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TRACING THE CONTOURS OF TRANSNATIONAL CORPORATIONS' HUMAN RIGHTS OBLIGATIONS IN THE TWENTY-FIRST CENTURY

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> A human being. . .posses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rationale beings in the world. – Immanuel Kant[1]

INTRODUCTION

What meaning modern-day society ascribes to the term "human rights" has long been understood as being heavily influenced by the twentieth century's exposure to human destruction hitherto unimagined. Motivated by the horrors of the Second World War, an international shift in perspective occurred, underlying the construction of a new legal structure increasingly invested in the inherent worth of the human condition.[2] For the first time, the shield of state sovereignty gave way before grave transgressions of humanitarian law, individual criminal liability was imposed, and an expanded understanding of human rights emerged through the formulation

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[1] IMMANUEL KANT, THE METAPHYSICS OF MORALS 186 (M. Gregor trans., Cambridge University Press 1996) (1797).

[2] Ruti Teitel, *Nuremberg and its Legacy: Fifty Years Later, in* WAR CRIMES: THE LEGACY OF NUREMBERG, 44, 45-53 (Belinda Cooper ed., 1999); *see also* Joern Eckert, *Legal Roots of Human Dignity in German Law, in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 41, 52 (David Kretzmer & Eckart Klein eds., 2002) ("The idea of human dignity was decisively strengthened by developments after the Second World War. After the terrible crimes and contempt towards mankind by the Nazis, there was a sudden surge for stronger protection of human dignity.").

of a new subset of norms—"crimes against humanity"—which applied to the internal relations between the State and its own nationals.[3]

These major principles—universal jurisdiction for grave breaches of humanitarian law, the recognition of crimes against humanity, criminal liability, and the construction of the individual as a direct subject of international law—have been expanded upon in subsequent well-known proceedings. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have reified and expanded the substance of crimes against humanity and have lately recognized independent criminal liability for non-state actors under international law.[4] On the domestic front, a proliferation of activity has extended the influence of the human rights discourse even further and, regionally, such institutions as the European International Court of Justice have recognized the capabilities of supranational organizations to enforce rights and bear obligations under international human rights law.[5] Overall, it may safely be observed that the gains made in the past half century towards protecting human rights far outstrip any previous gains in the international forum.

However, despite such achievements, the international legal framework, which dominated the imagination of post-World War II human rights advocates and which underlies our modern day international institutions, is encountering obstacles which threaten to undermine its future effective-

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[3] Teitel, *supra* note 2, at 47-52; Edward M. Wise, *The Significance of Nuremberg*, *in* WAR CRIMES: THE LEGACY OF NUREMBERG 55, 55-65 (Belinda Cooper ed., 1999); *see also* BINDA PREET SAHNI, TRANSNATIONAL CORPORATE LIABILITY: ACCOUNTABILITY FOR HUMAN INJURY 51-53 (2006).

[4] *See* SAHNI, *supra* note 3, at 62-63. The ICTR omits a reference to "armed conflict" in its statute expanding human rights violations to times of peace. Meanwhile, the ICTY codified the concept of crimes against humanity and also has recognized that non-state actors, in collusion with the state, can commit human rights violations.

[5] *See generally* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004). The most well known activity involves the United States' Alien Tort Claims Act (ATCA), though other common-law states are beginning to see domestic litigation. Most litigation against transnational corporations has happened in the United States because of plaintiff friendly laws such as ATCA, the Torture Victims Protection Act (TVPA), and Racketeering Influence and Corrupt Organizations Act (RICO). *Id.* at 16-17. In cases within the United States, the courts have consistently noted "persons" under, for example, the TVPA, encompass "artificial persons" including corporations. *Id.* at 61. Certain regional and international systems subsequently held likewise. *See* SAHNI, *supra* note 3, at 60, 73-74 (Apartheid Conventions and The Barcelona Traction case before the ICJ).

ness.[6] By focusing and imposing duties singularly upon the state, a breakdown of human rights protections has emerged in recent decades. This failure, which I posit is a product of the systemic separation between international economic development, human rights enforcement, and the regulation of private players, leaves powerful non-state actors, in particular transnational corporations (TNCs), essentially unencumbered by responsibility for the adverse effects caused by their policies or activities, despite the increasing impact of their decisions.[7]

Placing aside any arguments in support of or critiquing current economic development strategies, the subject of the TNC's accountability for human rights violations is being addressed on various levels with increasing urgency.[8] The International Commission of Jurists has noted that the con-

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[6] *See* Philip Alston, *The 'Not-A-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 3, 3-4 (Philip Alston ed., 2005); August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 37, 73-77 (Philip Alston ed., 2005).

[7] *See* David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 935 (2004).

[8] The role of TNCs in the new world order has generated nearly uniform opinion that TNCs increasingly play a role in the violation of human rights due to their increased economic and political influence. *See, e.g.*, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461-465 (2001). Numerous international and regional organs have expressly noted the issue in their instruments. *See, e.g.*, Asian Human Rights Commission, Asian Human Rights Charter, ¶ 2.8, May 17, 1998, *available at* http://material.ahrchk.net/charter/pdf/charter-final.pdf (last visited May 1, 2008):

> The capacity of the international community and states to promote and protect rights has been weakened by processes of globalization as more and more power over economic and social policy and activities has moved from states to business corporations. States are increasingly held hostage by financial and other corporations to implement narrow and short sighted economic policies which cause so much misery to so many people, while increasing the wealth of the few. Business corporations are responsible for numerous violations of rights, particularly those of workers, women and indigenous peoples. It is necessary to strengthen the regime of rights by making corporations liable for the violation of rights;

See also Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business

ceptualization and framing of corporate duties is the foremost question in the current human rights debate.[9] The necessary inquiry has three parts: what is the underlying ideological theory for placing duties and obligations upon the TNC (and upon all corporate entities) in the field of human rights, how does recognizing and imposing responsibility for human rights violations unfold in a sovereign-based system, and, finally, what should be the extent of those duties and obligations conceptually?[10]

In response to these inquiries, this Article argues that attempting to impose a set of expressly-defined duties upon the TNC misconstrues and ignores both the role of the TNC in the modern-day global context, and problematically diverges from a history of international and domestic jurisprudence which facilitates limited, but essential, flexibility in the development of human rights norms by defining obligations and accountability through the use of customary international law or fluid legislative processes.[11] Rather than fixate on formulating an exact set of rigid duties,

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Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter UN Draft Norms]. Preamble:

> Taking note of global trends which have increased the influence of transnational corporations and other business enterprises on the economies of most countries and in international economic relations. . ..Noting that transnational corporations and other business enterprises have the capacity to. . cause harmful impacts on the human rights and lives of individuals through their core business practices and operations. . .Noting also that new international human rights issues and concerns are continually emerging and that transnational corporations and other business enterprises often are involved in these issues and concerns, such that further standard-setting and implementation are required at this time and in the future.

[9] Phone Interview with Andrea Shemberg, member, International Commission of Jurists, in Geneva, Switzerland (Nov. 13, 2006) (record on file with author).

[10] This Article will be focusing only on an international law framework.

[11] For example, the ICTR Statute enumerates rape as a crime against humanity and war crime even thought the Nuremberg Statute did not. *See* Sita Balthazar, *Gender Crimes and the International Criminal Tribunals*, 10 GONZ. J. INT'L L. 43 (2006-2007). Domestic liability under the ATCA is expressly tied to breach of customary international law and *jus cogens*, a constantly (though slowly) evolving standard. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) (in denying Alvarez's ATS (ATCA) claim, the court held that brief detention did not constitute a breach of customary law and thus was non-actionable); Kiobel v. Royal Dutch Petroleum Co., 2004 U.S. Dist. Lexis 28813, 32 (S.D.N.Y. 2004) (". . .doing so would frustrate Congress's intention to make crimes against humanity violations of

this Article argues that, from ordinary human rights principles, economic realities assessments, and models of corporate regulation in other international spheres, a methodology may be derived which incorporates the unique combination of legal personhood and growing contemporary control and power of the TNC to determine how evolutionary customary norms and their attendant responsibilities may be framed.

Part I of this Article briefly introduces the backbone of the human rights discourse: the concept of dignity as the foundation for human rights obligations from all actors regardless of their public or private character.

Part II develops, through human rights objectives, the rationale for directly imposing legally-binding duties on the corporate entity, in particular the TNC. This Part first considers how TNCs have become several of the primary beneficiaries of trade liberalization but have succeeded in evading strict regulation by virtue of their multinational nature and increased power.[12] International economic development policies, favored by developed nations since the Second World War, have emphasized the primacy of

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United States domestic law. . .The [TVPA] thus recognizes explicitly what was perhaps implicit in the Act of 1789 – that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is. . .a violation of US domestic law."), *aff'd*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006); Sarei v. Rio Tinto, Plc., 487 F.3d 1193, 1200-1203 (9th Cir. 2007) (following *Sosa* the test for ATCA standing is still a claim based in the "present-day" law of nations), *vacated on other grounds, rehearing en banc granted*, 499 F.3d 923; The Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 304 (S.D.N.Y. 2003) (*quoting* Filirtiga v. Pena-Irala, 630 F. 2d 876, 888 (2d Cir. 1980) ([courts must] "interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."); *see also* Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2798 (2006) (in response to more amorphous state obligations to international human rights the Supreme Court noted that while the contours of Common Article 3 were not strictly defined, the United States nonetheless failed to meet whatever obligations did exist. While the outside perimeters of the duty were not known, an inspection of the international community's criminal procedures at least illuminated what was *not* acceptable in constituting military tribunals to try suspected terrorists according to the standards of civilized society).

[12] *See* Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 75, 92 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Ratner, *supra* note 8, at 459; 'Gbenga Bamodu, *Managing globalisation, UK initiatives and a Nigerian Perspective*, *in* HUMAN RIGHTS AND CAPITALISM, 145, 162 (Janet Dine & Andrew Fagan eds., 2006); Anne Orford, *Globalization and the Right to Development*, *in* PEOPLE'S RIGHTS 127, 158, 164 (Philip Alston ed., 2001) (quoting Raghavan, and Nadar & Wallach respectively).

lending and trade institutions such as the World Bank, the International Monetary Fund, and the World Trade Organization at the expense of state agency.[13] The relationship, especially between dependant developing states and TNCs, has become increasingly implicated by this intentional structural reconfiguration of power. This Part then examines some of the negative effects on the enjoyment of human rights experienced by the population due to transformations in power privileging the TNC.[14] The argument here is not that equal and even greater violations of human rights and dignity have not occurred at the hands of the State—for they assuredly have and continue to do so. Rather, the focus of this Part is on the necessity of emphasizing the responsibility of newly-emerging global players as well as the historically powerful state.[15] The international legal system must be refashioned so as to be capable of simultaneously regulating all the numerous important actors vis-à-vis their human rights behavior. Despite the far-reaching consequences of TNCs increasing influence, this Part will focus on the proportionally-magnified effects experienced by the populations in developing countries.[16] Though the ultimate theoretical analysis of this Article will not focus purely on territoriality, it is widely noted that the immediate effects of economic globalization have disparately affected those in developing nations.[17]

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[13] Orford, *supra* note 12, at 146-152, 157-158.

[14] *See* Dinah Shelton, *Globalization & The Erosion of Sovereignty in Honor of Professor Lichenstein: Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 294-299 (2002).

[15] HUMAN RIGHTS WATCH, WORLD REPORT 2006 92-96, 140-145, 146-153, 154-159, 179-186, 197-200, 227-231, 232-237, 284-289, 381-387, 423-431 (2006) (detailed listing of violations by country. Some notable problem states include: DR Congo, Sudan (with the crisis in the Darfur region), Uganda, Zimbabwe, Colombia, Haiti, Bangladesh, Burma (Myanmar), Nepal, Russia, Uzbekistan, and many others. However, though primarily focusing on national and rebel abuse, the report did include a short piece analyzing TNC involvement in human rights. *Id.* at 41-51.

[16] *See, e.g.*, Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL., 243, 257-259 (2000); Shelton, *supra* note 14, at 295-296 (ex: working conditions are poor in export production zones where a steep increase occurred by 2000 in developing countries).

[17] *See, e.g.*, Paul Hunt & Simon Walker, *WTO member states and the right to health, in* HUMAN RIGHTS AND CAPITALISM 228, 244 (Janet Dine & Andrew Fagan eds., 2006) (commitments to trade liberalization not uniformly imposed on all states, developing acceding states may have increased demands leading to diminishment of states capacity to realize health rights); Uche' U. Ewelukwa, *Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the*

Part III of this Article briefly details contemporary attempts at conceptualizing and grafting duties onto the TNC through international mechanisms. Currently, the most acute pressure felt by TNCs to modify their behavior results from concerted NGO and consumer action campaign activity. As a result, there has been a recent spate of self-regulation through corporate ethics codes. On the international level, the most comprehensive and prominent attempt at legislating corporate human rights obligations has been the draft United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, adopted in 2003 by the Sub-Commission on the Promotion and Protection of Human Rights.[18] Additionally, other international organs such as the International Labor Organization (ILO), the Organization of Economic Cooperation and Development (OECD), and UN Secretary General (through the Global Compact) have all attempted to grapple with this issue.[19] Adjudication of TNCs' human rights obligations under international law has yet to occur, but a series of decisions extending subjectivity to various non-state actors under international human rights law bears scrutiny. Extensions of liability have occurred on the domestic front as well,[20] particularly in the United States but also in other common-law jurisdictions.[21]

"New" International Trade Regime, 20 BERKELEY J. GENDER L. & JUST. 75 (2005); *see also* UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1999: GLOBALIZATION WITH A HUMAN FACE Chapter 1 (1999).

[18] Tom Sorrell, *The UN Norms*, *in* HUMAN RIGHTS AND CAPITALISM 284, 284 (Janet Dine & Andrew Fagan, 2006); David Weissbrodt & Muria Kruger, *Human Rights Responsibilities of Business as Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 315, 328 (Philip Alston ed., 2005).

[19] Weissbrodt & Kruger, *supra* note 18, at 318-320; Kinley & Tadaki, *supra* note 7, at 949-952.

[20] Coverage of domestic treatment is beyond the scope of this article though will be occasionally referenced.

[21] A majority of the litigation against TNCs for human rights abuses has been pursued through civil litigation in the United States under the Alien Torts Claim Act (ATCA), though recent cases have also occurred in other common-law jurisdictions such as the United Kingdom, Australia and Canada. *See* Reinisch, *supra* note 6, at 55-56. Few domestic attempts at invoking universal jurisdiction for prosecuting a corporation through criminal proceedings have occurred. Emailed Correspondence with Andrew Clapham, Professor, Geneva Academy of International Humanitarian Law and Human Rights, in Geneva, Switzerland (Oct. 30, 2006) (record on file with author) (the *only* current criminal prosecution against corporate officials for a violation of human rights is in Australia. Anvil Mining is being investigated by police for potential crimes against humanity for their admitted in-

Part IV of this Article explores the contents of several innovative theories currently circulating in the academy debating the proper basis for and contours of TNC accountability. This Part will focus on the positive aspects of these contemporary proposals and propose certain criticisms. While no consensus has yet been attained, extensive and valuable work has contributed to a comprehensive understanding of the topic and the United Nations continues to invest its energies on the issue.

The final Part of this Article proposes a multi-level examination of TNCs' relationships to affected populations and states in order to ascertain the scope of the TNC's duties in any particular instance. If properly utilized, this 'functionally equivalent' model of analysis could warn the TNC of its duties and, to the extent any given state or individual is forewarned as to what constitutes the discharge of obligations, help the TNC understand what affirmative actions it must undertake. This calculation factors in the juridical personhood status of the TNC in order to maintain the delineation between public (state actor) and private (non-state actor) duties, and to demarcate the important differences between a corporation's role and the state's role in global and national governance. At the same time, the individual TNC's relationship with both the relevant populations and the state must be assessed when attaching to it increased duties befitting an actor with its resources, influence, and consciously-facilitated empowerment.[22] Considerations of positive and negative rights for which the TNC should bear responsibility correlates roughly with the obligations of a state similarly-situated in resources and influence, circumscribed however by the concept of the TNC's private character and different purpose. To that end, current debates surrounding the extent of the state's duties may very well be replicated in future discussions seeking to further clarify TNCs' obligations.

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volvement in a massacre at Kilwa in 2004 in the Democratic Republic of Congo. No decision has been taken by the prosecutor). *See* Organization for Economic Cooperation and Development, *OECD Watch Newsletter March 2006*, *available at* http://www.germanwatch.org/tw/kwi-06-03.pdf (last visited May 1, 2008) (for additional information regarding Anvil's action in DC Congo.); *see also* JOSEPH, *supra* note 5, at 13 (Belgium's brief attempt before changing its universal jurisdiction statute under political pressure).

[22] The concept that corporations might fairly be treated uniquely specifically because of the state's facilitation of their unique access to resources (and potential power) is domestically embodied in Supreme Court cases such as Austin v. Mich. State Chamber of Commerce, 494 U.S. 660 (1990). The Court upheld the constitutionality the Michigan Campaign Finance Act holding that, "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed." *Id.* at 652.

It is at this juncture where the minimal, but still relevant, evolutionary process of international human rights norm creation as it now applies to individuals and states must be recalled. By internationalizing corporate accountability for human rights violations, the strengths of the current process can be emphasized. Mechanisms of assistance and enforcement at the international level should be uniformly established, but the norms themselves may evolve over time.

PART I: A BRIEF INTRODUCTION TO MODERN DAY UNDERSTANDINGS OF HUMAN RIGHTS AND DIGNITY

At the heart of the modern day investigation into who *bears* obligations under the human rights discourse is modernity's belief of the value of the human subject in itself. While varying adaptations of the notion of "dignity" date further back, the root of the modern day understanding, attributed to the philosopher Immanuel Kant,[23] invests every individual with an inherent quality of dignity irrespective of social status.

> But a human being regarded as a person, that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to an ends of others or even to his own ends, but as an end in himself, that is, he posses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rationale beings in the world.[24]

The conceptualization of dignity formulated by Kant, that is, an inalienable quality within each person serving as an ends unto itself, has been espoused continuously, particularly in the wake of the Second Word War.[25] For example, the German Federal Constitution does not allow the state to derogate from the absolute right of human dignity through legislation or national constitutional amendment; the right is inviolable.[26] More than 170 governments meeting in Vienna at the Second World Conference on Human Rights in 1993 recognized and affirmed the centrality of Kantian

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[23] *See, e.g.*, Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 748 (2006); Izhak Englard, *Uri and Caroline Bauer Memorial Lecture: Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1919 (2000).

[24] KANT, *supra* note 1, at 186.

[25] Eckert, *supra* note 2, at 52.

[26] Englard, *supra* note 23, at 1924.

dignity in the formulation of human rights.[27] And within American constitutional jurisprudence the intrinsic dignity of even those criminally convicted is embodied within the substantive protections of the Eighth Amendment.[28]

The ICTY, in its judgment against local military police unit commander Anto Furundzija, perhaps manifested the notion best when it confirmed outrages upon dignity as the underlying basis of crimes against humanity. After his underlings threatened a Muslim female victim with a knife, rubbing it against her thigh and then warning her they would vaginally impale her with it, the violation of her dignity served as a proper justification for construing the subsequent forcible oral sex as rape.[29]

> The forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person. . .The general principle of respect for human dignity is the basic underpinning and indeed the very raison d'être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law

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[27] ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 538-539 (2006).

[28] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 560 (2005) (striking down the death penalty for those under the age of eighteen) ("The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'. . By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."); *see also* Atkins v. Virginia, 536 U.S. 304, 311 (2002) (abolishing the death penalty for the developmentally disabled) ("The basic concept underlying the EIGHTH AMENDMENT is nothing less than the DIGNITY of man."); Hudson v. McMillian, 503 U.S. 1, 10-11 (1992) (resulting extent of injury was not the proper inquiry for an Eight Amendment inquiry) ("the use of force [cannot be] of a sort 'repugnant to the conscience of mankind'. . . To deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the "concepts of DIGNITY, civilized standards, humanity, and decency'" that animate the EIGHTH AMENDMENT"); Hope v. Pelzer, 536 U.S. 730, 738 (2002) (corporeal punishment a violation of human dignity) (use of the hitching post under these circumstances violated the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man.").

[29] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 39-41, 183 (Dec. 10, 1998).

> . . . It is consonant with this principle that such an extremely serious sexual outrage . . . should be classified as rape.[30]

Anchoring modernity's human rights discourse in the intrinsic and inalienable worth of every human being radically shifts the way in which human rights norms implicate various actors and international legal processes. The repercussions of World War II undermined the traditional purely statist approach to international human rights,[31] and finally inculcated in the collective conscience the duties, both positive and negative, imposed on every actor under an increasingly universal comprehension of dignity. Individuals became direct subjects of international law as a resulting expression of this essentialist truth.[32] The consequences of embracing human dignity as fundamental to society can be seen embodied in the Universal Declaration of Human Rights (UDHR) which assigned positive and negative human rights obligations to all individuals, irrespective of their public or private character.[33] Because dignity is vested in the individual and emanates outwards from their person, all those who come into contact and have the power to affect it bear obligations proportional to their capacity to do harm or help. Similar refrains were echoed in the criminal trial of Alfred Musema-Uwimama by the judges of the ICTR whom held that violations of the prohibition on torture required no state action component for there to exist liability under an international legal regime for crimes against humanity.[34] All participants in society interact with an individual's dignity and thus have human rights obligations; dignity does not spring from the rela-

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[30] *Id.* at ¶ 183.

[31] Diane F. Orentlicher, *Internationalizing Civil War, in* WAR CRIMES: THE LEGACY OF NUREMBERG 154, 154 (Belinda Cooper ed., 1999) (state-sovereign-oriented approach has gradually been supplanted by a human-being oriented approach); *see also* Louis Henkin, Lecture: *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et. Cetera.*, 68 FORDHAM L. REV. 1, 3-5 (1999); Wise, *supra* note 3, at 59.

[32] *See* Teitel, *supra* note 2, at 50 (the belief is widely held today that a state's persecution of its citizens is an international, even universal matter).

