187, art. 3.
\textsuperscript{237} Id.
\textsuperscript{238} See, e.g., id.
dependent on their earnings. Moreover, the narrow focus on the total eradication of child labor could stifle effective mobilization of the international community to address the problem of child labor as a whole. As Shahidul Alam argues, use of child labor is not necessarily seen as a human rights violation in developing countries. While the use of child labor may be unacceptable in the West, children in developing countries simply have to work to maintain the health and welfare of the family as a whole. Childhood is seen as a period for learning employable skills so that children can earn better pay when they grow up. When, therefore, developed countries, or advocacy groups within them, overzealously promote the complete abolition of child labor, they may be seen as culturally paternalistic for not taking into account the economic and social realities of developing countries.

Facing this conundrum, ILO Convention No. 182 targets “the worst forms of child labor,” which include slavery, forced or compulsory labor, prostitution, and trafficking of drugs. The Convention is designed to protect children under the age of eighteen. It requires states to take immediate and effective measures to prohibit and eliminate the worst forms of child labor by designing and implementing programs for enforcement, monitoring, sanctions, prevention, and child removal. Significantly, the programs should provide for rehabilitation and social integration of children through measures that address their educational, physical, and psychological needs. When these obligations are transferred to TNCs, it would require TNCs, at the very fundamental level, to abolish business practices that are characterized as the worst forms of child labor by Convention No. 182. Further, it is crucial in


241. See Mehta & Singh, supra note 189. See also Kazami & MacFarlane, supra note 152, at 195-96 (In their review of the “Atlanta Partnership” strategy for removing child labor from football manufacture in Pakistan, Kazami and Macfarlane concluded that alongside some significant benefits for some workers, there were some “notable negative socio-economic impacts and outcomes at community level,” including the aggregate income losses for some families and the further marginalization of workers in remote areas).


244. See U.N. Human Rights Norms for Corporations, supra note 57, ¶ 6.
this context to impose on TNCs the obligation to provide appropriate means for securing children's human rights. As unilateral termination of children's employment could, as noted above, cause children to engage in more dangerous and abusive forms of labor in a desperate search for income, TNCs must have transitional obligations to provide suitable opportunities for education, vocational training, and other social protection for the children and their families; for example, by hiring older siblings and parents.245

3. Environmental Rights

As noted earlier, TNCs can and do yield to the temptation to take advantage of lax environmental regulation in host states and as a result are directly responsible for environmental damage and degradation (and sometimes large scale disasters) that destroy the livelihood of local communities.246 The interdependency of human rights and environmental protection is expressed in many forms. Perhaps the most fundamental is the fact that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights. Thus, for example, serious environmental damage clearly threatens the enjoyment of the right to self-determination, the rights to life, liberty, and security of the person, the right of minorities to enjoy their culture, and the rights to health, to adequate food, and to an adequate standard of living.247 The necessary interdependency is also crucially apparent in the fact that the fulfillment of human rights norms, particularly the right to information and procedural guarantees of participation and access to remedies, is crucial to environmental protection.248

That said, however, it is far from clear whether the interrelationship of environmental norms with human rights gives rise to a separate,


246. See, for example, Chevron Texaco's defense to claims that its use of inadequate means to dispose of waste oil and waste water has caused an environmental disaster of immense proportions in the Ecuadorian rain forest that the impugned techniques were "legal and common at the time." John Vidal, Oil Giant in Dock over Amazon Waste: Clean up Our Polluted Forest, Ecuadorians Demand in Landmark Suit, THE GUARDIAN, Oct. 25, 2003, at 16.


distinctive right to a healthy environment, as opposed to one that is adjectival to or constitutive of another right. The latter is precisely what occurs at the international level with respect to the placement of environmental protection within the right to health under the ICESCR,\textsuperscript{249} and at the level of domestic law with so-called environmental torts, where tortious actions such as negligence or absence of duty of care results in environmental damage.\textsuperscript{250} The disagreement and debate over whether there is, or should be, a free-standing right to a healthy environment persists within the canon of human rights law,\textsuperscript{251} notwithstanding the development of non-binding international declarations affirming its existence.\textsuperscript{252} Whatever the formal outcome of the debate, the need to create a human right to a healthy environment may be largely redundant, given the substantial body of international environmental law already in existence.\textsuperscript{253} Certainly, corporations ought to be obliged to abide by the terms of the relevant international instrument covering the environment. Both the UN's Human Rights Norms for Corporations and the OECD Guidelines make

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\textsuperscript{249} ICESCR, supra note 44, art. 12. See also Scott, supra note 23.

\textsuperscript{250} Scott, supra note 23. For a discussion of environmental torts as they relate to corporations in particular, see Michael Anderson, Transnational Corporations and Environmental Damage: Is Tort Law the Answer? 41 WASHBURN L.J. 399 (2000).

\textsuperscript{251} The principal point of contention being the parameters and content of such a right in light of the manifest differences in perspective between developed and developing countries. See, e.g., Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874. The negotiators rejected the proposal for including a right to environment, having regard to the linkage of environmental protection and economic development. Shelton, supra note 248, at 198. On the question of a fragmented vision of what constitutes the right, see Alan E. Boyle, The Role of International Human Rights Law in the Protection of the Environment, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 43, 64 (Alan E. Boyle & Michael R. Anderson eds., 1996).

\textsuperscript{252} For example, the Stockholm Declaration on the Human Environment provides that "[m]an has the fundamental right to...adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being." Declaration on Environment and Development: Report of the United Nations Conference on the Human Environment, Principle 1, U.N. Doc. A/CONF.48/14/Rev.1 (1972). The 1994 Draft Principles on Human Rights and the Environment, submitted by the Special Rapporteur on Human Rights and the Environment for the UN Sub-Commission on the Prevention of the Discrimination and the Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights), also affirm that all persons have a right "to a secure, healthy and ecologically sound environment." Draft Principles on Human Rights and the Environment, reproduced in Ksentini, supra note 247, Annex 1. In addition to these international non-binding instruments, there are regional instruments recognizing the link between human rights and a healthy environment, such as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), Nov. 17, 1988, art. 11(1), 28 I.L.M. 156; and the African Charter on Human and Peoples' Rights, supra note 172, art. 24.

\textsuperscript{253} Boyle, supra note 251, at 53–57. Furthermore, efforts to reformulate international environmental law in explicit human rights terms may run the risk of tainting international environmental law with an anthropocentric bias. Id. at 51–53.
explicit provision for such. 254

In this respect, there is one particular feature of the interrelationship between human rights and environmental protection that deserves special attention: that is, the essentially procedural form of consultation and participation that binds them. This entails guaranteeing procedural environmental rights, which include access to environmental information, participation in environmental decision-making, and remedies for environmental harm. Importantly, these rights are underpinned by the notion that sustainable development cannot be achieved by governments alone, but requires an open society in which citizens can access pertinent environmental information, as well as relevant decision-making processes and institutions, both to influence decisions on the environment and to correct, and obtain redress for, environmental harm. 255 Access to information is intertwined with the right to participate in decision making because it is a crucial prerequisite to any meaningful participation by the public at large, local communities, or vulnerable groups, such as indigenous peoples, in environmental decision making. The right to information is recognized in major international and regional human rights instruments 256 and in many environmental instruments. 257 It consists in public bodies’ obligation to disclose all records they hold, regardless of the form in which those records are stored. 258 Further, the right should guarantee, without unreasonable charges, access to information relating to the environment held by public authorities, or by private (or semi-private) bodies with public responsibilities for the environment. 259 The right to participate in public affairs is also widely recognized in human rights instruments as part of democratic governance. 260 It lies at the heart of

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254. U.N. Human Rights Norms for Corporations, supra note 57, ¶ 14; OECD, supra note 70, pt. V.


256. See, e.g., ICCPR, supra note 44; UDHR, supra note 62; European Convention on Human Rights, supra note 44; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143 (as noted in Handl, supra note 255, at 323).

257. Shelton discusses many of the environmental treaties which guarantee the right to information, including the Framework Convention on Climate Change, art. 6; the Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 16; the Espoo Convention on Environmental Impact Assessment in a Transboundary Context; and so forth. Shelton, supra note 248, at 199–203.

258. Report by the Special Rapporteur on Freedom of Opinion and Expression, noted in ICHR, supra note 69, at 40.

259. Handl, supra note 255, at 319.

environmental rights because they are based on the very recognition that "environmental issues are best handled with the participation of all concerned citizens, at the relevant level."261 The Rio Declaration specifically recognizes the need for public participation by vulnerable groups such as women, youth, and indigenous peoples, as do, notably, the OECD Guidelines.262 The right of access to remedies is also a recognized human right in many international and regional treaties, either in the form of access to court in the determination of a person's rights and obligations, or for the purpose of redressing specific violations of fundamental rights guaranteed either by those instruments, or by the constitution or national law.263 In a similar vein, environmental instruments frequently proclaim the need for effective remedies.264

These procedural rights justify the proposition that there is a role for human rights law in promoting procedures for environmental protection, not only because they would add significantly to the protection of the environment, but also because they would avoid the uncertain definition of "a healthy environment" and problems of anthropocentricity.265 Therefore, given the clear normative reach of such environmental rights, TNCs should be obliged to ensure that they do not violate them. Environmental abuse and degradation pay no attention to the demarcation of public and private authority; and nor, in our view, ought the imposition of the responsibility not to abuse the environment. TNCs should, therefore, be obliged to disclose information relating to their activities that are likely to affect the environment, provide opportunities for members of affected local communities to participate in environmental decision-making, and refrain from impeding access to justice in the event that their activities have caused environmental


262. OECD Guidelines, supra note 72, Part V, ¶ 2(b), though note the qualifier that such "timely communication and consultation" is subject to limitations arising out of "concerns about cost, business confidentiality and the protection of intellectual property rights." Curiously, the U.N.'s Human Rights Norms for Corporations, supra note 57, do not insist upon consultation, nor do they mention it in the accompanying Commentary on the Norms, supra note 58.

263. Handl, supra note 255, at 323.


damage.

