

## Articles

### **Corporations and Human Rights: A Theory of Legal Responsibility**

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The last decade has witnessed a striking new phenomenon in strategies to protect human rights: a shift by global actors concerned about human rights from nearly exclusive attention on the abuses committed by governments to close scrutiny of the activities of business enterprises, in particular multinational corporations. Claims that various kinds of corporate activity have a detrimental impact on human welfare are at least as old as Marxism, and have always been a mantra of the political left worldwide. But today's assertions are different both in their origin and in their content. They emanate not from ideologues with a purportedly redistributive agenda, but from international organizations composed of states both rich and poor; and from respected nongovernmental organizations, such as Amnesty International and Human Rights Watch, whose very credibility turns on avoidance of political affiliation. Equally importantly, these groups do not seek to delegitimize capitalism or corporate economic power itself, but have criticized certain corporate behavior for impinging on clearly accepted norms of human rights law based on widely ratified treaties and customary international law.

Consider the following small set of claims challenging private business activity and the arenas in which they occur:

- The United Nations Security Council condemns illegal trade in diamonds for fueling the civil war in Sierra Leone and asks private diamond trading associations to cooperate in establishing a regime to label diamonds of legitimate origin.<sup>1</sup>
- The European Parliament, concerned about accusations against European companies of involvement in human rights abuses in the developing world, calls upon the European Commission to develop a "European multilateral framework governing companies' operations worldwide" and to include in it a binding code of conduct.<sup>2</sup>
- In response to public concern that American companies and their agents are violating the rights of workers in the developing world, the U.S. government endorses and oversees the creation of a voluntary code of conduct for the apparel industry.<sup>3</sup>

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1. S.C. Res. 1306, U.N. SCOR, 55th Sess., 4168th mtg., U.N. Doc. S/RES/1306 (2000).

2. Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 1999 O.J. (C 104).

3. Fair Labor Ass'n, Workplace Code of Conduct, at <http://www.fairlabor.org/html/CodeOfConduct/index.html> (last visited Oct. 15, 2001).

- The South African Truth and Reconciliation Commission, in a searching study of apartheid, devotes three days of hearings and a chapter of its final report to the involvement of the business sector in the practices of apartheid.<sup>4</sup>
- Human Rights Watch establishes a special unit on corporations and human rights; in 1999, it issues two lengthy reports, one accusing the Texas-based Enron Corporation of “corporate complicity in human rights violations” by the Indian government,<sup>5</sup> and another accusing Shell, Mobil, and other international oil companies operating in Nigeria of cooperating with the government in suppressing political opposition.<sup>6</sup>
- Citizens of Burma and Indonesia sue Unocal and Freeport-McMoRan in United States courts under the Alien Tort Claims Act and accuse the companies of violating the human rights of people near their operations. The corporations win both suits without a trial.<sup>7</sup>
- Holocaust survivors sue European banks, insurance companies, and industries for complicity in wartime human rights violations, and, with the aid of the U.S. government, achieve several multimillion-dollar settlements.<sup>8</sup>

The creation of a new target for human rights advocates is a product of various forces encompassed in the term globalization: the dramatic increase in investment by multinational companies in the developing world; the sense that the economic might of some corporations has eroded the power of the state; the global telecommunications revolution, which has brought worldwide attention to the conditions of those living in less developed countries and has increased the capacity of NGOs to mobilize public opinion; the work of the World Trade Organization (WTO) and International Monetary Fund (IMF) in requiring states to be more

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4. 4 TRUTH & RECONCILIATION COMM’N, FINAL REPORT ch. 2 (1998), <http://www.polity.org.za/govdocs/commissions/1998/trc/4chap2.htm>.

5. HUMAN RIGHTS WATCH, THE ENRON CORPORATION: CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS (1999), at <http://www.hrw.org/reports/1999/enron>.

6. HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA’S OIL PRODUCING COMMUNITIES (1999), at <http://www.hrw.org/reports/1999/nigeria>.

7. See *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff’d*, 248 F.3d 915 (9th Cir. 2001); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), *aff’d*, 197 F.3d 161 (5th Cir. 1999). For an updated list of suits, see Christopher Avery, *Lawsuits Against Companies*, at <http://www.business-humanrights.org/Lawsuits.htm> (last visited Oct. 1, 2001).

8. See Sean D. Murphy, *Nazi-Era Claims Against German Companies*, 94 AM. J. INT’L L. 682 (2000).

hospitable to foreign investors; and the well-documented accounts of the activities of a handful of corporations. These advocacy efforts build on earlier attempts by concerned actors to focus attention on private business activity, ranging from the trials of leading German industrialists for war crimes after World War II to campaigns in the United States in the 1970s and 1980s to encourage divestment from corporations doing business in South Africa. All are based on the view that business enterprises should be held accountable for human rights abuses taking place within their sphere of operations. Corporations, for their part, have responded in numerous ways, from denying any duties in the area of human rights to accepting voluntary codes that could constrain their behavior.

But is there an objective standard by which to appraise both the claims that various business activities are illegitimate from the perspective of international human rights and the corresponding responses of business actors? For example, are corporations responsible for human rights abuses if they simply invest in a repressive society? What if they know that the government will violate human rights in order to make an investment project succeed? What if they share with the government information on suspected troublemakers? What if, illegally, but with the tacit consent of the government, they pay a very low wage or provide bad working conditions?

Any answer not depending exclusively on diverse and possibly parochial national visions of human rights and enterprise responsibility must come from international law. International law offers a process for appraising, and in the end resolving, the demands that governments, international organizations, and nongovernmental organizations are now making of private enterprises. Without some international legal standards, we will likely continue to witness both excessive claims made against such actors for their responsibility and counterclaims by corporate actors against such accountability. Decisionmakers considering these claims—whether legislatures or international organizations contemplating regulation, courts facing suits, or officials deciding whether to intervene in a dispute involving business and human rights—will respond in an ad hoc manner, driven by domestic priorities or by legal frameworks that are likely to differ significantly across the planet. The resultant atmosphere of uncertainty will be detrimental to both the protection of human rights and the economic wealth that private business activity has created worldwide.<sup>9</sup>

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9. This uncertainty is reflected in a corporate policy statement of the Royal Dutch/Shell group of companies. See ROYAL DUTCH/SHELL GROUP OF COS., HUMAN RIGHTS—THE ROLE OF BUSINESS, at <http://www.shell.com/royal-en/content/0,5028,25470-51032,00.html> (last visited Sept. 2, 2001) (“It has often been difficult for [NGOs, the media, and others] to agree on . . . a theoretical framework for a new understanding of business’s role in . . . human rights. . . . As a result it has been difficult for business to respond to expectations that appear to be changing significantly . . .”).

This Article posits a theory of corporate responsibility for human rights protection. Building upon the traditional paradigm whereby international law generally places duties on states and, more recently, individuals, I consider whether and how the international legal process might provide for human rights obligations directly on corporations. My thesis is that international law should and can provide for such obligations, and that the scope of these obligations must be determined in light of the characteristics of corporate activity. In particular, business enterprises will have duties both insofar as they cooperate with those actors whom international law already sees as the prime sources of abuses—states—and insofar as their activities infringe upon the human dignity of those with whom they have special ties. My approach thus marries principles of international law concerning foreign investment, as well as principles of corporate law more generally, with the theory and practice of human rights law.

This proposal will not be without its detractors. Corporate and governmental leaders might find the idea simply unnecessary, viewing the state as a sufficient guarantor of the human rights of its population. They and others, including those sympathetic to the human rights agenda, might find a philosophical objection to the idea that human rights law should regulate private actors. Some traditional international legal scholars might see corporate duties as unprecedented or even doctrinally prohibited, asserting that only states, and perhaps individuals, are holders of obligations. And still others may find such an approach inherently unworkable given the differences between state and corporate structures. In addressing these concerns, my argument fits within broader academic and policy debates about the power of transnational corporations and nongovernmental organizations, the role of the state in protecting human rights, and the extent to which international law can and should regulate nonstate actors.

I lay out my argument in six Parts. Part I examines the approach international law has taken to corporations as independent actors. It describes a swinging pendulum in the attention that the law has given to the relations between corporations and the states where they undertake their activities. This process will prove critical to understanding international law's views on corporate duties. In light of this historical review, Part II seeks to justify the need for corporate responsibility, rather than state or individual responsibility, as a means for protecting human rights. Given that most human rights abuses continue to be committed by governments, organized insurgencies, and the individuals in them, the answer is by no means obvious. Inherent in this issue is also the tension between the imposition of duties on business enterprises and the conventional view that only violations of human dignity sponsored by governments or quasi-governmental actors engage international responsibility. With the concept

of corporate responsibility defended, Part III considers a variety of ways in which key international actors have already accepted duties on corporations, particularly in areas other than human rights. Their actual recognition of corporate responsibility undercuts any conceivable doctrinal bar to such duties.

Part IV launches the theory by examining whether existing international law doctrines, which make states and individuals responsible for violations of human rights, can provide a basis for deriving corporate duties. Part V, the core of my theory, proposes deriving such duties based on four factors: the corporation's ties with the government, its nexus to affected populations, the particular human right at issue, and the structure of the corporate entity. In Part VI, I review the theory and provisionally apply it to some of the factual claims currently leveled at corporations. In Part VII, I offer an overview of the means by which the theory of responsibility might be implemented within various arenas in which key actors prescribe, invoke, and apply international law. This includes a discussion of enforcement options, which represent one of the great challenges to international human rights law and international law generally. I conclude by engaging anticipated criticisms of the theory and discussing the theory's implications for international law and human rights.

Before beginning, it is worth putting up four guideposts for the reader. First, the theory offered here is grounded in international law rather than the domestic law of one state. Others have begun to consider the reasoning of U.S. courts handling corporate cases under the Alien Tort Claims Act (ATCA), which gives federal courts jurisdiction to hear claims of aliens for violations of international law.<sup>10</sup> These cases are important evidence of the trend toward corporate accountability—indeed, with concrete results.<sup>11</sup> Yet exclusive or excessive focus on them would be mistaken, because American principles of state action, which were developed in U.S. civil rights law and have proved critical in corporate ATCA cases, cannot simply be transferred to the international arena. This United States-centered view is likely to undermine the entire enterprise. The businesses at issue in this problem are predominantly multinational or foreign, and primarily

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10. 28 U.S.C. § 1350 (1994); *see, e.g.*, Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 BYU L. REV. 1139; *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 2025-49 (2001); Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act*, 40 VA. J. INT'L L. 545 (2000).

11. *See, e.g.*, Roberta C. Yafie, *Freeport in Deal with Irian Java [sic] Citizens*, AM. METAL MARKET, Aug. 22, 2000, at 6, LEXIS, Nexis Library, American Metal Market File (discussing a memorandum of understanding between Freeport and local citizens' groups, which was prompted by the suit in *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, *aff'd*, 197 F.3d 161, and which addressed human rights and environmental concerns).



headquartered outside the United States.<sup>12</sup> The abuses of concern also take place principally outside the United States. Not surprisingly, international law rejects such a one-dimensional basis for the creation of international norms. Indeed, domestic legal principles matter only to the extent they are shared by many different legal systems and, even then, are subsidiary to treaties and customary law.<sup>13</sup>

Second, this Article seeks to develop an approach to corporate responsibility that can be applied in numerous international fora, not merely courts. International law, including human rights law, is invoked, interpreted, and applied in diverse arenas.<sup>14</sup> Some norms based on the principles of international responsibility will be incorporated by businesses themselves under economic pressure from interested shareholders and consumers, who serve as private enforcers of the law. Some claims will be addressed in domestic fora as legislators and government officials draft statutes, regulations, or governmental policy. Some prescription and application of law will take place in international arenas as diplomats, perhaps prodded by NGOs, prepare treaties or nonbinding legal instruments. And both domestic and international courts and other dispute resolution bodies may play a role. But excessive focus on the activities of courts diverts attention from the principal venues in which international legal argumentation is made and matters.<sup>15</sup>

Third, this Article's advocacy of a theory of responsibility for business enterprises under international law should in no way suggest any sort of unilateral imposition of rules on corporations. International norms are not—indeed cannot be—prescribed through such a process. Wherever lawmaking occurs, the detailed elaboration of norms must directly involve all interested actors, whether governments, businesses, or human rights groups. A theory of responsibility under international law in no way precludes, but rather invites and assumes, a role for states and their citizens (individual and corporate) in developing appropriate norms and enforcement mechanisms.

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12. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 1999, at 78-80, U.N. Sales No. E.99.II.D.3 (2000) (ranking top multinational firms by “transnationality index,” of which the leading five were headquartered in Canada (Seagram and Thomson), Switzerland (ABB and Nestle), and the Netherlands (Unilever)).

13. 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996, at 1605 (3d ed. 1997) (construing general principles of law as “particularizations of a common underlying sense of what is just in the circumstances”); see also BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 24 (Grotius Publ'ns 1987) (1953) (defining general principles of law as “general propositions underlying the various rules of law which express the essential qualities of juridical truth itself”).

14. Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law Is Made*, in INTERNATIONAL LAW ESSAYS 353, 374-77 (Myres S. McDougal & W. Michael Reisman eds., 1981).

15. See, e.g., Steven R. Ratner, *International Law: The Trials of Global Norms*, FOREIGN POL'Y, Spring 1998, at 65, 70-71.

Finally, the use of the term “corporations” or “transnational enterprises” (TNEs) in this Article does not reflect an assumption of a particular structure of business enterprises. Rather, the terms are chosen to respond to the current debates among governments, human rights NGOs, and businesses, which essentially highlight the duties of multinational corporations in countries where they invest or otherwise do business. The theory I develop is, however, applicable broadly to business enterprises—whatever their form (e.g., partnership or family-owned business) and whatever the degree of transnationality (from completely local to highly transnational).<sup>16</sup> I thus use a variety of terms interchangeably and maintain a focus on multinational enterprises, but do not suggest that there is a principled distinction among such entities and other economic actors.