[33] Universal Declaration of Human Rights, G.A. Res. 217A (III), at preamble, art. 30, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) (Preamble: "every individual and every organ of society. .to promote respect for these rights and freedoms." Article 30: "nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any rights and freedoms set forth herein.").

[34] CLAPHAM, *supra* note 27, at 543.

tionship between an individual and the state, but between an individual and all others.

PART II: THE CHANGING POLITICAL LANDSCAPE: THE TRANSNATIONAL CORPORATION IN THE NEW WORLD ECONOMIC ORDER

Section I: The Uncertain Treatment of Dignity in the 21st Century

While the object of individual dignity was integral to the understanding of the universal order following World War II, the structuring of the new human rights legal regime was largely dominated by a world vision preoccupied with the specter of the sovereign power's abuse of its own citizens.[35] To that end, while the legacy of the Nuremberg trials established individual criminal liability for certain limited crimes,[36] the international human rights structure that sprung forth paralleled broader international law principles and primarily targeted the state as the bearer of duties.

Recent criticisms questioning the validity and effectiveness of a state-centric system in an increasingly diverse global order have surfaced.[37] By juxtaposing the sanctity of innate human dignity against the growing unregulated occurrences of human rights violations by non-state actors such as TNCs, critics have been able to effectively illustrate a fallacy of the current system, namely, that the international human rights framework should be singularly, or at least primarily, concerned solely with state activities. The impetus behind the original internationalizing of grave human rights violations—that rights originate in the individual human being and effect the obligations of all those who interact with him or her requires once again a shifting of the focus of international law's efforts to promote human rights compliance.

Section II: Economic Globalization and the Rise of the TNC

To properly understand the contemporary debate surrounding the scope of TNC human rights obligations, it must be contextualized in the current political and economic landscape. This Article does not attempt to

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[35] Shelton, *supra* note 14, at 273; Reinisch, *supra* note 6, at 38; Kinley & Tadaki, *supra* note 7, at 935.

[36] Teitel, *supra* note 2, at 47-49.

[37] *See, e.g.*, JOSEPH, *supra* note 5, at 1-4 (TNCs have more power than certain states. The top 100 economies include 51 corporations. TNCs may abuse their power); Alston, *supra* note 6, at 3 (assumption that the state is indispensable marginalizes a significant part of international human rights law from one of its largest challenges); Kinley & Tadaki, *supra* note 7, at 933-935; Ratner, *supra* note 8, at 461 (system in which the sole target is states may not be sufficient).

cover all the intricate and complex forces at play in economic globalization, nor pass judgment on every one of its various social and political effects. A discussion regarding TNC accountability does however require consideration of some of the practical repercussions of this strategy of development.

One of the primary results of economic globalization has been the diversification of powerful global actors.[38] There is no inherent reason why the results of this reconfiguration should generate a negative impact on human rights, especially when the problematic history of states' abuse is kept as a reference point.[39] Proponents of economic globalization focus on, for example, the "good governance" standards promoted by influential international lending institutions as improving transparency in certain governmental functions and therefore facilitating the positive enjoyment of civil and political rights.[40] Others note the potential for positive change accompanying increased trade and direct investment have for the realization of social, cultural, and economic rights through strengthening local economies.[41] Nor have advocates completely ignored the admittedly disproportionate gains produced by the globalization process.[42] Rather, as one advocate theorizes, though positive effects have been to date disparately experienced, nonetheless both parties prosper proportionately from a trade or investment pareto-improving relationship.[43]

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[38] *See* Bamodu, *supra* note 12, at 145; Orford, *supra* note 12, at 147-151, 157-158; Alston, *supra* note 6, at 4; Reinisch, *supra* note 6, at 74; Shelton, *supra* note 14, at 276; *see also*, Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and Democratization of Development*, 6 HARV. HUM. RTS. J. 159, 160 (1993).

[39] HUMAN RIGHTS WATCH WORLD REPORT 2006, *supra* note 15.

[40] *See* Jonathan Carlson, Symposium, *Interrogating Globalization: The Impact on Human Rights: Answering Antiglobalist Angst*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 13, 21-22 (2002); CLAPHAM, *supra* note 27, at 140 (supporting rule of law and transparency helps human rights agenda).

[41] *See* Carlson, *supra* note 40, at 22-27; Bamodu, *supra* note 12, at 152-153 (discussing the notorious regime under General Sanni Abacha and embezzlement practices costing the developing state some 2.2-5.2 billion dollars. Regulations on both the state and now recommendations for TNCs regarding transparency assist in making globalization beneficial for developing countries); CLAPHAM, *supra* note 27, at 140 (quoting IMF that government enhancement policies lead to attainment of human rights in their broad sense); Shelton, *supra* note 14, at 292.

[42] *See, e.g.*, GLOBALIZATION WITH A HUMAN FACE, *supra* note 17, at 25, 31, 38.

[43] JOHN BURTON, JUDITH GOLDSTEIN, TIMOTHY JOSLING & RICHARD STEINBERG, THE EVOLUTION OF THE TRADE REGIME 18 (2006) [hereinafter THE EVOLUTION OF THE TRADE REGIME].

Arguments espousing the positive ramifications of globalization do not contradict the notion that some of the primary influences shaping today's evolving system of global capital are the various new actors emerging onto the international economic stage. Particularly in relation to conditions in developing countries, relatively new actors including international financial and trade institutions, as well as private corporations, have had a great impact on national conditions in addition to the traditional influences of other states.[44] Since the 1980s, UN financial organs such as the International Monetary Fund (IMF) and World Bank (WB) have flexed their muscle by imposing "structural adjustment" requirements as prerequisites to ascendancy and the receiving of direct investment.[45] After succeeding the General Agreement on Tariffs and Trade (GATT) following the Marrakesh multilateral trade agreements of 1994 the World Trade Organization (WTO), through stronger member states,[46] has leveraged significant control of policy in developing nations by implementing asymmetric trade liberalization requirements. Coupled with subsequent supplemental bilateral investment agreements (BITs) and regional trade agreements such as NAFTA,[47] the policies of trade liberalization, privatization and governing

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[44] *Id.* at 164 (nations had to turn to the WB and IMF who would generally impose certain policies. Case example Mexico); Orford, *supra* note 12, at 147-152; *see also* Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347, 396 (1994) (massive additional transfers of foreign aid are unlikely, international trade and investment are indispensable); Shelton, *supra* note 14, at 297-298; Anghie, *supra* note 16, at 256-257.

[45] Structural adjustment programs for example generally require a country to cut spending on social services, eliminate trade barriers to foreign corporations, privatize national assets, and decrease wages among other actions. *See* Cristina Baez, Michele Dearing, Margaret Delatour, & Christine Dixon, *Multinational Enterprises and Human Rights*, 8 U. MIAMI INT'L & COMP. L. REV. 183, Part B(2)(e) (2000); *see also* Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443, 465-467 (1997).

[46] Ewelukwa, *supra* note 17, at 113-117 (date adopted, and tracking the enforced ban on protectionism in developing countries as compared to the protectionism allowed developed countries); THE EVOLUTION OF THE TRADE REGIME, *supra* note 43, at 166-167 (developing countries though a majority generally excluded from TRIPS talks despite grave concerns on the consequences and negative effects in nations of sub-Sahara Africa on drug accessibility).

[47] NICOLA JAGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 237 (2002) (under Chapter 11, corporations have the ability to submit complaints against the states to binding dispute settlement); *see generally* Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L & BUS. 327, 362-372 (1994).

investment practices have cumulatively placed constraints on the state's ability to fulfill some of its human rights obligations both directly and indirectly.[48] Changes imposed at the domestic level by these institutions include undertaking large scale privatization and implementing trade liberalization policies, intrastate non-discrimination requirements, reductions in government spending, and labor market deregulation.[49] In many cases these trade policies have substantially benefited the developing nation though the historical trend has been a privileging of developed nations who dominate institutional practices and the agenda and who have (somewhat understandably) sought policies furthering their own national interests.[50]

Until recently, the question of the non-state actor's role in the new economic world order was largely ignored by both the international human rights and international development and trade regimes. The question, however, has recently come to the forefront of the human rights debate with

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[48] *See, e.g.*, Steve Aderman & Rohan Kariyawasam, *TRIPS and bilateralism: Technology transfer in a development perspective*, *in* HUMAN RIGHTS AND CAPITALISM 169, 169-185 (Janet Dine & Andrew Fagan eds., 2006) (dissecting the desirably of a complementary competition regime to counter the influences of TRIPS-plus agreements and adjudicatory trends in rolling back original TRIPS (Agreement on Trade-Related Intellectual Property Rights) internal balancing mechanisms to ensure appropriate intellectual property transfers for such reasons as public health. Compulsory licensing rights under Article 27.3(a) are increasingly difficult to utilize threatening least developed countries ability to realize rights to health at the profit of the four dominant blocs in the WTO, the United States, Canada, Japan, and the European Union and TNCs); *see also* Patricia Feeney, *The Human Rights Implications of Zambia's Privatization Programme*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 323, 328-329 (Michael K. Addo ed., 1999) (privatization in Zamibia increased poverty, social service spending declined); Orford, *supra* note 12, at 157-158 ("[such agreements] curb the right of governments to intervene in the economy for the benefit of their people. . ."); Reinisch, *supra* note 6, at 77; Shelton, *supra* note 14, at 297-298; Baez, Dearing, Delatour, & Dixon, *supra* note 45, at Part B(2)(e) (required to cut spending on social services).

[49] Orford, *supra* note 12, at 151; Anghi, *supra* not 18, at 256. Of particular note is the tension between non-discrimination exemptions and the ability to utilize these procedures in practice. *See* Fernne Brennan, *Time for a change: Reforming the WTO trading rules to take account of reparations*, *in* HUMAN RIGHTS AND CAPITALISM 254, 254-261 (Janet Dine & Andrew Fagan eds., 2006) (with Guyana rice trade example).

[50] *See* THE EVOLUTION OF THE TRADE REGIME, *supra* note 43, at 166-167; Eweluka, *supra* note 19, at 113-117; Aderman & Kariyawasam, *supra* note 48, at 185.

force. It stems from the fundamental tension created by structures of regulation steeped in post-war state-centric ideology and the practical effects of globalization which have largely diminished state authority in large portions. The conflict is caused by the intentional devaluation of the sovereign capacity of certain states, and the simultaneous benefits consequently realized by other actors, for example TNCs, whom have been some of the largest beneficiaries of deregulation policy, but who have escaped any reciprocal imposition of concomitant obligations or duties towards human rights.[51]

Several relevant aspects of international investment and trade policy figure centrally in the coming discussion on human rights duty bearing. First, the way in which developing nations' sovereign agency over domestic policy has been undermined as detailed above. Second, the process of economic globalization has allowed many TNCs to accumulate vast sums of resources and power, often times in excess of the host state's own.[52] This reality does not diminish the role of TNCs' home states as primary causes or beneficiaries of contemporary trade and commercial policies, but the TNC cannot be said to be a passive player or a non-entity in the process.[53] As is popularly quoted, of the top one hundred economies in 1999, fifty one

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[51] WILLIAM H. MEYER, HUMAN RIGHTS AND INTERNATIONAL POLITICAL ECONOMY IN THIRD WORLD NATIONS 75-76 (1998) (BITs et. al. linked to privatization of least developed countries economies. WB and IMF structural reforms of the 1980s and 1990s included privatization which necessarily enhanced investment opportunities for transnational corporations. US policy to reduce debt in the developing world was designed to lead directly to new direct foreign investment opportunities for private corporations); Cecelia Wells & Juanita Elias, *Catching the Conscience of the King: Corporate Players on the International Stage*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 141, 146 (Philip Alston ed., 2005); Ratner, *supra* note 8, at 458-459; Bamodu, *supra* note 12, at 162 ("It is also fair to say that a coalescence of the interests of governments in developed countries and TNCs. . . . have contributed to the conclusion of agreements and the generation of rules under the WTO framework that seem to focus principally on advancing the interests of TNCs. . .it is hard to escape the conclusion that the direct primary beneficiaries of these agreements are international business enterprises."); Kinley & Tadaki, *supra* note 7, at 935-937; Alston, *supra* note 6, at 17; Aderman & Kariyawasam, *supra* note 48, at 181 (bilateral trade agreements have obtained better conditions for national treatment of TNCs).

[52] *See* Alston, *supra* note 6, at 17.

[53] *See* Bamodu, *supra* note 12, at 162.

were corporations.[54] The sales of the top five corporations exceeded the gross domestic product of 182 countries.[55] And the top 200 corporations' combined sales were larger than the combined economies of all countries except the top ten.[56] Whatever one thinks of these numbers in isolation, when they are positioned in the larger context, they realistically indicate a practical power imbalance between the TNC and developing states, both literally and in the sense of effecting political will.[57] Third, enforcement mechanisms established by international investment and trade organizations have conferred limited rights of standing to the TNC, further facilitating its agglomeration of power in relation to the state and also in relation to those populations effected by its activities to whom no reciprocal remedies or rights have as of yet been granted.[58] TNCs have the ability in certain circumstances to challenge policies they deem unfavorable through international quasi-judicial infrastructure, or often times through mechanisms established by mandatory private regimes such as the international binding

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[54] SARAH ANDERSON AND JOHN CAVANAGH, THE RISE OF CORPORATE GLOBAL POWER 6 (The Institute for Policy Studies, 2000), *available at* http://www.ips-dc.org/downloads/Top_200.pdf

[55] *Id.*

[56] *Id.*

[57] *See* Wells & Elias, *supra* note 51, at 146-148 (attract rather than regulate international capital); *see also* Joseph, *supra* note 12, at 78; Ratner, *supra* note 8, at 461; *see generally* Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 227, 237-238 (Philip Alston ed., 2005) (host states may not have the resources or political will, especially those committing violations themselves); Kinley & Tadaki, *supra* note 7, at 938 (in developing states domestic regulation may be compromised by economic considerations due to an unequal relationship with the TNC).

[58] *See* THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 12-13 (2002) [hereinafter BEYOND VOLUNTARISM] (regional FTA and NAFTA provide recourse to TNCs through panels). The World Bank has recently instituted "Inspection Panels" to consider individual complaints. *See* Reinisch, *supra* note 6, at 42. The World Bank's Inspection panels do consider complaints against TNCs or human rights violations complaints *per se*, but will review complaints against its own decision for proper procedural safeguards. While human rights are not expressly stated as a proper complaint, there are signs that the WB may extend its considerations in that direction after the Chad Pipeline Report though they are not wholly there yet. *See* CLAPHAM, *supra* note 27, at 152-155. Both the IMF and WB have been reticent in the past to allow human rights considerations to enter their decisions. *Id.* at 135-140; *see also* Shelton, *supra* note 14, 289-291.

arbitration systems provided for in many BITs and several multilateral trade agreements.[59]

Other attributes of development policy play a relevant part in globalization's recasting of the power dynamic. The complicated interplay of foreign aid for example, as distinctly separate from investment or trade policy, may implicate human rights by its own volition.[60] But the increasing import of TNCs in the various models, and especially in the space of economic globalization as a whole, compels the world to question what the extent of their responsibilities towards human rights should be in a way hitherto unnecessary before. Resources and power historically reserved for the state were, at least in theory, held accountable against abuse either by local democracy, or in cases of pluralism failure, by the international legal system. As power and resources increasingly shift to private non-state actors, their roles must inevitably be scrutinized under the rubric of human rights more conscientiously—not because TNCs did not have obligations prior to this point, (all actors capable of effecting the dignity of the individual have such obligations)—but because their potential to either promote the realization of human rights or harm that realization and escape liability for doing so has exponentially increased.

Section III: Contemporary TNC Behavioral and Relational Examples

To illustrate the necessity of integrating TNCs into the human rights framework of the future one needs only, unfortunately, to look in the year's headlines. Contemporary popular press examples of disturbing corporate behavior include Coca-Cola and a multiplicity of other TNCs, mostly from East Asian countries, investing in Sudan (which is receiving investment capital from the IMF and WB) despite the humanitarian crisis continuing in Darfur.[61] Or we can turn to an incident from October 2006 in which Trafigura (a Greek-owned tanker) released a highly toxic cocktail of petrochemical waste across from poor neighborhoods in Abidjan off the Ivory Coast while attempting to cut costs on a waste management procedure, killing ten and causing 100,000 people to seek medical treatment.[62]

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[59] Reinisch, *supra* note 6, at 85; Kinley & Tadaki, *supra* note 7, at 946; Aderman & Kariyawasam, *supra* note 48, at 181.

[60] MEYER, *supra* note 51, at 104-108, 115 (but note US aid is increasingly attached to requirements of direct relationship to the gifting nation, opening up opportunities for TNCs as well).

[61] Jeffrey Gettleman, *War in Sudan? Not Where the Oil Wealth Flows*, N.Y. TIMES, Oct. 24, 2006, at A1.

[62] Lydia Polgreen & Marlise Simons, *Global Sludge Ends in Tragedy for Ivory Coast*, N.Y. TIMES, Oct. 2, 2006, at A1; Editorial, *An African Dumping Ground*,

A well documented history of corporate practices infringing on the enjoyment of human rights exists. It is not only a recent phenomenon. A well recognized historic example of direct interference with the political and civil right to self-determination was the actions of International Telephone and Telegraph Co. (ITT) in the early 1970s. The TNC actively conspired with the United States Central Intelligence Agency to keep then Chilean candidate Salvador Allende from the presidential post before his election to the position.[63] It is also widely believed that ITT and other American corporations operating in Chile thereafter helped orchestrate the fatal military coup which eliminated Allende and installed the violent military regime of General Augusto Pinochet in 1973.[64] More recently, a handful of claims against transnational oil corporations operating in Nigeria are slowly wending their way through the American domestic legal system, utilizing the ATCA as a mode of redress for tort violations contravening customary international human rights law abroad.[65] The plight of the Ogoni in the Niger Delta region of Nigeria was widely publicized by an Amnesty International campaign in the mid-1990s after the execution of poet and community rights activist Ken Saro Wiwa and other Ogoni leaders for their protests against Shell Oil's iniquitous behavior. Shell frequently spilled oil on Ogoni land, failed to compensate the community either for the use of its resources or for the ruination of the surrounding environment, and assisted the Nigerian government in committing lethal campaigns against commu-

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N.Y. TIMES, Oct. 4, 2006, at A30; Lydia Polgreen, *Neglect and Fraud Blamed for Toxic Dumping in Ivory Coast*, N.Y. TIMES, Nov. 24, 2006, at A14; Daniel Wallis, *West Should Help Ivory Coast pay for toxic dumping-UN*, REUTERS, Nov. 24, 2006, http://www.alertnet.org/thenews/newsdesk/L24487273.htm (last visited May 1, 2008); BBC News, *Ivorians to sue toxic ship firm*, BBC NEWS, Oct. 24, 2006, http://news.bbc.co.uk/2/hi/africa/6079724.stm (last visited May 1, 2008).

[63] *Intelligence Activities: Hearings before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess. *reprinted in 7 Convert Action* 158-160 (381-386) (1975) (legislative history detailing ITT's specific involvement in Chilean coup); *see also* MEYER, *supra* note 51, at 178-183; JOSEPH, *supra* note 5, at 3; Wells & Elias, *supra* note 51, at 143-144.

[64] CLAPHAM, *supra* note 27, at 201; *see also* Jeffrey K. Powell, Comment, *Prohibition on Campaign Contributions from Foreign Sources: Questioning their justification in a global Interdependent Economy*, 17 U. PA. J. INT'L ECON. L. 957, at 977-978 (1996); Jan Huner, *The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 197, 201 (Mennot T. Kamminga & Saman Zia-Zarifi eds., 2000).

[65] Bowoto v. Chevron Corp., 2006 U.S. Dist. Lexis 63209 (N.D. Cal. 2006); Kiobel v. Royal Dutch Petroleum, 2004 U.S. Dist. Lexis 28813 (S.D.N.Y. 2004).

nity protesters.[66] Continuing violations by Chevron are charged despite Nigeria's transition back to democracy after the death of military dictator General Abacha.[67]

The behaviors of Shell Oil and ITT are of the easier subset to condemn. For one, they implicate only negative duties; one shall not eliminate, or conspire to eliminate, another individual's right to life or self-determination through one's own actions. These types of obligations proscribe certain generally-cognizable depraved behaviors. They require little affirmative efforts from the actor to assist others in fully realizing their rights, but only require that he or she refrain from destroying rights directly. Second, as is exemplified by the Shell Oil example, a TNC's transgressive actions may under a certain new mode of analysis also conceivably carry with them criminal liability, that is, Shell's behavior because it has risen to the level of crimes against humanity and grave breaches of international customary norms could be found criminally culpable and certain individuals in the corporation be held liable.[68] Through this lens of analysis, shaping the con-

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[66] *See generally* Kristian Tangen, Kare Rudsar & Helge Ole Bergesen, *Confronting the Ghost: Shell's Human Rights Strategy*, *in* HUMAN RIGHTS AND THE OIL INDUSTRY 185, 185-187 (Asbjorn Eide et al. eds., 2000) (Shell experienced widespread fall-out for refusing to intervene on behalf of Wiwa and for refusing to take positive steps and apply pressure on the government to comply with human rights norms. The article then goes on to detail Shell's policy changes subsequent to the events and the improvements they have attempted to make due to public pressure and declining financial worth); *see generally* Chinedu Reginald Ezetah, Symposium, *Minority Rights: International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma*, 19 LOY. L.A. INT'L & COMP. L.J. 811, 820 (1997) (per SPDC's request for security, "wasting operations" were suggested in a memo); Alston, *supra* note 6, at 11-13.

[67] Amnesty International, *Nigeria Ten Years On: Injustice and Violence haunt the oil Delta*, http://web.amnesty.org/library/Index/ENGAFR440222005 (last visited Mar. 20, 2007); *see also* HUMAN RIGHTS WATCH, THE ROLES AND RESPONSIBILITIES OF THE INTERNATIONAL OIL COMPANIES 10 (1999), *available at* http://www.hrw.org/reports/1999/nigeria/Nigew991-10.htm (last visited May 1, 2008) (discussing the now often referenced memorandums between the Nigerian Security Forces and Shell suggesting the "wasting operations" and "wasting targets" – § The Role of Shell in the Ogoni Crisis).