4. Rights of Indigenous Peoples

The adverse effects of TNCs’ activities on the welfare of indigenous peoples are well-documented. Perhaps the most common situation in which one finds the rights of indigenous peoples being compromised is where extractive industry TNCs fail to conduct their activities in an environmentally sustainable or culturally sensitive manner, impairing the ability of indigenous peoples living in the area to preserve their traditional forms of subsistence and way of life. In Myanmar, for example, in addition to the forcible displacement of local peoples, logging and oil exploration by TNCs in concert with the military government in the Mon territory have caused rapid deforestation and contamination of water sources, which have further led to the displacement of whole indigenous communities and various health problems, including malnutrition.

While such conduct could be characterized as violations of existing generic human rights norms, such as the right to life, the right to health, and the right of minorities to enjoy their cultural, religious, or linguistic practices, there is a well-developed notion that the application and implications of such rights are particularized in the case of indigenous peoples. This notion is underpinned by the recognition that indigenous peoples have been historically subjected to unjust dispossessions of their lands and consequent destruction of their culture and way of life. Indigenous peoples around the world have been deprived of their lands and resources through many unjust processes, including by way of military force, unlawful settlements, forcible removal and relocation,


"legal" fraud and deception, and illegal expropriation by the government.\textsuperscript{269} As a result, the cultural survival of indigenous peoples is directly threatened because their unique relationships with their traditional territories form the spiritual and material foundations of their cultural identities.\textsuperscript{270} As pointed out by José Martinez Cobo, "it is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture."

Indigenous peoples’ claim that their distinct cultural identity and existence hinges on protection of their unique relationship to their traditional territories has gathered recognition at the international level and has been, to a limited extent, translated into human rights of indigenous peoples under international law.\textsuperscript{272} This is reflected by the ILO Convention No. 169 (Concerning Indigenous and Tribal Peoples in Independent Countries)\textsuperscript{273} and the UN Draft Declaration on the Rights of Indigenous Peoples,\textsuperscript{274} which are specifically designed to protect human rights of indigenous peoples. Though neither of these instruments expressly address the question of the role of TNCs in the protection of the rights of indigenous peoples, it is possible to glean from them some human rights norms of particular importance to indigenous peoples that are vulnerable to infringement by the actions of TNCs—namely, the right of self-determination, the right to property,

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\textsuperscript{270} \textit{Id.} ¶ 13.
\textsuperscript{273} Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter ILO Convention No. 169]. Notwithstanding that the ILO Convention No. 169 supersedes the much criticized integrationist ILO Convention No. 107, it has only attracted 17 signatory states as of October 2003.
and the right to cultural integrity.

a. The Right of Self-Determination

As affirmed in the UN Charter and other major international legal instruments including Article 1 of both the ICCPR and the ICESCR, as well as the Draft Declaration, all peoples have the right to self-determination, and by virtue of that right are free to choose their political status and may freely pursue their economic, social, and cultural development.275 In the context of indigenous peoples, self-determination means the freedom “to live well, to live according to their own values and beliefs, and to be respected by their non-indigenous neighbors.”276 Such recognition, however, does not translate into unambiguous implementation through law, policy, and practice, either by states or by indigenous peoples. This is largely due to the twin problems that first, too often the right to self-determination is equated with an absolute right to form an independent state,277 and second, the fact that the categorization of “indigenous” is itself contested.278 This indeterminacy of the norm poses a fundamental difficulty in delineating TNCs’ duties with regard to indigenous peoples. Not only does the indigenous right of self-determination necessarily raise an issue that directly bears upon the institutions of governments, but it also serves to blur the lines between public and private action, as well as public and private responsibilities.279 These factors can make the process of

276. Daes, supra note 156, at 263.
277. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 86 (1996). It is precisely for this reason that the ILO Convention No. 169, supra note 273, avoids conferring on indigenous peoples the express right to self-determination, but rather recognizes their “aspirations” to that end, id. art. 3(1), and the more circumscribed right “to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.” Id. art. 8(2).
279. As is illustrated in the discussion of the Awas Tingni case below, see infra text at note 286. As Patrick Macklem states in his analysis of the implications of this case (and another like it), “the triangular relationship of actors involved [state, indigenous peoples and corporations]...reveals the fragility of efforts to establish a bright line between public and private action in the context of multinational corporate activity that threatens indigenous interests.” Patrick Macklem, Indigenous Rights and Multinational Corporations in International Law, 24
imposing the duty to respect the indigenous right of self-determination on TNCs a complex exercise. At the most fundamental level, however, TNCs should have the self-reflexive obligation to refrain from violating the right of self-determination, especially as it may often be the case in practice that corporations effectively take the place of the state and are exercising de facto public functions. TNCs should not engage in activities that deprive indigenous peoples of their means of subsistence (including through environmental degradation), or that impede the indigenous peoples’ pursuit of their own political, economic, social, and cultural institutions. Furthermore, where business activities do affect rights, lives, and destinies of indigenous peoples, TNCs should have the positive third-party obligation to facilitate full participation by indigenous peoples at all levels of corporate, and if immediately relevant, government decision making.

b. The Right to Property

The right to property, which is recognized in the UDHR, is closely linked to the right of self-determination. In the context of indigenous peoples, this link flows from the fact that a secure land and natural resource base is vital for indigenous peoples to ensure the economic viability and development of their communities. Article 14 of ILO Convention No.169 guarantees to indigenous peoples the rights of ownership and possession over their traditional lands. The Draft Declaration goes further by recognizing indigenous peoples’ rights to own, develop, control, and use the lands, territories, and other natural resources which they have traditionally owned, or otherwise occupied or used. These indigenous rights to property are most likely to be transformed into a concrete human rights norm, as foreshadowed by the case of Mayagna Awas Tingni Community v. Nicaragua in the Inter-

280. See, for example, the experience of Shell. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000). This phenomenon constitutes a part of what Macklem refers to more generally as “the realist insight that corporate authority is delegated state authority.” Macklem, supra note 279, at 477.
281. See U.N. Human Rights Norms for Corporations, supra note 57, ¶ 10, and Commentary on the Norms, supra note 58, ¶ (c), which precisely so provide.
283. ANAYA, supra note 277, at 104–05.
284. See ILO Convention No. 169, supra note 272.
286. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Case No. 79, Inter-Am.
American Court of Human Rights. The case involved a complaint by the Mayagna Sumo indigenous community about illegal logging by TNCs on their traditional lands, which threatened their right to enjoy their property. The Court held that indigenous groups have the right to live freely in their own territory, and their close ties with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.287 Ultimately, the Court held the Nicaraguan government liable for failing to demarcate and title the traditional lands, and for granting concessions to private companies to use the indigenous peoples' property without consulting them or obtaining their consent. This decision affirms the existence of indigenous rights to property and more importantly, at least in the context of this article, suggests that this state obligation might in the future be extended to oblige TNCs to respect the rights of indigenous peoples to own, occupy, develop, and use their traditional lands,288 especially in circumstances where, as the UN's Human Rights Norms for Corporations state, indigenous lands and resources have not been adequately demarcated or defined by the government.289 TNCs should actively seek consultation with indigenous peoples who may be affected by their development projects, with a view to obtaining free, prior, informed consent of all parties concerned.290

It is important to note that the right to property also encompasses intellectual property. The Draft Declaration expressly acknowledges this, providing in Article 29 that "indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property."291 An important aspect of indigenous peoples' intellectual property is their knowledge concerning the utility, diversity, and chemical characteristics of biological resources in their environment.292 Many indigenous groups voice their concern about "bio-


287. Id. at 79, ¶ 149.

288. Or, as Macklem would have it, states should be obliged "to acknowledge that the legitimacy of the authority they delegate to multinational corporations rests on their capacity to come to grips with sovereignty's suspect origins." Macklem, supra note 279, at 483-84.

289. See U.N. Human Rights Norms for Corporations, supra note 57; Commentary on the Norms, supra note 58, sub-para.(c).


291. See Draft Declaration, supra note 282.

292. Sarah Pritchard & Charlotte Heindow-Dolman, Indigenous Peoples and International
piracy," that is, the practice of TNCs using biological, genetic, or intellectual property resources from indigenous peoples to develop useful products that earn profits, while the indigenous peoples receive nothing.\textsuperscript{293} The form and substance of this right is still evolving even with respect to the responsibilities it vests in states.\textsuperscript{294} That fact notwithstanding, TNCs should have the duty to ensure the "equitable sharing" of the benefits arising from the utilization of indigenous knowledge, innovation, and practices, consistent with the state obligations required by the Convention on Biological Diversity.\textsuperscript{295}

c. The Right to Cultural Integrity

The right to cultural integrity, which upholds the right of indigenous peoples as a group to maintain and freely develop their cultural identities in coexistence with other communities, has been identified in a number of international human rights instruments.\textsuperscript{296} Article 27 of the ICCPR, which guarantees the rights of minorities to enjoy their cultural, religious, and linguistic practices, has been applied to indigenous peoples for the purposes of safeguarding an indigenous group's survival as a distinct culture, which has been understood to include protecting economic or political institutions, land use patterns, as well as language and religious practices.\textsuperscript{297} Article 5 of the ILO Convention No. 169 specifically recognizes and protects "the social, cultural, religious and spiritual values and practices" of indigenous peoples, and respects the "integrity of [their] values, practices and institutions."\textsuperscript{298} The Draft Declaration emphasizes further the need to ensure the survival of indigenous peoples as distinct peoples. To this end, it seeks to protect the right to maintain and develop distinct ethnic and cultural characteristics and identities,\textsuperscript{299} the right to be protected from cultural