#### I. THE SWINGING PENDULUM: A HISTORICAL REVIEW OF INTERNATIONAL LAW’S APPROACH TO THE BUSINESS-HUMAN RIGHTS DYNAMIC

The approach international law has taken and can take to business enterprises and the protection of human rights flows from relationships among four sets of key actors involved in the process of international economic activity and, in particular, of foreign investment: the home state of a transnational enterprise (a concept that has, of course, itself changed as corporations have become more multinational); the host state(s) for the activities of the enterprise; the enterprise or individual investor; and the affected population of the host state(s).<sup>17</sup> The law’s characterization of these relationships has changed significantly in the last century, reflecting global political and economic transformations.

##### A. *Action: The Colonial Era*

During the period of European colonialism, the home state retained the greatest power among the relevant actors. Its relationship with the host state was defined as one of direct control through the various mechanisms and legalisms of the colonial relationship. Far from undermining this dynamic, international law affirmatively recognized and supported it.<sup>18</sup> The host state

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16. For a similar starting point within the UN context, see David Weissbrodt, *Principles Relating to the Human Rights Conduct of Companies: Working Paper*, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52d Sess., para. 16, U.N. Doc. E/CN.4/Sub.2/2000-WG.2/WP.1 (2000).

17. One might wish to picture these four actors as sitting at the corners of a quadrangle, with home states and corporations the endpoints on the top left and right, and host states and their populations the endpoints at the bottom left and right, with the legal relationships among them viewed as lines between them.

18. See 1 LASSA OPPENHEIM, *INTERNATIONAL LAW* 99 (1st ed. 1905) (equating civilized states with fully independent ones); *id.* at 219 (“Colonies rank as territory of the

might exist as a de jure matter, with treaties officially defining its relationship with the metropole,<sup>19</sup> but in fact the home state could generally dictate to its own colonies whatever terms it chose. Of course, colonial powers did not enjoy these powers vis-à-vis the colonies of other states. Nonetheless, for the sake of a snapshot description of the international economic and political order of the period, the overall relationship between home states and host states could be regarded as colonial. The black African membership of the League of Nations, limited to two independent states—Liberia and Ethiopia, suffices to make this clear.

As for TNEs, they were creatures of domestic law. They varied in status, ranging from some that were purely private (including individual investors) to others that were effectively controlled by the government. The latter included the British East India Company, Hudson's Bay Company, Dutch East India Company, and other trading companies that helped—or in some cases de facto did—administer India, Canada, Indonesia, southern Africa, and other parts of the world. In matters concerning the overseas possessions, the business or individual could generally count on the support of the home state. European companies became the principal agents for the economic exploitation of the colonial territory.<sup>20</sup> That support gave enterprises and individuals access to the wealth of the colonies on extraordinarily favorable terms. Local communities received few economic benefits for their work and had no basis to complain. The colonial legacy included swaths of African farmland owned by whites, African mineral wealth controlled by Europeans, and significant petroleum sources in the Middle East granted to Western oil companies. The very legal term used to describe these foreign investments—concessions—crystallized the relationship between the home state and its companies, on the one hand, and the host territory, on the other.<sup>21</sup> The same general practice held sway even with respect to independent states in the developing world, notably in Latin America, where the United States and European nations at times

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motherland . . ."); see also Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999) (demonstrating the incorporation of colonialism within legal doctrine).

19. Cf. *Western Sahara*, 1975 I.C.J. 12, 39 (Oct. 16) (noting the legal status of nineteenth-century territories). But see Malcolm Shaw, *The Western Sahara Case*, 49 BRIT. Y.B. INT'L L. 119, 133-34 (1978) (noting theories of the time, which denied international legal personality to non-European entities).

20. See, e.g., MICHAEL W. DOYLE, EMPIRES 176-77, 189-91 (1986) (describing the rise of "company colonialism"); THOMAS PACKENHAM, THE SCRAMBLE FOR AFRICA 386-87, 491-94 (1992) (discussing the British South Africa Company's role in Rhodesia). On King Leopold of Belgium's privatization of colonial control over the Congo through the creation of the so-called Congo Free State, see generally ADAM HOCHSCHILD, KING LEOPOLD'S GHOST (1998).

21. See M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 9-10 (1994).

resorted to gunboat diplomacy or covert intervention to protect economic interests.<sup>22</sup>

The remaining actors—individuals in the host state—were, as a legal matter, marginal to the entire process. They enjoyed few rights with respect to the host state government (to the extent it might exist independently), the colonial power, or the TNE. The colonial authorities or their host state agents supplied workers to the TNEs. In sum then, home states and TNEs working with them had substantial rights vis-à-vis host states and (to the extent anyone in the North noticed) their populace, while the latter two enjoyed few rights with respect to the former two.

#### B. *Reaction: Decolonization and Its Aftermath*

The global transformation that resulted in the independence of nearly all colonial territories within thirty years after World War II drastically altered these political relationships and the corresponding legal relationships. First, states accepted that the legal links between the developed world and the developing world would be based on the notion of the sovereign or juridical equality of independent states.<sup>23</sup> Although certain territories remained non-self-governing, states agreed that any such relationship had to stem from a clear choice by the people of the territory.<sup>24</sup> Moreover, as more developing world states became members of international organizations, they succeeded in passing resolutions demanding greater economic equality between the North and the South and in creating mechanisms to study the realization of this goal. The apogee of this process took place in the 1970s, when the United Nations General Assembly passed a series of resolutions aimed at the establishment of a “New International Economic Order.” These included a Charter of Economic Rights and Duties of States that emphasized the obligations of the North to the South.<sup>25</sup> The United Nations Conference on Trade and Development held numerous meetings in which the grievances of the South

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22. EDWARD M. GRAHAM, *FIGHTING THE WRONG ENEMY* 168 (2000); SORNARAJAH, *supra* note 21, at 9-11.

23. U.N. CHARTER art. 2, para. 1.

24. G.A. Res. 2625, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 124, U.N. Doc. A/8028 (1970).

25. G.A. Res. 3281, *Charter of Economic Rights and Duties of States*, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974); G.A. Res. 3201, *Declaration on the Establishment of a New International Economic Order*, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9959 (1974); G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973).

received great attention, even though North-South disagreements prevented any significant restructuring of global economic relations.<sup>26</sup>

Second, alongside the decolonization process occurred another sea change in international law—the elaboration of a body of international human rights law that placed direct duties on states toward their own people. Although the UN Charter itself enshrined the notion of noninterference in the internal affairs of states,<sup>27</sup> this provision did not prevent the UN and its members from promoting the protection of human rights through international law. In the two decades after the Charter, states promulgated the Universal Declaration on Human Rights and codified many of its principles in the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and additional treaties on racial discrimination, women's rights, children's rights, and torture.<sup>28</sup> States and other actors thus came to see the relationship between a state and its inhabitants as governed by a set of human rights norms. At the same time, implementation of these norms remained sporadic, as most of the newly decolonized states ended up being ruled by regimes that resisted international inquiry into their domestic politics.<sup>29</sup> The Cold War contributed to this neglect, as each superpower sought to shore up client states without much concern for their human rights records.

The period of decolonization and its immediate aftermath also changed the relationship between multinational enterprises and host state governments. The host states in the developing world that were lobbying for a new North-South dynamic also sought to redefine the ties between themselves and the TNEs based in the North. Seeing the TNEs or individual foreign investors as agents of the North in the economic and political domination of the South, they wanted to even the scales.<sup>30</sup> The attempt at equalization had several dimensions. First, developing world states began to engage in significant expropriations of foreign investment. The best known of these took place in the petroleum industry, when Middle Eastern states

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26. See ROBERT L. ROTHSTEIN, *GLOBAL BARGAINING: UNCTAD AND THE QUEST FOR A NEW INTERNATIONAL ECONOMIC ORDER* 106-216 (criticizing UNCTAD as a forum for commodity negotiations); Edwin P. Reubens, *An Overview of the NIEO*, in *THE CHALLENGE OF THE NEW INTERNATIONAL ECONOMIC ORDER* 1, 2-6 (Edwin P. Reubens ed., 1981) (discussing the increasing demands of the South).

27. U.N. CHARTER art. 2, para. 7.

28. See generally U.N. DEP'T OF PUB. INFO., *THE UNITED NATIONS AND HUMAN RIGHTS, 1945-1995*, at 3-91, U.N. Sales No. E.95.I.21 (1995) (reviewing the UN's role in creating treaties and implementation mechanisms for human rights); see also JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 5-17 (1993) (reviewing the role of NGOs in the creation of international human rights law).

29. See, e.g., GEORGE B.N. AYITTEY, *AFRICA BETRAYED* 142-52 (1992) (highlighting significant human rights abuses in African countries); ARNOLD RIVKIN, *NATION-BUILDING IN AFRICA* 112-30 (1969) (discussing challenges to the rule of law in newly independent states).

30. GRAHAM, *supra* note 22, at 167-72.

nationalized concessions held by Western companies.<sup>31</sup> (Latin American states had already attempted to adjust the TNE-host state relationship before World War II, for instance, when Mexico expropriated U.S. agricultural holdings.)<sup>32</sup> Intimately tied with this action was the insistence by the developing world that international law did not grant foreigners any right to receive the economic value of their investment as compensation and that the amount of compensation was determined solely through domestic law. This position manifested itself most clearly in the aforementioned General Assembly resolutions, which contained expropriation provisions that were harshly resisted by the West.<sup>33</sup>

Second, host states and TNEs adjusted their economic and legal relationship through economic development agreements. These agreements provided in great detail the rights enjoyed by the host state and the duties of the foreign investor, in particular, with respect to payments by the former to the latter.<sup>34</sup> They also spelled out rights of investors, such as the right to institute international arbitration in the event of a contractual dispute. International lawyers devoted many pages to considering whether these agreements were governed by international law, domestic law, or something else.<sup>35</sup> Whatever their answer, the agreements clearly defined a set of legal rights and duties between the TNE and the host state. As the political and economic power of the South increased, these states demanded and achieved renegotiation of the agreements to increase their share of the wealth generated by the investment.<sup>36</sup>

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31. *E.g.*, Gov't of Kuwait v. Am. Indep. Oil Co. (Aminoil), 66 I.L.R. 519 (Int'l Arb. Trib. 1982); Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 17 I.L.M. 1 (Int'l Arb. Trib. 1978).

32. For the diplomatic correspondence on this episode, in which the United States formally asserted its views on the standard of compensation for expropriation, see Property Rights, 3 Hackworth DIGEST § 288, at 655-65 (1942).

33. *See, e.g.*, G.A. Res. 3281, *supra* note 25, at 52 (resolving that the right to nationalize is subject only to compensation by the state "taking into account *its* relevant laws and regulations and all circumstances that *the state* considers pertinent" with no reference to international law) (emphasis added). The commentary on these developments is voluminous. *See generally* Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1991) (proposing the balancing of interests of host states and investors); Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437 (1981) (endorsing the thrust of General Assembly resolutions from the 1970s).

34. For an example, see Oil Concession Agreement Between the Government of Abu Dhabi and Amoco Abu Dhabi Exploration Company (Oct. 13, 1980), in 2 THE PETROLEUM CONCESSION AGREEMENTS OF THE UNITED ARAB EMIRATES 122 (Mana Saeed Al Otaiba ed., 1982).

35. *E.g.*, Richard B. Lillich, *The Law Governing Disputes Under Economic Development Agreements: Reexamining the Concept of "Internationalization,"* in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY 61 (Richard B. Lillich & Charles N. Brower eds., 1993) (evaluating various positions).

36. *See* Gov't of Kuwait v. Am. Indep. Oil Co., 66 I.L.R. at 519-28; *see also* Samuel K.B. Asante, *Restructuring Transnational Mineral Agreements*, 73 AM. J. INT'L L. 335, 341-49 (1979) (reviewing the host states' practice of gaining control through joint ventures); Thomas W. Waelde

Third, host states sought to rein in the power of TNEs by drafting a multinational code of conduct for transnational corporations. This goal had for a long time been a part of the agenda of socialist political leaders in both the North and the South. It received its primary impetus from the revelations about United Fruit Company's and International Telephone and Telegraph's roles in destabilizing, respectively, the governments of Guatemala in the 1950s and Chile in the early 1970s.<sup>37</sup> In 1974, the United Nations established a Centre for Transnational Corporations to prepare the Code; it completed a draft in 1983 and another in 1990.<sup>38</sup> While recognizing some rights for investors, these Codes emphasized the need for foreign investors to obey host country law, follow host country economic policies, and avoid interference in the host country's domestic political affairs.<sup>39</sup> In a response to this development, the Organization for Economic Cooperation and Development (OECD), the principal international institution composed of wealthy states, drafted its own set of guidelines for multinational enterprises. These contained far fewer and weaker obligations on TNEs and were not intended to be binding.<sup>40</sup>

The overall effect of the decolonization period with respect to corporate-host state relations was thus to emphasize the rights of states and the duties of TNEs. Developing states asserted a right to expropriate with little or no compensation and to gain favorable economic development agreements that they could renegotiate on better terms. They also proposed duties on investors to comply with host country law and policies. The next phase in the relationship among foreign investors, home states, and host states would see a seismic shift in these patterns.

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& George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215 (1996) (reviewing the modern practice of contract renegotiation).

37. See, e.g., *Multinational Corporations and United States Foreign Policy: Hearing on the International Telephone and Telegraph Company and Chile, 1970-71, Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations*, 93d Cong. 1 (1973).