[68] The ATCA does not attach criminal liability but grants civil remedy to violations which fall into categories which international criminal tribunals have deemed criminal behavior such as crimes against humanity and grave breaches of international customary norms. *See* Bowoto v. Chevron Corp., 2006 U.S. Dist. Lexis 63209; Kiobel v. Royal Dutch Petroleum, 2004 U.S. Dist. Lexis 28813 (S.D.N.Y. 2004).

tours of corporate responsibility seems fairly simple. One could merely deconstruct the TNC, as one does the state in international criminal proceedings and hold the highest echelons responsible through "commander responsibility" principles for actions of their inferiors. To address any pertinent relationships between a TNC and its subsidiary, the common-law principal/agent test for tort liability could potentially be applied. Thus, a simple framework exists for establishing responsibility by imposing the subset of norms encompassing criminality under international law.

However, a closer assessment of these case examples questions the desirability of adopting such a method of resolution. Initially springing to mind is the corporation's unique recourse to capital necessary to effectively remediate grave human rights violations. Individuals, even wealthier persons located within the corporation, are unable to produce similar resources. The example of Coca-Cola in Sudan, for example, also problematizes the decision to delineate human rights duties according to an actor's active involvement or planning in the violation as adopting the purely negative obligation approach of criminal liability forces us to do.[69] The corporate practices occurring in Sudan echo the large-scale business community's involvement in buttressing the apartheid regime of South Africa. TNCs sustained and benefited from the oppressive policies, a practice so troubling that the South African Truth and Reconciliation Commission investigated and reported on the subject.[70] The case of Coca-Cola in Sudan and TNCs' involvement in apartheid South Africa also illuminate another important in-

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[69] American Courts under ATCA claims have somewhat adopted this negative obligation approach. *See* In Re: South African Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (granting defendant's motion to dismiss because merely transacting business in and with S.A. was not actionable claim under ATCA); *see also* The Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289, 300-302 (S.D.N.Y. 2003) (denying defendant's motion to dismiss and distinguishing from In Re: South African Apartheid Litigation because knowingly assisting in the attacks of civilian populations was not synonymous to business transacting), *aff'd*, 2005 U.S. Dist. Lexis 18410 (S.D.N.Y. 2005).

[70] Ratner, *supra* note 8, at 477; *see also* Sigrun I. Skogly, *Economic and Social Human Rights, Private Actors and International Obligations*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 239, 254-255 (Michael K. Addo ed., 1999) (once sanctions did occur, they had a decisive effect. Originally many TNCs had lobbied against them arguing that other states would allow TNCs to do business with S.A. so sanctions were not a good tool. Bishop Tutu made the ethical point, "Not complying with sanctions just because somebody else is out there who will not comply, is just like seeing a girl hitch hiking along the road, and picking her up and raping her, as surely, somebody else will come along and do it anyway.").

quiry, that is, if the state itself is a perpetrator, does it appropriately follow that the non-state actor bears no responsibility for his or her own actions merely because they are sanctioned by the state or because they financially profit from it? Regulation is highly unlikely to come from Khartoum, as it was unlikely to flow from the Boer plutocracy, a fact known by the whole of the global community.[71] Another particularly illustrative contemporary example of such mutually complicit human rights violations is mining giant Rio Tinto Plc. which combined forces with the Papua New Guinean state to suppress local protests over its destructive mining policies. Their joint action, which will be explored *infra* example III of this Part, caused a civil war which culminated in 20,000 civilian deaths. Does the fact that the state desires, or at the very least allows, a TNC's objectionable behavior or methods mean that the TNC should act with legal impunity and compound, or at the very least benefit from, any state initiated harm?

These questions insinuate that fully applying the human rights discourse to TNCs complicates the situation beyond the capacity which a simple national/individual or non/criminal polarity can handle. In essence, should TNCs bear obligations to assist with the realization of a penumbra of non-international customary norm human rights enumerated in the UDHR and other treaties rather than being limited interacting only with rights carrying criminal penalties if violated? Why only impose negative obligations if TNCs are central to the new economic world order? How should the often international or decentralized character of TNCs figure into their responsibilities?[72]

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[71] *See* De Schutter, *supra* note 57, at 237 (cannot count on the host state when they are actively violating human rights).

[72] For example, Trafigura created environmental damage and illness resulted there from. The rights to environment and health have not been expressly defined internationally though they do exist. Many countries in fact struggle with new IP trade regime regulations as noted earlier, constraining them from providing desperately needed drugs. *See* Anderman & Kariyawasam, *supra* note 54; Hunt & Walker, *supra* note 17. Similarly, environmental damage has received much attention in recent years, but it too has no distinct borders. Almost all TNCs and states generate pollution which results in health problems; such behavior is generally not conceived of as criminal under international law though increasingly, human rights obligations are being imposed. *See, e.g.*, Dinah Shelton, *International Decisions: Decision Regarding Communication 155/96 (Action Center for Social and Economic Rights v. Nigeria) Case No. ACHPR/COMM/A044/1*, 96 A.J.I.L. 937, 939 (2002) (Nigeria found to have breached obligations to respect, promote, and fulfill the rights guaranteed under the African Charter on Human and Peoples' Rights including right to environment. The right is closely linked to economic and social rights. No criminal liability for breach attached, the proper obligations and remedy

In considering these questions Professor David Kinley and Barrister Junko Tadaki highlight the reality that the rights most prone to TNCs' abuse are those historically labeled economic, social and cultural rights—the very rights which do not carry criminal liability when violated. In a similar vein, Professor Steven Ratner argues that to apply the subset of norms applicable to the individual (criminal), and forego the broader set of duties imposed upon the state, is to ignore the fact that the TNC is neither in capacity or power identical to a natural person, and should therefore not be treated as such.[73] These observations go to the heart of the debate. A full range of questions is ignored by retaining a dichotomous human rights framework. These omissions are perhaps best explored through a more in-depth focus on some of the contemporary examples found in the mainstream media: Trafigura, Coca-Cola, and the litigation against British mining giant Rio Tinto this past year under the ATCA in the United States.[74]

Transnational Corporation Example I: Trafigura

Cote d'Ivoire (the Ivory Coast) became independent from France in 1960.[75] Located in the western part of the African continent, this state of seventeen million currently lead by President Laurent Gbagbo has been plagued with violence despite initially ceasing hostilities from civil war in 2003 and an African Union brokered peace accord in 2005.[76] Impasse this past year caused a steady stream of human rights violations by both government and rebel forces including extrajudicial killings, torture, and arbitrary detentions.[77] Less-well publicized human rights violations by the state including the failure to provide education, healthcare, and to promote the rule of law are also systematically occurring.[78]

This past August, local residents of the poor neighborhoods north of Abidjan woke up to find a toxic compound of petrochemical waste flood-

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includes permitting independent monitoring and publicizing impact studies, providing information to effected communities, and providing avenues for meaningful dissent).

[73] Ratner, *supra* note 8, at 494-495.

[74] Sarei v. Rio Tinto, 487 F.3d 1193 (9th Cir. 2007).

[75] The World Factbook, United States Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/countrylisting.html (last visited May 1, 2008).

[76] *Id.*; HUMAN RIGHTS WATCH WORLD REPORT 2006, *supra* note 15, at 85.

[77] HUMAN RIGHTS WATCH WORLD REPORT 2006, *supra* note 15, at 85.

[78] *Id.* at 86. The World Bank has even listed Cote d'Ivoire on its 2006 LICUS List (Low-Income Countries Under Stress; recently termed "Fragile States") along with Sudan, http://www.worldbank.org/ieg/licus/licus06_map.html.

ing their communities causing wide-spread illness and multiple deaths.[79] The Greek-owned tanker which had contained the waste was leased to Trafigura, a London branch of a Swiss trading corporation.[80] Originally Trafigura negotiated a $15,000 disposal fee with the Netherlands for what it depicted as regular "slops" waste, but Dutch officials refused to dispose of the compound for the price negotiated when the quantity on board exceeded the amount projected and tests motivated by unexpected dock worker illnesses detected previously undisclosed hazardous toxin traces.[81] The Dutch authorities recalculated the disposal fee and demanded $300,000 which Trafigura refused to pay despite 28 billion dollars in revenue for 2005—a sum greater than the GDP of Cote d'Ivoire.[82] Without discharging, the vessel traveled to Estonia, took on oil products, and then after unloading its stock in Nigeria traveled on to Cote d'Ivoire where the TNC allegedly reached a deal with a local enterprise to dispose of the waste.[83] International experts from France, Holland, and Britain strenuously assert that any oil trader could easily ascertain that Cote d'Ivoire had no facilities capable of handling the high level waste carried by the vessel.[84] A spokesperson for Trafigura refused to acknowledge the company bore any responsibility for the disaster.[85]

Trafigura claimed Ivorian officials gave permission to the TNC to discharge the refuse in their port for $20,000.[86] A government report found that "Tommy," the enterprise Trafigura had contracted with for disposal of the waste, was a shell company created during the period the tanker had left Holland on its way to Cote d'Ivoire.[87] The same report found that officials at the city's port and in multiple senior government positions were negligent in their monitoring of the waste, and had permitted the discharge to go forward despite repeated warnings of the compound's toxic nature.[88] The report concluded that the illegal dumping was due to mismanagement, corruption and fraud, and negligent oversight by government agencies and offi-

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79 Polgreen & Simons, *supra* note 62.

80 *Id.*; Editorial, *supra* note 62; Polgreen, *supra* note 62; Wallis, *supra* note 62.

81 Polgreen & Simons, *supra* note 62.

82 *Id.*; The World Factbook, *supra* note 75.

83 Polgreen & Simons, *supra* note 62.

84 *Id.*; *see* BBC News, *supra* note 62 ("known or should have known" claims are the charges in a lawsuit being pursued in Dutch courts).

85 Wallis, *supra* note 62.

86 Polgreen & Simons, *supra* note 62; Editorial, *supra* note 62; Polgreen, *supra* note 62.

87 Polgreen, *supra* note 62.

88 *Id.*

cials.[89] Similar political conditions as well as minimal or non-existent domestic dumping laws have long made many countries in the African continent particularly susceptible to the harms caused by the practice of exporting and dumping industrialized nations' hazardous waste.[90]

The Trafigura example illustrates several inadequacies in applying either the state/non-state actor model or the individual criminal liability model to the TNC's responsibilities for human rights. First, we must ask ourselves how far we as an international community wish to expand the number and nature of violations which warrant criminal culpability considering the gravity of the punishment attached. Should grossly negligent, reckless, or knowing destruction of the environment resulting in death or ill health be included within the purview of criminal law or should we view this type of human rights violation through the human rights option of non-criminalized obligations? If we feel the latter, there is no current recourse for applying human rights obligations upon TNCs under the existing international human rights structure. If we believe the former, only certain individuals and not the corporate entity itself will suffer the very grave consequences for an expanded definition of human rights violations, forgoing the potential benefit which a TNC's substantial financial resources and institutional strength afford recovery efforts such as those required by mass environmental degradation. This observation implicates the second question which the Trafigura example raises, namely, should Trafigura have any monetary obligation as an independent actor to assist in clean-up and any subsequent rebuilding efforts even though the TNC was given permission by state authorities to dispose of the waste? Lastly, do we believe Trafigura had any positive obligations to avoid the disaster? Answering yes would be an impossibility under the international criminal liability model which is predicated on a negative obligation theory. To what extent was Trafigura obliged to investigate claims made by the contracted agent and governmental authorities that the waste would be properly disposed of considering the constructive notice it had regarding the potential illegality of the proposition? Indicators included Holland's sixteen times higher fee assessment for

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[89] *Id.*; *see also* Franz Wild, *Ivory Coast Officials Faulted in Report*, THE ASSOCIATED PRESS, Feb. 24, 2006, *available at* http://www.unep.org/cpi/briefs/2006Nov27.doc (last visited May 1, 2008).

[90] Wallis, *supra* note 62; Polgreen, *supra* note 62; *see generally* Hugh J. Marbug, Note, *Hazardous* WASTE Exportation: The Global Manifestation of Environmental Racism, 28 VAND. J. TRANSNAT'L L. 251, 257-259, 263-268 (1995) (discussing the disproportionate effect of toxic waste dumping on African countries who largely accept the waste because of their economic situation. Also discussing the developing nations support for the Basel Convention in contrast to developed nations).

proper incineration of the compound, known traces of hazardous toxins positively identified in the waste, and the wide-spread knowledge that countries in Africa such as Cote d'Ivoire are internationally renown as primary illegal dumping locations because they lack the legal and technical institutional capacity to halt the activity and are often times poorly overseen and economically mismatched.[91] Developed countries have often refused to sign conventions which eliminate their ability to export hazardous waste to developing countries for many of those reasons enumerated above.[92]

Transnational Corporation Example II: Coca-Cola

Coca-Cola Corporation finds itself participating in several corporate activities recently which provide substance for contemplation. As mentioned before, in 2002 Coca-Cola began operating a factory in Sudan using syrup legally exported into the country under the food and medicine exemption to the currently-existing sanctions.[93] Meanwhile, ATCA, TVPA, and RICO claims have been brought against the TNC in American federal court seeking parent liability for a Coca-Cola subsidiary's orchestrating of a union leader's murder by Colombian paramilitary forces.[94] Finally, Coca-Cola and other companies situate themselves in the heart of the broader debate surrounding water privatization, bottled water profitability, and public aquifer exploitation for commercial purposes, an issue with vast potential impact on the basic human rights of poorer populations in developing countries as access to water is causally deteriorating, the most prominent example at the moment being India.[95]

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[91] Wallis, *supra* note 62.

[92] Marbug, *supra* note 90, at 270.

[93] Gettleman, *supra* note 61.

[94] Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (attempting to hold parent corporation Coca-Cola USA liable for subsidiary's actions; the plant manager allegedly orchestrated the paramilitary action against union activists in the plant resulting in victim's assassination. Coca-Cola's motion to dismiss for lack of subject matter jurisdiction granted. Some claims against remaining defendants for the activity under ATCA survive). Prior reports of similar behavior involving Coca-Cola surfaced in Guatemala. *See* Amnesty International, *Maquila Workers Among Trade Unionists Targeted*, Feb. 1995, http://www.amnestyusa.org/business/document.do?id=2938BC265CF761A4802569A5007157EA (last visited May 1, 2008). Current reports are arising in Nicaragua. *See* WAR ON WANT, COCA-COLA, THE ALTERNATIVE REPORT 8-9 (2006), *available at* http://www.waronwant.org/downloads/cocacola.pdf.

[95] *See generally*, Douglas A. Kysar, Symposium, *Of Waterbanks, Piggybanks, and Bankruptcy: Changing Directions in Water Law: VI: Market Misgivings: The Role*

World-wide Coca-Cola's products are quite possibly the most widely disseminated in history. The only four countries in which Coca-Cola does not have a market are Myanmar, Cuba, Syria and Iraq.[96] In 2003, expected revenue for the TNC was estimated at 21 billion dollars, with two-thirds of it generated abroad (Coca-Cola is an American based TNC).[97] Third-quarter results for 2006 reveal revenues totaling 5.2 billion dollars with the net profit for the quarter equaling 213 million dollars.[98]

The three states used as foils to Coca-Cola in this Part share several commonalities, but more relevant for the purposes of this Article, contain substantial differences in internal conditions. Sudan, since obtaining independence in 1956, has been embroiled in two prolonged civil wars rooted in

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of Private Global Governance: Sustainable Development and Private Global Governance, 83 TEX. L. REV. 2109 (2005) (Coca Cola in India and the threat to the right to water in the future); *see also* Mark Williams, *Parched village sues to shut tap at Coke Drought-hit Indians say plant is draining groundwater*, SAN FRANCISCO CHRONICLE, March 6, 2005, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/03/06/MNGE2BL7161.DTL (last visited May 1, 2008); War on Want, *supra* note 101, at 4-7 (including drop in water table numbers); Public Citizen, India: Demand that Coca-Cola Stop stealing Water, http://www.citizen.org/cmep/Water/cmep_Water/reports/india/ (last visited May 1, 2008); *see generally* Jens Loewe, *Global Wars for Water, Facts on World Hunger and Poverty* ASIAN WATER BUSINESS.COM, Dec. 17, 2005, http://www.asiawaterbusiness.com/news_show.php?language=english&n_id=906 (EU in GATS negotiations requiring opening up of markets for water privatization. At the moment, Coca-Cola's actions are very controversial "where the extremely poor Indians are no longer allowed access to water that was once "their own." In addition to this, the wells are being sunk deeper and deeper (to a depth of several hundred metres in some places) and the ground water-level is falling further and further." Also, Coca-Cola runs a private bottled water line, Dasani, which is extremely profitable and was discovered to be purified tap water being sold at a cost of 2.80 euros a litre while the same water as tap water would have cost 0.076 cents). Bottled water profitability intersects with the increasingly inaccessible public water supplies, creating questions of affordability of water for drinking and agriculture for poorer populations.

[96] Paul Klebnikov, *Coke's Sinful World*, Forbes.com, http://www.forbes.com/forbes/2003/1222/086.html (last visited May 1, 2008) "Here's the part Douglas Daft left out: Building business overseas requires dealing with the devil and other questionable characters. . .Coke has had to endure that and more as it expands relentlessly into the globe's last nooks and crannies.").

[97] *Id.*

[98] Atlanta Business Chronicle, *Coca-Cola Enterprise profit at $213 M in third quarter*, Oct. 26, 2006, *available at* http://www.bizjournals.com/atlanta/stories/2006/10/23/daily33.html (last visited May 1, 2008).

ethnic hostilities.[99] Khartoum, the capital of this forty one million person state,[100] saw large amounts of violence and death despite a peace accord reached for southern region autonomy between the Muslim government and the Sudanese People's Liberation Army (SPLA) in 2005.[101] The crisis in Darfur continues unabated and government militias have indiscriminately raped, killed, and displaced millions of civilians who share the rebel forces' ethnicities.[102] The conditions in Darfur reached such a height in March of 2005 that the U.N. Security Council made its first ever state referral to the newly standing International Criminal Court.[103] Rebel groups were also extremely brutal.[104] Despite the grave and systemic human rights violations in Sudan, needed oil reserves coupled with the government's implementation of IMF and WB macroeconomics policies have brought an increase of investment into the country.[105] Seeking natural resources to fuel its large economic expansion at home, China weakened a U.N. Security Council sanctions resolution and refused to exert pressure on the Sudanese regime for its human rights abuses. China also supplied military and financial support to the government, as did several TNCs.[106]

Unlike Sudan, Columbia has stabilized somewhat in the recent past few years, though guerilla forces, government backed paramilitary groups, and state troops still commit violence against civilians regularly, making Columbia the most problematic state for human rights in South America in 2006.[107] Colombia is also home to the second largest population of inter-

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[99] The Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289, 297-299 (S.D.N.Y. 2003); World Factbook, *supra* note 75; HUMAN RIGHTS WATCH WORLD REPORT 2006, *supra* note 15, at 140-145.

[100] World Factbook, *supra* note 75.

[101] HUMAN RIGHTS WATCH WORLD REPORT 2006, *supra* note 15, at 143.

[102] *Id.* at 140.

[103] *Id.* China abstained rather than use its permanent veto power. *Id.* at 255.

[104] *Id.* at 142.

[105] Gettleman, *supra* note 61; World Factbook, *supra* note 75 (economic statistics section).

[106] HUMAN RIGHTS WATCH WORLD REPORT 2006, *supra* note 15, at 25; The Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289, 300 (S.D.N.Y. 2003) (plaintiff TNC hired security officers to coordinate strategy with the government, predecessor corporation repaired military vehicles and supplied utilities to military bases).

[107] HUMAN RIGHTS WATCH WORLD REPORT 2006, *supra* note 15, at 179-186; *see also* Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651, 733-736 (cases arising from Columbia's continuing internal armed conflict. A

nally-displaced persons behind Sudan.[108] The Colombian Constitutional Court found the government's program of assistance to the internally-displaced insufficient in 2004.[109] The following year the Court found that changes in the governmental program enacted to comply with the Court's original order were inadequate, and that the government had evidenced a lack of political will for instituting serious alterations.[110] Despite persistent violence, President Alvaro Uribe's economic domestic reforms have won some accolades from international lending institutions.[111] However, government-linked paramilitary groups are linked to wide-spread systematic attacks on labor organizers, often with the assistance of TNCs.[112] Colombia is one of the deadliest states in the hemisphere in recent history for union activists, its actions infringing upon not only *jus cogens* human rights norms such as the prohibition on extrajudicial executions and torture, but constraining the realization of a set of rights falling under the broad panoply of social, economic, and cultural rights.

Finally we contrast Coca-Cola to India, the second most populous nation in the world with a figure of over one billion. India gained independence from Britain in 1947 after being lead by the non-violent advocate Mohandas Gandhi. Although the state has made notable gains in its human rights record, problems still exist regarding abuses in the contested territory of Kashmir, and the Indian government has failed to reform its police forces who regularly utilize torture.[113] Caste-based hierarchies have been banned by law, but violence continues against certain historically marginalized groups, and Hindu-Muslim tensions perceiver.[114] On the other end of the spectrum, India's economy has averaged a 7% GDP increase every year since 1997, including 2006, where it achieved an 8.5% increase.[115] Poverty has been reduced by an estimated 10%.[116] A large sector of the population

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historical analysis of the conflict indicates that the government is presumptively behind paramilitary attacks on civilians).

[108] HUMAN RIGHTS WATCH WORLD REPORT 2006, *supra* note 15, at 184.

[109] *Id.*

[110] *Id.*

[111] World Factbook, *supra* note 75.

[112] *See, e.g.*, Sinaltrainal v. Coca-Cola, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *see also* Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

[113] HUMAN RIGHTS WATCH WORLD REPORT 2006, *supra* note 15, at 262-263.

[114] *Id.* at 264-265.

[115] World Factbook, *supra* note 75.