\textsuperscript{293} ICHR, supra note 69, at 40. See also Pritchard & Heindow-Dolman, supra note 292, at 503–07.
\textsuperscript{294} Under the Trade Related Aspects of Intellectual Property Agreement (TRIPs) there is no express provision for intellectual property rights that accrue especially to indigenous peoples. The Doha Round of the WTO talks foreshadowed the need for consideration of including such rights within TRIPs, but despite the drafting of a number of proposals, the matter has yet to receive serious consideration by the WTO member states.
\textsuperscript{296} ANAYA, supra note 277, at 98.
\textsuperscript{297} Id. at 100.
\textsuperscript{298} ILO Convention No. 169, supra note 273, arts. 5(a), (b).
\textsuperscript{299} Draft Declaration, supra note 282, art. 8.
genocide,\textsuperscript{300} and the right to practice and revitalize cultural, religious, or spiritual traditions and customs.\textsuperscript{301} Given the breadth and depth of recognition of the need to protect culture at international law, TNCs should be under both self-reflexive and third-party duties to avoid activities which impair the health, environment, culture, and institutions of indigenous peoples.\textsuperscript{302} Since lands and natural resources are vital to cultural survival, TNCs should be prohibited from forcibly removing, or, as is more likely, from being complicit in removing indigenous peoples from their lands or territories. And where communities are relocated, TNCs must be obliged to ensure that adequate, ongoing compensation be provided.\textsuperscript{303} TNCs should also take particular caution not to damage the environment when they or their partners carry out exploration or exploitation of natural resources on indigenous lands.\textsuperscript{304} It should be made a duty of TNCs to conduct environmental impact assessments and include indigenous peoples in the decision-making process.\textsuperscript{305} The fact that the adverse social and environmental impact of TNCs appears to be markedly lower in cases where there is a high degree of indigenous participation in planning and management reinforces the efficacy of imposing such a duty on TNCs.\textsuperscript{306}

IV. THE ENFORCEMENT OF THE HUMAN RIGHTS RESPONSIBILITIES OF TNCs AT INTERNATIONAL LAW

We accept of course that inevitably there is and will be debate about the extent and composition of the categories of rights-duties to be imposed on corporations that we have discussed in Part III. However, while that matter is an important one in its own right, it is underpinned by an equally crucial pair of questions—namely, whether and how it is possible to establish the means by which such rights (whatever they are) can be enforced against corporations at the level of international law and practice. The final, integral stage, therefore, in the process of creating a viable legal regime to regulate TNCs' activities with respect to human rights is to identify the means of enforcement. This is a two-

\textsuperscript{300} Id. art. 7.
\textsuperscript{301} Id. arts. 12–14.
\textsuperscript{302} U.N. Human Rights Norms for Corporations, \textit{supra} note 57, ¶ 10; Commentary on the Norms, \textit{supra} note 58, sub-para. (c).
\textsuperscript{303} U.N. Human Rights Norms for Corporations, \textit{supra} note 57, ¶ 18.
\textsuperscript{304} Id. ¶ 14.
\textsuperscript{305} Id.; Commentary on the Norms, \textit{supra} note 58, sub-para. (c), (d).
\textsuperscript{306} Centre on Transnational Corporations, \textit{supra} note 267, ¶ 21.
step process, requiring adaptations of the traditional formats of both international instruments and institutions.

A. Adapting the Language of International Instruments

First, it is necessary to frame the obligations to protect human rights contained in international instruments in such a way as to bind corporations. Beyond the somewhat open-ended reference to the responsibilities of “all organs of society” to promote the protection of human rights in the Universal Declaration on Human Rights, very few international instruments impose obligations of any kind on corporations, let alone obligations to protect human rights. As a matter of concept and practice, it is, at present, improbable to suppose that international instruments could be framed in such a way as to bind corporations directly. However, one can move beyond the traditionally state-centric focus of most international instruments to construct a hybrid instrument that is clearly directed towards corporate behavior and its attendant responsibilities while maintaining the primary executive duties of states. Models already exist: both the International Convention on Civil Liability for Oil Pollution Damage and the United Nations Convention on Contract for the International Sale of Goods fit into this hybrid category. Both treaties have been signed by states and it is they who are obliged to enforce the rules and prescriptions enunciated in the instruments through their own legal systems. The bulk of the texts of the two instruments, however, are concerned with how private parties must act, what responsibilities they carry, and what consequences will follow from failing to abide by the strictures provided. The UN’s Human Rights Norms for Corporations—as the only real contender for a binding international instrument in this field—also has this format. For although as we noted earlier the precise manner of enforcement under the Norms has yet to be determined, states are expected to be the signatories to the instrument and will be primarily responsible for enforcing it, even though the Norms’ substance is concerned almost wholly with the conduct of corporations and the obligations imposed upon them within their spheres of activity and influence.

307. UDHR, supra note 64, Preamble.
308. See supra notes 55-57 and accompanying text.
309. See supra note 59 and accompanying text.
310. See U.N. Human Rights Norms for Corporations, supra note 57, ¶ 1; Commentary on the Norms, supra note 58.
B. Adapting the Roles of International Institutions

The second, more complex, step in the process seeks to address the question of which institutions could realistically and effectively implement and enforce the human rights duties of TNCs discussed in Part III above. For without such institutions, the proposition to impose human rights duties on TNCs, though not without significant rhetorical force, would be robbed of any substantial practical effect. The remainder of this Part is concerned with the analysis of this second step.

Reflecting the state-centric focus of international human rights law, all existing regimes are designed to hold states directly accountable for their implementation. In order, therefore, to develop the means by which to ensure that the human rights duties of TNCs are to be regulated on the international plane, it is necessary either to extend existing mechanisms or to develop new ones, or to do both. Although our focus is clearly on the international operation of the bodies we discuss below, the international sphere’s ultimate reliance on the acceptance, implementation, and enforcement by states is fundamental.

We do not, in this section, seek to canvass all the international bodies, regimes, and processes that could be utilized in ways that might advance the object of human rights protection. Rather, with a view to assessing their potential as enforcers of TNCs’ human rights duties, we examine four specific international organizations: the UN, the World Bank, the WTO, and the ILO. Together they represent the pertinent spheres of endeavor with which we are concerned: aid and development (the Bank), trade (the WTO), commerce—specifically the utility and welfare of the workforces upon which commerce relies (the ILO)—and human rights (the universalizing human rights “project” of the UN). Also, individually, albeit it to differing degrees, each of these possesses foundations upon which the apparatus for bringing human rights responsibilities to bear directly on corporations might be built. That is: (1) direct, or fairly direct, impact of their actions on corporations; (2) recognition, or incorporation, of human rights principles within their existing mandates; (3) mechanisms through which disputes can be settled or at least mediated; and, not least of all, (4) acknowledgement, if not yet full acceptance, of the persistent calls for each of them to do

311. See José Alvarez, Constitutional Interpretation in International Organizations, in The Legitimacy of International Organizations 104, 110 (Jean-Marc Coicaud & Veijo Heinakansan eds., 2001).

312. For an account of the broad conceptual questions this raises within the canon of international law, see Rosalyn Higgins, Problems and Process: International Law and How We Use It 49–50 (1994).
more in this respect from various quarters including states, civil society (both international and domestic), other international organizations, and even each other.

Other international bodies that might have been candidates for discussion here are not being discounted; rather, they appear to us not to be so prominent or promising as the ones we have chosen. For our present purposes, it would be of questionable worth to compile or explain this “B List,” which would certainly include the various regional human rights regimes; regional trade blocs such as NAFTA and the EU; the African, Inter-American and Asian Development Banks; and others such as the OECD. Having said this much, however, it is necessary to provide some explanation for perhaps the most obvious omission from the “A List”—namely, the International Monetary Fund (IMF).

Our determination not to discuss the role the IMF might play is not because it is unimportant, nor because it has no potential to provide a means for better human rights protection by corporations. Rather, it is because the potential it does have has been steadfastly suppressed, despite mounting calls for the IMF to accept a broader socio-political perspective of the impact of its actions.\footnote{313} IMF orthodoxy holds that the fundamentals of human rights are not appropriate or indeed even possible companions to the central features of the IMF’s mission—macroeconomic and fiscal reform and financial management.\footnote{314} What is more, though the actions of the IMF can clearly have the most profound effects on nearly all aspects of a recipient state’s economic, social, and political order, the IMF neither directly works with, nor directs its policies expressly towards, corporations. Finally, the IMF presently has no dispute settlement mechanism out of which might be fashioned the means to scrutinize corporations for better human rights observance. For these reasons, especially when compared to the characteristics of the bodies we have chosen to discuss, we have not included the IMF in our following analysis.

\footnote{313} Thus, while Darrow acknowledges some shifts in rhetoric and policy, he nevertheless sees the institutional resistance to any innovation “outside the box” of economic management, the relatively small and static size of the Fund and the prevailing political climate in Washington as making it “difficult to imagine human rights penetrating beyond very superficial levels within the Fund’s policies and program activities in the short term.” MAC DARRW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW 201-2 (2003). See also Joseph Stiglitz’s unstintingly damning account of the IMF’s “broken promises” in this regard. JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 23-52 (2002).

\footnote{314} STIGLITZ, supra note 313, at 25–36.
C. The UN Human Rights Bodies

Given their mandate and expertise, the UN human rights bodies appear to be well placed to implement and enforce TNCs' human rights duties. Alongside the individual petitioning schemes that exist under four of the main human rights treaties,315 the public examination of the human rights records of individual states by way of the reporting procedures is another important method of implementing states' human rights duties. The monitoring Committees under each of the six principal human rights treaties require state-parties to submit initial and periodic reports on domestic implementation of that treaty and issue Concluding Observations at the conclusion of the Committee's consideration of each report.316 It would be both conceptually difficult and practically impossible to require all TNCs themselves to submit human rights reports to the various UN committees,317 though the UN's Human Rights Norms for Corporations proposes that corporations "shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms."318 However, it would be possible for the Committees to become more insistent on states providing them with details of corporations' compliance and non-compliance with relevant human rights treaty provisions, and further, on the strength of such reports, be expected to answer for the actions of corporations operating within their respective jurisdictions.

Another proposal is to utilize the thematic procedures of the Commission on Human Rights. Under "the 1235 procedure," the


318. U.N. Human Rights Norms for Corporations, supra note 57, ¶ 16 (emphasis added).
Commission is empowered to establish a working group to examine allegations of gross human rights violations or consistent patterns of human rights violations. Thus, for example, it would be possible to make the Working Group, or some such similar body or office, responsible for rendering the Human Rights Norms for Corporations permanent, and for this body to be charged with the task of monitoring the activities of TNCs. At the very least, such an organ would have competence to receive and assess information from all stakeholders—governments, NGOs, affected groups, individuals, and corporations. Alternatively, or in addition, a special rapporteur could be appointed specifically to investigate allegations of human rights abuses by TNCs.