38. *Development and International Economic Co-operation: Transnational Corporations*, U.N. ESCOR, 2d Sess., U.N. Doc. E/1990/94 (1990) [hereinafter *1990 Code*]; *Draft United Nations Code of Conduct on Transnational Corporations*, U.N. ESCOR, Spec. Sess., Supp. No. 7, Annex II, U.N. Doc. E/1983/17/Rev.1 (1983); see also Peter T. Muchlinski, *Attempts To Extend the Accountability of Transnational Corporations: The Role of UNCTAD*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 97, 98-102 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

39. See, e.g., *1990 Code*, *supra* note 38, at 6-8.

40. Declaration on International Investment and Multinational Enterprises annex 1 (1976), reprinted in *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 57 (1994) [hereinafter *1976 OECD Guidelines*]; see also Hans W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, in 1 *LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES* 3 (Norbert Horn ed., 1980) (demonstrating how codes might produce binding norms under domestic and international law).

C. *Counterreaction: Globalization and the Emphasis on Corporate Rights*

As hard as the developing world fought to rectify the imbalance of economic power between North and South, its leaders also realized that developing countries desperately needed foreign direct investment from the developed world. When the Cold War wound down in the late 1980s, many developing-world states could no longer count either on economic aid from one side of the iron curtain or the other, or on political support in the North-South battles at the UN. International banks, stung by the failure of many developing-world nations to service their debts, stopped much of their lending.

As a result, the lure of foreign investment became even greater,<sup>41</sup> which led to a shift in the relationships among home states, host states, and investors. The rhetoric of the New International Economic Order faded in favor of one promoting free trade and investment, albeit with a hope of the developing world for development aid and forgiveness of foreign debt. Many developing-world states concluded bilateral investment treaties (BITs) with home states and thus undertook significant obligations to protect foreign investment. These included guarantees of fair and equitable treatment as determined by international law, national treatment, and most favored nation treatment; the right of investors to hire their own senior personnel; a guarantee of free repatriation of profits and liquidated proceeds; and, most significantly, the duty to pay full economic value in the event of an expropriation.<sup>42</sup> The United States even succeeded in including in its later BITs and in the North American Free Trade Agreement (NAFTA) a ban on certain so-called performance requirements, prohibiting treaty partners from asking investors for certain concessions, including technology transfers and promises to sell a certain amount of output locally or abroad.<sup>43</sup> The Draft UN Code of Conduct, which, its advocates hoped, would become a treaty, was effectively discarded in the early 1990s as the South retreated from assertive policies regarding economic development.<sup>44</sup> Indeed, in the General Assembly's 1990 Declaration of International

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41. GRAHAM, *supra* note 22, at 172; *see also* Sagat Tugelbayev, *Come and Exploit Us*, FAR E. ECON. REV., Jan. 28, 1993, at 25 (consisting of a plea from the governor of a province in Kazakhstan for foreign investment).

42. *See, e.g.*, Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, U.S.-Arg., arts. II-V, S. TREATY DOC. NO. 103-2, at 3-6 (1993), 31 I.L.M. 124, 129-32 [hereinafter United States-Argentina BIT]; *see also* Kenneth J. Vandavelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621 (1998) (evaluating BITs as vehicles for promoting economic liberalism).

43. *See, e.g.*, United States-Argentina BIT, *supra* note 42, art. II(5), S. TREATY DOC. NO. 103-2, at 4, 31 I.L.M. at 130; North American Free Trade Agreement, *done* Dec. 17, 1992, art. 1106, 32 I.L.M. 605, 640 [hereinafter NAFTA].

44. Muchlinski, *supra* note 38, at 102-05.



Economic Cooperation, governments urged developing nations to achieve “favourable conditions for domestic and foreign investment.”<sup>45</sup>

This transformation, of course, directly affected the host state-foreign investor relationship as well. Bilateral investment treaties are heavily skewed in favor of foreign investors. Beyond the substantive rights noted above, the BITs and NAFTA also provided investors a critical procedural right—to institute international arbitration without the consent of the host state to the individual arbitration and thereby bypass domestic courts entirely.<sup>46</sup> The OECD’s proposal for a Multilateral Agreement on Investment would have provided these rights on a multilateral basis to companies from its various signatory states. The prospect of such rights for companies galvanized a coalition of nongovernmental organizations to press governments to abandon the pact, which was laid to rest (at least for now) in 1998.<sup>47</sup>

On the ground in host states, the results from the change in attitude about foreign investment have been staggering. Annual increases in foreign investment have significantly outpaced growth in international trade.<sup>48</sup> Furthermore, foreign investment has changed, moving from the traditional concession to new relationships between corporation and host state. These include joint ventures, innovative licensing and franchising regimes, turn-key operations, and other forms.<sup>49</sup> These arrangements predate the 1990s and indeed flowed from the shift of foreign investment—as a result of the expropriations in the 1960s and 1970s—away from concessions. But they have clearly accelerated since that time.<sup>50</sup> The result is a different, far denser relationship between the corporation and the host state. Instead of relying upon relatively unskilled labor to carry out mining or farming operations, the TNE is now an active player in the economy, hires many types of workers, and relies upon local offices to do much of its work. It is more embedded in the economy of the host state than ever before.

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45. G.A. Res. S-18/3, U.N. GAOR, 18th Spec. Sess., Supp. No. 2, at 6, U.N. Doc. A/S-18/15 (1990).

46. See, e.g., United States-Argentina BIT, *supra* note 42, art. VII, S. TREATY DOC. NO. 103-2, at 6, 31 I.L.M. at 132-34; NAFTA, *supra* note 43, arts. 1115-1121, 32 I.L.M. at 642-44.

47. For the last text before negotiations ceased, see ORG. FOR ECON. COOPERATION & DEV., THE MULTILATERAL AGREEMENT ON INVESTMENT: NEGOTIATING TEXT (1998), at <http://www.oecd.org/daf/investment/fdi/mai/negtext.htm>. On the debacle, see, for example, GRAHAM, *supra* note 22, at 1-49.

48. Compare U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2000, at 4 (2000) (showing a twenty-seven percent increase in foreign direct investment inflows in 1999), with WORLD TRADE ORG., INTERNATIONAL TRADE STATISTICS 2000, at tbl.I.1 (Bernan CD-ROM, 2000) (showing a five percent increase in trade in 1999).

49. CHARLES OMAN, NEW FORMS OF INTERNATIONAL INVESTMENT IN DEVELOPING COUNTRIES 14-21 (1984).

50. SUSAN STRANGE, THE RETREAT OF THE STATE 47 (1996).

D. *The Missing Link: Business Relations with Individuals*

In terms of the four actors involved in the foreign investment-human rights interactions, the contemporary situation is thus defined as follows in terms of international law: host states and home states enjoying juridical equality, with economic forces and international economic law now promoting free trade and investment as a recipe for progress; host states (as well as home states) having obligations to their populations under human rights law; and host states having significant obligations to TNEs and individual investors pursuant to various international legal instruments. But something is clearly missing from this description: Has this evolution created any role for international law in the relationship between business enterprises and the citizens in the states in which they operate? Is such a relationship solely a function of the employment contract between the worker and the TNE, or do the corporations have any duties under international law?

This link was until recently not the subject of much interest for either the host states or the corporations. During the decolonization period, host states were primarily concerned with control over foreign investors by requiring obedience to the host states' laws and policies. The government sought to achieve these goals through expropriation of assets, special laws aimed at regulating TNEs, the Draft UN Code of Conduct, and other measures.<sup>51</sup> More recently, the host states' goals have shifted to attracting foreign investment. Host states have adjusted domestic laws to make them more attractive to corporations, handed over tracts of land to de facto control by corporations, or simply turned a blind eye to violations of domestic law.<sup>52</sup> In responding to corporate demands for a hospitable investment environment, they have essentially turned the South's agenda for the Draft UN Code of Conduct on its head. Compliance with host country law has been enough—indeed, often more than enough—to ask of the foreign investor. For the corporations, the relationship with the citizenry became a matter of getting the best terms out of the employment contract. The citizenry's human rights were the government's responsibility, not theirs. In short, the race to the bottom was on.<sup>53</sup>

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51. On the use of nonpublic codes to effect these policies, see Michael W. Gordon, *Of Aspirations and Operations: The Governance of Multilateral Enterprises by Third World Nations*, 16 U. MIAMI INTER-AM. L. REV. 301, 325-40 (1984).

52. See, e.g., U.N. CTR. ON TRANSNATIONAL CORPS., THE DETERMINANTS OF FOREIGN DIRECT INVESTMENT, U.N. Doc. ST/CTC/121, U.N. Sales No. E.92.II.A.2 (1992); *As a River Runs Over, the Rain Forest Is Besieged*, TIMES-PICAYUNE, Jan. 28, 1996, at A18.

53. See Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999) (analyzing the problem as one of a global "prisoner's dilemma"); see also Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 54-55 (1999) (endorsing an economic analysis of the race to the bottom).

## II. WHY CORPORATE RESPONSIBILITY?

Protecting human rights solely through obligations on governments seems rather uncontroversial if host states represented the only threat to human dignity, or if states could be counted on to restrain conduct within their borders effectively. However, a system in which the state is the sole target of international legal obligations may not be sufficient to protect human rights. In this Part, I justify the need for corporate responsibility first by examining the shortcomings of placing human rights duties solely on states, the primary holders of international legal obligations. Corporations are powerful global actors that some states lack the resources or will to control. Other states may go as far as soliciting corporations to cooperate in impinging human rights. These realities make reliance on state duties inadequate. Beyond the practicalities of corporate power, human rights theory rejects efforts to limit dutyholders to states or to those carrying out state policy. This Part then examines the shortcomings of individual responsibility as an alternative to state responsibility. In this context, corporate law provides guidance to international law on the need to view corporations, and not simply those working for them, as dutyholders. Thus, both the corporate entity's potential impact on human rights, and theoretical understandings of the nature of human rights and of business enterprises, render corporate responsibility practically necessary and conceptually possible.

### A. *The Limits to Holding States Accountable for Human Rights Violations*

International human rights law principally contemplates two sets of actors who may be held liable for abuses—states, through the concept of state (primarily civil) responsibility, and individuals, through the concept of individual (primarily criminal) responsibility. States are dutyholders for the full range of human rights, whether defined in treaties or customary law. Individual responsibility applies to a far smaller range of abuses, principally characterized by the gravity of their physical or spiritual assault on the individual.<sup>54</sup>

#### 1. *Corporations as Global Actors*

The inadequacy of state responsibility stems fundamentally from trends in modern international affairs confirming that corporations may have as much or more power over individuals as governments. In analyzing the

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54. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 13 (2d ed. 2001).

power of TNEs today, Susan Strange emphasizes the need to conceptualize power beyond political power to include economic power and accordingly concludes that markets matter more than states.<sup>55</sup> Whether or not the “retreat of the state” is as great as she states,<sup>56</sup> corporations clearly exercise significant power over individuals in the most direct sense of controlling their well-being. Of course, corporations have always wielded significant power over their employees; and governments have to enforce their own laws as well as to protect the human rights of their citizens. So why does such power require moving beyond state responsibility?

First, the desire of many less developed states to welcome foreign investment means that some governments have neither the interest nor the resources to monitor corporate behavior, either with respect to the TNEs’ employees or with respect to the broader community.<sup>57</sup> Their views on investment might lead them to assist companies in violations, for instance, through deployments of security forces. In extreme cases, governments actually grant corporations de facto control over certain territories. For instance, whatever one may believe of the merits of claims against Freeport-McMoRan of human rights abuses in Irian Jaya or against Texaco in the Colombian rainforest, there seems little doubt that those entities exercise significant power in certain regions, often with little interference by the government.<sup>58</sup>

Second, regardless of its position on foreign investment, the government might also use various corporate resources in its own abuses of human rights. The South African experience represents the epitome in recent times of such nefarious cooperation between public and private sectors.<sup>59</sup> Because repressive governments (or opposition movements) may need to rely on businesses to supply them with material for various

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55. STRANGE, *supra* note 50, at 16-43.

56. For a dissenting view, see Gregory H. Fox, *Strengthening the State*, 7 IND. J. GLOBAL LEGAL STUD. 35 (1999).

57. See AMNESTY INT’L & PAX CHRISTI INT’L, MULTINATIONAL ENTERPRISES AND HUMAN RIGHTS 17-18 (2000). Indeed, labor unions would point out that the problem is not limited to less developed countries.

58. *Criticism Undermines Freeport-McMoRan Image*, TIMES-PICAYUNE, Jan. 28, 1996, at A16; Laurie Goering, *Pollution Test Case Pits Ecuadoreans Against U.S. Firm*, CHI. TRIB., June 25, 1996, at 1; see also Freeport McMoRan & Gold, Inc., *Military Security: Does Freeport Provide the Military with Food, Shelter, and Transportation?*, at <http://www.fcx.com/mr/issues&answers/ia-m&s.html> (last visited Oct. 1, 2001) (“Irian Jaya (Papua) is one of the most undeveloped regions in the world. In its area, Freeport is the only infrastructure.”). For an overall assessment of the effect of mining on local communities in the Philippines and Indonesia, see Michael C. Howard, *Mining, Development, and Indigenous Peoples in Southeast Asia*, 22 J. BUS. ADMIN. 93 (1994).

59. See 4 TRUTH & RECONCILIATION COMM’N, *supra* note 4, ch. 2, paras. 23-36 (relating the degrees of involvement of industry with the government).

unacceptable activities, corporations may work in tandem with governments in abusing human rights.<sup>60</sup>

Third, as firms have become more international, they have also become ever more independent of government control.<sup>61</sup> Many of the largest TNEs have headquarters in one state, shareholders in others, and operations worldwide. If the host state fails to regulate the acts of the company, other states, including the state of the corporation's nationality, may well choose to abstain from regulation based on the extraterritorial nature of the acts at issue.<sup>62</sup> Corporations can also shift activities to states with fewer regulatory burdens, including human rights regulations. Recognition of duties on corporations under international law could encourage home states to regulate this conduct or permit others to do so; at the very least, it would suggest a baseline standard of conduct for corporations themselves that could be monitored by interested constituencies.