[116] *Id.*

is educated and bilingual.[117] The rapid speed of development, however, has increased the exposure of civilians to avoidable industrial accidents without impelling the concomitant implementation of proportionate civilian protections; a common trend in developing nations seeking to attract needed foreign investment in the form of TNCs' business.[118] The 1984 accident in Bhopal graphically illustrated the damage a TNC's negligence could inflict on a community and the concurrent gaps which quick modernization rendered in the state institutions meant to regulate corporate behavior or protect applicable constituencies. Over 1,500 persons died and 200,000 made ill within days of a poisonous gas leak at the Union Carbide of India Ltd. plant in Bhopal.[119] After calculating fatalities caused by the ill-effects of long-term exposure, the death toll is estimated at approximately 15,000.[120] At the time of the disaster the surrounding community was unaware that a damp cloth placed over their faces would have shielded them from a lethal exposure.[121] Victims seeking relief filed actions in the United States, but the suits were dismissed under the doctrine of forum non conveniens even though Indian courts were too procedurally underdeveloped to effectively host the lawsuits at the time of the dismissal.[122]

The activities and comparative relationships Coca-Cola pursues in these three countries raises a whole set of considerations further complicating and troubling any attempt at grafting the current international human rights framework onto TNCs. First, as implicated by Coca-Cola's interaction with Sudan, should a TNC bear the duty to withhold from investing in or profiting from objectively highest-level repressive regimes—in other words states in breach of norms carrying criminal culpability such as genocide? In analyzing the questions arising from Coca-Cola's activities in Columbia, does the TNC carry negative or positive obligations to protect social, cultural, and economic rights such as the right to organize, an oft-disapproved practice that by no means has reached customary norm status?

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[117] *Id.*

[118] MEYER, *supra* note 51, at 150 (investigation tracking hazards created in developing world by modern industry finds a growing international trend of which the accident in Bhopal is indicative due to developing nations attempt to attract western TNCs).

[119] *Id.* at 151; SAHNI, *supra* note 3, at 137.

[120] BEYOND VOLUNTARISM, *supra* note 58, at 14.

[121] MEYER, *supra* note 51, at 151.

[122] In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986); *see also* SAHNI, *supra* note 3, at 137-138 (discussing dismissal from federal courts due to *forum non conveniens*); MEYER, *supra* note 51, at 149-153.

And finally, we look towards Coca-Cola's relationship to India; an emerging international economic powerhouse which arguably presents an improving picture of rule of law—how should the responsibilities of a TNC change according to the country it finds itself in and the relationship the two share?

Transnational Corporation Example III: Rio Tinto

The last question voiced above as well as several others seem best explored by considering the atrocities which occurred in the 1990s on the island of Bougainville, Papua New Guinea (PNG) where 20,000 civilians were killed following Rio-Tinto Plc's civil war generating activities.[123] In stronger states where domestic regulatory systems are more likely to function effectively and enforcement to occur[124] it may be sufficient hypothetically to hold the state responsible for ensuring horizontal as well as vertical rights enjoyment.[125] This method of enforcement does not, of course, mitigate the understanding that all actors bear human rights responsibilities, but it does conform to the current international human rights law framework reinforcing the primacy of the state in protecting individual rights. The ultimate desirability of this model is questioned most forcefully when it is applied to weaker states however: those who depend on a TNC's behavioral self-regulation or in the instances where a state goes substantially further and participates in active alliances or is complicit in a TNC's violative behavior in order to boost essential economic investment. The realities of how comparable disproportionate political and economic strength mature weakens effective human rights protections under the state-centric model.

Papua New Guinea, which gained independence in 1975, depends on mining production for two-thirds of its export earnings.[126] In 2005, residents of the island of Bougainville re-filed an action in U.S. federal courts attempting to collect civil damages for a large number of grave violations of customary international law against Australian-based Rio Tinto, a business group operating copper and gold mines on the island.[127] To secure the deal

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[123] World Factbook, *supra* note 75.

[124] *See* Stuart Kirsch, *Mining and Environmental Human Rights in Papua New Guinea*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 115, 115 (Jedrzej George Frynas & Scot Pegg eds., 2003) (framing the following history of Ok Tedi mine and BHP lawsuit by 30,000 indigenous persons in Australia settled out of court in 1996).

[125] Kinley & Tadaki, *supra* note 7, at 937 (vertical application of human rights law is when the state violates an individuals rights. Horizontal application of human rights law functions in respect to actions between private actors).

[126] World Factbook, *supra* note 75.

[127] Sarei v. Rio Tino, 487 F.3d 1193, 1197 (9th Cir. 2007).

for rights to the natural resources, Rio Tinto offered 19.1% of the mine's profits to the PNG government.[128] The ensuing operations resulted in devastating environmental degradation and poisoning which ruined the health and subsidence of the islanders.[129] The company paid lower wages to the Black islanders it employer than the White workers it recruited from off the island, and subjected the Black workers to "slave-like" conditions.[130] After local residents sabotaged the mine protesting the TNC's lack of consideration for the community's concerns and ill-treatment of its residents, Rio Tinto ordered the government to quell the protests in a bid to reopen the mines. The ensuing violence and civilian fatalities resulting from the company's demands triggered a ten year civil war on the island.[131] Rio Tinto allegedly provided helicopters to transport military troops and facilitate their operations.[132] Repeated grave violations of humanitarian law and numerous crimes against humanity were committed, including aerial bombings and burnings of entire villages, thousands of civilians were killed and systematic acts of cruelty, rape and degrading treatment, often at the behest of Rio Tinto who was in a superior position to the poverty-stricken and poorly-governed nation.[133] The U.S. federal district court found that

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[128] *Id.* at 1198.

[129] *Id.*; *see also* Press Release, Hagens, Berman, Sobol, Shapiro LLP, OCEANIC ISLANDERS USE FEDERAL LAW TO SUE BRITISH MINING GIANT RIO TINTO FOR ALLEGED ECOCIDE AND HUMAN RIGHTS CRIMES (SEPT. 18, 2000), HTTP://FINDARTICLES.COM/P/ARTICLES/MI_M0EIN/IS_2000_SEPT_6/AI_65015334 (LAST VISITED MAY 1, 2008).

[130] Sarei v. Rio Tino, 456 F. 3d at 1197.

[131] *Id.*

[132] Hagens, Berman, *supra* note 129; Sarei v. Rio Tinto Plc., 221 F. Supp. 2d 1116, 1149 (C.D. Cal. 2002) (plaintiffs alleging Rio Tinto provided helicopters), *rev'd*, Sarei v. Rio Tino, 487 F.3d 1193 (9th Cir. 2007) (reversing the dismissal of claims arguing violations of anti-discrimination norms and war crimes, among others, and remanded), *vacated on other grounds, rehearing en banc granted*, 499 F.3d 923.

[133] Sarei v. Rio Tino, 487 F.3d 1193, 1198 (9th Cir. 2007); JOSEPH, *supra* note 5, at 35 (in analyzing the case, Joseph points out that the plaintiff's made out a proximate cause claim against Rio Tinto, that is, the relationship between the state and TNC was such that Rio Tinto's threats to disinvest resulted in the government's actions. Rio Tinto knew this would be the result, and was in a sufficiently more powerful position that the state so effectively was responsible for the subsequent atrocities); World Factbook, *supra* note 75 (Prime Minster Somare will be the first government in decades to serve a full five year term); *see also* Hagens, Berman, *supra* note 129 ("By exerting financial pressure, Rio Tinto played an active role in the demise of the Bougainville's environment and people, as surely as if they'd pulled the trigger themselves.").

whether adjudicated pursuant to a "joint action" or via a "control" theory test for liability under ATCA, there was, assuming all allegations to be true, sufficient proof that Rio Tinto was the "proximate cause" of the PNG government's actions to withstand a motion to dismiss.[134] Threats of disinvestment made by the leadership of Rio Tinto to the poorer PNG combined with their support of the military campaign and decade long blockade of the island amounted to effective control of the tortious operations.[135]

The atrocities committed in Bougainville, Papua New Guinea make the example one of the less complicated to analyze because of the extremity of the behavior. The political instability of the nation, economic dependence on the TNC's operations, and the direct involvement and control by Rio Tinto of PNG's decision-making processes, makes the situation relatively rare on the global scale. The example, however, serves as an exemplary analytic tool for addressing the necessity of reconceptualizing international human rights law in relation to the TNC. As was questioned in all three corporate examples in this Part but most clearly illustrated by Rio Tinto's situation, what independent human rights responsibilities should the TNC have when the state sanctions or desires the human rights violation itself? Further, does the relationship of the TNC to the state and the population factor into the ultimate calculus for ascertaining the extent of human rights obligations?[136]

PART III: INTERNATIONAL TREATMENT: A BRIEF PRIMER

To contextualize the theories and debate surrounding the future content of TNCs' legal responsibilities, a brief mapping of the current state

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[134] Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1149 (C.D. Cal. 2002) ("The court concludes that, if proved, these facts in combination are sufficient to permit a jury to find that the acts of PNG are "fairly attributable" to Rio Tinto, that it was "willful participant" in those acts, and/or that it exercised "control" over them. The allegations of the war crimes claim are thus sufficient to state a claim and confer jurisdiction under the ATCA."). The claims were all dismissed because of the political questions doctrine. *Id.* at 1208-1209, *rev'd*, Sarei v. Rio Tinto, 487 F. 3d 1193 (9th Cir. 2007) (reversing the dismissal of certain claims based on the political questions doctrine).

[135] Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1148-1149 (C.D. Cal. 2002) (listing plaintiffs' claims for purposes of defeating the motion to dismiss which include particulars of Rio Tinto's threats); Sarei v. Rio Tinto, 487 F.3d 1193, 1199 (9th Cir. 2007) (agreeing with the district court's findings of proximate cause as alleged by plaintiff's claims for the purposes of defeating motion to dismiss).

[136] A similar type inquiry is posited by Alston in a case study regarding Shell Oil in Nigeria. *See* Alston, *supra* note 6, at 11-14.

of regulation helps the project. The increasing pressure TNCs are feeling to alter their behavior speaks to not only their growing importance in the global hierarchy, but also more importantly to their ability to carry international personality; that is, to be both the beneficiary,[137] but also a duty-holder, under international law. It is important to appreciate what structural changes would be required when theories of direct corporate regulation by international human rights law are proposed, as well as those which are not.

Detractors of international subjectivity often draw attention to the significant modifications necessary of the international legal structure if TNCs are to be accommodated.[138] Additionally, the previously discussed erosion of state sovereignty generates inertia against modifying the international human rights framework in unlikely players, namely, nation-states themselves.[139]

While legitimate considerations, the fears articulated by opponents often fail to adequately account for the already existing informal market-based and formal legal-based regulatory mechanisms influencing TNCs' behavior which have produced something less than the dire consequences prophesied. Attempts to modify the international arena to accommodate private actors as a whole have neither wrought destruction on the existence of state sovereignty, nor proved impossible to implement, nor conflicted ideologically with the broader human rights discourse by expanding emphasis and scrutiny to a broader range of players than solely states.[140] As tracing the various modes of non-state actor regulation suggests, the more productive process for integrating these considerations is not by invoking them as definitive insurmountable obstacles, but by utilizing them to inform and guide future structural and policy changes. The momentum towards direct

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[137] As mentioned prior, TNCs are already beneficiaries and holders of limited enforceable rights under certain trade and investment frameworks. JAGERS, *supra* note 47.

[138] *See, e.g.*, United States Council for International Business, *UN to Review Proposed Code on Human Rights for Business*, Mar. 5, 2004, http://www.uscib.org/index.asp?documentID=2846 (last visited May 1, 2008) ("The major problem is that the code would represent a fundamental shift in responsibility for protecting human rights – from governments to private actors, including companies – effectively privatizing the enforcement of human rights laws.").

[139] *See* Carlos Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 948-958 (2005).

[140] Henkin, *supra* note 31, at 5 (the human rights movement following WWII caused a major "rent" in state sovereignty as we have come to understand it, but despite this development, state sovereignty is alive and well entering the twenty first century).

regulation of the transnational corporate form under an international human rights framework requires alterations of the system but not ones of such a radical nature as to render impossible or unfavorable the attempted transformation, in contrast to opponents' insinuations. Already a number of non-state actor entities have been located within the international scheme and have acquired direct hard-law obligations without destabilizing the state-centric model or diffusing the state's human rights responsibilities.

Section I: Non-legal Forms of Accountability

Upfront it should be noted that the legal world does not hold a monopoly over the discussion of human rights and corporate behavior. Actually, up until this point in time the primary mode of administering censure or imposing obligations on TNCs has been through various market-based systems of pressure such as public campaigns, niche competition development, socially-conscious investing tactics, and other non-legal strategies.[141] The construction of positive obligations is particularly well formulated in non-legal histories as corporations responded to, and even capitalized on, nongovernmental organizations (NGOs) adept use of media campaigns promoting human rights values in the general populace. The recent prolifera-

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[141] *See generally*, Lance Compa & and Tashia Hinchliffe-Darricarrere, *Doing Business in China and Latin America: Developments in Comparative and International Labor Law: Enforcing International Labor Rights through* CORPORATE CODES OF CONDUCT, *33* COLUM. J. TRANSNAT'L L. 663 (1995); Sean D. Murphy, *Essay in Honor of Oscar Schachter: Taking Multinational* CORPORATE CODES OF CONDUCT to the Next Level, *43* COLUM. J. TRANSNAT'L L. 389,391-403 (2005); Simon Webley, The Nature and Value of Internal Codes of Ethics, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 107, 107-113 (Michael K. Addo ed., 1999) (*UK companies with voluntary codes of conduct rose from 18% to 57%); Alex Wawaryk,* Regulating Transnational Corporations through Corporate Codes of Conduct, in TRANSNATIONAL CORPORATION AND HUMAN RIGHTS 53, 53-73 (Jedrzej George Frynas & Scott Peggs eds., 2003) (*analyzing four types of codes which have been attempted; the most common form is the voluntary self-adapted internal model);* see also Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria, in* NON-STATE ACTORS AND HUMAN RIGHTS 177, 180-187 (Philip Alston ed., 2005) (the rise of socially conscious investing, NGO campaigns, certification formulas, shareholder pressure etc. has developed a market-based regime of regulation for human rights); *See, e.g.*, FABIENNE FORTANIER & MARIA MAHER, FOREIGN DIRECT INVESTMENT AND SUSTAINABLE DEVELOPMENT 5 (OECD, 2001), *available at* http://www.oecd.org/dataoecd/33/48/1906135.pdf (since the late 80s a growth in socially conscious investing has culminated in 13% of the total investment market by 1999 in the United States).

tion of NGO corporate accountability campaigns has heavily influenced consumer behavior, forcing business groups to confront the dangers of infringing upon human rights, and the potential profitability in some instances even of actively promoting them.[142]

Non-legal mechanisms, most prominent of which are the now ubiquitous voluntarily adopted internal codes of conduct,[143] have long shared a symbiotic relationship with international legal objectives. Though primarily in response to financial concerns, TNCs have also been partially influenced by legal instruments and maneuvers at the international level. For example, the promulgation of several non-binding legal instruments addressing TNC responsibilities has affected TNCs' own normative ideologies, most notably by shaping their internal voluntary codes of conduct.[144] Conversely, these numerous voluntary codes have influenced the development of a set of emerging duty standards for TNCs[145] or have, on occasion, inspired innovative litigation at the domestic level for the vindication of international rights

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[142] Steinhardt, *supra* note 141, at 180-187; WORKING PARTY OF THE TRADE COMMITTEE, CODES OF CORPORATE CONDUCT—AN EXPANDED REVIEW OF THEIR CONTENT 11-14 (OECD, 2000) [hereinafter CODES OF CORPORATE CONDUCT], *available at* http://appli1.oecd.org/olis/1999doc.nsf/c16431e1b3f24c0ac12569fa005d1d99/c12568d1006e01b9c12568f70035dd97/$FILE/00078855.PDF (for example, while most voluntary ethics codes restricted themselves to compliance with law for environmental regulation, proactive measures included development of environmentally friendly products and services, exerting influence on partners, contractors and suppliers, commitments to sustainable development, and considering community concerns. Labor rights are also significantly dealt with in most codes, though they tend to adhere to minimal standards and forgo guaranteeing unionizations rights). The Body Shop is probably best known for these business tactics. The TNC has codified its commitments from topics ranging from animal rights, to environmental and sustainable development initiatives, to human rights—including a commitment to abide by all the principles enshrined in the UDHR including screening suppliers to ensure they do likewise. The Body Shop, http://www.thebodyshopinternational.com/Values+and+Campaigns/Our+Values/Defend+Human+Rights/Home.htm (last visited May 1, 2008).

[143] *See* Kinley & Tadaki, *supra* note 7, at 954-955 (companies include: Adidas, Nike, The Gap, Reebok, Levi Strauss & Co., Royal Dutch Shell, BP, and Rio Tinto); *Webley,* supra *note 141, at 109;* CODES OF CORPORATE CONDUCT, *supra* note 142.

[144] Steinhardt, *supra* note 141, at 184 (drawing substance from i.e., UDHR and ILO conventions).

[145] *See, e.g.*, Kinley & Tadaki, *supra* note 7, at 959 (helping shape the Draft UN Norms).

concepts.[146] As noted, voluntary codes of ethics or conduct are also largely adopted in response to non-governmental organization and consumer action campaigns.[147] Hitherto the most effective tool in modern times, consumer awareness campaigns and grass-roots pressure has forced a number of corporations to attempt improving their practices.[148] With that said however, there are several noticeable weaknesses in depending solely on internal voluntary regulation or other informal market-based strategies, though public pressure as a whole most certainly influences TNCs' human rights behavior.[149] First, there exist no methods of legal enforcement for voluntary codes and there is an inherent fallacy in allowing a TNC, or any actor, to be the sole monitor of its own compliance.[150] Second, a philosophical point: why are natural persons, international organizations, and states subject to international legal scrutiny, but the TNC permitted to circumvent it? The conception of human right in the modern era places responsibilities on all entities[151] which have the ability to affect the rights and dignity of the person. That understanding of inherent worth underlies the rationale behind acknowledging TNC subjectivity under international law in the same manner it validates the subjectivity of all other entities currently governed by

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[146] Kasky v. Nike, Inc., 27 Cal. 4th 939, 947, 963-964 (Cal. 2002), *cert. dismissed* 539 U.S. 654 (2003) (plaintiff pressed suit against corporation for under California Business and Professions Code § 17200 et seq. for false advertising contravening California's business code and consumer protection laws § 17500 et seq. Part of the misleading information was Nike's publicized MOU assumed responsibility for subcontractors violations of labor, environmental, health and safety, and wage/overtime compliance. The TNC promoted for commercial gain its statements and documents demonstrating its good behavior).

[147] *See, e.g.*, Joseph, *supra* note 12, at 80-82.

[148] *See* Andrew Fagan, *Buying right: Consuming ethically and human rights*, *in* HUMAN RIGHTS AND CAPITALISM 115, 115 (Janet Dine & Andrew Fagan eds., 2006); Steinhard, *supra* note 152, at 181-187; Tangen, Rudsar & Bergesen, *supra* note 66, at 187-189 (public forced Shell to change its policy towards human rights).

[149] *See, e.g.*, *Wawaryk*, *supra* note 141, at 62-64.

[150] *Id.* (enforcement problems are most common critique); Kinley & Tadaki, *supra* note 7, at 955-956; Joseph, *supra* note 12, at 82-83; BEYOND VOLUNTARISM, *supra* note 58, at 7-9.

[151] This has grown to include international organizations like the UN Peace Keeping forces. *See* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Lexis 6 (Apr. 11) (granting the organization standing as a subject of international law to bring claims). In the Nuremberg Charter, Article 9 granted the tribunal competence to declare an organization criminal status, and Article 10 noted group members could become implicated personally for their membership. SAHNI, *supra* note 3, at 52.

the international human rights framework. The centrality of human dignity to the formulation of human rights grounds the starting position for all further analysis.[152]

Section II: International Legal Accountability of Non-State Actors

Subsection IIA: Judicial Treatment

To preface, the primary mode by which international human rights obligations are constructed and enforced is through domestic adoption of legislation and through the nation's judicial system.[153] To that end, as noted in the introduction of this Article, most litigation against corporations and other non-state actors for human rights violations occurs in domestic jurisdictions.[154] Pertaining to human rights violations which take place in non-domestic geographies, the United States' ATCA is particularly worth bearing mention. The ATCA has served as the primary tool for human rights litigation against TNCs to date.[155] Cases against Del Monte, Chevron, Royal Dutch Shell, Rio Tinto, Talisman Energy, Occidental Petroleum, Eastman Kodak, Texaco, Exxon, Unocal, Freeport-McMoRan, Coca-Cola, the Gap, Unocal, and Pfizer have been pursued, among others, with varying degrees of success.[156]

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[152] CLAPHAM, *supra* note 27, at 538-539.

[153] BEYOND VOLUNTARISM, *supra* note 58, at 11, 77; *see also* Reinisch, *supra* note 6, at 53 (way to secure human rights is to "translate international human rights guarantees into domestic legal order.").

[154] JOSEPH, *supra* note 5, at 16-17; Reinisch, *supra* note 6, at 55-56.

[155] JOSEPH, *supra* note 5, at 16-17.