The enforcement capacities of these various suggestions rely largely on the public examining TNCs’ activities through the agency of states, which are directly responsible for regulating human rights abuses. This mechanism can pose problems, in that the effectiveness of such agency is significantly dependent upon state cooperation. But even putting that aside, the lack of sufficient resources is equally capable of undermining any, or all, of these proposals. Each one of them would certainly add to the demands on the already stretched resources and the overburdened agenda of the Commission specifically, and the UN generally. Unsurprisingly, therefore, it seems that political commitment to the cause will have to be garnered at the appropriate levels both within the UN agencies themselves, and from the member state governments, before any of these proposals will be acted upon.

319. Id. Its mandate is currently limited to run until 2004, although the Sub-Commission has recommended that the Commission on Human Rights consider establishing an open-ended working group to review the Norms.

320. See id.; Commentary on the Norms, supra note 58, ¶ (b).


322. The public dimension of which might be particularly effective with respect to brand-image sensitive. See Joseph, supra note 36, at 185.


324. An “acid test” in this regard will be the reception given to the Human Rights Norms for Corporations when they are considered at the Commission on Human Rights’ 60th session in March/April 2004, see supra notes 57 and 58, for despite their long journey through the UN system to date, only then will the state parties have fully begun to engage with the implications of the Norms. For the Commission’s Decision on the Norms, see supra note 119, and for links to various opinions on the Norms from both corporate and NGO bodies, see http://www.business-humanrights.org/Home (last visited 3 May 2004).
D. Global Trade and Aid Institutions

By comparison to the UN, global trade and aid institutions like the World Bank and the WTO have fewer problems in terms of adequate resources, political support, and institutional technical expertise to enforce their rules effectively.\textsuperscript{325} Given their pivotal role in the process of economic globalization and their direct relations with, and impact upon, corporations, there is some logic in seeking to utilize them to ensure TNCs’ observance of human rights standards. To the extent that profit maximization is the primary goal of corporations, the most effective enforcement mechanism would focus on directly affecting TNCs’ profits, and these institutions are capable of doing so.\textsuperscript{326} Putting it crudely, one can say that where the message is successfully conveyed that a good human rights record is good for business, then the chances of successfully protecting human rights are enhanced.

1. The World Bank

The central mission of the World Bank is to assist in economic development and poverty alleviation in its developing member countries, primarily through long-term financing of development projects and programs.\textsuperscript{327} The Bank’s operations clearly have implications for human rights because its projects and programs can directly contribute to the creation of conditions in which human rights, particularly economic, social, and cultural rights, can be enjoyed. For instance, the Bank promotes the rights to food, health, education, and non-discrimination, as well as to adequate housing and an adequate standard of living, by financing programs and projects that address the economic and social obstacles to the enjoyment of these rights in developing countries.\textsuperscript{328} Yet, despite acknowledging its obvious influence over human rights,\textsuperscript{329} the World Bank has been reluctant either.

\textsuperscript{325} ICHRP, supra note 69, at 65.
to adopt a rights perspective (or "rights way") for its mission, or to assume any role in enforcing these rights, and it has consistently denied the possibility of acting as an enforcement agency for international or national law.\footnote{330} This is due largely to its Articles of Agreement, which prohibit interference in the "political affairs" of any member state and require that only "economic considerations" be relevant to decisions of the Bank. Traditionally the Bank has assumed that the issue of human rights belongs to the sphere of domestic politics, and thus is outside its jurisdiction,\footnote{331} though today this stance is the subject of ongoing challenge and debate, even from within the Bank itself.\footnote{332} Whatever the outcome of the conceptual wrangling on this point, in terms of practice, the orthodox position seems untenable in light not only of the general consensus that human rights have become issues of international concern and can no longer be called domestic affairs,\footnote{333} but also in light of the stark fact that the Bank's operations have a direct positive and negative impact on human rights protection.\footnote{334} Furthermore, a number of commentators have pointed out that as a result of its status as a specialized agency of the UN, the World Bank is bound to observe the UN Charter and its provisions, including the general principle to protect human rights.\footnote{335} The World Bank, therefore, cannot shy away from

\footnote{330} See The World Bank, Core Labor Standards and the World Bank (Jan. 20, 1998), at http://www1.worldbank.org/sp. "The Bank is above all," as Mac Darrow observes, "a technocracy, prizing economists, financial experts and those with specialised skills, and relying on well-honed and widely applicable lending techniques that can be measure quantitatively." DARROW, supra note 313, at 199.

\footnote{331} Bradlow, supra note 328, at 65.

\footnote{332} See Darrow's discussion of the meaning of "political prohibition" in the Bank's Articles. DARROW, supra note 313, at 149-69.


\footnote{334} Thus, for example, while Antony Anghie acknowledges the human rights benefits of Bank activities, he also notes the substantial body of evidence that argues the opposite, leading him to conclude that "[t]he assumption, then, that the economic development and structural adjustment programs fostered by IFIs [i.e., the World Bank and the IMF] with the aim of improving living standards will in themselves better human welfare and hence human rights, is highly questionable." Antony Anghie, Time Present and Time Past: Globalization, International Financial Institutions, and the Third World, 32 N.Y.U. J. INT'L L. & POL'Y 243, 252-53 (2000). For another account, see WORLD VISION, DOING THE RIGHTS THING? THE WORLD BANK AND THE HUMAN RIGHTS OF PEOPLE LIVING IN POVERTY (2003), available at https://worldvision.org.nz/reports/rights.pdf (last visited Nov. 7, 2003).

\footnote{335} Such obligation, it is held, flows from a consideration of the UN Charter's human rights provisions in articles 55, 57, and 63 alongside the World Bank/UN Relationship Agreement. See DARROW supra note 313, at 124-25, 128. Moreover, Skogly contends that although this Relationship Agreement purports to emphasize the independent status of the Bank, this independence is not a "legal" independence in terms of not being bound by the general principles and purposes of the UN Charter. SKOGLY, supra note 333, at 103-06, 108-09.
human rights issues by claiming that its Articles of Agreement prohibit it from intervening in domestic political matters. It would be absurd to interpret the Bank’s “charter” as requiring the Bank to place, as Mac Darrow puts it, “small ‘c’ charter obligations above any international obligations which the [Bank] may have by virtue of membership in the United Nations family, in particular, big ‘C’ [UN Charter] obligations.”

In point of fact, the distinction between “political” and “economic” considerations in the context of the Bank’s operations collapses if political considerations are shown to influence the economic development of a member state. In the absence of definitions for the terms “political affairs” and “economic considerations,” the Bank has often interpreted the terms itself and determined what issues and activities should fall within its permissible scope of operations. This is best illustrated by the World Bank’s enthusiastic promotion of the concept and institutions of good governance in its programs. By so involving itself in “the process by which authority is exercised in the management of a country’s economic and social resources for development,” as good governance has been described, the Bank is inevitably drawn into the political arena. As Herbert Morais notes, the significantly expanded scope of activities financed by the Bank now cover

such politically sensitive areas as reform of the civil service, reform of public sector enterprises, legal and judicial reform, reform of local governments, land titling and registration reform, combating corruption, the rights of indigenous people and minorities, the rights of people displaced or resettled as a result of projects funded by international development banks, family planning, and enhancing the rights of women.

It would appear, then, that even if the Bank’s Articles of Agreement contain no express recognition of the need to promote respect for human rights in its operations, as is the case with its younger cousin, the European Bank for Reconstruction and Development (EBRD), there

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336. Darrow, supra note 313, at 129.
337. Bradlow, supra note 328, at 55, 60–63.
340. Established in 1990, the Agreement Establishing the EBRD notes at the outset the
is little in the Articles to prevent the World Bank from taking into account such considerations where the link is established—as would almost always be the case—between the economic development of the host state and human rights protection.  

The significance of this point is that the World Bank’s prominent role in global foreign investment flows and its close connection with private businesses make it a potentially powerful regulator of TNCs’ activities, particularly in developing countries. A key body in this respect is the Bank’s private sector arm—the International Finance Corporation (IFC), which deals directly with businesses, providing them with loans to implement development projects, usually in partnership with host states. The IFC has a standing policy to carry out all of its operations in “an environmentally and socially responsible manner” and it requires its business clients to abide by the IFC’s environmental, social, and disclosure policies. These policies include some of the existing international human rights standards, such as prohibitions on forced labor and harmful child labor, and the rights of indigenous peoples. They are normally incorporated in the investment agreement drawn up between the IFC and the corporate client, and the client’s failure to comply with the policies can result in suspension or cancellation of an IFC loan. The standing of such policies appears to have been elevated

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commitment of the contracting parties to “the fundamental principles of multi-party democracy, the rule of law, respect for human rights and market economics.” See 1990 OJ (L372/3) at 1, or at http://www.ebrd.com/pubs/insti/basic/basic1.htm (last visited, April 23, 2004). For discussion, see Morais, supra note 338, at 91–92.

341. SKOGLY, supra note 333, at 98.


343. The IFC is said to be guided by international norms based on standards set by international conventions and the ILO. The IFC’s policy is not to support projects that use harmful child labor, defined as “the employment of children that is economically exploitative, or is likely to be hazardous to, or to interfere with, the child’s education, or to be harmful to the child’s health, or physical, mental, spiritual, moral, or social development.” See IFC’s Policy Statement on Forced Labor and Harmful Child Labor (Mar. 1998), available at http://ifcfin1.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_ChildLabor/$FILE/ChildForcedLabor.pdf (last visited Mar. 24, 2004).