If private entities might be contributing to a deleterious human rights situation, then those concerned with the behavior of such enterprises are left with three options—to continue to focus exclusively on the state, encouraging it eventually to control such enterprises; to enforce obligations against individuals (the limits of which I discuss below); or to identify and prescribe new obligations upon those private entities in international law and develop a regime of responsibility for violations they might commit.

Indeed, multinational enterprises are themselves recognizing the limits of duties on states. Unocal, for instance, has stated publicly that “human rights are not just a matter for governments.”<sup>63</sup> In 2000, the United Kingdom's Prince of Wales Business Leaders Forum and Amnesty International teamed up to issue *Human Rights: Is It Any of Your Business?*, a glossy 144-page human rights guide for senior corporate policymakers. The publication notes: “While a company is not legally obliged under international law to comply with [human rights] standards, those companies

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60. See S.C. Res. 1306, *supra* note 1 (condemning the role of diamond companies in Sierra Leone's civil war).

61. STRANGE, *supra* note 50, at 49-50; see also Nick Butler, *Companies in International Relations*, SURVIVAL, Spring 2000, at 149, 155 (describing the lack of national identity of TNEs); Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 770-72 (examining the role of corporations as global actors).

62. Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL'Y SYMP. 19, 28-30 (1997).

63. Human Rights and Unocal: Our Position, at <http://www.unocal.com/responsibility/humanrights/hr1.htm> (last visited Oct. 1, 2001); see also PRINCE OF WALES BUS. LEADERS FORUM & AMNESTY INT'L, HUMAN RIGHTS: IS IT ANY OF YOUR BUSINESS? 83-85 (2000) [hereinafter PWBLF & AI] (summarizing major corporate statements); Enron, Statement of Principles of Human Rights, at [http://www.enron.com/corp/pressroom/responsibility/human\\_rights\\_statement.html](http://www.enron.com/corp/pressroom/responsibility/human_rights_statement.html) (last visited Oct. 1, 2001) (“We do not and will not tolerate mistreatment or human rights abuses of any kind by our employees or contractors.”). *But see* Goering, *supra* note 58, at 1 (quoting a Texaco spokesman stating that the company “complied with existing laws and regulations” of Ecuador).

who have violated them have found, to their cost, that society at large will condemn them.”<sup>64</sup> And, as discussed in Section VII.A below, corporate-initiated codes of conduct represent clear evidence that normative expectations of all relevant actors—not just NGOs or governments—are now shifting.

In this sense, the need for corporate responsibility parallels the evolution of the existing corpus of law beyond state liability to cover individual responsibility, under which individuals are criminally responsible for exceptionally serious human rights abuses.<sup>65</sup> Individual responsibility emerged primarily from the sense of governments and nonstate actors that holding states accountable proved inadequate to address those acts.<sup>66</sup> Unlike state responsibility, accountability for individual violators might provide victims of atrocities with a sense of justice and a possibility to put the past behind them (the amorphous notion of closure). It might also help deter future abuses more effectively,<sup>67</sup> send a powerful message of moral condemnation of heinous offenses, and help a society traumatized by massive human rights violations to identify perpetrators and thereby promote national reconciliation.<sup>68</sup> In its ability to advance these goals, individual responsibility has become a promising alternative along a continuum of enforcement mechanisms for international human rights or international humanitarian law.<sup>69</sup>

Some of the reasons for the inadequacy of state responsibility for individual human rights abuses—for example, the impact on victims of identifying and punishing their individual perpetrators (as opposed to merely blaming the state)—differ from the reasons for its inadequacy for corporate actions. But the deterrence rationale remains common to both contexts and points to the need to place obligations on entities that have the resources to violate human rights and whose conduct cannot properly be policed by the state where they operate. If international law provided for a regime whereby the corporations had duties themselves and incurred some

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64. PWBLF & AI, *supra* note 63, at 23.

65. See *infra* text accompanying notes 74-81.

66. See 22 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948) [hereinafter IMT TRIALS] (“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”).

67. On the efficacy of individual accountability as a deterrent, see David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473 (1999); and Aryeh Neier, *What Should Be Done About the Guilty?*, N.Y. REV. BOOKS, Feb. 1, 1990, at 32, 35.

68. For an overview of theories of punishment in the context of human rights abuses, see Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 6-11 (1990).

69. See M. Cherif Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 REVUE INTERNATIONALE DE DROIT PÉNAL 405, 405-06 (1974).

penalty for violations of them, it would place the incentives on the party with the greatest ability and interest in addressing corporate conduct.

In one historically significant instance, the justifications for individual accountability and business accountability, and the corresponding limits of state responsibility, all came together—international efforts to outlaw the slave trade. The slave trade represented, in a sense, the worst form of private enterprise abuse of human rights. To end it, abolitionists eschewed sole reliance upon state responsibility, both because traders operated on the high seas and because many states tolerated the practice. Instead, they convinced governments to conclude a series of treaties that allowed states to seize vessels and required them to punish slave traders.<sup>70</sup> Thus the first true example of international human rights law was a response to commercially oriented violations of rights.

Beyond these three reasons lies a fourth and, for some readers, I suspect, more compelling reason. Even if one believes that the state should be the sole object of obligations regarding the behavior of businesses operating on its soil based on its unique competence to control private behavior within its borders, one would still need to determine *which* acts of corporations render the state liable. As discussed in the following Subsection, international human rights courts and other bodies have begun to hold states responsible for failing to prevent private activity that violates human rights. In order to hold states accountable for corporate conduct in a coherent fashion, however, one would still need a theory of understanding when a corporation's violation of human rights rises to such a level that the state is responsible for preventing or suppressing it.

## 2. *The Problem of State Action*

A more profound argument against corporate duties in international human rights law would question the possibility of even conceiving of human rights as creating duties in actors other than states. For although the post-World War II elaboration of human rights law destroyed any notion that only states had rights under international law (or, in other words, that states had duties only to other states), it did seem to rest on the premise that

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70. See Protocol to the 1926 Slavery Convention, *opened for signature* Dec. 7, 1953, art. 6, 212 U.N.T.S. 17, 22 (requiring that parties “whose laws do not at present make adequate provision for the punishment of infractions [under the Convention] . . . undertake to adopt the necessary measures in order that severe penalties may be imposed”); see also MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 482-508 (1980) (discussing the historical treatment of slavery internationally and mentioning agreements permitting the seizure of slave ships); A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 329-42 (1999) (showing the evolution of international law on slave trade to cover a broad array of practices).

the rights individuals have are principally against states. Of course, human rights may give rise to a variety of obligations of states, depending in part upon the particular right. These include the duty to avoid certain conduct that impinges on the right, the duty of equal treatment in guaranteeing the right, the duty to create institutional machinery (like courts) to secure the right, the duty to prevent abuses, the duty to provide a remedy for abuses, the duty to provide certain goods or services, and the duty to promote human rights.<sup>71</sup> But the unstated understanding during the growth of the human rights movement was that the duties were still those of states.<sup>72</sup>

This seemingly originalist position regarding human rights emphasizes that international law should distinguish between, on the one hand, ordinary crimes (e.g., murder) or torts (e.g., slander) between private actors—which are outside its province and belong to domestic law—and, on the other hand, governmental action, which is the true subject of international law. State (or quasi-state) action elevates violations of human rights to the international plane on the theory that domestic law is not sufficient to regulate the behavior of governments (or de facto authorities). In that sense, to talk about corporate duties is arguably to redefine international human rights—and international law—in an unacceptable way. To the extent that one contemplates recognizing in law a large number of duties on entities other than the state, one has potentially asked international law to do too much and ignored the expectation that states should enjoy the prerogative to regulate most areas of private conduct on their territory.<sup>73</sup>

The short answer to this argument is that international law has already recognized human rights duties on entities other than states. International humanitarian law (the law of war) places duties on rebel groups (qua groups, rather than individuals) to respect certain fundamental rights of persons under their control.<sup>74</sup> States have also accepted the idea of duties of

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71. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 182-84 (2d ed. 2000) (listing five kinds of duties); see also HENRY SHUE, *BASIC RIGHTS* 51-64 (1980) (discussing the duties that accompany various rights); James W. Nickel, *How Human Rights Generate Duties To Protect and Provide*, 15 *HUM. RTS. Q.* 77 (1993) (discussing duties to avoid deprivation of the right, to protect against deprivation, and to aid those deprived).

72. E.g., ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 105 (1994) (stating that human rights are “demands of a particularly high intensity made by individuals *vis-à-vis* their governments”); see also William N. Nelson, *Human Rights and Human Obligations*, in *HUMAN RIGHTS* 281, 281-82 (J. Roland Pennock & John W. Chapman eds., 1981) (labeling this the “standard assumption”). *But see* MCDUGAL ET AL., *supra* note 70, at 4 (stating that “rudimentary demands for freedom from despotic executive tyranny have gradually been transformed into demands for protection against not only the executive but all institutions or functions of government and all private coercion”).

73. I appreciate this argument from David Wippman.

74. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609. On the convergence of human rights and humanitarian law, see, for example, Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 *INT’L REV. RED CROSS* 94 (1993).



nonstate actors through the corpus of international criminal law on human rights atrocities.<sup>75</sup> Thus, war crimes, genocide, crimes against humanity, torture, slavery, forced labor, apartheid, and forced disappearances are all crimes under international law. Some treaties make an individual criminally responsible only if he was an agent of the state or some other entity controlling territory,<sup>76</sup> but others—including the slavery treaties—provide that wholly private actors incur individual responsibility.<sup>77</sup> In any case, these treaties and customary norms clearly provide individual responsibility by setting forth a variety of strategies to hold the individual responsible. These include explicit recognition of certain acts as international crimes (genocide under the Genocide Convention or crimes against humanity under customary law); requirements that states prosecute or extradite individuals committing certain crimes (as in the Geneva Conventions on armed conflict and the Torture Convention); and authorizations to states to prosecute certain offenses notwithstanding normal jurisdictional limits.<sup>78</sup> By authorizing punishment for *individuals* who commit especially egregious abuses, the law imposes duties directly upon them to refrain from this behavior.

Yet this answer falls short, insofar as international criminal law and humanitarian law conventions have thus far recognized only a relatively small category of human rights abuses as crimes, most notably true atrocities, or, as Agnes Heller put it, “manifestations of evil.”<sup>79</sup> Several of these—genocide, crimes against humanity, and war crimes—have particular elements that were intended to internationalize the offenses and thus distinguish them from ordinary crimes, namely, a special intent to destroy a protected group of people, a systematic attack on a civilian population, and the presence of an armed conflict.<sup>80</sup> Other conventions—on torture and forced disappearances—require a clear nexus to official

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75. See RATNER & ABRAMS, *supra* note 54.

76. See Inter-American Convention on the Forced Disappearance of Persons, *done* June 9, 1994, art. II, 33 I.L.M. 1529, 1530 (1994); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, art. 1, S. TREATY DOC. NO. 100-20, at 1 (1988), 1465 U.N.T.S. 85, 113-14 [hereinafter Torture Convention].

77. *E.g.*, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *done* Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3; Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, S. EXEC. DOC. O, 81-1 (1949), 78 U.N.T.S. 277 [hereinafter Genocide Convention]; *cf.* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (holding the president of an unrecognized state liable for human rights violations under the Alien Tort Claims Act).

78. RATNER & ABRAMS, *supra* note 54, at 11.

79. Agnes Heller, *The Limits to Natural Law and the Paradox of Evil*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 149, 154-55 (Stephen Shute & Susan Hurley eds., 1993).

80. *E.g.*, Rome Statute of the International Criminal Court, July 17, 1998, arts. 6-8, U.N. Doc. A.CONF/189/9 [hereinafter ICC Statute].

conduct.<sup>81</sup> International criminal law does not simply incorporate human rights law.

A fuller answer accepts that the notion of corporate duties represents a departure from the emphasis on the state as dutyholder and seeks to justify that new direction. That position starts from a jurisprudential premise—that the rights of individuals give rise to not only a variety of duties but also a variety of *dutyholders*. As Joseph Raz has stated, “there is no closed list of duties which correspond to the right . . . . A change of circumstances may lead to the creation of new duties based on the old right.”<sup>82</sup> Moreover, he goes on, “one may know of the existence of a right . . . without knowing who is bound by duties based on it or what precisely are these duties.”<sup>83</sup> Raz and others thus emphasize that rights come first—that they ground duties.<sup>84</sup> The focus on rights preceding duties is, of course, not the only way of relating the two. Kant derived his moral theory from a duty-based starting point.<sup>85</sup> But even from that framework, dutyholders still encompass a broad range of entities.

Natural rights theory took the starting point of individual rights and attempted to derive a moral code from it. Yet it readily accepted that those fundamental rights enjoyed by all peoples were rights vis-à-vis each other.<sup>86</sup> Locke thus never saw natural rights as creating duties only on government; he believed that any duties on government were derivative insofar as (1) governments were set up to protect rights of individuals against each other; and (2) governments might, in the process of possessing power to protect those rights, have duties to the citizenry not to abuse that power.<sup>87</sup> Over time, however, the rhetoric of natural rights came to focus on duties of the state, because of the state’s agglomeration of both power and authority over

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81. See Torture Convention, *supra* note 76, art. 1, S. TREATY DOC. NO. 100-20, at 1, 1465 U.N.T.S. at 113-14. For a critique of these distinctions, see Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT’L L.J. 237 (1998).

82. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 171 (1986).

83. *Id.* at 184; see also *id.* at 170-72, 184-86 (discussing the relationship between rights and duties).

84. See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 79-87 (1988); Neil McCormick, *Children’s Rights: A Test-Case for Theories of Right*, in *LEGAL RIGHT AND SOCIAL DEMOCRACY* 154, 161-83 (1982).

85. See IMMANUEL KANT, *THE GROUNDWORK OF THE METAPHYSICS OF MORALS* 10-18 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1785); see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 171-73 (1978) (stating that Kant’s moral theory was “duty-based”).

86. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 271 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“The *State of Nature* has a Law of Nature to govern it, which obliges every one[;] . . . no one ought to harm another in his Life, Health, Liberty, or Possessions.”).

87. *Id.* at 351, 353, 357-63; cf. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[A]ll men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. . . . [T]o secure these rights, governments are instituted among men . . . .”); DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 2 (Fr. 1789), translated at <http://www.hrcr.org/docs/frenchdec.html> (last visited Nov. 15, 2001) (“The aim of all political association is the preservation of the natural and imprescriptible rights of man.”).

its citizens.<sup>88</sup> And when the idea of natural rights moved into the international arena, this focus continued.<sup>89</sup>

Accordingly, the League of Nations oversaw a regime of treaties that provided ethnic and religious minorities with a variety of rights against the governments of the new or reconstituted states of Central and Eastern Europe.<sup>90</sup> The immense power of the state to cause harm to human dignity was revealed as never before in World War II and thus justified the continued concentration on rights of individuals against the state. Although the Universal Declaration of Human Rights does not on its face limit dutyholders to states, the premise of that instrument and of the treaties that eventually flowed from it was that states held the obligations.<sup>91</sup>

Thus, while human rights law has focused on state duties, the two are by no means tied to each other jurisprudentially or even historically. The link is rather a product of a decision by those concerned with human rights, including those in government, that (1) states represent the greatest danger to the individual; (2) domestic law cannot alone effectively constrain state action; (3) domestic law can effectively regulate private action; and probably (4) states will never accept international regulation of private entities. I do not wish to challenge the first two propositions, nor do I need to.<sup>92</sup> Rather, I posit the view that other entities may also pose a threat to human dignity—either acting with the state or alone—so that any contemporary notion of human rights must contemplate duties on those entities as well. This step does not entail the recognition or development of new human rights, which is quite popular among some scholars and activists.<sup>93</sup> Instead, it requires the identification of new dutyholders.

As Andrew Clapham discusses in his remarkable book, *Human Rights in the Private Sphere*, the European Court of Human Rights (ECHR),

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88. Burns H. Weston, *Human Rights, in HUMAN RIGHTS IN THE WORLD COMMUNITY* 14, 14-16 (Richard Pierre Claude & Burns H. Weston eds., 2d ed. 1992).

89. See David Sidorsky, *Contemporary Reinterpretations of the Concept of Human Rights, in ESSAYS ON HUMAN RIGHTS* 88, 90-95 (David Sidorsky ed., 1979).

90. FRANCESCO CAPOTORTI, U.N. ECON. & SOC. COUNCIL, COMM'N ON HUMAN RIGHTS, SUB-COMM'N ON THE PREVENTION OF DISCRIMINATION & PROTECTION OF MINORITIES, STUDY OF THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES 16-26, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979); David Wippman, *The Evolution and Implementation of Minority Rights*, 66 *FORDHAM L. REV.* 597, 599-602 (1997); see, e.g., Convention Concerning Upper Silesia, Mar. 15, 1922, Ger.-Pol., 16 *Martens Nouveau Recueil* (ser. 3) 645 (enumerating rights for the Polish minority).

91. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948); JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 36-91 (1999); see also HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 155-57 (1950) (limiting dutyholders to states, but arguing that states have a duty to prevent racial discrimination by private actors).

92. On the feminist critique of the first and third assumptions, see *infra* notes 109-110 and accompanying text.

93. For one example, see Mohammed Bedjaoui, *The Right to Development, in INTERNATIONAL LAW* 1177, 1182 (Mohammed Bedjaoui ed., 1991).

European Court of Justice (ECJ), Inter-American Court of Human Rights (IACHR), and UN human rights bodies have repeatedly found that abuses of human dignity by private actors in private relations can give rise to international human rights violations.<sup>94</sup> In most instances, they have worked within the paradigm of state responsibility by asserting that the state's tolerance of a private human rights abuse actually violates the state's duty to protect the right through legislation, preventive measures, or provision of a remedy (or, in other cases, that the private actor involved is actually the organ of a state). For instance, the ECHR has held that the Netherlands' failure to prosecute sexual assault by a private person against a mentally handicapped ward violated the victim's right to privacy;<sup>95</sup> that Italy's failure to prevent a fertilizer company from releasing toxic gases also violated the right to privacy;<sup>96</sup> that the United Kingdom's plan to deport an AIDS patient to St. Kitts, where he would receive inadequate medical treatment, violated his right to life;<sup>97</sup> and that the United Kingdom's failure to protect two boys against child abuse violated their right to be free from torture and cruel treatment.<sup>98</sup> The Inter-American Court of Human Rights, in its famous *Velásquez Rodríguez* decision of 1988, found the Honduran government responsible for the failure to prevent and punish a forced disappearance committed by persons whom it could not associate with the state (even though in all likelihood they were state agents).<sup>99</sup> In requiring states to prevent or punish certain acts by private entities, those bodies have implicitly concluded that some private activities are a legitimate area for international concern.<sup>100</sup>

This trend of decisions suggests that state responsibility can still go very far in addressing actions in the private sphere. Holding governments accountable may create important incentives for them to prevent private infringements, and governments might have the means to do so. Thus corporate responsibility through state responsibility remains an important

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94. ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 89-133 (1993); Evert Albert Alkema, *The Third-Party Applicability or "Drittwirkung" of the European Convention on Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 33, 33-36 (Franz Matscher & Herbert Petzold eds., 2d ed. 1990).

95. *X and Y v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A) at 11 (1985) (stating that the Convention may require "the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves").

96. *Guerra v. Italy*, 1998-I Eur. Ct. H.R. 210.

97. *D. v. United Kingdom*, 1997-III Eur. Ct. H.R. 777.

98. *A. v. United Kingdom*, 1998-VI Eur. Ct. H.R. 2692.

99. *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988).

100. For an example of the reluctance of a domestic constitutional court to adopt a similar stance at the national level, see *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). The Court dismissed a suit against a state welfare agency for its failure to prevent severe child abuse and held that the Due Process Clause was only designed "to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196.

part of the process of accountability.<sup>101</sup> Yet, as discussed earlier, relying upon state responsibility still begs a key question: What sorts of abuses by private actors does the state have a duty to prevent and remedy?<sup>102</sup>

Beyond holding states responsible for abuses by private actors, other courts in Europe have found violations of human rights even when the defendant is not a state. The European Court of Justice has held that provisions of the Treaty of Rome (the EU's founding document) that prohibit states from discriminating based on nationality and require equal pay for equal work apply directly to private entities. Adopting an overtly teleological interpretation of the Treaty, in key cases in the 1970s, it found that the elimination of employment discrimination, whether nationality-based or gender-based, is central to the purpose of the European Community and required private entities to terminate it.<sup>103</sup> Long before those cases, German courts had developed the notion of third-party (or horizontal) effect (*Drittwirkung*), holding that some German constitutional rights affect private legal relationships.<sup>104</sup> Dutch courts have relied upon similar doctrines to find international obligations relevant to private disputes;<sup>105</sup> Israeli courts have applied Israel's Basic Law in private litigation;<sup>106</sup> and after Britain's passage of domestic legislation incorporating the European Convention into British law, courts in that country will soon be facing the issue of third-party effects as well.<sup>107</sup>

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101. See INT'L COUNCIL ON HUMAN RIGHTS POLICY, BUSINESS WRONGS AND RIGHTS paras. 44-80 (draft report 2001), at <http://www.ichrp.org/excerpts/30.pdf> (calling such duties "indirect obligations"). The ICHR study is the most sophisticated to date to emerge from the NGO community.

102. See Francesco Francioni, *Exporting Environmental Hazard Through Multinational Enterprises: Can the State of Origin Be Held Responsible?*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 275, 288 (Francesco Francioni & Tullio Scovazzi eds., 1991) (calling for the state of origin of a company that causes a toxic spill in another country to be held responsible, and proposing substantive contours to the duties of that state).

103. See, e.g., Case 36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405; Case 43/75, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, 1976 E.C.R. 455.

104. *Lüth Case*, BverfGE 7, 198 (1958), translated in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 361 (2d ed. 1997); see also B.S. MARKESINIS, *The Applicability of Human Rights as Between Individuals Under German Constitutional Law*, in 2 ALWAYS ON THE SAME PATH 175 (2001) (reviewing and endorsing trends in case law); Kenneth M. Lewan, *The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany*, 17 INT'L & COMP. L.Q. 571 (1968). For U.S. laws that make private individuals liable for constitutional violations, see *infra* note 222.

105. André Nollkaemper, *Public International Law in Transnational Litigation Against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, *supra* note 38, at 265, 270-76.

106. Gabriela Shalev, *Constitutionalization of Contract Law*, in TOWARDS A NEW EUROPEAN IUS COMMUNE 205 (A. Gambaro & A.M. Rabello eds., 1999).

107. Authorities have debated the legislation's likely impact. Compare Gavin Phillipson, *The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?*, 62 MOD. L. REV. 824 (1999) (opining that the legislation is unlikely to have a major effect in private

Clapham builds upon these important trends, in terms of both direct and indirect duties on private entities to respect human rights, to support a human rights regime that challenges the exclusive focus on the state. He writes:

[T]he emergence of new fragmented centres of power, such as associations, pressure groups, political parties, trade unions, corporations, multinationals . . . and quasi-official bodies has meant that the individual now perceives authority, repression, and alienation in a variety of new bodies. . . . This societal development has meant that the definition of the public sphere has had to be adapted to include these new bodies and activities.<sup>108</sup>

In addition, and not surprisingly, the call for the blurring of the public/private distinction has received particular attention from some women's rights advocates and feminist legal scholars, who are concerned that a focus on state responsibility eliminates various sexual assaults from the purview of human rights protection.<sup>109</sup> Strategies for responding to this perceived bias vary, however, with some favoring a complete reconceptualization of international law to govern private behavior, and others finding the link to state action malleable enough to cover the most important private conduct.<sup>110</sup>

In light of the above-mentioned increase in corporate power and of the concomitant inadequacy of state responsibility, Clapham's arguments would appear to apply strongly to activities by corporations. If human rights are aimed at the protection of human dignity, the law needs to respond to abuses that do not implicate the state directly. As discussed further below, this does not mean that everything that a corporation does that might deleteriously affect the welfare of those in the corporation's sphere of operations is a human rights abuse—just as, for example, a tax increase that makes some people worse off financially is not a human rights abuse. Nor does it require ignoring the nexus to state action, as such a linkage may well serve to help clarify certain duties of corporations. But it does suggest that the recognition of some duties of corporations, far from being at odds with the purpose of international human rights law, is wholly consonant with it.

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litigation), with Dawn Oliver, *The Human Rights Act and Public Law/Private Law Divides*, 4 EUR. HUM. RTS. L. REV. 343 (2000) (stating that significant impacts are possible).

108. CLAPHAM, *supra* note 94, at 137. For a critical and eloquent argument for this view from a generation ago, see Jean Rivero, *La protection des Droits de l'Homme dans les rapports entre personnes privées*, in 3 RENÉ CASSIN AMICORUM DISCIPULORUMQUE LIBER 311 (1971).

109. See, e.g., Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 625-30 (1991).

110. Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143 (Dorinda G. Dallmeyer ed., 1993).

B. *The Limits to Holding Individuals Accountable for Human Rights Violations*

Decisionmakers in the international legal process have developed an adjunct to the idea of states as dutyholders through their acceptance of individual responsibility. If individuals, such as corporate officers, can in theory be held responsible for abuses (under existing or perhaps expanded norms of international criminal law), then why the need for corporate responsibility? A response to this question comes from those who have examined the need to hold corporations, rather than individuals within them, liable for certain conduct. While international law works from the starting point that states should be held responsible for human rights abuses, and only then acknowledges the need for duties on others, theorists of corporate liability have worked from the opposite position—that of domestic civil and criminal law holding individuals accountable—to make a case for corporate liability. Their insights thus have direct relevance to our task.

Scholars of corporate accountability have proffered a variety of policy rationales for holding corporations responsible for undesirable conduct. The economic rationale has received particular attention.<sup>111</sup> It holds that liability upon enterprises deters corporate managers better than liability upon individuals, because corporate agents are judgment-proof and cannot bear the costs of sanctions, and because corporate liability encourages shareholders to monitor corporate actions. Richard Gruner has summarized the rationales for criminal sanctions in particular, as follows: punishing unacceptable conduct by corporate agents, coercing corporations into complying with the law, creating economic incentives for proper conduct, signaling to third parties the limits of acceptable corporate behavior, punishing the corporation, reforming the corporation, and compensating victims.<sup>112</sup> Nations implementing criminal schemes have grappled with whether they actually accomplish these goals.<sup>113</sup>

Brent Fisse and John Braithwaite have offered a compelling normative account of the shortcomings of individual liability with respect to corporate misconduct, and their theory seems pertinent to the inquiry regarding

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111. See, e.g., RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 225-36 (1976); John Collins Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 *AM. CRIM. L. REV.* 419, 456-65 (1980); Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 *CAL. L. REV.* 1345 (1982); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 *YALE L.J.* 857 (1984); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 *YALE L.J.* 1231 (1984).