[156] Aldana v. Del Monte Fresh Produce, Inc., 416 F.3d 1242 (11th Cir. 2005); Bowoto v. Chevron, 2006 U.S. Dist. Lexis 63209 (N.D. Cal. 2006); Kiobel v. Royal Dutch Petroleum, 2004 U.S. Dist. Lexis 28813 (S.D.N.Y. 2004); Sarei v Rio Tinto, 487 F.3d 1193 (9th Cir. 2007); Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C. Dist. Cal. 2005); Abdullahi v. Pfizer, Inc., *2005 U.S. Dist. Lexis 16126 (2005);* Sinaltrainal v. Coca-Cola, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *Beanal v. Freeport-McMoran, Inc.,* 197 F.3d 161 (5th Cir. 1999); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1090-1094 (S.D. Fla. 1997); Doe v. Exxon Mobil, 393 F. Supp. 2d 20, 26 (D.D.C. 2005); Does 1 v. The Gap, Inc., *2001 U.S. Dist. Lexis 25035 (Dist. N. Mariana Islands, 2001); Flores v. S. Peru Copper Corp.,* 253 F. Supp. 2d 510 (S.D.N.Y. 2002); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

An initial worry surfaced prior to the 2004 Supreme Court Case, *Sosa v. Alvarez-Machain*,[157] that the use of the ATCA, the United States' analogue of a universal jurisdiction statute but for non-criminal civil claims only, would be eliminated as a mode of recourse for aliens seeking redress for violations of their human rights. The decision in *Sosa* did not erase the potential for using the ATCA to serve this aim, despite fearful pre-judgment speculation, but the decision did partially limit the scope of what constitutes violations contravening the law of nations for the purposes of the Act.[158] A full detailed analysis of the various state methods for imposing civil or criminal accountability is beyond the objectives of this article.[159] Irrespective of any individual states' potential domestic judicial remedies, the question still remains whether the TNC, supranational in character and interacting with a spectrum of state players who may lack the technical capacity or political will to enforce human rights standards independently,

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[157] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (holding that ATCA was a jurisdictional statute and granted a private cause of action for international law transgressions for aliens).

[158] *See generally* Aldana v. Del Monte Fresh Produce, 416 F.3d at 1246-1247 (discussing effects of Sosa on the analysis: "the federal courts are to be "vigilant doorkeepers" but a modest number of international law violations may pass through."); Kiobel v. Royal Dutch Petroleum, 244 F. Supp. 2d 289 (S.D.N.Y 2006) (affirming refusal to dismiss plaintiff's claims for crimes against humanity, torture, and arbitrary arrest and detention despite intervening Sosa decision).

[159] Good sources include Sarah Joseph's book looking in depth at the ATCA named CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION, *supra* note 6. On an additional note, examples of corporate accountability for international rights violations have also been developed on an ad hoc basis by individual states within the US. For example, California has legislated a private right of action for anyone (or their estate) who was forced into labor by the Nazis or their sympathizers and allies for any time between 1929-1945 granting a right to recovery of compensation against the entity for whom the labour was performed, or its successor in interest. CAL. CIV. CODE § 354.6 (Deering 2006); *see generally* Michael Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2001). The same cannot be said for recourse of harms pertaining to apartheid litigation unfortunately. In Re: South African Apartheid Litigation, 346 F. Supp. 2d 538, 544 (S.D.N.Y. 2004) ("at the least, defendants [corporations] benefited from a system that provided a glut of cheap labor."). The litigation was merged and dismissed.

should be subject to the direct supervision of the international human rights legal regime, and, if so, to what extent?[160]

Jurisprudentially, the roots of corporate accountability for human rights violations may be deciphered from the treatment of certain other categories of non-state actors in international courts since direct litigation against or on behalf of the corporation has not yet occurred in that arena.

Foreshadowings of corporate liability under international law can be traced back to the Second World War where the narrower subset of human rights obligations, those implicating individual criminal culpability, imposed upon prominent corporate participants for aiding and abetting the Nazi extermination plan. The material role leading industrialists and their business activities played in supporting the Nazi regime has been fastidiously documented and was the subject of multiple prosecutorial attempts following the cessation of hostilities.[161] The behavior of the corporation as a judicial person was not *per se* at issue in these trials as the Nuremberg statute did not authorize jurisdiction over non-natural persons.[162] Rather, individual criminal accountability was imposed in limited cases of complicity, the leading example being the sentencing of two high-level corporate officials for supplying Zyklon B, the gas used to kill prisoners in Auschwitz and other concentration camps, to the Germans with the knowledge the gas would be used to pursue such an objective.[163] Charges arose from business

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[160] *See* Wells & Elias, *supra* note 51, at 146-148; *see also* Joseph, *supra* note 12, at 78; Ratner, *supra* note 8, at 461; De Schutter, *supra* note 57, at 237-238; Kinley & Tadaki, *supra* note 7, at 938.

[161] *See generally* Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers"*, 9 TEMP. INT'L & COMP. L.J. 173, 181-249 (1995); *see also* Beth Stephens, Symposium, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 45-53 (2002); Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of prosecuting corporate officials whose business transactions facilitate war crimes and crimes against humanity*, 56 A.F.L. REV. 167, 167-195 (2005).

> If you want to indict industrialists who helped to rearm Germany, you will have to indict your own too. The *Opel Werke,* for instance, who did nothing but war production, were owned by your GENERAL MOTORS. Hjalmer Horace Greeley Schacht, Defendant at Int. Military Tribunal at Nuremberg.

[162] JAGERS, *supra* note 47, at 223.

[163] The Zyklon B Case: Trial of Bruno Tesch and Two Others, 1 Law Reports of Trials of War Criminals 93 (Brit. Mil. Ct. 1946) (Tesch and Weinbacher were found guilty. The third, Drosihn, was acquitted. The two were sentenced to death by hanging. The sentences were later confirmed and carried out); *see also* Jacob-

practices including the use of enslaved labor, crimes of complicity in genocide, war crimes, and other crimes against humanity in connection with aiding the Nazi efforts.[164] The Tribunal in adjudicating these cases formulated two important conclusions. First, obligations pertaining to particular per se wrongs existed regardless of the status of the duty bearer, in other words, individuals in their private capacity and nature bore certain obligations, regardless of their non-public/state nature.[165] Second, by imposing liability on corporate leadership in their individualized capacity for enterprise activity, the tribunals took the further step of connecting limited violative forms of business activity to private, non-state accountability.

Since World War II, international criminal tribunals have extended principles of liability to non-state actors independent of the state action requirement for certain crimes. The ICTY, for example, severed the state action requirement and instead focused on accountability by virtue of de facto control over a territory when it tried the Serb leader Dusan Tadic for war crimes and crimes against humanity during the ethnic strife in the former Yugoslavia.[166]

> The prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising *de facto* control over a particular territory but without international recognition or formal status of a *de jure* state, or by a terrorist group or organization. The defense does not challenge this assertion, which conforms with recent statements regarding crimes against humanity.[167]

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son, *supra* note 161, at 193-195; SAHNI, *supra* note 3, at 60; Ratner, *supra* note 8, at 477-478.

[164] *See* Jacobson, *supra* note 161; Stephens, *supra* note 161.

[165] *See* Steinhardt, *supra* note 141, at 196-198.

[166] Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 654 (May 7, 1997). The ICTR extends liability for crimes against humanity to times of peace, eliminating any nexus requirement to armed conflict. *See* SAHNI, *supra* note 3, at 63; the importance of de facto control has emerged due to the changing nature of armed conflict since WWII. Increasingly, internal armed conflict is the paradigm, and groups such as the SPLA, Tamil Tigers in Sri Lanka, and FARC in Colombia are exercising de facto control over regions and their role and responsibilities need to be considered in the international human rights regime. *See* Alston, *supra* note 6, at 18-19.

[167] Prosecutor v. Tadic, Case No. IT-94-1-T, ¶ 654, Opinion and Judgment.

This extension proves useful conceptually, if somewhat less-so technically, because it extends liability for grave violations of human rights norms to entities beyond those classified as the official state, and does so to entities acting in their independent capacity not only when they work in conjunction with the state. It reinforces the understanding that human rights emanate from the individual and concern all those who come into contact with his or her person and may violate those rights—they are not merely a set of affairs arising from the citizen-state relationship. The text of the decision also indicates that certain non-state actor organizations can have independent or de facto control over a territory and assume extra responsibilities because of that position. Though *Tadic* referenced crimes committed during certified armed conflict and not during the regular course of daily activities, the concept of independent control produces helpful theoretical grounding for developing the narrative and language of TNC obligations. These two themes running in the *Tadic* case, extension of liability beyond state actors and the inspection of the relevant actors relationship to the population, assist in bridging the steps towards configuring TNC subjectivity under international law. Though extremes are not common, relationships between the civilian population and the corporation have at times taken on attributes of non-state actor de facto control, Rio Tinto being exemplary for purposes of this hypothetical. At other times a more nuanced assessment shows similar aspects and relationships of non-state actor control over the population within the borders of a given sectors or service as privatization is stressed in economic development practices.

The International Court of Justice (ICJ) has also extended standing to a number of non-state actors to pursue civil remedies for human rights violations through the international system. The past ability of the international structure to evolve and accommodate different manners of actors proves useful when assessing its future capabilities of integrating TNCs as subjects under its jurisdiction. The question in the *Reparations for Injuries Suffered in the Service of the United Nations* case was whether the United Nations, as an organization, had the ability to bring an international claim for reparations against the responsible state if its agent was harmed in the performance of his duties while stationed therein.[168] The United Nations inquired as to both its own recompenses and on behalf of the victim and to those entitled through him.[169] The ICJ found that the UN could seek reparations on its own behalf for breach of obligations owed to it from all states,

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[168] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Lexis 6 (Apr. 11).

[169] *Id.* at 1.

whether member of the United Nations or not.[170] In regards to seeking reparations on behalf of the victim or his beneficiaries, the ICJ found that the UN Charter mandated certain activities of the organization necessary for effectively carrying out its difficult mission. Because of this condition, the agents of the organization were entitled to assurance of certain protections while assisting in fulfilling those duties.[171] The ICJ instituted a practical test, finding that the organization had the "capacity to exercise functional protection in respect of its agents" due to its mandate[172] and therefore inherited an objective set of rights and *obligations* regardless of whether the state in question was a member of the UN. The ICJ decision invested the U.N., a supranational actor, with objective international personality under international human rights law.[173] Though a composite of its member states, the integration of the U.N. into the international human rights legal framework reflects the system's capacity to recognize and enforce obligations against entities other than solely the state without the system's complete fragmentation or collapse.

Regional bodies have been imposing human rights obligations directly on non-state actors for several decades. The European Court of Justice for example in *Walrave and Koch v. Association of Union Cyclists*, the court held that limiting anti-discrimination obligations to the public sphere would risk undermining the prohibitions entirely.[174] The court reinforced the concept that private corporations bore human rights responsibilities directly in *Defrenne v. Sabena*. The court again noted that, while establishing judicial enforcement of non-discrimination rights was an obligation of the state's, the legal duty to pay men and women equally continued to apply directly to the employer, irrespective of whether they are a private or public entity.[175] The orders stemming from these adjudications have been directly applied to the TNC without requirement of the state acting as an intermediary. The ability of regional legal systems to accommodate private actors without exponentially undermining the state's sovereignty or responsibility for promoting human rights calls into question the assumption that the international framework cannot do likewise.

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[170] *Id.* at 4.

[171] *Id.* at 6.

[172] *Id.*

[173] *Id.* at 7.

[174] Case 36/74, B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, 1974 E.C.R. 1405, ¶¶ 17, 19-20.

[175] Case 43/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, 1976 E.C.R. 455, ¶¶ 22, 38, 39, 40.

Additionally, international non-human rights legal bodies have managed the task of integrating non-state actors into their structures. The subjectivity of the corporation as a separate legal entity under various domestic and international schemes is cognizable in practically every nation.[176] The universality of that subjectivity has caused the TNC to benefit from access to judicial processes at the international level. Investment and trade organizations such as the IMF, WB, and WTO have created enforcement mechanisms which sometimes provide direct recourse for TNCs suffering violations of their recognized rights against foreign states.[177]

Subsection IIB: Legislative Treatment

International legal regimes in other sectors have implemented systems imposing obligations on corporations through treaty-based agreements. While the various treaties leave enforcement up to the domestic judicial system, the obligations and liabilities are directly imposed upon the corporation as an independent duty-bearer. Corporations which violate environmental standards, for example, are liable for civil damages under several treaties including the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships, the 1963 Vienna Convention on Civil Liability for Nuclear Damages, the 1969 International Convention on Civil Liability for Oil Pollution Damage and the attached 1984 Protocol, the 1971 Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, and the 1976 Convention on Civil Liability

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[176] *See* Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase), 1970 I.C.J. Lexis 2, 7 (1970) (the court rationalized that international law recognizes the institutions of municipal (state) law, and that under state law the company's rights are firmly distinct from shareholder rights. The company is endowed with legal personality of its own); *see also* Michael Addo, *The Corporation as a Victim of Human Rights Violations*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 187, 192 (Michael K. Addo ed., 1999) (most legal jurisdictions recognize certain entitlements of the corporation); *see generally* ANITA RAMASASTRY & ROBERT THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW (FAFO INSTITUTE, 2006) (many states go even further and have domestic regimes that acknowledge corporations and other judicially created persons can be liable for criminal violations), *available at* www.fafo.no/pub/rapp/536/536.pdf (last visited Mar. 20, 2007).

[177] Reinisch, *supra* note 6, at 85; Kinley & Tadaki, *supra* note 7, at 946; Aderman & Kariyawasam, *supra* note 48, at 181; Ratner, *supra* note 8, at 488.

for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources.[178]

In the human rights field, several international organs have attempted to move beyond the restricted discourse of individual criminal liability to discuss and articulate TNC obligations for a broader set of human rights. The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises were adopted in 1976.[179] They function in a non-binding fashion. To encourage implementation and observance the Guidelines employ a consultation mechanism which receives complaints and in return "clarifies" the guidelines for all invested parties including the state, NGOs, and corporations. Clarifications are not legally-enforceable, though state parties signatory to the document commit to promoting the standards enumerated in the instrument and the state is obligated to set up the prerequisite complaint procedures.[180] The instrument targets both the state and corporations in its language, although it retains general principles of international law in privileging the prerogative of the national government in setting local standards. The OECD Guidelines seek to pressure TNCs into adhering to those local standards. However, the style in which the Guidelines focus on the state and the corporation in requesting the positive facilitation of its contents constructs the foundation for future OECD directives targeted solely at the TNC in its own separate capacity.[181] In 2000, a revised version of the OECD formulated language directly addressing TNCs separately.[182] To date, thirty OECD states have accepted the instrument and an additional eight non-state members have adopted it.[183] The Guidelines were last updated in 2000 and, despite some complaints regarding their ineffectiveness,[184] advocates argue that several positive consequences have resulted, not the least being that international instruments

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[178] Ratner, *supra* note 8, at 479-480.

[179] Joachim Karl, *The OECD Guidelines for Multinational Enterprises*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 89, 90 (Michael K. Addo ed., 1999).

[180] *Id.* at 89; CLAPHAM, *supra* note 27, at 202.

[181] CLAPHAM, *supra* note 27, at 202.

[182] BEYOND VOLUNTARISM, *supra* note 58, at 66.

[183] CLAPHAM, *supra* note 27, at 203.

[184] *See, e.g.*, Huner, *supra* note 64, at 202 (general malaise in the mid 90s); Kinley & Tadaki, *supra* note 7, at 950-951.

were directly speaking to TNCs regarding their duties to promote a broader spectrum of human rights.[185]

Another quasi-legislative international attempt at regulating TNC behavior is the International Labor Organization's (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises. The instrument was adopted in 1977 and amended in 2000.[186] Similar to the OECD guidelines, it is non-binding, but is different in nature in that it initially directly spoke to TNCs as independent entities as well as states, labor organizations, and employers' associations, asking all parties for certain minimum rights commitments.[187] It incorporates all the rights listed in the UDHR and the two International Covenants, one for Civil and Political Rights and the other for Economic, Social and Cultural Rights.[188] The instrument also focuses heavily on employee labor condition rights.[189] Though its larger signatory base may garner it a certain amount of authority as a rights document edging towards international customary norms, its current enforcement mechanisms resemble in some capacity those of the OECD clarification procedures and its periodic review of member states through a surveying process has culminated in few significant changes.[190]

In 1999 then-UN Secretary-General Kofi Anan, noting the rising strength of corporations and the inevitability of economic globalization, asked the business world directly to voluntarily enact and promote the UN Global Compact (launched in 2000), which contained a set of universally-agreed upon principles fundamentally grounded in three human rights documents: the UDHR, ILO Declaration on Fundamental Principles and Rights at Work (1997), and the Rio Declaration of the UN Conference on Environment and Development.[191] The Global Compact has gone considerably be-

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[185] *See generally*, BEYOND VOLUNTARISM, *supra* note 58, at 67-68 (espousing positives); CLAPHAM, *supra* note 27, at 207 (right to organize and collectively bargain recognized).

[186] International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy pg 1, Feb. 2000, *available at* http://www.ilo.org/public/english/employment/multi/download/english.pdf.

[187] *Id.* ("Hereby approves all the following Declaration. . . . and invites governments of States Members of the ILO, the employers' and workers' organizations concerned and the multinational enterprises operating in their territories to observe the principles embodied therein.").

[188] *Id.* at 3.

[189] BEYOND VOLUNTARISM, *supra* note 58, at 69.

[190] *Id.*; CLAPHAM, *supra* note 27, at 216-218.

[191] The Global Compact also incorporates the United Nations Convention Against Corruption. United Nations Global Compact, Ten Principles, http://www.unglobal

yond any prior legislative attempt at expanding the breadth of corporate responsibilities for human rights. Two types of obligations are spelled out; firstly, not to instigate violations of human rights directly; and second, not to be complicit in such violations.[192] The Global Compact is revolutionary in that it is directed solely at corporations. It begins extending obligations by linking them to the "spheres of influence" of a corporation, encompassing not only employees, but also communities outside of the work place and the broader good. Finally, the complicity factor has been interpreted as affecting the TNC's relationship to third-party abuses and the TNC's responsibility not to benefit from such actions.[193]

In August 2003, the Sub-Commission on the Promotion and Protection of Human Rights sought to formulate a comprehensive answer to the question of TNC responsibility. It adopted the UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft Norms).[194] The then Commission on Human Rights (now Human Rights Council) did not adopt the norms, therefore they remain only illustrative.[195] The Draft Norms are an attempt at creating the first non-voluntary legally-binding instrument directed at TNCs and other corporate entities. However, the instrument delineates between TNCs and other business participants for the purpose of distinguishing well-capitalized and powerful enterprises.[196] In order to respond to the centrality in international human rights law of the state, the Draft Norms also, though specifically targeting corporate actors, include a "savings clause" which reinforces that the Norms may not be construed as altering the broad obligations of the state to protect and promote human rights.[197]

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compact.org/AboutTheGC/TheTenPrinciples/index.html (last visited May 1, 2008); *see also* Asbjorn Eide, *Globalization and the Human Rights Agenda: The Petroleum Industry at Crossroads*, *in* HUMAN RIGHTS AND THE OIL INDUSTRY 25, 39 (Asbjorn Eide et. al. eds., 2000).

[192] United Nations Global Compact, *supra* note 204, at "Human Rights," http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html.

[193] *Id.*; *see* CLAPHAM, *supra* note 27, at 218-225.

[194] UN Draft Norms, *supra* note 8.

[195] Sorrell, *supra* note 18, at 285; CLAPHAM, *supra* note 27, at 226.

[196] CLAPHAM, *supra* note 27, at 227.

[197] UN Draft Norms, *supra* note 8, at § A. General Obligations; *see also* Sorrell, *supra* note 20, at 287; CLAPHAM, *supra* note 27, at 229; *but see* John Ruggie, UN Secretary General's Special Representative for Business and Human Rights, Opening Statement to the United Nations Human Rights Council (Geneva, Sept. 25, 2006), http://www.reports-and-materials.org/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf, at 3 (major concern with the Norms is their

The Draft Norms adopt the "spheres of influence" concept from the Global Compact, extending the reach of duty beyond direct employees and other persons traditionally associated with the TNC. Additionally, the Draft Norms spell out a series of negative and positive obligations, requiring TNCs to "promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law."[198] Under this language, TNCs resemble the state to an extent, with the difference being the limiting factor of their "sphere of influence." Enforcement mechanisms drafted to implement the norms necessarily assume a different nature of regulation due to the private character of the party as compared to the state. Requirements include entering the Norms into every contract or other arrangement, making them enforceable under an international contract law regime.[199]

PART IV: CONTEMPORARY THEORIES

Several worthwhile attempts at further conceptualizing the positionality of TNCs in the international human rights legal framework have been formulated and bear considering.

Professor Ratner sees TNCs located in three potential power relationships which implicate human rights enjoyment. First, the desire of developing nations to attract foreign investment can lead to de facto control of a given territory by a TNC.[200] Second, regardless of the TNC's position in foreign investment, a problematic government might still use resources obtained from transacting with the TNC to further its own human rights abuses.[201] Lastly, as corporations progressively internationalize, they become increasingly independent of state governmental controls.[202] With the advent of these relationships, the desirability of imposing regulation on the TNC as a separate entity under international law becomes increasingly apparent. The additional inherent difference between the TNC and the natural person's ability to access resources, as well as avoid state regulation, and the difference in ability to harm human dignity, buttress the conclusion that more than a mere subset of individual criminal liability should be imposed

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poorly thought-out theoretical underpinnings and their potential threat to developing nation democracy).

[198] UN Draft Norms, *supra* note 8, at § A. General Obligations.

[199] *Id.* at 233.

[200] Ratner, *supra* note 8, at 462 (giving example of Freeport-McMoRan in Papua, Indonesia).

[201] *Id.* (giving example of apartheid).

[202] *Id.* at 463.

on the TNC.[203] When confronted with the question that international law is functionally state-centric, Ratner argues that the international law has already recognized human rights duties on non-state actors, including rebel militias, with the purpose that such groups, analogous to their governmental counterparts, must respect the fundamental human rights of those under their control.[204] We have also accepted the notion of non-state actor duties born by the individuals through a criminal law system which has held private actors wholly responsible at the international level for agreed-upon crimes such as genocide.

Professor Ratner then proposes a methodology for deriving the norms of corporate responsibility. He suggests four separate aspects which must be considered. In adjudging the extent of the TNC's responsibilities, one must look at the relationship the TNC has to the government,[205] the nexus it has to the affected populations,[206] the substantive rights at issue,[207] and attribution principles pertaining to the corporate structure. As a fifth likely consideration, Professor Ratner considers the element of fault, though determines that the *mens rea* requirement would in all likelihood be prescribed by the nature of the judicial proceeding.[208]

The third step of the theory, the substantive right at issue segment, begs deeper inquiry as the philosophical underpinnings of the entire calculation lie in a trifurcated analysis proposed for determining the extent of the TNC's responsibilities regarding any one particular right. First, one must differentiate between essentially public and private rights—in other words, those that only the state has the capability of violating, like the right to cross-examination in criminal trials, versus actions which are in the purview

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[203] *Id.* at 494-495.