345. For example, if harmful child labor is identified as a potential issue during project appraisal, the IFC will drop the project for further consideration unless the project sponsor provides an appropriate mitigation plan to eliminate or avoid harmful child labor. See IFC, Harmful Child Labor: Interim Guidance (July 8, 1999), available at http://ifcfin1.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_ChildLabor/$FILE/ChildForcedLabor.pdf (last visited
within the IFC in recent times according to the Managing Director of the IFC who believes that, as an institution, the IFC is already “convinced that [it] ha[s] to integrate human rights” and as such, the role that the IFC must and can play in the field will be as “the leader in helping banks and other financial institutions sort through these issues.”\textsuperscript{346} Further, the importance of social and environmental questions in the operations of international finance has also been boosted by the recent development and adoption of the “Equator Principles” by a number of leading international banks.\textsuperscript{347} The principles, which are in fact based on social and environmental policies of the World Bank and the IFC (and especially strongly supported by the latter),\textsuperscript{348} set certain conditions upon which development project finance will be provided by the financial institutions.\textsuperscript{349}

In theory, the IFC would appear to have both the position and the power to ensure that corporations involved in development projects respect human rights covered in its policies. In practice, however, not only is the IFC often unable to monitor its business clients to ensure that they adhere to IFC standards,\textsuperscript{350} but the IFC itself has been accused of violating its own policies by funding projects that have caused human rights abuses.\textsuperscript{351} Such undesirable outcomes may be attributed to the

\textsuperscript{346} Demetri Sevastopulo, World Bank Arm May Add Human Rights to Its Criteria, FIN.
T\textsc{imes}, Nov. 4, 2003, at 9 (quoting interview with Peter Woicke, executive vice-president of the IFC).


\textsuperscript{349} Broadly, the Principles are designed to foster in the signatory banks the “ability to document and manage [their] risk exposures to environmental and social matters associated with the projects [they] finance, thereby allowing [them] to engage proactively with [their] stakeholders on environmental and social policy issues.” Equator Principles, supra note 347, Preamble.

\textsuperscript{350} For example, the Chad Cameroon Pipeline Project involved a number of environmental and social risks that have not been adequately addressed in the Environmental Impact Assessment submitted by the project sponsor. Susanne Breitkopf, The Chad Cameroon Petroleum Development and Pipeline Project: Risky Business (September 2000), available at http://www.ciel.org/Publications/IFCCSChadCameroon.pdf (last visited Mar. 24, 2004); Uriz, supra note 328.

\textsuperscript{351} There are numerous NGO reports implicating the IFC in human rights abuses through its funding of development projects. For example, the IFC owns five percent of shares in the joint venture which developed the Yanacocha gold mine in Peru. The local people have claimed that the mine has led to poverty, environmental degradation and eroded traditional cultures and values. Shanna Langdon, Peru’s Yanacocha Gold Mine: The IFC’s Midas Touch? (Sept. 2000), available at http://www.ciel.org/Publications/IFCCSPeru.pdf (last visited Nov. 7, 2003). The IFC also approved a $15 million loan that would ultimately benefit Royal Dutch Shell in Nigeria, the
IFC’s pervasive “approval culture” which provides a disincentive for the IFC to take into account non-economic issues like human rights abuses. In response to increasing public criticism, the office of the Compliance Advisor Ombudsman (CAO) was established in 1998. The CAO is an independent office whose main function is to respond to complaints by persons adversely affected by IFC projects. Although the CAO is not an enforcement mechanism and only uses problem-solving approaches such as facilitation, mediation, and negotiation, it could influence behavior of corporations by calling on the IFC’s leverage in urging them to adopt recommendations. In some cases, the CAO can also oversee audits of corporate sponsors to ensure compliance with the IFC’s policies and guidelines. The major shortcoming of the CAO is its lack of transparency, as it is bound by IFC disclosure policies, which require respect for business confidentiality. While the IFC’s policy is ostensibly to operate with a presumption in favor of disclosure, it is unclear the extent to which this is qualified by the business confidentiality principle. Critics contend that the IFC is potentially able to keep almost all project and strategic information from public scrutiny. Nevertheless, the CAO remains an important mechanism in the frame of this article’s reference as it enables affected individuals directly to lodge complaints against corporations. Where a project is jointly financed by the IFC and the World Bank, the World Bank Inspection Panel could be used in conjunction with the CAO. The Inspection Panel consists of three independent experts and its function is to receive complaints by individuals who have been adversely affected by a Bank project and to conduct investigations. Although the Panel is


352. See Gray, supra note 351. As Mac Darrow notes in this regard, the “approval culture” is “inimical to the inculcation of the incentives, skills and approaches required to implement projects with complex environmental and human rights dimensions.” DARROW, supra note 313, at 196.


354. See Chris Chamberlain, Bank Information Center Review, Public Access to Information at the International Finance Corporation and the Multilateral Investment Guarantee Agency (March 1997), available at http://www.bicusa.org/bicusa/issues/ifcinfo.pdf. In fact, it has been claimed that when the CAO was requested to investigate the mercury spill at the Yanacocha gold mine, the results of the investigation and recommendations were not made public until the corporate project sponsor, Minera Yanacocha S.A., had had ten days to look at the report to ensure the accuracy of the facts, while the local people never had an opportunity to verify the facts. Langdon, supra note 351.
not an enforcement mechanism, its recommendations can be powerful enough to compel the Bank to halt or amend its projects to the benefit of the complainants, which in turn affects businesses involved.

Overall, there are a number of opportunities, limitations, successes, and failures that define the worthiness of the idea of using the World Bank to enforce the human rights obligations of TNCs. It is the matrix formed by these factors that will dictate the Bank’s ultimate ability to operate successfully in this respect, now and in the future. The continuing absence of any clear methodology as to how the Bank draws a distinction between “political” and “economic” issues, and the uncertain human rights enforcement role that it could and does play, currently lead to unpredictable and inconsistent outcomes. On the face of it, it makes little sense that the Bank is able to determine that female genital mutilation is an economic issue because of the economic costs associated with it, but that freedom of the press is not. It is true, also, that the Bank’s power to enforce human rights only extends to its project partners and would generally have no influence over the behavior of other TNCs if they have no contractual relationships with it, but considering both the scale, in terms of volume and reach, of Bank operations and the considerable scope that allows the Bank to develop a standard-setting role for itself, the Bank has considerable powers of influence in this realm. Finally and importantly, while it is clear that the human rights norms that the Bank is able to effectively protect are limited to those covered by its social and environmental policies, this can be viewed as a significant benefit in that not only are the economic, social, and cultural rights associated with those policies the most vulnerable to TNC abuse, but these rights are also traditionally the least protected within the body of international human rights law and practice.

2. The World Trade Organization

Given the scope of the WTO’s activities as well as its considerable power, many commentators see it as ripe for taking on a role in

356. Roos notes that positive outcomes (from the complainants’ (called “Requesters”) perspectives) have been achieved in up to fifty percent of cases filed with the Panel; Roos The World Bank Inspection Panel 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 475, 514 (2001).
357. See Bradlow, supra note 328, at 61.
enforcing human rights.\textsuperscript{359} Trade sanctions would be a very powerful enforcement mechanism and prima facie would present a significant deterrent to corporations engaged in activities that endanger human rights. Corporations (and especially TNCs) drive free-trade commercial enterprise and therefore are often the “immediate and unequivocal” beneficiaries of the WTO agreements.\textsuperscript{360} This is so, aside from the fact that states are the actual members of the WTO. However, it is the combination of these two facts that lead some to argue that the WTO offers the prospect of the most effective means for “true sustainable human rights enforcement.”\textsuperscript{361} The UN High Commissioner for Human Rights, for example, argues that as all 147 member states of the WTO are subject to some degree of concurrent obligation under international human rights law (by way both of treaty and customary international law), they “should therefore promote and protect human rights during the negotiation and implementation of international rules on trade liberalization.”\textsuperscript{362}

At the heart of the debate lies the question of how to bring non-economic considerations like human rights onto the WTO’s agenda when its institutional culture is driven by the free trade imperative.\textsuperscript{363} For while the WTO recognizes that trade should be conducted with a

\textsuperscript{359} See, e.g., Patricia Stirling, \textit{The Use of Trade Sanctions as an Enforcement Mechanism for Basic Rights: A Proposal for Addition to the World Trade Organization}, 11 Am. U. J. Int’l L. & Pol’y 1, 34 (1996). Stirling argues that a human rights committee should be created within the WTO to make recommendations for the enforcement of human rights through trade sanctions. See also Duke, supra note 326, at 355–56; Summers, supra note 189, at 80–89; James Thuo Gathii, \textit{Institutional Concerns of an Expanded Trade Regime: Where Should Global Social And Regulatory Policy Be Made? Re-Characterizing The Social in the Constitutionalization Of The WTO: A Preliminary Analysis}, 7 Widener L. Symp. J. 137, 156 (2001). Cf. ICHR, supra note 69, at 110 (stating that the WTO does not really offer possibilities for enforcing either direct or indirect obligations on companies to respect human rights); Oloka-Onyango & Udagama, supra note 12, ¶¶ 15, 19 (describing the WTO as a “veritable nightmare” for certain sectors of humanity and calling for radical review of the WTO’s mechanism of operation, the role and place of both developing country participation and that of non-state actors such as NGOs, and the WTO’s relationship to the UN system as a whole).

\textsuperscript{360} Caroline Dommen, \textit{Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies}, 24 Hum. Rts. Q. 1, 47 (2002). Corporations often lobby governments to bring cases at the WTO which would advance their commercial interests. For example, the U.S. banana-producing companies were thought to be behind a complaint to the WTO regarding European subsidiaries to Caribbean banana exporters, and a commercial dispute between Kodak and Fuji was explicitly acknowledged as the basis for a trade dispute between the US and Japan in 1997/8, see ICHR, supra note 69, at 111.

\textsuperscript{361} Duke, supra note 326, at 363.