112. RICHARD S. GRUNER, *CORPORATE CRIME AND SENTENCING* 84-160 (1994).

113. See, e.g., William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 *VAND. L. REV.* 1343 (1999) (regarding the shifting of liability from firms to agents in the United States).

human rights. They argue that corporations act as organizations and are not simply the sum of individuals working for them; because they have autonomy of action, including the capacity to change their policies, they can be held responsible for the outcomes resulting from these policies.<sup>114</sup> Fisse and Braithwaite reject any notion that blameworthiness requires a prior determination that the relevant actor have “philosophical personality” (which, in the view of some philosophers, only individuals possess).<sup>115</sup>

Thus, if a corporation’s internal decisionmaking process results in morally irresponsible behavior, the corporation may be blameworthy, either civilly or criminally. The degree of fault required for such responsibility might be as high as intent to cause an outcome, but could just as easily be a negligence or strict liability standard. Justifying the liability of Union Carbide for the disaster at Bhopal, Fisse and Braithwaite note that even if the executives of the corporation individually did not engage in criminal conduct, “higher standards of care are expected of such a company given its collective might and resources.”<sup>116</sup> As for claims that only individuals, and not corporations, will be deterred by liability or punishment, they note correctly that a collective cost on the corporation from having been found responsible for unacceptable conduct does affect corporate behavior.<sup>117</sup> Peter French, Celia Wells, and others have built on these normative premises to argue for a theory of criminal responsibility that takes into account defects in corporate decisionmaking structures rather than simply individual fault. In the process, they have developed different standards of corporate fault.<sup>118</sup>

In focusing on what societies might legitimately expect from corporations as a basis for holding them responsible, these scholars have built on the work of Robert Goodin. Goodin rejects a concept of responsibility that is centered on blame and that holds actors with evil intent

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114. Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 483-88 (1988).

115. *Id.* at 481-82 & n.63. A similarity exists between this criticism of personality and that pertinent to international law. *Compare id.* at 482 n.63 (“[T]he moral responsibility or blameworthiness of corporate entities . . . is most unlikely to be resolved by resort to the question-begging notion of philosophical ‘personality.’”), with HIGGINS, *supra* note 72, at 50 (attacking the subject-object dichotomy as overly simplistic).

116. Fisse & Braithwaite, *supra* note 114, at 486.

117. *Id.* at 488-90.

118. See PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 156-63 (1984) (endorsing the idea of “reactive fault” based on a corporation’s failure to institute procedures to prevent the repetition of a harmful act); CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 143-46 (1993) (discussing liability based on aggregating the responsibility of certain officers and considering internal decisionmaking structures); see also J.E. PARKINSON, CORPORATE POWER AND RESPONSIBILITY 358-59 (1993) (focusing on criminal liability, but arguing that the mens rea of a corporation should be replaced by the concept of defective decisionmaking); V.S. KHANNA, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239 (2000) (calling for a mixed liability regime).



per se more blameworthy than actors who are merely negligent in their actions. Instead, he emphasizes the actors' responsibility for different tasks and their ex ante duties to ensure that certain harms do not happen.<sup>119</sup> As a consequence, the distinction between civil responsibility and criminal responsibility is ultimately of second-order importance. This stress on ex ante duties also provides an important starting point for a theory of corporate duties under international law. These duties will turn not on any concept of ill will by the corporation, but rather on its potential for violating human rights. In the end, all these theorists of corporate responsibility point to the futility of targeting norms only at individual employees who commit wrongs. Instead, the business enterprise as such must assume its own responsibilities.

### III. TRENDS OF INTERNATIONAL DECISION IN FAVOR OF CORPORATE DUTIES

If a legal regime regulating corporations, rather than only states or individuals, is necessary to address the nature of corporations as actors in the human rights field, a final step must be taken before seeking to offer a theory. This step entails examining international practice to see whether states, international organizations, and other key participants are, in a sense, ready for such an enterprise. In reviewing recent trends, one discovers that international law has already effectively recognized duties of corporations.<sup>120</sup>

As an initial matter, it bears brief mention that international law doctrine poses no significant impediment to recognition of duties beyond those of states. Some writers insist that private persons cannot, in general, be liable under international law because the state is a "screen" between them and international law;<sup>121</sup> or that only states are full subjects of international law (with so-called legal personality) because only they can enjoy the full range of legal rights and duties and make claims for violations of rights.<sup>122</sup> Yet the orthodoxy now accepts that nonstate entities may enjoy forms of international personality. For a half-century it has been clear that the United Nations may make claims against states for violations

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119. Robert E. Goodin, *Apportioning Responsibilities*, 6 LAW & PHIL. 167, 181-83 (1987).

120. Cf. INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 101, paras. 81-156 (offering an independent account of this practice).

121. See, e.g., NGUYEN QUOC DINH, DROIT INTERNATIONAL PUBLIC 618 (Patrick Daillier & Alain Pellet eds., 5th ed. 1994).

122. See, e.g., Nkambo Mugerwa, *Subjects of International Law*, in MANUAL OF PUBLIC INTERNATIONAL LAW 247, 249 (Max Sørensen ed., 1968); Giuseppe Sperduti, *L'individu et le droit international*, 90 RECUEIL DES COURS 733 (1956).

of their obligations to it.<sup>123</sup> International lawyers have argued about the extent of personality enjoyed by individuals and corporations in light of treaties allowing victims of human rights to sue states in regional courts or permitting foreign investors to sue states in the International Centre for the Settlement of Investment Disputes.<sup>124</sup> And the corpus of international criminal law makes clear that actors other than states have duties under international law.<sup>125</sup> The question is not whether nonstate actors have rights and duties, but what those rights and duties are.

The lack of an international court in which businesses can be sued does not alter this conclusion. Of course, mechanisms for compliance—or, as the New Haven School puts it, control mechanisms—are central, for law cannot exist without them.<sup>126</sup> But in most areas of the law, states have obligations without either the possibility or probability that they might be called before an international court. Instead, the diverse methods of enforcement include self-restraint based on states' reluctance to create adverse precedents,<sup>127</sup> reciprocal action, protest, diplomatic responses, nonforcible sanctions, and, in highly limited circumstances, recourse to force.<sup>128</sup> In the human rights area, the presence of a court holding states responsible has never been the linchpin of the obligation itself. The International Covenant on Civil and Political Rights (ICCPR) contains no provisions granting either individuals or interested states the right to take a violating state to the ICJ or any other court.<sup>129</sup> Instead, many states and regional organizations take human rights

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123. Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11).

124. See WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 223 (1964) (calling for “a limited *ad hoc* subjectivity” for TNEs); CARL AAGE NØRGAARD, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW 180-82 (1962). Rosalyn Higgins has made a convincing attack on the entire notion of legal personality. See *supra* note 115.

125. See *supra* text accompanying notes 74-78.

126. See McDougal & Reisman, *supra* note 14, at 377-78; Carlos S. Nino, *The Duty To Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2621 (1991) (“[A] necessary criterion for the validity of any norm of . . . positive international law . . . is the willingness of . . . states and international bodies . . . to enforce it.”).

127. Georges Scelle, *Le phénomène juridique de dédoublement fonctionnel*, in RECHTSFRAGEN DER INTERNATIONALEN ORGANISATION 324 (Walter Schatzel & Hans-Jürgen Schlochauer eds., 1956).

128. LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 10 (1989); OLIVER J. LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE 5-6 (1951) (stating that international law is enforced primarily in a horizontal, rather than vertical, manner).

129. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. EXEC. DOC. E, 95-2, at 23 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]. The closest provision is Article 44, S. EXEC. DOC. E, 95-2, at 37, 999 U.N.T.S. at 184, which merely provides that the ICCPR's procedures for implementation do not prevent parties from utilizing “other procedures for settling a dispute in accordance with general or special international agreements in force.” A state could appear before the ICJ for violations of the ICCPR if it and the applicant state had both accepted the court's compulsory jurisdiction. See ICCPR, *supra*, arts. 40-42, S. EXEC. DOC. E, 95-2, at 33-37, 999 U.N.T.S. at 181-84; see also Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 302 (enabling the Human Rights Committee to comment on reports submitted by states and to issue opinions in response to individual complaints, if a state accepts the individual petition procedure).

into account in their foreign policy, and the United Nations has other mechanisms (of varying degrees of effectiveness) for putting pressure on violators.<sup>130</sup>

As we move from doctrine to the more important realm of the actions of global decisionmakers, the following developments evince a clear trend in favor of corporate duties.

#### A. *The World War II Industrialist Cases*

Although the universe of international criminal law does not reveal any prosecutions of corporations per se, an important precedent nonetheless shows the willingness of key legal actors to contemplate corporate responsibility at the international level. This episode concerns the trials of German industrialists by American courts sitting in occupied Germany in the so-called second Nuremberg trials under the Allied forces' Control Council Law No. 10.<sup>131</sup> In three cases, *United States v. Flick*, *United States v. Krauch* (the *I.G. Farben Case*), and *United States v. Krupp*, the leaders of large German industries were prosecuted for crimes against peace (i.e., initiating World War II), war crimes, and crimes against humanity.<sup>132</sup> The charges stemmed from the active involvement of the defendants in Nazi practices such as slave labor and deportation. A British court also tried those manufacturing Zyklon B gas for complicity in war crimes.<sup>133</sup>

Although in all these cases the courts were trying individuals, they nonetheless routinely spoke in terms of corporate responsibilities and obligations. For example, in the *I.G. Farben Case*, the court wrote:

With reference to the charges in the present indictment concerning Farben's activities in Poland, Norway, Alsace-Lorraine, and France, we find that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries. . . . The action of Farben and its

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130. See generally OAS Res. AG/RES.1080, OAS Gen. Ass., 21st Sess., Proceedings, vol. I, at 4, OAS Doc. OEA/Ser.p/XXI.0.2 (1991) (discussing responses to "sudden or irregular disruption of the democratic political institutional process"); HUMAN RIGHTS AND COMPARATIVE FOREIGN POLICY (David P. Forsythe ed., 2000) (appraising practices of various states); Bruno Simma et al., *Human Rights Considerations in the Development Co-operation Activities of the EC*, in THE EU AND HUMAN RIGHTS 571 (Philip Alston ed., 1999) (discussing linkages of human rights to EU development aid).

131. Control Council Law No. 10 (Dec. 20, 1945), reprinted in 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, at xvi (photo. reprint 1998) (1949) [hereinafter CCL NO. 10 TRIALS].

132. See generally CCL NO. 10 TRIALS, *supra* note 131, vols. 6-9 (1950-1953).

133. The *Zyklon B Case: Trial of Bruno Tesch and Two Others*, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (1997) (Brit. Mil. Ct. 1946).

representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich. . . . Such action on the part of Farben constituted a violation of the Hague Regulations [on the conduct of warfare].<sup>134</sup>

The court used these various activities as a starting point for determining the guilt of the individuals based on their knowledge and participation.<sup>135</sup> The courts' focus on the role of the firms shows an acceptance that the corporations themselves had duties that they had breached.

#### B. *International Labor Law*

Second, states have promulgated a series of international labor conventions, recommendations, and other standards to promote the welfare of employees. In line with the traditional paradigm, governments and the International Labour Organization (ILO) view the standards as creating duties on states, and thus the focus of ILO and governmental attention is on the duties of states to implement them.<sup>136</sup> But both the purpose of the conventions and their wording make clear that they do recognize duties on enterprises regarding their employees. For instance, one of the ILO's so-called core conventions, the 1949 Convention Concerning the Application of the Principles of the Right To Organise and To Bargain Collectively, states simply, "Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment."<sup>137</sup> While clearly an injunction to governments to enact legislation against certain behavior by industry, the obligation also entails, indeed presupposes, a duty on the

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134. *United States v. Krauch*, 8 CCL NO. 10 TRIALS, *supra* note 131, at 1081, 1140 (1952) (U.S. Mil. Trib. VI 1948); *see also* *United States v. Krupp*, 9 CCL NO. 10 TRIALS, *supra* note 131, at 1327, 1352-53 (1950) (U.S. Mil. Trib. III 1948) ("[T]he confiscation of the Austin plant [a French tractor plant owned by the Rothschilds] . . . and its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations . . . [and] the Krupp firm, through defendants[,] . . . voluntarily and without duress participated in these violations . . .").

135. *United States v. Krauch*, 8 CCL NO. 10 TRIALS, *supra* note 131, at 1081, 1153 (1952) (U.S. Mil. Trib. VI 1948) ("[C]orporations act through individuals and, under the conception of personal individual guilt . . . the prosecution . . . must establish . . . that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it."); Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMP. INT'L & COMP. L.J. 173 (1995).

136. *See* Constitution of the International Labour Organisation, *adopted* Oct. 9, 1946, pmbl., 15 U.N.T.S. 35, 40-42 ("[T]he failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries."); *see also* NICOLAS VALTICOS, INTERNATIONAL LABOUR LAW 225-36 (1979) (focusing on state obligations).

137. Convention Concerning the Application of the Principles of the Right To Organise and To Bargain Collectively, *adopted* July 1, 1949, art. 1, <http://ilolex.ilo.ch:1567/english/convdisp2.htm>.

corporation not to interfere with the ability of employees to form unions. In Raz's conception, the rights to form a union and to strike are rights against the employer, even if the treaties themselves place the duties on the state.<sup>138</sup> States preparing other conventions have, in fact, recognized this truism in textual terms. For example, the 1981 Occupational Safety and Health Convention contains six articles specifically obligating employers to attain certain standards.<sup>139</sup>

The labor rights treaties assume special significance with respect to the possibility of duties on corporations in the human rights area. They have a long historical pedigree, dating back to the 1920s, well before the development of most modern human rights law, and thereby they show that states have accepted the need to regulate corporate conduct through international law. Today, most states view labor rights as a subset of human rights and, in particular, of economic and social rights.<sup>140</sup> This global recognition that the rights of employees create duties for corporations represents a stepping stone to an acceptance by states that the rights of the citizenry can create other duties for corporations.

### C. *International Environmental Law and Polluter Responsibility*

Beyond labor law, decisionmakers prescribing international environmental law have gone even further in holding private enterprises liable for harms. Governments and environmentalists understand that state responsibility—even under a strict liability regime—may not work to provide appropriate reparation for the harm done.<sup>141</sup> As a result, the “polluter pays” principle has exerted a strong impact on governmental policies toward prevention and responses to pollution, moving international

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138. See *supra* text accompanying notes 82-84.