[204] *Id.* at 466-467.

[205] *Id.* at 496-505 (the TNC could either be the mirror image if the state, considered a governmental agency when it is exercising quasi-state authority, could be complicit with government actions similar to the individual criminal law analysis, or perhaps be found liable under a 'commander' liability doctrine for those cases where governmental forces, etc. maintain private security of the TNC).

[206] *Id.* at 506-509 (the TNC has responsibilities in 'concentric circles' like ripples in a pond. As the TNC's influence diminishes on the population in question, the scope of its responsibilities diminishes towards that population as well).

[207] *Id.* at 511- 517 (there are several main components to this step which will be discussed in the paper. The key consideration in the formulation of this step is circumscribing a set of responsibilities which factor in the unique nature of the TNC as compared to the state).

[208] *Id.* at 522-524 (whether administrative, criminal, or civil etc.).

of every actor, such as cruel, inhumane, and degrading treatment.[209] Regarding the former, private non-state actors may only be complicit and cannot bear the direct obligation.[210] Second, Professor Ratner argues that it is imperative to balance the interests of the TNC with the rights at stake of the person. The balancing of interests between the state and the individual occurs in the question of justifiable derogation, and an analogous balancing must occur in relation to the TNC and the individual.[211] An example of this is freedom of opinion. Through a balancing of interests the TNC may permissibly terminate an employee for publicly criticizing the company, though is barred from disciplining the worker for critiquing the government.[212] Lastly, beyond merely prohibiting certain action by the TNC which would violate human rights, the extent that the TNC must take positive measures to help the population realize their rights would depend on its nexus to the affected population and the necessity of such actions in order to comply with its negative duties. The more effective control it has over the territory, the more its responsibilities would mirror a state's obligations.[213]

Professor Kinley and Barrister Tadaki replicate certain elements of Professor Ratner's argument but extrapolate more specific duties and argue for more positive rights obligations to be required of the TNC.[214] The authors agree that to ignore the fundamental character difference between the TNC and the state is erroneous and, similar to Ratner, believe a balancing test of the TNC's rights with the individual's human rights should occur.[215] However, the increased position of the TNC requires some form of extended responsibility under international law.[216]

Professor Kinley and Barrister Tadaki break down their system of analysis into two levels. First, they look at how duties apply directly to the behavior of the TNC ("self-reflexive" responsibilities) and what obligations the TNC has to prevent others from harming human rights ("third party" responsibilities).[217] The authors adopt a similar "concentric circles" of influence paradigm for defining the scope of responsibilities to the population in

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[209] *Id.* at 511-512.

[210] *Id.*

[211] *Id.* at 513-515 (similar to states, certain rights would never be allowed to be derogated from).

[212] *Id.* at 514.

[213] *Id.* at 516-517 (as a practical matter TNC only have negative duties).

[214] Kinley & Tadaki, *supra* note 7.

[215] *Id.* at 961, 967-968; Ratner, *supra* note 8, at 494-495.

[216] Kinley & Tadaki, *supra* note 7, at 938.

[217] *Id.* at 963.

question,[218] but seemingly insinuate a similar form of assessment regarding the TNC's obligations to attempt to influence third-parties. Thus, if the TNC has significant influence in its contractual relationship with subsidiaries, subcontractors, suppliers, etc., it should reasonably be expected to encourage those entities to respect the human rights in question.[219] The fact that providing protections where others have not or lobbying others to protect human rights which have historically been public functions does not disturb the authors. They note that the privatization of public functions has been a hallmark of economic globalization, and TNCs have become accustomed to exercising these types of power regularly, particularly in developing countries.[220] Their new roles give TNCs considerable ability to affect public and private conditions.[221]

The authors then work through a series of substantive rights and play out their theoretical conception as it applies to the situation. They note that some rights are beyond the purview of the direct obligations of TNCs by nature of their excessively public nature, such as the right to asylum and nationality.[222] However, some rights traditionally conceived of as public may be reworked to circumscribe the private nature of the TNC, such as the right to education, which could entail the responsibility to curtail child labor use or provide financial assistance to children to attend school.[223] The authors apply their self-reflexive and third-party responsibility model onto two sets of rights, "core rights," which are fundamental universal norms such as the right to life, liberty and bodily integrity, and "direct impact rights," which belong to the constituencies most directly impacted by the TNCs actions.[224] To demonstrate one break-down, the authors develop the rights of association and collective bargaining, noting that this widely-recognized freedom is the cornerstone of the basic rights of workers.[225] Yet, TNCs are often reluctant to give effect to that right, especially in developing countries. The authors propose that TNCs are obligated to refrain from discrimination, have the positive obligation of providing the employees information, and have third-party obligations to protect that right from abuse, even if they must exert their influence on a hostile host country.[226] As an

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[218] *Id.* at 963-964; Ratner, *supra* note 8, at 506-509.

[219] Kinely & Tadaki, *supra* note 8, at 964-965.

[220] *Id.* at 965.

[221] *Id.*

[222] *Id.* at 967.

[223] *Id.* at 966.

[224] *Id.* at 968.

[225] *Id.* at 976.

[226] *Id.*

alternative, the TNC should facilitate other forms of employee organizing and participation such as single-issue committees.[227] They should influence agents and partners to do likewise.[228]

Both Professor Ratner and Professor Kinley and Barrister Tadaki have articulated a central concept that the framework of analysis must consider several different relationships, both with respect to the population and to the state. The two theories also delineate, though in a somewhat different manner, between essentially public and private duties—in other words, sets of responsibilities that may only be born by the state. These two components are essential for locating the TNC in a larger international framework which still invests in the supremacy of the state. The danger of allowing private entities equal positionality in the structure threatens the rights to democratic self-determination itself. The conceptualization espoused by these two theories for a type of middle ground between the individual and the state allows for a relativist locating of the TNC in what Professor Andrew Clapham theorizes as "acquiring rights and duties through capacity rather than subjectivity."[229]

Professor Clapham proffers an alternative to the rhetoric of subjectivity under international law. Instead, the language of subjectivity gives way to the idea of "capacity," or whether the non-state actor *can* acquire rights and obligations under the international system.[230] Professor Clapham argues there is nothing literally in the way of endowing non-state actors with the capacity or legal personality to have these sets of features, and it is then only a short leap to provide apposite enforcement mechanisms.[231] We have already seen such a process take place in the example of international organizations. As the *Reparations for Individuals in the Service of the United Nations* case shows, the non-state actor has the "capacity to bring an international claim;" the organization has rights and obligations, and a large measure of international personality which is different from those of member states.[232] Thus, vesting the TNC with capacity or legal personality for the purposes of enforcing obligations under international law does not necessarily require threatening the supremacy of the sovereign state in international law. The problem, Professor Clapham argues, is the issue of nation-states fearing this loss of their sovereignty, rather than a legal problem, for a

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[227] *Id.* at 977.

[228] *Id.*

[229] *See* CLAPHAM, *supra* note 27, at 70-73.

[230] *Id.* at 70; *see also* JAGERS, *supra* note 47, at 22-35.

[231] CLAPHAM, *supra* note 27, at 70.

[232] *See* Reparations for Injuries Suffered while in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Lexis 6, 3-4 (Apr. 11).

number of humanitarian law and human rights treaties have imposed obligations on non-state actors when not doing so would defeat the focus on victims and their rights.

Professor Ralph Steinhardt also argues that subjectivity under international law does not serve as a barrier through both historical and current models. Professor Steinhardt argues that an artificial distinction between the realms of the public (human rights) and private (corporate activities) molded about the state-centric international legal model results in a misinterpretation of corporate and human rights interactions unreflective of contemporary reality and inhibitive of future productive legal discourse.[233] Professor Steinhardt looks at the four predominant regimes through which institutional change has been effectuated. Corporations have become obligation-bearers under the international human rights regime for negative and positive responsibilities through market-based regimes, domestic regulatory mechanisms, domestic civil liability schemes, and an emerging regime of international regulatory attempts.[234] He argues, the process and substance of the emerging rights-based behavior created by these interactive regimes points towards a modern adaptation of *lex mercatoria*, or, the "medieval law merchant."[235] The *lex mercatoria* was a normative regime which sought to internationalize commercial transacting standards through the enforcement efforts of the entrepreneurs themselves in 15th and 16th century Europe as interstate merchant trade increased and the promulgation of standards became essential.[236] The norms generated from the structure became codified in both national and international trade and commercial law instruments over the years.[237] Steinhardt sees a similar model possible under current trends. While direct regulation has not occurred, TNCs are self-

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[233] Steinhardt, *supra* note 141, at 177.

[234] *Id.* at 180-220.

[235] *Id.* at 221; *see generally* Charles Donahue, Jr., *The Empirical and Theoretical Underpinnings of the Law Merchant: Medieval and Early Modern* LEX MERCATORIA: An Attempt at the probatio diabolica, 5 CHI. J. INT'L L. 21 (2004); Emily Kadens, *The Empirical and Theoretical Underpinnings of the Law Merchant: Order within Law, Variety within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT'L L. 39 (2004); Celia Wasserstein Fassberg, *The Empirical and Theoretical Underpinnings of the Law Merchant:* LEX MERCATORIA—Hoist with Its Own Petard?, 5 CHI. J. INT'L L. 67 (2004). The existence of the amorphous *Lex Mercateria* in history and modernity remains debated.

[236] Steinhardt, *supra* note 141, at 222-223.

[237] *Id.* at 224.

regulating in the moment and there is nothing to prevent the translation of those business practices into international law over time.[238]

Professor Ratner reinforces both Professors Clapham and Steinhardt's arguments, noting that we have in reality subjected a number of non-state actors to "subjectivity" under international human rights law, and the TNC is not different in this manner. The introduction of certain non-state actors into the scheme has not destroyed sovereignty. Rather, the distinguishing feature, he notes, between the TNC and other non-state actors is the systemic access to resources unavailable to the natural person, and the increased potential to affect the enjoyment of rights in both a positive and negative way.[239]

Professor Kinley and Barrister Tadaki build on Ratner's hypothesis. Their movement into positive obligations based on the very nature of the TNC's increased power seems preferable when considering, as Professor Philip Alston notes, the increased privatization of previously public essential services such as health care and social services, not to mention the increased privatization of security forces.[240]

The above theories cycle back to the initial consideration of the nature of human dignity perhaps best captured in the defense of *Drittwirkung* by Professor Nicola Jagers.[241] That is, they all argue for the existence of a form of horizontal application of rights.[242] The nature of human rights—that they are vested in each individual as a human being in the Kantian sense—militates against recognizing only violations vis-à-vis the state. As Professor Jagers notes, merely because enforcement mecha-

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[238] *Id.* at 224-225.

[239] *See* Ratner, *supra* note 8, at 466-467, 494-495.

[240] Alston, *supra* note 6, at 9-10, 17 (privatization of security and other public functions such as social welfare systems and health care have placed private actors in positions historically associated with the state and greatly affecting the realization of human rights).

[241] An example of *Drittwirkung* (*indirect version*) in the International Bill of Rights; the non-discrimination obligations such as those imposed by International Covenant of Civil and Political Rights (ICCPR) are sometimes interpreted as prohibiting discrimination by private parties as well as state actors. The Human Rights Committee's General Comments reinforces this interpretation by noting its desire to be informed of violations committed by private persons as well as state entities. Subsequent international instruments are even more explicit about the flow of non-discrimination obligations between private parties, though all of these are *enforced indirectly* by holding the state accountable for failing to secure the rights of the individual against other individuals. JAGERS, *supra* note 47, at 51-53.

[242] *Id.* at 36-37.

nisms do not currently exist at the international level at this time, it should not be read as meaning that human rights responsibilities do not lie between private parties.[243] Professor Jagers traces decisions by both the Inter-American Court of Human Rights and the European Court of Human Rights which reify the concept of private obligations.[244] The IACHR in its now well-recognized *Velasquez Rodriguez* case, for example, emphasized that states have an obligation to prevent human rights violations which are not attributable in any capacity to the state.[245] The reasoning exhibited in the cases Professor Jagers tracks articulates and affirms the existence of violative capabilities intrinsic to the private individual, even if international enforcement mechanisms do not currently target such types of transgressive parties directly.

However, what is currently missing from the international framework is the concept of *direct Drittwirkung*—the ability for the individual to bring claims against the private party in its own right.[246] Generally, the international space currently allows only support of *indirect Drittwirkung*, or the ability to hold the state responsible for violations of private parties against each other's human rights when the violation is the result of negligence or impropriety by the state.[247]

The one criticism that figures most prominently in Professor Ratner's and Professor Kinley and Barrister Tadaki's arguments is the assumption by each that an inherent component of conceptualizing TNC responsibility boundaries requires a balancing test of the TNC's private objective.[248] Both sets of authors neglect to consider the rationale behind this ability to derogate. The balancing of the state's rights with the individual's in times when derogation may be acceptable is theoretically justified under the auspices of necessity for securing the greater good. The curtailing of individual rights can only legally occur when it is necessary for the procurement of the broader community's human rights.[249] At no point in the

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[243] *Id.* at 37-38.

[244] *Id.* at 147-157.

[245] VELASQUEZ RODRIGUEZ v. Honduras, Inter-Am. Ct. H.R. (Ser. C) No. 4, at ¶ 172 (Jul. 29, 1988).

[246] *Id.* at 37.

[247] *Id.* at 38, 46; Vazquez, *supra* note 139, at 937-938 (only *indirect Drittwirkung* possible under ECHR).

[248] Ratner, *supra* note 8, at 513-515; Kinley & Tadaki, *supra* note 7, at 967-968.

[249] *See* Hum. Rts. Comm., General Comment No. 29, UN Doc. HRI/GEN/1/Rev.5/Add.1, para. 2, 3, et. al. (Apr. 18, 2002) (exploration of times when derogation may occur and defining the boundaries of "threat to the life of the nation"); Oren Gross, *"Once More unto the Breach": The Systemic Failure of Applying the European*

equation do private considerations between equal parties supply reasoning for infringing on human rights. That is not to say that the TNC, as a legal person, has no rights. It merely means that the considerations when defining the scope of its human rights responsibilities as a private player, both negative and positive, must revolve around a different set of questions, such as the private/public distinction both sets of authors illustrate, and perhaps even those rights which we find indispensable to the facilitation of the corporate form, few of which implicate heavily the human rights responsibilities explored throughout this article.

PART V: THE SHAPE OF TRANSNATIONAL CORPORATE RESPONSIBILITY

Extending direct duty-bearing capacity under international human rights law to the TNC is required by contemporary exigencies[250] and the theoretical underpinnings of modern human rights.[251] As evidenced by legislative and judicial histories extending human rights obligations to non-state actors, imposing such responsibilities upon TNCs is technically possible.[252] Economic globalization, with all of the positive effects it has and may in the future engender, has through its perpetuation changed the relationship between states and non-state actors.[253] Procedures advocated by

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Convention on HUMAN RIGHTS to Entrenched Emergencies, 23 YALE J. INT'L L. 437, 459-460 (1998):

> A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called "DEROGATION measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the LIFE OF THE NATION. A threat to the LIFE OF THE NATION is one that: affects the whole of the population and either the whole or part of the territory of the State, and threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant. . . Economic difficulties per se cannot justify DEROGATION measures.
> *Quoting,* Daniel O'Donnell, *Commentary by the Rapporteur on* DEROGATION, 7 HUM. RTS. Q. 23, 23-25 (1985) (restating principles).

250 *See supra* Part II (Section II: Economic Globalization and the Rise of the TNC).

251 *See supra* Part I.

252 *See supra* Part III.

253 *See supra* Part II (diversification of important players on the global screen including TNC as some of the wealthiest "economies" and political players); *see also*

dominant international development and trade regimes have privatized many public functions, constrained the ability of the state to act in arenas previously left to its sovereign discretion, and have facilitated the accumulation of extensive resources and authority in TNCs.[254]

Assigning to the TNC the legal "capacity" to bear duties directly under international human rights law seems structurally viable. The treatment of the United Nations Organization in civil proceedings[255] and various non-state private and collective actors in criminal trials,[256] as well as other legal and market-based attempts at regulating corporate behavior, illustrate the proposition that including TNCs in the international human rights framework does not necessitate deemphasizing the central authority or obligation of the state in protecting and promoting human rights.[257] These non-state entities may be consciously located in the hierarchy of international law at an intermediate level: lower than the state, but higher than the position of individuals, thus appropriately taking into account TNCs' elevated contemporaneous position in the global economic order[258] while preserving the sanctity of sovereignty and emphasizing state participation rights under international law processes. Additionally, by positioning the TNC at an intermediate level in the spectrum, the right of a population to self-determination in governance is maintained.

Concurrent with this narrow construction of a TNC's subjectivity under international law follows the obvious inquiry: subjectivity with regard to what? Once we bestow a modified international personality on the TNC through the theory of "capacity,"[259] the question shifts from whether regulation can occur to what should be the ostensible contours of that regulation. By emulating the historic trend to extend legal capacity to various

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Feeney, *supra* note 48, at 325 (swap over to private financing pushed by WB, private capital flows by 1996 equaled 86% of total funds in a notable trend change).

[254] *See* MEYER, *supra* note 51, at 75-76; Wells & Elias, *supra* note 51, at 146; Ratner, *supra* note 8, at 458-459; Bamodu, *supra* note 12, at 162; Kinley & Tadaki, *supra* note 7, at 935-937; Alston, *supra* note 6, at 17; Aderman & Kariyawasam, *supra* note 48, at 181.

[255] *See* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Lexis 6 (Apr. 11).

[256] *See* SAHNI, *supra* note 3, at 62-63; Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

[257] *See* CLAPHAM, *supra* note 27, at 70-73; Steinhardt, *supra* note 141, at 224-225.

[258] Ratner, *supra* note 8, 494-495.

[259] CLAPHAM, *supra* note 27, at 70-73.

non-state actors[260] and reflecting on the TNC's current capability of carrying enforceable rights under such agreements as NAFTA and even under international regimes constructed by the WTO or the World Banks' International Center for the Settlement of Investment Disputes,[261] state preeminence may still be reinforced while adapting the international human rights framework to a new diversity of players. In this regard, one must consider which obligations, either positive or negative, may be properly assigned to the TNC?

Section I: An Equation for Establishing the Scope of Obligation

Any test for ascertaining the contours of the TNC's human rights responsibilities must stem from the basic precepts of human rights ideology. First, the individual is protected from incursions on their rights by any and all parties, because rights flow from the individual outwards.[262] Second, the rhetoric of state sovereignty and public official immunity cannot be used to shield those entities guilty of violations from responsibility.[263] However, despite this second factor, the third element of this equation recalls the state's primary responsibility for protecting and promoting rights vis-à-vis

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[260] *See generally* Shelton, *supra* note 14, at 307-317; Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. Lexis 6 (Apr. 11); SAHNI, *supra* note 3, at 62-63; Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998); Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997).

[261] JAGERS, *supra* note 47, at 237; BEYOND VOLUNTARISM, *supra* note 58, 12-13; Reinisch, *supra* note 6, at 85; Kinley & Tadaki, *supra* note 7, at 946; Aderman & Kariyawasam, *supra* note 48, at 181; ICSID Convention, Regulations and Rules, *available at* http://www.worldbank.org/icsid/basicdoc/basicdoc.htm.

[262] *See supra* Part I.

[263] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 27, U.N. Doc. A/CONF.183/9 (1998) (entered into force July 1, 2002).

> The multilateral treaty establishing the permanently standing international criminal court states: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

its population. Retaining this hierarchy is preferable because of the overall configuration of international law, the undesirability of eliminating rights to self-governance, and the concentrations of wealth and power retained by a significant subset of nations. Lastly, while this calculation for determining human rights obligations takes an inflexible stance on negative obligations as is required by human rights doctrine, echoing the progressive realization policies governing many contemporary rights the positive obligations of the TNC should reflect an entity's ability to promote realization according to resources, ability, and relevant other considerations.[264]

To that end, Professor Ratner's first two inquiries in his multi-faceted examination for ascertaining the contours of the TNC's human rights duties make a great deal of sense.[265] An analysis of the relationship the TNC shares with both the state and the affected population(s) seems relevant even according to the interpretation of prominent corporate organizations.[266] Under the calculation proposed in this Article, the obligations of the TNC may become increasingly reflective of the state's broader obligations as the relationship between the state and TNC becomes increasingly favorable to the TNC, at least in regards to the subject matter over which the two entities are interacting. The TNC's obligations may then rise proportionally to those of a nation similarly situated in resources, control, and

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[264] International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.").

[265] Ratner, *supra* note 8, at 496-509.

[266] *Id.*; *see* Gareth Llewellyn, Group Director, Business Leaders Initiative on Human Rights, Speech delivered to the United Nations General Assembly preparatory process for the High-level Plenary meeting on 14-16 September 2005 (Sept., 2005) (transcript available at http://www.blihr.org/Pdfs/BLIHR%20Speech%2023%20June%202005.pdf) (when governments are unwilling or unable to fulfill their human rights obligations the role of business becomes more important. . .to avoid being complicit in human rights violations, and to use their potential to relieve poverty and build sustainable economic growth). The Business Leaders Initiative on Human Rights is a group of prominent TNCs including General Electric, the Gap, MTV, and Novartis who have since 2003 advocated for expanding business' responsibility for not only abstaining from violating human rights, but affirmatively helping to realize those guaranteed in the UDHR. *See* Business Leaders Initiative on Human Rights, Introduction from Mary Robinson, Honorary Chair of BLIHR, http://www.blihr.org/.

infrastructure to the extent that its private and corporate nature still circumscribes the particular duties owed.[267] Certain aspects of rights, by nature, are products of the public realm, and therefore TNCs cannot reasonably be expected to protect them. The nexus to the affected population should also be considered, though, in accordance with this Article's thesis, less so in the 'physical territoriality' or 'presence of authority' type context embodied by the 'concentric circles' voiced by Professor Ratner and Professor Kinley and Barrister Tadaki, and more so via an examination of the import of the right in question according to customary international law and the TNC's capabilities of assisting in its realization within the confines of its private character. This latter assessment may often be calculated by considering the physical presence or amount of direct power a TNC has over a distinct community, but need not and should not always be so done.