\textsuperscript{363} ICHR, supra note 69, at 66–68.
view to, *inter alia*, raising standards of living, ensuring full employment, and achieving sustainable development, it tends to promote free trade vigorously on the assumption that free trade will naturally deliver these benefits. However, mounting evidence of adverse effects of free trade on certain sectors of humanity has proved this assumption fundamentally flawed. In fact, the WTO’s free trade agenda often works to reduce some of the constraints on TNCs that otherwise provide protection from human rights abuses. For example, the WTO’s agreement on agriculture has been criticized as essentially an agreement designed by and for industrialized countries, which does not respond to developing countries’ needs. It is said to have contributed to the concentration of control of food production in the hands of a few agro-chemical companies, making it difficult for developing countries to access adequate food, let alone the world’s food markets.

The WTO’s preoccupation with the trade liberalization objective means that it is inclined to resist any proposal to make it a human rights enforcement agency, as illustrated, for example, by the demise of the proposal to link labor rights to international trade standards. Coincidentally, developing states can often appear equally resistant to such suggestions. Thus, proposals to link labor rights and trade rules put forward by the EU and U.S. in 1999 to address the issue of labor standards inside the WTO, with former U.S. President Bill Clinton stating that trade sanctions may one day be used in retaliation for labor standards violations, were fiercely opposed by developing countries.

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367. Thus, for example, it is suggested in a recent Fabian Tract publication, that trade, alongside all other international phenomena, must be subject to what the authors identify as the four pillars of a new system of global governance—namely, equitable trade, economic regulation, global redistribution and democratic governance. MICHAEL JACOBS ET AL., PROGRESSIVE GLOBALISATION (2003). See also Larry Elliott, *Free Trade Is Fine in a World of Equals*, GUARDIAN WKLY, Sept. 11–17, 2003, at 11.
which together saw it as a veiled form of protectionism designed to remove their comparative advantage of cheap labor.\textsuperscript{369} It has also been opposed by businesses, which argue that improvement of labor standards is the central responsibility of the ILO, not the WTO.\textsuperscript{370} To that extent, the suggestion to enforce labor rights through the WTO by characterizing violations such as the use of forced labor as unfair trade practices in contravention of the GATT/WTO rules may yet be some way off.\textsuperscript{371}

All that said, however, there are certain features of the WTO regime and its supporting Agreements that open up avenues along which human rights concerns can be raised and, to some degree, acted upon. There are two broad categories in this respect. The first relates to claims that certain human rights norms are already positively embraced within the WTO apparatus. These human rights inherent in trade law are said to include liberty rights such as freedom of movement and association, which in the particular context of trade might together amount to a right to trade,\textsuperscript{372} rights to fair trial, and rights to certain social welfare benefits.\textsuperscript{373} But none of these stated claims are especially strong and they appear to run afoot of what Caroline Dommen sees as their


\textsuperscript{371} That is, despite the novel argument that the use of forced labor and child labor could be viewed as a state subsidy or “social dumping,” in that it constitutes states artificially depressing the cost of labor inputs by the exploitation of forced or child labor. See Daniel S. Ehrenberg, \textit{The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor}, 20 YALE J. INT’L L. 361, 379 (1995).

\textsuperscript{372} For a critique of such a notion, see Steven Peers, \textit{Fundamental Right or Political Whim? WTO Law and the European Court of Justice, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES} 129 (Grainne de Burca & Joanne Scott eds., 2001).

inherent indeterminacy in the trade context.\textsuperscript{374} What is more, some claims are even considered to be antithetical to the notion that in as many instances as possible, trade rules ought to be made subject to human rights principles, not the other way around.\textsuperscript{375} A stronger case can be made, however, for two particular human rights pertaining to the WTO.

The first of these rights includes foundational principles of trade law built into the WTO Agreements, themselves. One such foundational principle of trade law is the right of non-discrimination. Under this right, preferential or detrimental treatment should not be accorded to certain trading partners (i.e., states), but rather all should be treated alike.\textsuperscript{376} The fact that there are numerous explicit and implicit exceptions to this rule provided under WTO Agreements (some of which we discuss below) does not detract from the fact that this human rights norm of non-discrimination constitutes an essential part of international trade law.

Another such foundational principle is the protection of intellectual property rights. One of the pillars of the WTO is the Trade-Related Aspects of Intellectual Property Agreement (TRIPs). The avowedly protectionist objectives of this instrument characterize it as one enormous exception to the notion of unfettered trade, and to that extent it is possible to view TRIPs as a protector of a particular human right against the harsher travails of free trade.\textsuperscript{377} Beyond this formal depiction, however, it must be said that the operation of TRIPs is often portrayed as contributing to the violation of other rights. It is argued that under its auspices, corporations can pursue intellectual property rights, such as those inhering in pharmaceutical goods, without regard to the

\textsuperscript{374} "[R]eferences to human rights in the trade context," as she notes, "mean different things to different people." Dommen, \textit{supra} note 360, at 5.

\textsuperscript{375} As Philip Alston notes in one of his contributions to the intellectual brawl between himself and Ernst-Ulrich Petersmann, the purposes of the two regimes are fundamentally different. In Alston's view:

Human Rights are recognized for all on the basis of the inherent human dignity of all persons. Trade-related rights are granted to individuals for instrumentalist reasons. Individuals are seen as objects rather than as holders of rights. They are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy, but not as political actors in the full sense and nor as holders of a comprehensive and balanced set of individual rights. There is nothing \textit{per se} wrong with such instrumentalism but it should not be confused with a human rights approach.


\textsuperscript{376} See Kinley & McBeth, \textit{supra} note 11.

\textsuperscript{377} \textit{Id.}
countervailing rights of people (especially the poor) to health care.\textsuperscript{378}

The presence, then, of certain human rights dimensions within the body of WTO Agreements certainly can add some rhetorical force to the argument that human rights principles ought to play a more significant part in the WTO’s regulation of free trade. However, it is with respect to the second category of human rights features of the WTO that we find more practical utility for this contention.

The second category of rights emanates from the contention that there are permissible exceptions to the prevailing object of unrestricted trade under the WTO Agreements. It is argued that human rights are sufficiently important and to qualify as such an exception. Furthermore, there is some precedent for this view. There are a number of broad provisions under various WTO Agreements (notably, the GATT, GATS, and TRIPs)\textsuperscript{379} that potentially provide important human rights exceptions to the free trade commitments of the WTO.\textsuperscript{380} Article XX of the GATT is both typical and the most prominent example. Article XX allows trade restrictive measures if they are “necessary” to achieve one of the ten enumerated objectives, provided that such measures are not applied to arbitrarily or unjustifiably discriminate between countries where the same conditions prevail, nor are a disguised restriction on international trade. The enumerated policy objectives permitting restrictions on trade include protection of public morals under article XX(a) and protection of human life or health under article XX(b). While these provisions have not yet been invoked to enforce human rights obligations \textit{per se}, they have clear implications for the protection of human rights.

The interpretation of the phrase “public morals” in article XX(a) is not spelled out, however, Steve Charnovitz examines the historical circumstances in which article XX(a) was drafted and concludes that subject matters that affect “public morals” would include slavery, weaponry, narcotics, liquor, pornography, religion, compulsory labor, and animal welfare.\textsuperscript{381} Notably, slavery and compulsory labor are


\textsuperscript{379} General Agreement on Tariffs and Trade (GATT), art. XX; General Agreement on Trade in Services (GATS), art. XIV; TRIPs, arts. 7, 8, available at http://www.wto.org.


\textsuperscript{381} Steve Charnovitz, \textit{The Moral Exception in Trade Policy}, 38 VA. J. INT’L L. 689, 713 (1998). It is notable that in the Tuna–Dolphin case, representatives of Australia submitted that Article XX(a) could justify measures regarding inhumane treatment of animals. Bal argues that if this view is accepted, there is no reason why the same justification should not be valid for the
practices prohibited under international human rights law. These
categories are certainly not closed. The panel in the *U.S. Shrimp*
case noted that the enumerated policy objectives in article XX must be read
"in the light of contemporary concerns of the community of nations,"382
in which case, there is scope for inclusion of the combined categories of
relevant *jus cogens* norms and international customary law. These
categories go beyond the basic norms against genocide, slavery, and
torture to encompass a substantial list of human rights norms,383
and may include the entire Universal Declaration of Human Rights and its
successor conventions, on the grounds that they have customary
international law status.384 The body, therefore, of relevant international
human rights law that may be employed in interpreting trade law is
conceivably very broad indeed.385

The linkage between article XX(b) and human rights appears more
direct, as the right to life and the right to health are both internationally
recognized human rights. At the present time, however, article XX(b) is
only applied to restrict the importation of final products which expose
domestic populations to health risks, provided that equivalent
restrictions also are applied to locally produced products of the same
type.386 The key issue with this provision is, therefore, that it has not

inhumane treatment of human beings, such as poor working conditions. See Bal, *supra* note 380,
at 77.

382. World Trade Organization, United States—Import Prohibition of Certain Shrimp and
case].

383. The list of *jus cogens* obligations alone is not clear-cut. See RESTATEMENT (THIRD) OF
THE FOREIGN RELATIONS LAW OF THE U.S. § 702 (1987). For an alternative (and longer list), see
General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession
CCPR/C/21/Rev.1/Add.6 (1994).

384. Adam McBeth, The Human Rights Responsibilities of International Economic Actors,
view of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702
L.J. 129 (1977), and noting a range of views in between).

385. Further, it is accepted that the categories of *jus cogens* and customary law can and do
develop over time with changes in international law and state practice. See International Law

386. See Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on
Cigarettes case]; WTO Appellate Body Report, *United States—Standards for Reformulated and
(1996); WTO Appellate Body Report, *European Communities—Measures Affecting Asbestos and
been applied to regulate methods of production in foreign countries for the purpose of protecting the life and health of their populations. It may be argued that this has not occurred because of fears that allowing each contracting country unilaterally to determine life or health protection policies from which other contracting countries could not deviate would jeopardize trade rights. As Salman Bal argues, however, the fear of unilateral determination should not apply to internationally recognized human rights, which the overwhelming majority of countries have pledged to protect. By implementing restrictive trade measures, countries would not be unilaterally determining health or protection policies, but would be complying with their international obligation to protect human rights. Furthermore, article XX(e), which allows import restrictions on products made by prison labor, clearly relates to the conditions under which products are produced. Since article XX(b) is silent on the issue, it can be deduced from the structure of article XX(e) that article XX does not prohibit trade measures which relate to methods of production and practice. As such, one might argue that any labor conditions risking the life of employees or causing severe health problems could justify invoking restrictive measures.