139. Convention Concerning Occupational Safety and Health and the Working Environment, adopted June 22, 1981, <http://ilolex.ilo.ch:1567/english/convdisp2.htm>; see, e.g., *id.* art. 16(1) (“Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.”); see also Convention Concerning Forced or Compulsory Labour, as Modified by the Final Articles Revision Convention of the International Labour Organisation, done Aug. 31, 1948, art. 25, 39 U.N.T.S. 55, 56-74 (obligating states to criminalize any forced labor, but not imposing such an obligation directly on corporations).

140. Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22 (Lance A. Compa & Stephen F. Diamond eds., 1996). On the U.S. government's acceptance of labor rights notwithstanding its rejection of much of the logic of economic and social rights, see *id.* at 24. See generally Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS Q. 156 (1987) (providing an overview of perceptions on economic, social, and cultural rights and discussing states parties' obligations).

141. Alan E. Boyle, *Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM, *supra* note 102, at 363, 363-66.

environmental law well beyond exclusive reliance on state responsibility.<sup>142</sup> The principle in the abstract has been reiterated in various important, though nonbinding, instruments.<sup>143</sup> More important, states have made it operational through an array of treaties that place liability directly upon polluters. These include the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy,<sup>144</sup> the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships,<sup>145</sup> the 1963 Vienna Convention on Civil Liability for Nuclear Damage,<sup>146</sup> the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1984 Protocol thereto,<sup>147</sup> the 1971 Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material,<sup>148</sup> and the 1976 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources.<sup>149</sup> For instance, the 1969 Brussels Convention states:

[T]he owner of a ship at the time of an accident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.<sup>150</sup>

These treaties thus impose an international standard of liability on the corporation. Indeed, one key environmental treaty recognizes some pollution damage as a bona fide international crime. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous

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142. PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 201 (1992).

143. *See, e.g.*, 1 U.N. CONFERENCE ON ENV'T & DEV., RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT 9, 10-11, U.N. Doc. A/CONF.151/26, U.N. Sales No. E.93.I.11 (1993) ("National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."); Implementation of the Polluter-Pays Principle, OECD Council Res. C(74)223 (Nov. 14, 1974), *reprinted in* ORGANIZATION FOR ECON. COOPERATION & DEV., OECD AND THE ENVIRONMENT 26 (1986). On the notion of soft law, see *infra* text accompanying note 179.

144. Paris Convention on Third Party Liability in the Field of Nuclear Energy, *done* July 29, 1960, 956 U.N.T.S. 251.

145. Brussels Convention on the Liability of Operators of Nuclear Ships, *done* May 25, 1962, *reprinted in* 57 AM. J. INT'L L. 268 (1963).

146. Vienna Convention on Civil Liability for Nuclear Damage, *done* May 21, 1963, 1063 U.N.T.S. 265.

147. International Convention on Civil Liability for Oil Pollution Damage, *done* Nov. 29, 1969, 26 U.S.T. 765, 973 U.N.T.S. 3 [hereinafter 1969 Convention].

148. Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, *done* Dec. 17, 1971, 974 U.N.T.S. 255.

149. Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, *done* Dec. 17, 1976, 16 I.L.M. 1450.

150. 1969 Convention, *supra* note 147, at 5.

Wastes and Their Disposal declares that “illegal traffic in hazardous wastes or other wastes is criminal” and requires all parties to introduce legislation to prevent and punish it.<sup>151</sup>

Although environmental treaties demonstrate a willingness of states to impose responsibility directly on corporations, they are still very much influenced by the traditional paradigm of international law. Thus, governments and commentators routinely refer to them as “civil liability” treaties, rather than corporate responsibility schemes, reflecting the extent to which the term “responsibility” is tied up with the idea of state responsibility.<sup>152</sup> Indeed, scholars largely exclude these regimes from the ambit of public international law and instead regard them as private law regimes.<sup>153</sup> Commentators use these terms because all the treaties above provide for implementation by national courts, wherein victims of the pollution may sue; they are thus merely, as Alan Boyle puts it, “transboundary civil litigation” regimes.<sup>154</sup>

But this once again confuses the existence of responsibility with the mode of implementing it. It suggests that international law does not itself impose liability on the corporations—even though this is the very language of some of the treaties—because the mechanism for enforcement is through a private lawsuit in one or more states. The treaties do impose responsibility upon the polluters, however; the use of domestic courts to implement this liability does not change this reality, just as the use of such courts to implement international criminal responsibility—through, for example, obligations on states to extradite or prosecute offenders—does not detract from the law’s imposition of individual responsibility.<sup>155</sup>

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151. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *done* Mar. 22, 1989, arts. 4(3), 9(5), 1673 U.N.T.S. 57, 132, 137; *see also id.* art. 2(14), 1673 U.N.T.S. at 130 (“‘Person’ means any natural or legal person.”); Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, *supra* note 38, at 139, 173-75 (discussing EU and U.K. implementation).

152. *See, e.g.*, Environmental Liability: White Paper from the European Commission Directorate-General for the Environment, COM(00)66 final (proposing a civil liability regime for Europe); Boyle, *supra* note 141, at 363-70. In orthodox usage, the term liability is thus used to describe a form of accountability that does not entail a finding of an international law violation. *See* Pemmaraju Sreenivasa Rao, *First Report on Prevention of Transboundary Damage from Hazardous Activities*, U.N. GAOR, Int’l Law Comm’n, 50th Sess., U.N. Doc. A/CN.4/487 (1998); Karl Zemanek, *Causes and Forms of International Liability*, in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW 319 (Bin Cheng & E.D. Brown eds., 1988).

153. *See* Zemanek, *supra* note 152; *see also* Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 AM. J. INT’L L. 24, 48-56 (1994) (analyzing the “negotiated private law regime”).

154. Boyle, *supra* note 141, at 367.

155. RATNER & ABRAMS, *supra* note 54, at 11-12. *But see* Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT’L L. 302, 308 (1999) (distinguishing between *delicta juris gentium* and direct international responsibility, where the former applies to crimes in which states are authorized or required to prosecute and the latter to a smaller category of crimes).

#### D. *Anti-Corruption Law*

Beyond environmental treaties, states have developed international law creating binding obligations on corporations with respect to discrete economic activities. In 1997, the states in the OECD concluded under its auspices the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>156</sup> The Convention requires state parties to criminalize bribery of foreign public officials, when committed in whole or in part in their territory.<sup>157</sup> Moreover, the Convention makes clear that each party must ensure that such criminal liability extends to corporations.<sup>158</sup> While adhering to the orthodox distinction between duties of governments under international law and duties of enterprises under domestic law, the treaty nonetheless makes clear that the responsibility of businesses is recognized and may be regulated by international law.<sup>159</sup> The Organization of American States and the Council of Europe have similar treaties with provisions on enterprise liability.<sup>160</sup> The United Nations, IMF, World Bank, and other organizations have also taken steps toward standards for corporations in this area.<sup>161</sup>

The Bribery Conventions are also an important precedent insofar as they do not aim simply to penalize corporate conduct that governments and their citizenry regard as illegitimate (namely, bribe-giving) or to avoid disadvantaging companies whose home states prohibit bribery (such as the United States). Rather, the states sought to create a process leading to the

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156. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, <http://www.oecd.org/daf/nocorruption/20nov1e.htm> [hereinafter OECD Bribery Convention]. The Convention has twenty-six parties, including five non-OECD states.

157. *Id.* arts. 1, 4.

158. *Id.* art. 2 (requiring parties to “establish the liability of legal persons”).

159. This treaty states that:

The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party’s own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

*Id.* art. 3.

160. See Inter-American Convention Against Corruption, *done* Mar. 29, 1996, art. VIII, 35 I.L.M. 724, 730 (stating that states must prohibit bribes by “businesses domiciled there”); Criminal Law Convention on Corruption, *done* Jan. 27, 1999, art. 18, 38 I.L.M. 505, 509 [hereinafter Council of Europe Corruption Convention] (requiring parties to legislate “to ensure that legal persons can be held liable” for various offenses); see also Second Protocol to the Convention on the Protection of the European Communities’ Financial Interests, 1997 O.J. (C 221) 12 (requiring members to hold legal persons liable for misuse of EU resources).

161. See, e.g., Int’l Monetary Fund, Revised Code of Good Practices on Fiscal Transparency, at <http://www.imf.org/external/np/fad/trans/code.htm#code> (last visited Oct. 15, 2001); World Bank Group, Supporting International Efforts To Reduce Corruption, at <http://www1.worldbank.org/publicsector/anticorrupt/supporting.htm> (last visited Sept. 2, 2001).



diminution of corruption in the target states.<sup>162</sup> By recognizing that foreign individuals and companies are complicit—indeed an indispensable element—in the obnoxious behavior, the OECD hopes to cut off the resources for bribery and reduce the incidence of corrupt activities.<sup>163</sup> One can thus ask why, if corporations can be regulated to reduce the incidence of corruption, they have not been regulated to reduce the incidence of human rights abuses. Possible reasons include the lack of the type of causal nexus between corporate behavior and governmental abuses that is present in cases of corruption, and the clear interest of corporations from states that banned bribery in creating an international regime that would eliminate their competitive disadvantage—a factor missing from the human rights dynamic.<sup>164</sup>

#### E. *United Nations Sanctions*

Haltingly during the Cold War and with increasing frequency thereafter, the members of the United Nations have used the General Assembly and the Security Council to recommend or impose economic sanctions against a variety of states, or, on occasion, insurgent groups.<sup>165</sup> Such sanctions resolutions are, by their terms, formally directed at states. But their implementation requires the cooperation of private business as well, and both UN organs have at times recognized that, in the end, sanctions create a duty upon corporations. During its long efforts to isolate apartheid-era South Africa, the General Assembly repeatedly noted that private businesses have duties to respect the sanctions it had recommended.<sup>166</sup> The Security Council, in creating a comprehensive

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162. See, e.g., OECD Bribery Convention, *supra* note 156, pmbll., para. 1 (noting that bribery “undermines good governance and economic development”). I appreciate this insight from Jeffrey Gordon.

163. The OECD has thus established a broad outreach program with nonmember states to help with the implementation of the Convention. See OECD Online: Anti-Corruption Div., Non-Member Activities, at <http://www.oecd.org/daf/nocorruption/outreach.htm> (last visited Sept. 1, 2001).

164. See David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 J. INT’L L. & BUS. 457 (1998).

165. U.N. CHARTER arts. 11, 25 (empowering the General Assembly to make recommendations concerning peace and security and the Security Council to make binding decisions).

166. See, e.g., G.A. Res. 2671F, U.N. GAOR, 25th Sess., Supp. No. 28, at 33, 34, U.N. Doc. A/8028 (1970) (deploring “the continued co-operation by certain States and foreign economic interests with South Africa . . . as such co-operation encourages the Government of South Africa in the pursuit of its inhuman policies”); *Programme of Action Against Apartheid*, U.N. SCOR, 38th Sess., Supp. for Oct.-Dec. 1983, at 58, 63, U.N. Doc. S/16102 (1983) (calling on “corporations and employers” to “withdraw from any commercial operations in South Africa”); Appeal by Leaders of the African National Congress, the South African Indian Congress and the Liberal Party of South Africa for a Boycott of South African Produce by the British People (Dec. 1959), in U.N. DEP’T OF PUB. INFO., THE UNITED NATIONS AND APARTHEID 1948-1994, at 243, U.N. Doc. DPI/1568, U.N. Sales No. E.95.I.7 (1994).

sanctions regime for Iraq following the conclusion of the 1991 Gulf War, endorsed a plan by the Secretary-General that placed strict requirements on corporations regarding their purchases of oil from Iraq.<sup>167</sup> Indeed, in order to gain permission for trade with Iraq, the oil companies themselves must apply to the Council's sanctions committee and comply with its directives.<sup>168</sup> While it may appear that sanctions obligations are confined to UN member states, the reality has suggested otherwise.

#### F. *European Union Practice*

Alongside the foregoing attempts to create duties upon corporations through the paradigm of state duties, the states of the European Union have gone significantly further. Both the Treaty Establishing the European Community (i.e., the 1957 Treaty of Rome, as amended) and the binding decisions of the European Council and Commission have created a vast body of legal obligations which apply directly to corporate entities. For instance, Article 81 of the Treaty forbids anticompetitive behavior.<sup>169</sup> Further, the Council and Commission have issued numerous regulations and directives with which private companies must comply, and the European Court of Justice has heard many cases in which one private party has sought to enforce the Treaty against another.<sup>170</sup> As noted earlier, in a series of highly significant cases, the European Court of Justice directly imposed on companies not only legal duties, but also human rights duties regarding nondiscrimination. The *Walrave and Koch* and *Defrenne* cases rely upon the language of the Treaty of Rome, which does not distinguish between public and private entities in banning nationality- and gender-based discrimination. These decisions also emphasize the purpose of the European Community in promoting free movement (thus prohibiting

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167. S.C. Res. 986, U.N. SCOR, 50th Sess., at 101, U.N. Doc. S/INF/51 (1995) (approving a report of the Secretary-General that required private purchasers of oil from Iraq to follow certain procedures, including depositing proceeds in an escrow account); *Report by the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 706*, U.N. SCOR, 46th Sess., para. 58, U.N. Doc. S/23006 (1991).

168. See, e.g., Annual Report of Security Council Committee Established by Resolution 661, paras. 7-13 (1990), *annexed to* Letter from the Chairman of the Security Council Committee to the President of the Security Council (July 26, 2001), U.N. Doc. S/2001/738 (2001) (discussing the oil-for-food program).

169. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 81, O.J. (C 340) 3 (1997) [hereinafter EC TREATY].

170. See generally David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT'L L.J. 97 (1994) (analyzing successes of and tensions among EU actors).

nationality-based discrimination) and social equality between the sexes (thereby barring gender-based discrimination).<sup>171</sup>

That European Community law—a category of international law—provides both direct rights and duties on corporations (i.e., without the intervention of individual states) follows both from the language of the Treaty of Rome itself<sup>172</sup> and from the acceptance of direct effect by both the European Court of Justice and the EU member states.<sup>173</sup> Indeed, direct effect is now a cornerstone of the EU legal system.<sup>174</sup> It might be argued that this “new legal order of international law” (to quote the ECJ in its key decision on direct effect<sup>175</sup>) makes the EU unique and demonstrates that other, seemingly more ordinary treaty regimes can at best provide for the indirect sort of liability seen in the environmental or bribery conventions. Yet the European Community’s practice shows that states can conclude treaties providing for direct corporate responsibility and implement those treaties effectively. The leap of faith is one of political will; the legal doctrine follows inevitably.