In fleshing out the different considerations articulated above, it becomes apparent that a certain form of risk is produced by transacting with politically or economically weaker states in subject areas where state strength is a theoretical positive. Examples illustrative of this concept include environmental or workplace health and safety regulations, coupled with the attendant infrastructure for enforcement. The existence of such legal regimes are a favorable step towards protecting and promoting the respective human rights they target: the rights to a safe workplace[268] or to health.[269] But when the state's capabilities are somehow lacking in these realms, the TNC's obligations should increase. What is little trumpeted but which serves well for the purpose of supporting such a conclusion is the disproportionate financial rate of profitability experienced by TNCs through their foreign affiliates or activities in many developing countries.[270] While multiple other considerations factor into investment or corporate development strategies, the return on inflow investment from some developing countries buttresses the rationale for increasing obligations according to

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[267] *See* Kinely & Tadaki, *supra* note 8, at 967 (public nature of certain rights make them literally non-transferable); *see, e.g.,* JAGERS, *supra* note 47, at 73 (list of examples).

[268] International Covenant on Economic, Social and Cultural Rights, *supra* note 264, at art. 7(b) ("Safe and healthy working conditions.").

[269] *Id.* at art. 12(b) ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. . .[states must take steps towards]. . .The improvement of all aspects of environmental and industrial hygiene.").

[270] Bamodu, *supra* note 12, at 158; *see also* Baez, Dearing, Delatour, & Dixon, *supra* note 45, at Part (B)(1) (TNCs seek foreign production site because of low labor costs and environmental regulation associated costs).

both profit and situational instability assessments. Profit from inflow investment for TNCs in Africa, for example, rose sharply in the 1990s.[271] From that date forward, the return on direct investment has averaged 29%, as much as double the rate of return from any other region including developed nation clusters in the same time period.[272] Similarly, the United Nations Conference on Trade and Development noted that some of the most recent significant developments in foreign direct investment have been those attached to natural resources and related industries.[273] Despite the noted degradation of conditions in many of the pertinent states, increasing demand for resources has motivated investment in expectation of high profit yield.[274] Geographical considerations combine with those of an industrial nature to define the extent of the responsibilities TNCs have in relation to the population.

In exchange for the profitability of interacting with a particular geography or the profitability of engaging in a certain business activity or services, foreseeable consequences of engagement become relevant. By looking at the TNC's relationship to the state, its obligations increase according to its ability to facilitate or compound violative governmental behavior through its own actions. For example, Trafigura's obligation to investigate and ensure the proper disposal of its hazardous waste shipment increased when it chose Cote d'Ivoire, a nation known for its political instability, economic depression, and infrastructural incapability to safely dispose of toxic wastes. Profiting from transacting with developing nations, particularly those categorized as problematically fragile or unstable,[275] car-

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[271] Bamodu, *supra* note 13, at 158.

[272] *Id.*

[273] United Nations Conference on Trade and Development, Press Release: Foreign Direct Investment Rose by 34% in 2006, (UNCTAD, Sept. 1 2007), *available at* http://www.unctad.org/Templates/webflyer.asp?docid=7993&intItemID=1528&lang=1 (last visited May 1, 2008) ("One of the most significant developments in FDI over the past two or three years has involved natural resources and related industries. Despite some unfavourable developments for foreign investors in such industries, high demand for natural resources—and, as a result, the opening up of new potentially profitable opportunities in the primary sector, such as gas and oil development in Algeria—are likely to attract further FDI to the extractive industries. FDI in this sector will be examined in greater detail in UNCTAD's World Investment Report 2007."). Other developing nations have experienced upward trends in increases inflow as well with the exception of the Latin American countries which have experienced a decrease. *Id.*

[274] *Id.*

[275] World Bank 2006 LICUS List, *supra* note 78 ("fragile states" raise particular concerns which must be considered in developing business relations).

ries with it predictable realities and therefore attendant responsibilities as the state becomes less likely to appropriately regulate either because it lacks political will, an imbalance in strength exists, or the pressures of economic globalization dominate. In addition, Trafigura's profitable though inherently dangerous commercial activities—toxic waste removal and shipment—factor into determining its human rights obligations, especially in the context of its interactions with a weak domestic environmental and human rights regulatory structure. Trafigura's commercial activities carry both the potential for significant profit and the evident potential to cause great damage to human rights enjoyment. Correlating these two conditions, political/economic instability and potential consequences of industrial/service activity, the civilian population becomes increasingly dependant on and affected by the TNC's independent behavior respecting the protection and promotion of their rights. Therefore, the TNC's responsibilities increase proportionally.

The desire to foster, or in the very least refrain from deterring, certain commercial activity will figure as a common objection to imposing any international regulation for human rights requirements on TNCs. In response, it is helpful to note that TNCs are not forgoing all profit merely because they assume certain human rights responsibilities in addition to their other priorities. As creations of law, society may expand the TNC's goals and functions if it so desires, and there is no particular obstacle to reconfiguring the nature of its legal identity, which springs from the law at its very outset.[276] Obligations, particularly those of an affirmative nature, may therefore be incorporated into the corporate form if technically required. Adjudging the sufficiency of affirmative steps taken to assist in the realization of human rights is admittedly difficult, especially in cases relating to rights traditionally thought of as economic, social and cultural in character. This set of rights has yet to serve as an independent cause of action before an international human rights tribunal, and on the whole rarely served as a substantive cause of action before regional organs.[277] Re-

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[276] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").

[277] There currently exists no international tribunal for adjudicating violations of economic, social and cultural rights. Regional bodies have a minimal, though more developed, jurisprudence in this realm though trends show a disinclination to deal with them outside of their relationship to civil and political rights except, only recently, in the European system, or to attach particular affirmative obligations to them in general. *See* David Marcus, *The Normative Development of Socioeconomic*

cently, however, an increased focus on the justiciability of and the defining of these rights through regional and domestic jurisprudence as well as international philosophical inquiry has begun to demarcate the core substance of these rights and attach to them flexible but positive financial obligations.[278]

Rights Through Supranational Adjudication, 42 STAN. J INT'L L. 53, 54, 68-88 (2006); Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 37-39 (2006). *See also*, James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of* ECONOMIC AND SOCIAL Rights in the Americas, 56 HASTINGS L.J. 217, 226-227 (2004) (Latin American states in theory acknowledge the binding nature of social, economic, and cultural rights which require positive actions, but adjudication before the Inter-American Court has been rare and only limited economic and social rights are even granted a right of petition).

[278] *See* Craig Scott & Parick Macklem, *Constitutional Ropes of Sand or Justiceable Guarantees, Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 77-82, 104-105, 111 (1992) (talking about three levels of obligations often discussed regarding the state and their obligations to help progressively realize the human rights enumerated in the ICESCR. The Council of Europe has found violations of rights and demanded affirmative financial remedies, for example, the right to housing. The Inter-American system has ordered preventative health measures); Johan D. van der Vyver, Symposium, *Municipal Legal Obligations of States Parties to the Rights of the Child: The South African Model*, 20 EMORY INT'L L. REV. 9, 38-40 (2006) (South Africa's progressive constitution allows for the enforcement of positive obligations on a range of rights including those traditionally construed as economic, social, and cultural rights. Several examples include housing and access to medications); Marcus, *supra* at 277, at 63-65 (various domestic systems have found the state lacking in its fulfillment of economic, social and cultural human rights and have mandated positive steps in target of promoting those rights); Marc J. Cohen and Mary Ashby Brown, *Development Goals and Indicators: Access to Justice and the Right to Adequate Food: Implementing Millennium Development Goal One*, 6 SUSTAINABLE DEV. L. & POL'Y 54, 55-57 (2005) (looking at India, Brazil, and South Africa legal systems in affirmative obligations on procuring the right to food. The Indian Supreme Court has made interim orders mandating the nation to feed the needy. While cases have not yet come before the Brazilian or South African courts, both national high courts have ordered the state to implement and budget for the realization of rights, most notably health and housing rights); *see also* People's Union for Civil Liberties v. Union of India & Ors., (S.C. 2001), Writ Petition (Civil) No. 196/2001, *available at* http://www.righttofoodindia.org/orders/interimorders.html#box14 (last visited May 1, 2008). Order of 28 November 2001: Mid-day Meal scheme:

> We direct the State Governments/ Union Territories to implement the Mid-Day Meal Scheme by providing every child in every Government and Government assisted Primary Schools with a

Regarding civil and political rights, judicial systems at all levels have proven ready to impose affirmative financial obligations as part of remedial schemes, though exact numbers are rare.[279] A productive legal process has emerged in which a rights-based focus controls. Once a violation has been found, the state is allowed the flexibility of fulfilling the attendant obligations in whichever manner it judges most efficient, so long as its obligations are completely satisfied. Granting a similar flexibility in formulating the methods by which the TNC may fulfill its obligations facilitates both the ability of the corporation to retain profitability while addressing the TNC's role and power in the new global order and its ability to affect human rights.

In sum, the substantive contours of TNCs' responsibilities derive from an analysis of the TNC's power in relation to the state in either an overall or an industry/service-specific capacity, as increasingly privatized public services pivotal to human rights realization are often implicated. Ad-

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> prepared mid day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days. Those Governments providing dry rations instead of cooked meals must within three months [February 28, 2002] start providing cooked meals in all Govt. and Govt. aided Primary Schools in all half the Districts of the State (in order of poverty) and must within a further period of three months [May 28, 2002] extend the provision of cooked meals to the remaining parts of the State.

[279] *See, e.g.*, Case of the Miguel Castro-Castro Prison v. Perú, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160, at ¶¶ 441-456 (Nov. 25, 2006) (Peru, other than reparations consisting of compensatory, pecuniary, and non-pecuniary damages for the beneficiaries of the 41 deceased and the remaining living victims, must bear the unspecified cost for fully investigating the torture and death of prisoners, ensuring non-repetition of the human rights violations, assume the costs of delivering bodies of the deceased to family, of publicly apologizing on behalf of the state with families and press present, of publishing and disseminating the present judgment, of assuming the medical and psychological rehabilitation of the victims and their families, and of adopting training and educating public actors); Case of Claude Reyes et al. v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151, at ¶¶ 163, 165 (Sept. 19, 2006) (Chile, other than reparations, must bear unspecified costs of adopting measures to guarantee the right to access of state-held information and of adequately training public entities to that end). The Council of Europe makes publishes a regularly updated report of measures states have taken in order to fulfill their obligations under European Court of Human Rights judgments. The violation list at this point only enumerates civil and political rights. COUNCIL OF EUROPE, GENERAL MEASURES ADOPTED TO PREVENT NEW VIOLATIONS OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS (May, 2006), *available at* http://www.coe.int/t/e/human_rights/execution/H-Exec(2006)1_GM_960e.doc.

ditionally, the intensity of the TNC's obligations must also reflect its relationship to the population, not merely in the physical sense, but in the more expansive sense of the TNC's capacity to affect rights. Finally, in addressing the actual financial expenditures required relating to affirmative obligations, the TNC must be allowed to retain control over the methods by which it satisfies its obligations, preserving the agency required to operate profitably while simultaneously fulfilling its human rights obligations.

Section II: Negative Obligations

Bearing in mind the four principles enumerated in the introduction of this Part and the above-detailed paradigm, the equation for negative obligations under this calculation essentially bars the TNC from all behavior transgressing directly against or complicit in violating human rights, unless, as is the rationale governing justifiable state derogation, the greater good's most fundamental human rights are threatened.[280] Of course, this does not speak to the more difficult ascertainment of positive obligations, but it does at least clearly denote the TNC's immediate duty to refrain from some of

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[280] *See* Gross, *supra* note 249, at 459-460. To play out this hypothetical, a TNC would obviously be allowed to regulate the workspace for health and safety, since the broader sub-set of the community's right to health would be threatened otherwise. In the same vein, a corporation would be permitted to terminate an employee despite the right to possess the opportunity to earn a living through work under the ICESCR (Article 6) for violating the potential right to health of the larger population. International Covenant on Economic, Social and Cultural Rights, *supra* note 264, at art. 6. Similarly, we may look at the usual contentious labor rights provisions (Article 8) which include the right to strike. The right to strike may only be abrogated by the TNC when the larger community's direct health and safety or life might be in danger, for example, the right to bar striking has been constitutionally upheld in the United States in relation to firemen and policemen because of the immediate and grave direct threat to public safety that would ensue. *See, e.g.*, City of New Orleans v. Police Ass'n of Louisiana, 369 So. 2d 188 (La. App. 4 Cir. 1979); Michael A. DiSabatino, *Who are employees forbidden to strike under state enactments or state common-law rules prohibiting strikes by public employees or stated classes of public employees*, 22 A.L.R.4th 1103, § 2(a) (1983) ("perhaps the most clear-cut example of employees whose functions do involve the public safety and who therefore must be included within prohibitions against public employee strikes are police officers and firefighters."). The National Labor Relations Act requires Unions to give an employer ten days notice before striking in the health care industry so that it may find replacements and ensure the continued care of patients. This seems a reasonable partial restraint on a human right for the purposes of protecting the rights of a larger group. *See* National Labor Relations Act, 29 U.S.C. 158(g) (2000).

the more overtly deleterious behavior evidenced in many of the cases being currently litigated,[281] and imposes upon TNCs the remedial responsibility for those violations which result from its improper actions.[282] Delineating the TNC's immediate or progressive affirmative obligations is unfortunately a more complicated process. With the relative complexity of ascertaining positive obligations in mind it is easier to first explore the negative duties of TNCs separately before moving on to explore the positive duties which result from this Article's thesis.

Professor Ratner proposes a hypothetical dissecting the freedom of speech.[283] However, in utilizing a private party balancing scheme as he does, Professor Ratner undermines the human rights analysis in his example.[284] As this Article notes, the concept of human rights as we currently understand it—a dignity central to the order of humanity—is especially insulated from compromise by goals of financial profit,[285] a core interest of the corporation implicit in Professor Ratner's examination.[286] When the

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[281] *See, e.g.*, Sarei v Rio Tinto, 487 F.3d 1193, 1198, 1209-1210 (9th Cir. 2007) (war crimes, racial discrimination); Bowoto v. Chevron Corp., 2006 U.S. Dist. Lexis 63209, 4-5 (N.D. Cal. 2006) (crimes against humanity); Presbyterian Church of Sudan v. Talisman, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (genocide, war crimes, enslavement, and torture); Kiobel v. Royal Dutch Shell, 2004 U.S. Dist. Lexis 28813 (S.D.N.Y. 2004) (crimes against humanity, torture, arbitrary arrest and detention); Sinaltrainal v. Coca-Cola, 256 F. Supp. 2d 1345, 1356 (S.D. Fla. 2003) (regarding several defendants' hiring of Columbian paramilitary to impede union organizing activity).

[282] Suing and holding the corporation accountable for negative violations is preferable to imposing solely individual criminal liability on corporate leadership in several respects other than those ethically inherent, though it is not mutually exclusive to doing so. First, a broader set than the criminal-penalty bearing set of rights may be applied. Additionally, TNCs have resources unavailable as a practical rule to private individuals of even the wealthiest variety. The reparations to victims could thus generally only be possible through access to the corporate coffers. Financial resources for remedial measures on the broader basis (for example to ensure the wrong does not reoccur in the future) are also necessary. Finally, the construction of institutional history can influence the entities behavior far into the future in a manner individual criminal liability does not. Thus, trying the corporation as an entity liable for wrongs committed against human rights, in addition to any particularly prominent individuals therein, serves the function of enabling future progress and proper restitution.

[283] Ratner, *supra* note 8, at 514-515.

[284] *Id.* at 513-515.

[285] *See* Skogly, *supra* note 70, at 246 (companies driven by profit maximization).

[286] *See* Gross, *supra* note 249.

consideration of private economic profit is allowed to figure so prominently in determining the contours of negative obligations, the right to free speech and, subsequently, the rights to association or political organizing which flow there from are nearly completely eliminated. Professor Ratner does not expressly address speech critical of the corporation in the context of attempting to motivate policy or behavioral changes in the institution. However, sanctioning of penalization for "public speech that insults the company to consumers, [or] lures away employees. . .since [it] impinge[s] on core interests of the company"[287] implicate just such types of employee free speech. It is understandably within the corporation's strong financial interest to eliminate employee speech targeted at garnering broader public support for urged boycotts ("insults against the company to consumers"), or employee strikes ("lures away employees"), or provoking legislative scrutiny and regulation affecting its bottom line through critical ("insulting") speech. The right then becomes nearly universally threatened.

A realistic assessment of the corporate examples provided in this Article show the shortcomings of introducing a private financial interest balancing act to govern the negative obligations of the TNC, even though such considerations may factor more appropriately into affirmative obligations. To illustrate, we examine Rio Tinto's behavior in Papua New Guinea[288] and Coca-Cola's in Columbia,[289] the examples given in this Article which best demonstrate the repercussions of allowing TNCs to violate their negative obligations to refrain from limiting freedom of speech.

Through the examples of these two TNCs, we see that, under a paradigm allowing for profit interests to modify negative human rights obligations, two disconcerting results materialize. First, in turning to Rio Tinto, we see that the ability of Rio Tinto's employees[290] to critique the TNC is perhaps as fundamental, if not more so, than their ability to critique the PNG government itself.[291] Rio Tinto's position dominated its relationships to both the state and the population. To allow the TNC to abrogate or derogate from[292] ensuring its employees' or the surrounding community's right to publicly decry its activities by applying a standard significantly less strin-

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[287] Ratner, *supra* note 8, at 514.

[288] *See* Sarei v. Rio Tino, 456 F. 3d 1069 (9th Cir. 2006).

[289] *See* Sinaltrainal v. Coca-Cola, 256 F. Supp. 2d 1345 (S.D. Fla. 2003).

[290] Protest organization was spearheaded by a landowner who was also an employee. Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1125 (C.D. Cal. 2002) (Francis Ona led the sabotage after sixteen years of ignored protests).

[291] *Supra* Part II (Transnational Corporation Example III – Rio Tinto).

[292] Ratner, *supra* note 8, at 514. Professor Ratner allows for derogation from all obligations except those which are non-derogable for the state. *Id.* at 515.

gent than that which governs justifiable state derogation,[293] the Bougainvilleans' ability to improve their human rights conditions are severely curtailed. Barring the TNC from restricting freedom of speech insulting to the corporation does not eliminate the TNC's right to protect itself against speech which harms its interests but is unfounded. Malicious libel and defamation, for example, may be defended against and litigated as it is without sufficient grounding in the realities of the situation. But to curtail speech based on the foundation of loyalty or harm to business interests would, for all intent and purposes, effectively eliminate the right to freedom of speech and the potential positive impact on human rights attached to that right. Though an extreme example, Rio Tinto's study demonstrates the imperative of applying similar limitations on the corporate entity's ability to derogate when conceptualizing its negative obligations. The island's landowners and employees were silenced by the TNC's actions; the government would not have undertaken military operations and instituted the supply blockade had Rio Tinto not requested it.[294] But replications of this model, with less severe conditions, play out regularly. The TNC's relationship to the increasingly privatizing economy[295] is such that its policies and actions influence the day-to-day realization of individuals' human rights often in larger part than do a state's actions.[296]

Similar results can be seen in Coca-Cola's repression of union organizing,[297] which is in essence the repression of a mode of speech critical of the corporation's inequitable policies and behavior. Improving conditions, whether individually or collectively, requires the ability to criticize, often aggressively or vociferously, the TNC's behavior, and to disseminate that critique to others in the workspace and the broader community.[298] Al-

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[293] For the greater good, or "life of the nation." *See* Hum. Rts. Comm., General Comment No. 29, *supra* note 266, at para. 2, 3, et. al., Gross, *supra* note 249, at 459-460.

[294] Sarei v. Rio Tino, 456 F. 3d 1069, 1078-1079 (9th Cir. 2006).

[295] *See* Baez, Dearing, Delatour, & Dixon, *supra* note 45, at Part B(2)(e); *see also* Alston, *supra* note 6, at 17-18; MEYER *supra* note 51, at 77.

[296] MEYER *supra* note 51, at 85 (citing Peter French's argument that corporations have a larger influence on day-to-day lives because they, "define and maintain human existence within the industrialized world.").

[297] *Supra* Part II (Transnational Corporation Example II – Coca-Cola).

[298] Union organizing is often seen as the most necessary step for obtaining other rights relating to the work place. *See* Jedrzej George Frynas, *The Transitional Garment Industry in South and South-East Asia: a Focus on Labor Rights*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 162, 167 (Jedrzej George Frynas & Scott Pegg eds., 2003).

lowing TNCs to infringe on this right under the auspices of maintaining or increasing profit or in defense of loyalty, as noted above, is inherently problematic, as the right will almost always be subject to reduction under the paradigm. Whether construed in terms of civil and political rights or as an economic, social, and cultural right, the right to speech geared towards collectively improving conditions is an object of TNC protection to the same extent as the state is bound. Though currently the status of collective organizing is unclear under varying state treatments, Coca-Cola helps us explore the second set of considerations which point to the non-viability of localized derogation of speech as attached to unionization. Because of its transnational character,[299] Coca-Cola is exemplary for helping us evaluate the impact of the corporation's actions through the alternative lens of the geographically unrestricted multinational character of the TNC and its implications. Coca-Cola's obligations can be read both in the local context as was Rio Tinto above, but also in the broader context of its global operations.

The proliferation of the modern state's reference points and the resulting influence by those sources on its practices should be considered. Induced by the increasing percentage of private investment in overall long-term foreign capital levels,[300] the state, in order to attract private corporate business, is subject to and informed by the international dialogue of human rights resulting from TNC behavior.[301] Permitting direct infringement on the freedom of speech in a localized workspace is a decision with broader impact on the national and global realization of that human right, as states seek to replicate less strident or onerous conditions in order to attract necessary in-flow.[302] Contained infringement influences state decisions regarding which rights they wish to codify or enforce and either fosters or allays the state's concerns regarding loss of private foreign investment.[303] Coca-

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[299] Klebnikov, *supra* note 96 (operations in all but four countries in the world).