The major weakness of using article XX to enforce human rights, as with similar provisions under GATS and TRIPs mentioned above, is that the article does not impose on states any affirmative obligations to invoke import restrictions for the sake of human rights protection. Even where a trade-restricting measure is deemed to fall within the ambit of possible article XX exceptions, it can be invoked only where it is deemed additionally strictly "necessary" to fulfill its proclaimed objective. Though historically this term has been interpreted narrowly, such that interpretations which entail "the least degree of inconsistency with other GATT provisions" are preferred the strict necessity test has been significantly relaxed in more recent decisions.

Asbestos case].

388. Bal, supra note 380, at 83.
389. Id. at 86.
390. Id. at 80.
391. The reasoning for this is based on the fact that article XX is supposed to be a "limited and conditional" exception, not a rule establishing affirmative obligations in itself. See World Trade Organization, Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994), available at http://www.worldtradelaw.net/reports/gattpanels/tunadolphinII.pdf.
The Appellate Body observed in the EC Asbestos case, for example, that the more vital or important the common interests or values pursued, the easier it would be to accept, as "necessary," measures designed to achieve those ends. This sort of approach expands the ambit of article XX to cover enforcement of human rights, as the international community has obligations to protect human rights under numerous treaties.

Although there now may be some signs that a more certain foothold is being established for human rights considerations within the WTO's operational mandate, the fact remains that there is no great incentive to use article XX in ways that might curtail potential human rights abuses by corporations. One reason for this is that states, not corporations, are the prime movers in this area. States do not willingly expose claims of human rights violations in their jurisdiction in a public (or even semi-public) setting such as the WTO. Further, imposing restrictive trade measures on the basis of human rights violations may have destabilizing effects on diplomatic relations between the member states, as actions of member states may be inhibited by fear of retaliatory measures. If the contracting member state is itself violating human rights, it may choose not to act in order to avoid retaliatory trade measures by the other contracting state. In certain circumstances it may also be difficult for a member state to judge accurately whether there is a real threat to human rights interests. In such a situation, a state would likely avoid making any premature assessment of human rights violations and would avoid imposing trade measures, so as not to strain diplomatic relations or deviate from the trade rules.

All this might lead states to—at best—reserve article XX for the most reprehensible human rights abuses, leaving less extreme abuses unpunished. Given the existing body of jurisprudence on how article XX might be applied to protect human rights, coupled with the minimal political will of the member states to invoke it, article XX thus may do no more than provide an additional measure to enforce limited human rights norms in circumstances of their most egregious breaches. None of this means that the "human rights exceptions" route is not a valuable


one to pursue; rather it illustrates its likely limitations as a vehicle for providing broader protection against human rights abuses by corporations.

Aside from the more practical and immediate initiatives, it is possible to see on the horizon other developments that might serve to exploit the potential in trade law to better protect human rights. Rhetorically, the member states of the WTO continue to be urged to adopt a human rights approach to their perspectives on, and participation in, global trade regulation.\textsuperscript{396} At the very least this requires an acknowledgement that while “[t]here can be no doubt that the promotion of economic activity, especially in developing countries, can improve the realization of human rights...such positive outcomes are not automatic and require great care in terms of instituting safeguards and of monitoring the situation.”\textsuperscript{397}

There is also the ongoing matter of the “harmonization” of standards on process and production methods (PPMs), which imported products must meet. Member countries are encouraged to refer to international standards, guidelines, and recommendations in setting their own standards so that they are prevented from applying discriminatory restrictions on imports. For example, the Agreement on Sanitary and Phytosanitary Measures sets out the basic rules for food safety and animal and plant health standards.\textsuperscript{398} The International Council on Human Rights Policy has suggested that it might be possible in the future to use the harmonization process to enforce international human rights standards through the WTO. For example, if a product were made by child or forced labor, states that ban imports produced by child labor might rely on an ILO standard to argue in favor of trade restriction.\textsuperscript{399} Such a development would potentially tie existing international human rights standards to trade, and thereby move beyond article XX, which requires identification of human rights norms that fall within the stated exceptions. However, this leaves open the broader question of whether trade sanctions can always be considered effective means of protecting and promoting human rights.\textsuperscript{400}


\textsuperscript{397} Kinley & McBeth, \textit{supra} note 11, at 66.


\textsuperscript{399} ICHR, \textit{supra} note 69, at 115.

\textsuperscript{400} See Usha Haley’s analysis of how corporations operate within, and react to, changing political environments (including where pressure is applied to them directly, either by the host
There is clearly scope within the apparatus of the WTO to develop means and mechanisms for better human rights protection. There is clearly, also, a popular demand that something be done in this regard. The challenge will be to harness sufficient political support from the state membership of the WTO and couple it with a more expansive interpretation and sympathetic application of the WTO's mandate.  

3. **Limitations of Utilizing Global Trade and Aid Institutions**

Although global trade and financial institutions like the World Bank and the WTO can offer potentially powerful mechanisms to enforce the human rights obligations of TNCs, both institutions suffer from ideological and practical limitations. On the ideological side, there is the fundamental dilemma about utilizing the World Bank and the WTO to enforce human rights. The problem is that they do not have unambiguous mandates for protecting human rights, nor do they have expertise and knowledge in human rights law. There must be, therefore, serious concern over whether to entrust these bodies with the task of enforcing human rights when they are largely preoccupied with economic efficiency and development. Thus, before considering the use of these institutions as enforcement mechanisms, there is a need for a reconceptualization of the current policies of international trade, investment, and finance, so that human rights issues are no longer treated as peripheral to the operation of these institutions.

On the practical side, the fact that these bodies are economic institutions significantly limits their ability to address human rights issues. In the absence of explicit mandates to protect human rights, they cannot be expected to act as general enforcement agencies of the relevant human rights norms that TNCs should respect. The extent to which they are currently willing to enforce human rights obligations of TNCs is limited by their economic objectives. For example, while the

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401. To which end Robert Wai's idea of using international human rights as a "countering strategy" is an intelligent and practicable proposition. This strategy, Wai contends, uses "international social rights in the trade regime as an argumentative and political strategy that can destabilize utilitarian-functionalist policy orientations"—namely, orientations that underpin claims that free trade yields a bigger economic pie for all (or most), and from which all (or most) benefit, albeit to varying degrees. Robert Wai, *Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime*, 14 EUR. J. INT'L L. 36, 38 (2003).

World Bank supports the efforts to abolish child and forced labor and to promote gender equality, it is ambivalent about promoting the freedom of association and collective bargaining because the economic effects of those labor standards are apparently unclear. Thus the human rights norms that these institutions are presently prepared to protect would inevitably be selective, based on the "market friendliness" of the rights rather than on the needs that give rise to the invocation of the rights.

Given these limitations, the World Bank and the WTO are only able to provide enforcement mechanisms in specific circumstances in a piecemeal manner. Although this does not mean that their potential for enforcing human rights should be dismissed altogether, their enforcement devices can be apparently stretched only so far as to enforce those human rights that directly fall within the scope of their economic operations.

E. The International Labor Organization (ILO)

In contrast to international trade and aid organizations, the ILO at first glance seems to be ideally placed to take on some significant responsibility for the supervision, regulation, and enforcement of at least certain human rights within the context of private commercial enterprise. There are a number of factors that contribute to this impression. First, the ILO is already in the business of human rights protection. One of its principal aims is to ensure that "all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." To be sure, the body of rights with which the organization is concerned does not stretch across the full range of human rights, but the particular category of rights—namely, labor rights—with which it is concerned, are of peculiar importance in the field of corporate activity on which this article focuses. In fact, the ILO has had a long-standing interest in the specific question of the social (including human rights) responsibilities of corporations, having established in 1977 a Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The Declaration, which was updated in 2000, comprises a

set of voluntary principles concerning conditions of employment, work, training, and industrial relations, to which the membership of the ILO is urged to comply. Further, the durable, tripartite organizational structure that underpins the ILO—comprising governments, employers’ organizations, and workers’ bodies—appears to lend itself to the role of human rights regulator within the field.

Despite this undoubted capacity, there are certain significant limitations on the ILO’s ability to translate such a role into practice. Most fundamentally, the structure of the ILO is not in fact as inclusive and as egalitarian as it may seem, and as such its reach—even its potential reach—is compromised in important respects. For example, both the unemployed and non-unionized workers—namely, those often subjected to the worst forms of corporate human rights abuse—are not formally represented within the ILO and their interests tend to be marginalized. This has especially detrimental consequences for labor forces in developing countries which are often marked by joblessness and little unionization. This problem is further entrenched by the consensus-based decision-making processes of the ILO, which make changes difficult, because representatives of employees and those of workers naturally tend to promote conflicting interests.