[300] MEYER *supra* note 51, at 77.

[301] *See* Frynas, *supra* note 298, at 179.

[302] *See generally* Jessica Woodroffe, *Regulating Multinational Corporations in a World of Nation States*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 131, 132 (Michael K. Addo ed., 1999) (third world governments reduce standards to attract foreign investment); Chris Avery, *Business and Human Rights in a Time of Change*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 17, 23 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (discussing "race to the bottom" in labor market as developing nations seek to undercut competition and attract investment).

[303] *See* Shelton, *supra* note 14, at 294-296; Kinley & Tadaki, *supra* note 7, at 1007-1008 (labor rights requirements were particularly opposed by developing

Cola's actions in Columbia, then, project the corporation's appreciation for cultural and political climates in which the freedom of speech is not favored, adversely affecting the right as developing countries seek to construct host friendly environments.[304]

In addition to strongly influencing international norms by its actual and perceived behaviors and desires, Coca-Cola's protection of freedom of speech in those nations where it lacks excess power over both state governance and the population registers differentiating treatment based on ethnic or national origin, an impermissible delineation.[305] These latter arguments would forbid Coca-Cola's direct attempts or complicity in silencing protests over its operations and employment practices.[306]

The reasoning supporting the forbiddance of directly violative behavior by the TNC also extends to the quasi-negative but also somewhat positive obligation to refrain from profiting from a state's own iniquitous or violative behavior.[307] The example posited in this Article was Coca-Cola in Sudan.[308] First, it would seem that the TNC would necessarily have to emu-

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countries who saw them as forms of protectionism designed to remove the advantage of cheap labor in those countries); Wells & Elias, *supra* note 51, at 144 ("States are unlikely to take action against multinational corporations in order to protect labour standards and human rights because of fears of losing much needed foreign investment."); Woodroffe, *supra* note 302, at 132; Avery, *supra* note 302, at 23.

[304] *See generally* Frynas, *supra* note 298, at 179 (TNC's activities may influence country human rights policy, for example, encourage low-wages and poorly enforced labor rights legislation).

[305] Both the ICCPR and ICESCR forbid discriminatory treatment in the protection or assistance in realizing of rights. International Covenant on Civil and Political Rights art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, *supra* note 264, at art. 2(2); Sarei v. Rio Tinto, 487 F.3d 1193, 1209-1210 (9th Cir. 2007) (recognizing racial discrimination as an international customary norm).

[306] *See* Sinaltrainal v. Coca-Cola, 256 F. Supp. 2d 1345 (S.D. Fla. 2003). Though of course, less extreme forms of silencing than assassination would also be covered under this discourse.

[307] *See supra* pgs 17-18, 22-24 (Coca-Cola in Sudan); *see also* Avery, *supra* note 302, at 24 (quoting Desmond Tutu, "I haven't heard similar arguments [that sanctions do not work] brought forward. . .when sanctions are applied to. . .Libya. . .I have to say that I find this new upsurge of altruism from those who suddenly discover they feel sorry for blacks very touching, though its strange coming from those who benefited from cheap black labor for so many years. . .for your massive profits have been gained on the basis of our black suffering and misery.").

[308] *Id.* (along with apartheid in South Africa).

late the state's practices and law, thus directly participating and perpetuating the violation of human rights. Additional theoretical justification can be found pursuant to the four human rights principles given earlier in this Part.[309] Accordingly, the TNC must at the very least forgo profiting from transacting with problematic states when an international customary law is implicated. In heeding the state-centric formulation of customary law while still maintaining the understanding that human rights responsibilities lie on all entities, crimes such as slavery, racial discrimination,[310] war crimes, crimes against humanity and genocide become practices in which the TNC can have no affiliation

Section III: Positive Obligations

The more complicated aspect of the question of TNC human rights responsibility asks what affirmative steps the entity must take in order to discharge its obligations.[311] Focusing on the impacts of economic globalization, Professor Kinley and Barrister Tadaki note that the increased privatization of public functions and the agglomeration of historically state-marked funds into private hands warrant this inquiry.[312] To accommodate the realities of the contemporary economic and political landscape, a human rights discourse should be established based on an analysis of the relationships between the TNC and the state and communities affected.

Seeking to expressly define the outermost boundaries of affirmative duties is ideologically problematic and likely impossible in all practicality. Much like the evolution of individual criminal liability and state human rights obligations as a whole, a gradual evolutionary flexibility must be worked into the process.[313] The outward expansion of these boundaries may occur from different sources, from, for instance, the incremental shifts in

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[309] *Supra* pgs 50-51.

[310] Unlike the other enumerated crimes which are often the listed as international customary law violations, I am drawing upon anti-discrimination in accordance with Sarei v. Rio Tinto, 487 F.3d 1193, 1209-1210 (9th Cir. 2007).

[311] It is at this point that Professor Ratner's conclusion that such responsibilities will be limited diverges from Professor Kinley and Barrister Tadaki's note that such obligations should in fact occur. *See* Kinley & Tadaki, *supra* note 7, at 966.

[312] *Id.*

[313] Human rights is a fluid constantly emerging process. *See* MICHAEL WRIGHT & AMY LEHR, BUSINESS RECOGNITION OF HUMAN RIGHTS: GLOBAL PATTERNS, REGIONAL AND SECTORAL VARIATIONS 49 (United Nations, 2006), *available at* http://www.reports-and-materials.org/Business-Recognition-of-Human-Rights-12-Dec-2006.pdf (merely because the ideas surrounding TNC obligations change does not mean they should be discounted. Human Rights is a fluid process).

the law of nations according to jurisprudence[314] or by mechanisms such as treaty-based/"legislative" processes whereby standards of acceptable behavior are consciously or actively promulgated after integrating feedback from corporate representatives.[315] The fluid process need not erase the character of the TNC as a private individual[316] and may continuously circumscribe the TNC's human rights obligations on account of infrastructural and socio-economic role differences as well as considerations privileging the state's role in the hierarchy of the international law structure. Merely, because these considerations survive, as Professor Kinley and Barrister Tadaki note,

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[314] *See, e.g.*, Talisman Energy, 244 F. Supp. 2d 289, 304 (S.D.N.Y. 2003); Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2798 (2006).

[315] The ILO for example works with employer associations as part of its unique triparte governing system. International Labor Organization, Structure of the ILO, http://www.ilo.org/public/english/depts/fact.htm (last visited Mary 1, 2008); Shelton, *supra* note 14, at 281. It is beyond the scope of this article to explore how the various forum in which norms applicable to TNCs might conceivably function or look like. This Article is primarily concerned with establishing the theories and levels of obligation a TNC might be subject to in human rights contexts.

[316] Concepts of private affirmative obligations for human rights can and do exist, for example, tax systems provide for the realization of human rights by their very nature. They support the governmental infrastructure which protects rights through regulatory and recourse methods, and spending on public welfare promotes the realization of rights in the broader community. Programs guaranteeing certain minimums of education or health care for example are basic tools of human rights achievement. There are obviously many different theories and reasons for taxation, but social welfare considerations are often implicated to varying degrees. It may be possible to think of TNC obligation even in this simpler dichotomy between the public and private if necessary, with the TNC's global identity allowing international direct regulation and its obligations reflecting the increased resources it posses. *See, e.g.*, United States Department of the Treasury, Fact Sheet: Taxes, Economics of Taxation, http://treasury.gov/education/fact-sheets/taxes/economics.shtml ("Throughout history, every organized society had some form of government. In free societies, the goals of government have been to protect individual freedoms and to promote the well-being of society as a whole."); Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 FORDHAM URB. L.J. 607, 623-624 (1996) (John Rawls' 'Theory of Justice' serves as the basis for one of the modern viewpoints connecting taxation to rights realization); Kornhauser, *Rethinking Redistribution: Tax Policy in an Era of Rising Inequality: Choosing a Tax Rate Structure in the Face of Disagreement*, 52 UCLA L. REV. 1697, 1727-1737 (2005) (promotes equality of opportunity, and liberty).

it does not mean that affirmative human rights obligations are nonexistent.[317]

It is in the act of conceptualizing the affirmative obligations of the TNC that an evaluation of the TNC's relationship to the state and to affected populations is most productive. Contemplating the TNC's relationship to the state and populations seems desirable not merely because it in some fashion generates the conditions for imposing a theory of human rights duty-bearing, for the underlying responsibility already exists,[318] but, rather, looking to the TNC's relationship with other actors reinforces the primacy of the state in international law and fortifies the sovereign-based system desired by international governments.[319] The benefit of locating the TNC's obligation vis-à-vis the state when extrapolating the contours of a certain duty borrows from the already existent rationale behind extending liability to non-state actors in human rights settings[320] while prescribing a broader set of obligations in response to the increased power and resources TNCs have gained.

The analysis of the TNC's relationship to the state when contemplating affirmative duties takes on a nuanced application. Several levels of interaction may factor into defining the content or borders of the corporation's positive human rights obligations. Not only must the overall power imbalance be examined, but a focus on the relationship betwixt the two through the narrow perspective of the particular service or business function of the TNC should be separately considered. In other words, it is beneficial to look at how much authority the TNC has compared to the state with regard to a specific subject or operation as privatization is advocated, for instance, the above-referenced public water resources and infrastructure in India.[321] If the power imbalance is high, as is the case between Rio-Tinto and Papua New Guinea[322] and between Trafigura and Cote d'Ivoire,[323] the TNC's levels of obligation should rise substantially, sometimes even to

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[317] *See* Kinley & Tadaki, *supra* note 7, at 966. However, I again note that the specific balancing of corporate interests in maximizing profit and individual rights enjoyment are not a proper mode of analysis.

[318] All entities carry obligations to each other by the nature of human rights. *See* Goodman, *supra* note 23; Englard, *supra* note 23, at 1918-1919.

[319] *See* CLAPHAM, *supra* note 27, at 73.

[320] *See* Ratner, *supra* note 8, at 466-467; *see also* Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 654 (May 7, 1997) (for example, *de facto* control by non-state actors).

[321] *See supra* notes 102-103 and accompanying text.

[322] *See supra* Part II (Transnational Corporation Example III: Rio Tinto).

[323] *See supra* Part II (Transnational Corporation Example I: Trafigura).

levels analogous to similarly situated states, though in keeping with the private character of the TNC. This mode of analysis poses somewhat greater duties on TNCs transacting with extremely politically or economically weak states, as noted before.[324] However, this method also imposes more extensive obligations on the private social service and public utility provider or on TNCs that rely heavily on public resources for their own profits. For example, consider the several TNCs bidding for water system contracts in India as the system moves towards privatized control[325] or the exhausting of public water tables for the purposes of reaching profit, as Coca-Cola has in India.[326]

This article argues that responsibility should flow derivatively from the corporation's profiting from historically-administered public services and thus by functionally serving as the state in a narrow capacity.[327] The elevation of obligations proposed is not meant to deter TNCs from investing and developing within these industries. Though the increase in affirmative duties correlates proportionally with the position of the TNC broadly or in

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[324] *See supra* pg 52.

[325] Coca-Cola is depleting the public water supply in India. Additionally, international lending institutions are advocating privatization of the water system, several well-known TNCs are bidding for the contracts including Suez, Bechtel, Vivendi and Thames Water, and several others like Coca-Cola and Pepsi are profiting heavily from selling bottled water. *See* SHRIPAD DHARMADHIKARY, PRIVATISATION AND COMMERCIALISATION ON WATER SERVICES IN INDIA (Manthan Adhyayan Kendra India, 2003) (naming Suez, Bechtel, Vivendi and Thames Water. Also discussing water privatization agenda of international institution WTO), *available at* http://www.jubileesouth.org/news/EpZZZlkuAkDMZZOUuf.shtml; *see also* Vanda Shiva, *Water Privatization and Water Wars*, ZNET COMMENTARIES, July 12, 2005, http://www.zmag.org/Sustainers/Content/2005-07/12shiva.cfm (last visited Mar. 10, 2007) (naming Suez, Bechtel and Saur).

[326] *See* Loewe, *supra* note 95 (discussing Coca-Cola's water depletion as well as profits from bottled water); Kysar, *supra* note 102 (depletion of public water sources).

[327] *See* Kinley & Tadaki, *supra* note 7, at 966; *see also* Alston, *supra* note 6, at 17-18 (privatization of social welfare services, prisons, asylum processing, education, health care and utilities has placed non-state actors in the role of the state. Security and the attendant violence attached to it has been privatized); Reinisch, *supra* note 6, at 75-76; *see also* Antenor Hallo De Wolf, *Modern Condottieri in Iraq: Privatizing War from the Perspective of* INTERNATIONAL AND HUMAN RIGHTS Law, 13 IND. J. GLOBAL LEG. STUD. 315, 317-320 (2006) (for example privatization of military operations in Iraq); *see* Michael Addo, Symposium, HUMAN RIGHTS Perspectives of Corporate Groups, 37 CONN. L. REV. 667, 671, 678 (2005) (public services increasingly privatized).

subject-specific capacities as the state's influence decreases, this does not insinuate that the corporation must now fulfill a purely benevolent or non-profit role. It is still empowered to profit from its operations. Rather, the emphasis rests on the space the TNC now occupies in relation to the public's human rights. However, the new position must be adequately integrated into private business models and the broader international legal framework, even if altruism is not to be the TNC's primary purpose.

The simplest corporate example to address is Trafigura. In applying the three step calculation, an examination of the TNC to the state, the population, and retaining a flexible process for fulfilling positive obligations, we find that Trafigura had the positive duty to independently investigate whether Cote d'Ivoire as a state, and "Tommy" as a private enterprise, were sufficiently capable of disposing of the vessel's hazardous waste even though the transaction would otherwise be legally permissible.[328] If we look at Trafigura's relationship to the state, we find a notable power imbalance, not by virtue of threat, but by virtue of financial need, resource distribution, and political fragmentation.[329] If we look at the relationship of the impacted population, we also find a direct nexus resulting in a very serious imbalance. The affected civilians were unable to influence the TNC's decision-making procedures, had no recourse to preventative measures through state political processes, and had no practical effective national regulatory or judicial structures extant for addressing the negative impacts or maintaining preemptive disincentives for the TNC. Further, the absence of warning maximized the harm to the residents' fundamental rights which was violated to such an extent that criminal liability against individual officials may possibly be attached.[330] The TNC had actual sufficient knowledge, or on minimum constructive knowledge, of the country's inability to manage such waste disposals[331] as well as the broader continent's troubling history with transnational waste disposal.[332] In relation to the population, the damage potentially wrought by improper care of the hazardous waste was extreme and violated basic fundamental rights such as those to life.[333] Trafigura was profiting from a dangerous enterprise activity, whether by contract for its shipping or through activities of its own which peripherally generated the waste. Further, the population was particularly dependant on the TNC because of the unstable economic and political circumstances

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[328] *See supra* Part II (Transnational Corporation Example I: Trafigura).

[329] *See* World Bank LICUS List, *supra* note 78.

[330] *See* BBC News, *supra* note 62.

[331] *Id.*

[332] *See* Marbug, *supra* note 90.

[333] *See supra* note 68 and accompanying text.

which made effective regulation unlikely, either in technical form or alternatively by enforcement.

In turning to the third aspect of the calculation, Trafigura would have been entitled to proceed in any number of manners so long as it discharged its obligations. It could have chosen to expend the extra capital necessary to dispose of the waste in the Netherlands, circumventing the need to undertake extensive investigation because of the relatively powerful and developed position of the state. Or the TNC could have retained its own staff for investigating the matter or sought the opinions of outside experts. Trafigura could have fulfilled its positive obligation through any manner it deemed most appropriate for the sake of efficiency, so long as it met the requisite criteria established by the situation. In failing to do so, the TNC should become responsible for financing immediate and long-term operations ameliorating the ramifications of the disaster, in collaboration with the state who remains the primary securer of rights.

The case of Rio Tinto further expands the conceptual boundaries. Beyond its direct obligation to refrain from leveraging its power to motivate state human rights violations, from being complicit in violations of norms, and in directly enacting and perpetuating significant violations, by virtue of its position and enterprise, the TNC should assume a heightened set of responsibilities to help actuate an array of human rights. The corporation's significant power over the PNG government,[334] the nature of the industrial enterprise from which it was profiting and from which resulted foreseeable extensive environmental degradation, property accumulation, and negative human rights consequences to the surrounding communities, and the corporation's understanding of the underdeveloped status of the area with which it was transacting, culminate in the entity's enhanced affirmative human rights obligations. Beyond the most direct actions such as just compensation for property loss, investment in environmentally safe technologies or practices, and implementing higher remuneration and benefit packages than state minimums might require, the TNC would need to invest funds in public infrastructure tangential to its business practices. For example, Rio Tinto would be responsible for developing a local adequate health care system through which the wellbeing of its employees and their families could become a meaningful right. The TNC might invest in community facilities or by recruiting sufficiently trained medical staff and securing medical supplies in order to facilitate its employees and the surrounding impacted community's right to health which is directly affected by the corporation's activities. The TNC must then look to the manner in which its practices

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[334] Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1148-1149 (C.D. Cal. 2002); JOSEPH, *supra* note 5, at 35; Hagens, Berman, *supra* note 129.

affect the customary human rights standards of the populations in question and invest accordingly under the flexible strategy posited above.

The most complicated example for delineating positive dimensions of human rights obligations lies with this Article's water privatization/exploitation study in India. This hypothetical entails a combination of institutional pressures towards privatization[335] in combination with Coca-Cola's over-use of public water supplies[336] from which it profited greatly, and the projections that a majority of the TNC's revenue would issue from bottled water in the coming years.[337] If these circumstances actualize, Coca-Cola and other corporations profiting from the sale of bottled water, in tandem with the network of TNCs obtaining contracts under the new privatized water system regime, bear a reciprocal responsibility for providing necessary quantities of potable water to the impacted populations.[338]

Breaking with the physicalist tendencies of the 'concentric circles' approach,[339] the applicable community may be understood not only in terms of a modified de facto control-centered model, but in terms of more nebulous attenuated constituencies. The increase in water prices as an international trend requires a broader conception of who is affected by the privatization, exhaustion of natural resources, or the subsequent profiting by private enterprises capitalizing on the previously-public commodity or service. In short, the collaborating TNCs have obligations to ensure that sufficient potable water is provided to those individuals living in poverty, the population most affected by the contemporary move towards privatization and commercial sales of water, whether by refraining from rendering it inaccessible or by affirmatively providing it.[340]

Under a flexible approach, Coca-Cola's obligations may vary greatly both with regard to how the TNC creates the structural capacity to fulfill this obligation as well as how it discharges its obligations in relation

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[335] *See* DHARMADHIKARY, *supra* note 325.

[336] *See supra* Part II.

[337] *See* Maude Barlow, *Blue Gold: The Global Water Crisis and the Commodification of the World's Water Supply* 36 (Council of Canadians, 2001), http://www.ratical.org/co-globalize/BlueGold.pdf (last visited May 1, 2008) (Coca-Cola predicts that its water sales will surpass its soft-drink sales).

[338] In other words, those living in poverty. *Id.* at 2, 14-15, 20, 22, 41 (discussing unequal access to water for the poor globally, price rises for water under privatization as an international trend, water prices eliminating access for the poor and cost affects in India).

[339] *See* Ratner, *supra* note 8, at 506-509; Kinley & Tadaki, *supra* note 7, at 963-964; Draft UN Norms, *supra* note 9.

[340] *See* Barlow, *supra* note 337.

to each state with which it interacts. In India, the TNC could conceivably develop a production system which causes less devastating effects on the water tables. At the next level of obligation, if the TNC seeks to continue financially gaining from bottled water sales and therefore causally rendering the essential resource increasingly inaccessible,[341] Coca-Cola may wish to pool its efforts with other TNCs towards donating the appropriate amounts of potable water to areas which cannot afford its beverages. These suggestions are not meant to be exhaustive, but rather illustrative of the numerous options Coca-Cola could potentially take to retain profit margins while simultaneously fulfilling the affirmative obligations which result from its corporate endeavors.

As TNCs create expensive commodities out of quintessential resources and services necessary for the realization of human rights, they bear the responsibility of ensuring that unjust and adverse effects are not visited upon various susceptible populations. As is illustrated, this does not mean that Coca-Cola is unable profit financially from bottled water, only that it bears the affirmative responsibility of ensuring that its activities, though not necessarily directly deleterious to human rights, do not negatively impact and may even promote such rights. Mimicking the state's discretion in choosing the effective manner in which it will domestically execute its international human rights obligations, the options of TNCs should not be constrained by strict implementation method requirements. TNCs, when finding themselves assuming the broader responsibilities of the state, must also be afforded similar discretion and respect for the methods by which they choose to fulfill their human rights duties. Discretion, however, does not mean that the TNC does not bear significant human rights duties or is excused from fulfilling them. Rather, the TNC should find its actions governed by the basic presumptions of good-faith, measurable by results, which are applied to the state.[342]

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[341] *See id.*

[342] *See, e.g.*, Hum. Rts. Comm., General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 3 (2004) ("Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction (see paragraph 10 below). Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.").

Conclusion

The dignity inherent in the human condition requires a reconfiguration of the international human rights framework. The imposition of human rights obligations, particularly of an affirmative nature, upon TNCs is a fundamental question facing the new century. The realities of our contemporary world reinforce the need to assimilate TNCs into the international human rights regime. Doing so neither defeats democratic rights to self-determination nor the sovereign state-based system of international law, but rather it acknowledges the essential truth that non-state actors, particularly TNCs, have become part of the global fabric of power and implicate human rights in a way that can no longer be disregarded.

By positioning the TNC in relation to both the population and the state, we construct a relativist model which projects the duties of the TNC in accordance with the specificity of the overall relationships of the corporate entity to the state and population vis-à-vis human rights and which allows the flexibility of the human rights model to modify those responsibilities over time.