The more conventional characteristics of the ILO as an international organization yield some limited capacity to contribute to the regulation of corporate human rights abuses. By imposing on states binding obligations to implement workers’ rights in ILO Conventions, the ILO already plays a part in this regard. Although the attendant enforcement system for these obligations is oriented around the state, there is room for more direct interaction with employer and worker bodies. Direct requests for information can be made of worker and employer organizations, and the representation procedure allows any

407. See supra text accompanying note 71.
408. See BARTOLOMEI DE LA CRUZ ET AL., supra note 188, at 3-15, 127-29.
409. Dickerson, supra note 198, at 662.
410. U.N. Commission on Human Rights, supra note 69, at 89.
411. Indeed, it should be noted that various key ILO Conventions are expressly acknowledged as standards against which corporate behavior ought to be measured in the U.N. Human Rights Norms for Corporations, supra note 58, ¶¶ 5-9, and Commentary on the Norms, supra note 58.
412. The enforcement system comprises the examination of annual reports submitted to the ILO, direct requests for information from governments, provision of technical assistance, the issuance of observations if the violations persist, the receipt of representations, and the presentation of complaints (that can ultimately be submitted to the ICIJ for determination). See ILO Constitution, supra note 405, arts. 24-34; Ehrenberg, supra note 371, at 381-90.
employers’ or workers’ organization to make representation that a member state has failed to observe its obligations under any ILO Convention. It is true that the effectiveness of these scrutiny procedures in relation to corporate behavior is inhibited both by their state orientation and by their exclusive reliance on “moral persuasion, publicity, shame, diplomacy, and dialogue” to ensure compliance.413 However, even indirectly, an impact may be made on corporations that may be involved in human rights abusing behavior, through the pressure brought to bear on them by the relevant state (the home and/or host jurisdiction) and the power of negative publicity that might emanate from situations that are subject to ILO attention or scrutiny. This, for example, has been the experience of the relatively few TNCs that operate, or have recently operated, in Myanmar.414 These TNCs were certainly very aware of and sensitive to the ILO’s various initiatives in that country that arose out of concerns about widespread practices of forced labor.415

More particularly, the ILO has recently begun to expand its role as a factory inspector. In Bangladesh, the garment makers’ association has agreed to allow the ILO to monitor more than 2000 member factories for adherence to the agency’s core labor standards, such as the prohibitions against forced labor and the freedom of association.416 In Cambodia, the ILO conducted inspection of garment factories to assess their compliance with the ILO’s core labor standards and provided employers with three months of training to correct any violation that the ILO found.417

413. Ehrenberg, supra note 371, at 388-89.
414. Foremost amongst which are the oil companies Total Elf Final, Unocal and Petronas (to which Premier Oil sold all its Burmese interests in 2002), see www.premier-oil.com/asp/pdf/restructuringsep2002.pdf (last visited April 20, 2004).
416. For an assessment of the effectiveness of the ILO’s factory inspection, see LAWYERS COMMITTEE FOR HUMAN RIGHTS, INTERNATIONAL STANDARDS AND VOLUNTARY MONITORING—THE INTERNATIONAL LABOR ORGANIZATION’S (ILO’S) GARMENT SECTOR PROJECT IN BANGLADESH (2003), available at http://www.humanrightsfirst.org/workers_rights/wr_other/bangladesh_report.pdf (last visited Apr. 2, 2004). While the Lawyers Committee for Human Rights notes the project is “an important and welcome development for the ILO,” id. at 11, it doubts the effectiveness of the project, as it lacks transparency and publicity, and fails to incorporate remediation programs.
417. Aaron Bernstein, Do-It-Yourself Labor Standards, BUS. WK., Nov. 19, 2001, at 74. Note, in this respect, that the United States and Cambodia have a bilateral textile agreement, which offers an annual increase in Cambodia’s export entitlements to the United States provided Cambodia meets the ILO’s core labor standards. The ILO provides extensive monitoring of
There is thus potential within the ILO’s various mechanisms for some extension of the organization’s role in the direction of greater scrutiny of TNCs’ compliance with international labor standards, but not as much as perhaps one might presume from its unique structure and situation within the body of international organizations considered in this article.

F. A Plurality of Enforcement Mechanisms

The foregoing examination of various international bodies illustrates the potential as well as the limitations of each as a vehicle for the enforcement of the human rights responsibilities of corporations. Clearly, no single body can provide a comprehensive enforcement mechanism. Rather, the pursuit of enforcement must be targeted at the collective efforts of all institutions across their constituent fields, with each contributing their particular technical expertise and resources. Such a conclusion should be seen neither as a surprise, nor as undesirable. The combined breadth of the interests of commercial enterprise and human rights protection necessitates a broad approach and, in fact, promotes wider acceptance of the need to enforce through broad engagement between the various key stakeholder interests and institutions.

Whatever, then, is the resultant format of enforcement, it must be one that seeks to draw on the strengths and minimize the weaknesses of the mechanisms examined above.418 Thus, the impetus regarding the need, nature, form, and extent of human rights protection must be harnessed from the work and workings of the relevant expert human rights bodies


418. This would include the suggestions put forward in the UN’s Human Rights Norms for Corporations that

[1]he Commission on Human Rights should consider establishing a group of experts, a special rapporteur, or a working group of the Commission to receive information and take effective action when enterprises fail to comply with the Norms. The Sub-Commission on the Promotion and Protection of Human Rights and its relevant working group should also monitor compliance with the Norms and developing best practices by receiving information from non-government organizations, unions, individuals and others, and then allowing transnational corporations or other business enterprises an opportunity to respond. Commentary on the Norms, supra note 58, ¶ (b) (on paragraph 16 of the U.N. Human Rights Norms for Corporations, supra note 57).
(the UN and the ILO). And while this intersession of human rights demands in the worlds of economics, commerce, and corporate activity must be undertaken with an appreciation of the peculiarities of these worlds, it must, at the same time, not permit any attenuation in human rights standards. The World Bank and the WTO as key global economic regulators certainly have complementary roles to play, in that they ought to adopt henceforth a more holistic approach, where human rights concerns are incorporated in important decision-making processes concerning the global economy.  

As for enforcement of human rights, the focus should be on employing specific measures of enforcement in situations where violations of human rights fall within a corporation’s sphere of authority. And while that would likely be skewed towards self-reflexive duties, it would also include such third-party duties as the promotion of human rights-protecting behavior throughout all relevant supply chains, subsidiaries, and partnerships. These factors reflect the reality that these organs are primarily designed to pursue broadly economic goals, and thus cannot be expected to assume human rights mandates as broad as those of the UN human rights bodies.

However, in view of the obvious fact that trade and financial institutions lack expertise in human rights issues, there should certainly be more dialogue across institutions in order to promote human rights law as a basic and fundamental principle for all regimes of international law. It appears at least that such cross-fertilization is under way, as evidenced by the recent ILO symposium addressing social concerns at the international financial institutions, attended by union leaders from fifty countries, as well as representatives from the World Bank, the IMF, and the WTO. Further, consideration of the UN’s Human Rights Norms for Corporations by the Commission on Human Rights at its sixtieth session, occurring at the time of this writing in March and April 2004, will likely prompt responses and commentary on the subject from the World Bank and the WTO.

419. Oloka-Anyango & Ugadama, supra note 12, at 63.
420. Id.
422. Following, for example, the World Bank’s interest in the matter as evidenced in its recent review of various existing laws, regulations, and guiding codes relating to corporate social responsibility standards, as well as a consideration of future options in this regard. See THE WORLD BANK GROUP, STRENGTHENING IMPLEMENTATION OF CORPORATE SOCIAL RESPONSIBILITY IN GLOBAL SUPPLY CHAINS, 40-46 (2003), available at
V. CONCLUSION

Fundamentally, this article is premised on the basic axiom that where there is power, there must be responsibility.\(^{423}\) There is legitimate concern that the invisible hand of the selectively liberalized global market has undercut this fundamental principle to the benefit of TNCs. Thus far, TNCs have eluded the reach of international human rights law in any direct sense—and in almost any indirect sense—despite TNCs’ enormous power, which often threatens the enjoyment of human rights. The state-centric framework of international human rights law and attendant institutions is at present ill-equipped to regulate powerful non-state actors like TNCs, which are, by definition, not constrained by notions of territorial sovereignty. This article has examined the possibility of creating an international framework for the regulation of TNCs’ activities, while simultaneously bolstering the potential for states themselves to regulate the TNCs within their jurisdiction. The current inability of nation states properly to regulate the power of TNCs means that the exclusive reliance on state responsibility is almost tantamount to turning a blind eye to human rights abuses inflicted by TNCs.

By this lament, however, we do not wish to suggest that international regulation of TNCs should substitute for state responsibility in controlling non-state actors within each state’s jurisdiction. There is no doubt that governments have, and should have, primary responsibility for the protection of human rights. TNCs cannot, and ought not, replace governments in their roles as the chief guarantors of human rights.\(^{424}\) We do suggest, however, that there is an urgent need to reassess the traditional concepts and structures of international human rights law, so that the focus is on the effective protection of human rights, rather than on the entities from which human rights have to be protected.\(^{425}\) The


inertia of international human rights law in addressing the accountability of non-state actors contrasts starkly with the activism among stakeholders in promoting voluntary guidelines, codes of conduct, and other soft-law initiatives. That said, it cannot be left to market forces to determine the human rights responsibilities of TNCs. Codes of conduct produced by the muscle of the market are often subject to distortions, especially in terms of their legal pusillanimity, and cannot be solely relied upon as a weapon against human rights abuses by TNCs.

Unquestionably, private actors do have the capacity to stimulate the development of domestic and international laws by consistently implementing human rights standards for TNCs in the market. The bottom-up view of international law tells us that state behavior in the international arena is molded by the domestic social contexts in which they are embedded. This suggests that a collective effort on the part of all entities, including consumers, workers, NGOs, TNCs themselves, states, and inter-state institutions, is needed to make TNCs’ actions both visible and accountable under international human rights law. The role of international lawyers must surely be to delineate TNCs’ self-reflexive and third-party human rights responsibilities with sufficient precision. This must be followed by identifying and enabling institutions capable of implementing and enforcing such duties and thereby transporting them beyond mere rhetorical significance. In this process, it ought to be clear to all relevant institutions that international human rights law is a fundamental premise upon which they must formulate and implement their policies.

Economic interests and human rights have long been “locked up in separate compartments” without any necessary interrelationship between them. Consequently, TNCs have been able to treat profit maximization as a preeminent value and human rights as peripheral. The greater exposure of human rights abuses by TNCs clearly signals that a pluralistic approach to international law is necessary to defend the fundamental value of human dignity. To attain this goal, every inter-state institution, every state, and “every individual and every organ of society” must try to unlock their separate compartments, with a view to securing, collectively, the universal respect for, and protection of, human rights. In this context, it has to be remembered that from the perspective of the victims of human rights abuses, the consequences are just as keenly felt irrespective of the institutional character of the

426. Weeramantry, supra note 423, at 28.
427. UDHR, supra note 64, Preamble, ¶ 8.
abuser. Stopping the abuse is paramount, to which end the identification of those responsible and the articulation of their levels of responsibility are but key steps.