### G. *Treaty Interpretation Bodies*

Most of the standing expert bodies established under global human rights treaties have refrained from addressing corporate duties, although they have on occasion reinforced the view of the European and Inter-American courts that the state has a duty to prevent certain private abuses.<sup>176</sup> It is worth noting, however, that in 1999, the Committee on Economic, Social, and Cultural Rights, which oversees implementation of the International Covenant on Economic, Social, and Cultural Rights, interpreted an individual’s right to food under Article 11 of that Covenant

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171. Case 36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405, 1419; Case 43/75, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, 1976 E.C.R. 455, 457-63; CLAPHAM, *supra* note 94, at 248-52.

172. EC TREATY, *supra* note 169, art. 249 (establishing EU regulation as “binding in its entirety and directly applicable in all Member States”).

173. See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie Der Belastingen*, 1963 E.C.R. 3, 12 (“[T]his Treaty is more than an agreement which merely creates mutual obligations between the contracting states . . . [T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. . . . Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”); Case 6/64, *Costa v. Ente Nazionale per l’Energia Elettrica (Enel)*, 1964 E.C.R. 585; see also P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 26-32, 41-45 (7th ed. 1999) (explaining the legal status of regulations and directives).

174. See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413-15 (1991) (describing the direct effect as key to the “constitutionalization” of EU law).

175. *Van Gend en Loos*, 1963 E.C.R. at 12.

176. See CLAPHAM, *supra* note 94, at 108-12.

as giving rise to responsibilities by private actors.<sup>177</sup> Nonetheless, the Committee's interpretive comments, while often influential upon both governments and nonstate actors, are not binding, and it is hard to interpret that comment as more than aspirational. The UN Human Rights Commission's Subcommission on the Promotion and Protection of Human Rights (which does not address a particular treaty but human rights observance generally) has established a panel to study and make proposals on the activities of TNEs, but its work is in an early stage.<sup>178</sup>

#### H. *Soft Law Statements of Direct Duties*

Finally, governments have recognized duties of corporations through a number of significant soft law instruments. These documents result when governments wish to make authoritative statements about desired behavior; these statements typically correspond to the expectations of most states, even though states may not be prepared to state that such behavior is legally mandated.<sup>179</sup> In the area of corporate responsibilities, two soft law instruments stand out. First, in 1977 the ILO adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.<sup>180</sup> This instrument remains important insofar as it was adopted by the three component groups of the ILO's governing body—governments, industry, and labor—and has been cited by governments and industry since that time as reflecting a fair balance among the interests of all three.<sup>181</sup> The

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177. International Covenant on Economic, Social, and Cultural Rights, *adopted* Dec. 16, 1966, art. 11, 993 U.N.T.S. 3, 7 [hereinafter ICESCR]; *see* General Comment No. 12, para. 20, in *Report of the Committee on Economic, Social, and Cultural Rights*, U.N. ESCOR, Supp. No. 2, at 102, 106, U.N. Doc. E/2000/22 (2000) ("While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society—individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities in the realization of the right to adequate food."). For an argument that the Universal Declaration of Human Rights itself creates obligations on corporations, *see* INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 101, paras. 94-106.

178. *See* Res. 1998/8, U.N. ESCOR, Subcomm'n on Prevention of Discrimination & Protection of Minorities, para. 4, U.N. Doc. E/CN.4/SUB.2/RES/1998/8 (1998); Weissbrodt, *supra* note 16 (presenting a report for the Subcommission on developing a human rights code of conduct for companies). (The Subcommission on the Promotion and Protection of Human Rights was formerly known as the Subcommission on Prevention of Discrimination and Protection of Minorities.)

179. *See, e.g.*, Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 25-31 (Dinah Shelton ed., 2000); *see also* Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, in 1 ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS 135, 135-36 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992) (positing three ways in which a legal instrument might be soft).

180. Declaration Adopted by the Governing Body of the International Labour Office at Its 204th Session (Nov. 1977), <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> [hereinafter Tripartite Declaration].

181. U.S. DEP'T OF LABOR, THE APPAREL INDUSTRY AND CODES OF CONDUCT § II.B.1, <http://www.dol.gov/dol/ilab/public/media/reports/iclp/apparel/2b.htm> (noting the Tripartite

document contains a variety of principles for both governments and corporations. It urges corporations to cooperate with governmental development policies, to adopt a hiring policy favorable to local nationals, to look out for the employees' health and safety, and to recognize the rights of workers to organize and bargain collectively.<sup>182</sup> Most of these precepts restate various obligations on governments, but the reformulation of some as creating duties (albeit soft ones) on corporations is significant. Given the source of the instrument and its repeated recitation, it is not merely wishful thinking, but reflects a sense among those three constituencies that corporations have duties toward their employees.

Second, the OECD has developed various sets of guidelines for multinational enterprises. The first such guidelines, from 1976, contained rather anodyne statements regarding a corporation's duties to follow the policies of the host country.<sup>183</sup> In 2000, the OECD issued a long-awaited and far more detailed set of guidelines to respond to growing concerns by nongovernmental organizations about the power of TNEs.<sup>184</sup> Though principally addressing business-related issues such as disclosure, employment practices, pollution, and bribery, the principles do cover human rights specifically. Among the general policies for corporations to follow, the OECD Guidelines state that corporations should "[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."<sup>185</sup> At the same time, the Guidelines go no further than this statement and give corporations no sense of what rights are included and how broadly the group of "those affected by their activities" extends. In addition to the ILO and the OECD, the European Community issued a set of nonbinding guidelines concerning business in apartheid-era South Africa and is, as noted, considering a broader code of conduct.<sup>186</sup>

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The overall picture thus far presented shows a somewhat inconsistent posture among decisionmakers over the role of corporations in the international legal order. On the one hand, they accept that business

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Declaration with favor); U.S. Council on Int'l Bus., USCIB Position Paper on Codes of Conduct, <http://www.uscib.org/code1298.asp> (same).

182. Tripartite Declaration, *supra* note 180, §§ 10, 16, 37, 41.

183. 1976 OECD Guidelines, *supra* note 40, paras. 1-2.

184. OECD Guidelines for Multinational Enterprises (2000), <http://www.oecd.org/daf/investment/guidelines/mnetext.htm> [hereinafter 2000 OECD Guidelines].

185. *Id.* § II.2.

186. See Menno T. Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, in *THE EU AND HUMAN RIGHTS*, *supra* note 130, at 553, 564.

enterprises have *rights* under international law, whether the economic right under investment treaties to receive nondiscriminatory treatment and to bring a state to international arbitration, or clearly recognizable political rights such as freedom of speech.<sup>187</sup> Yet most governments appear to remain somewhat ambivalent about accepting corporate duties, and, in particular, duties that corporations might have toward individuals in states where they operate.<sup>188</sup> They have, however, indirectly recognized duties upon corporations by prescribing international labor law, environmental law, anti-corruption law, and economic sanctions. And the European Union, through treaties, legislation, and decisions of the European Court of Justice, has gone further, directly placing duties on businesses. States have provided for enforcement of those duties through the civil liability regime of the environmental agreements, the criminal liability regime of the OECD Bribery Convention, and recourse to the European Court of Justice. The cumulative impact of this lawmaking and application suggests a recognition by many decisionmakers that corporate behavior is a fitting subject for international regulation.

If states and international organizations can accept rights and duties of corporations in some areas, there is no theoretical bar to recognizing duties more broadly, including duties in the human rights area. The soft law instruments like the OECD Guidelines show that governments at least talk about duties upon corporations with respect to human rights, as does the UN's current focus on illicit diamond trading,<sup>189</sup> or the Human Rights Commission's discussions of the issue. And even corporations themselves, while generally disdaining the idea of increased international regulation, have come to accept the idea of duties to protect human rights.<sup>190</sup> Nonetheless, to move beyond the current stage and prescribe law in this area in a coherent fashion requires a theory of corporate responsibility for human rights under international law.

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187. See *Asakura v. City of Seattle*, 265 U.S. 332 (1924) (holding that a friendship treaty with Japan overrode a Seattle ordinance against Japanese businesses); *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) (1979) (upholding a newspaper's right to free speech). See generally Michael K. Addo, *The Corporation as a Victim of Human Rights Violations*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 187 (Michael K. Addo ed., 1999) (reviewing cases in human rights bodies brought by corporate entities).

188. See Charney, *supra* note 61, at 767 (noting how the "nonstatus" of corporations allows them to enjoy rights but not duties and thus to "have it both ways").

189. The operative paragraph of the Security Council's resolution directed toward private entities is not worded in the form of an obligation, presumably because of a belief that the Council cannot place obligations on them. See S.C. Res. 1306, *supra* note 1, at 3 (encouraging "the International Diamond Manufacturers Association . . . to work with the Government of Sierra Leone"). But see *supra* notes 166-167 (citing UN resolutions on South Africa and Iraq).

190. See *supra* note 63 (noting statements of Enron).

#### IV. PRIMARY RULES AND SECONDARY RULES: INTERNATIONAL LAW'S DOCTRINAL STARTING POINT

Any theory of corporate responsibilities in the human rights area that seeks to gain some acceptance among international decisionmakers—whether states, international organizations, corporations, diverse nongovernmental organizations, or even academic advisers to these groups—must have some grounding in contemporary understandings about international law. In that regard, it becomes necessary to examine the law's approach to liability—state and individual—and to inquire into its suitability for the new enterprise. This Part first outlines the basic doctrines of state and individual responsibility. It then appraises whether these principles can be transposed to a clearly different sort of entity—the transnational corporation.

##### A. *The Responsibility of States: A Primer*

The task of appraising the expectations of states and other decisionmakers regarding the contours of state responsibility benefits from the systematic study of the subject undertaken by the UN's International Law Commission (ILC), a standing body of thirty-four independent experts. In 1949, the ILC decided to begin work on a project to draft a treaty on the responsibilities of states for injuries to aliens and their property. States have long agreed that, if one state harmed the citizens of another who might be traveling or setting up a business there, the host state was committing a harm against the home state. Such acts had been the subject of countless interstate disputes and numerous arbitrations, and the ILC and the UN's members believed that elaboration of the duties of host states might prevent future incidents.<sup>191</sup> By the early 1960s, however, the Commission was plagued by disagreements among its members as to the substance of those duties. A key divergence concerned the duties of states regarding the protection of alien property, the very issue that proved so divisive during the developing world's efforts to construct a New International Economic Order.<sup>192</sup>

Stymied in its original mandate, the Commission made an explicit decision to refocus its project on developing a set of “principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States.”<sup>193</sup> International law doctrine has

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191. See 1 IAN BROWNLIE, *STATE RESPONSIBILITY* 60-84, 90-131 (1983).

192. See *supra* text accompanying note 25.

193. *Report of the Special Rapporteur*, [1970] 2 Y.B. Int'l L. Comm'n 306, U.N. Doc. A/8010/Rev.1. As the ILC's Special Rapporteur wrote, “it is one thing to define a rule and the

come to accept this distinction by referring to both primary and secondary rules of state responsibility. Primary rules are the substantive obligations of states in the myriad subject areas of international law, from the law of the sea to jurisdiction to the use of force. Secondary rules are those, as stated by the ILC, that elaborate what it means for a state to be legally accountable for violations of these duties.<sup>194</sup>

Thus, many secondary rules concern principles of attribution—namely, rules for determining the responsibility of the state or individuals for acts of agents or others. For example, the state is responsible for the acts of its organs, even if they act beyond their authority, for the acts of nongovernmental groups exercising governmental authority in the absence of the official government, for the conduct of others that it adopts after the fact, and for knowingly assisting another state in its illegal acts.<sup>195</sup> Other rules concern circumstances that preclude a finding of wrongful conduct by the state despite a prima facie violation by the state of its duties; these rules include consent, lawful self-defense, lawful countermeasures, force majeure, distress, and a state of necessity.<sup>196</sup> The ILC's decades-long codification project has, as a result, sought to refrain—not always with complete success—from elaborating primary rules in international law. Those norms continue to proliferate as new subjects of international relations emerge and require regulation.<sup>197</sup>

The ILC's bifurcated approach to state responsibility reflects the practice of decisionmakers authorized to determine whether a state has breached its duties, insofar as they have addressed primary and secondary rules separately, analyzing both the content of a given norm and the links between the unlawful conduct and the state. The International Court of Justice, for instance, extensively addressed secondary rules in determining whether the acts of Iranian students in taking over the U.S. Embassy in

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content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation." *Id.*

194. See *Report of the International Law Commission*, [1991] 2 Y.B. Int'l L. Comm'n, pt. 2, at 1, U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (1991 Draft Articles); *Report of the International Law Commission*, [1980] 2 Y.B. Int'l L. Comm'n, pt. 2, at 30-34, U.N. Doc. A/CN.4/SER.A/1980/Add.1 [hereinafter *1980 ILC Report*] (1980 Draft Articles). As a shorthand, when international lawyers refer to the doctrine of state responsibility, they are referring to the set of secondary rules and processes. For a broader definition of secondary rules, see H.L.A. HART, *THE CONCEPT OF LAW* 89-96 (1961) (defining secondary rules as rules that set up the principles by which the primary rules are formed, amended, or terminated).

195. *Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, Int'l Law Comm'n, 53d Sess., pt. I, ch. 1, arts. 4-11, 16, U.N. Doc. A/CN.4/L.602/Rev.1 (2001) [hereinafter *ILC 2001 Draft Articles*].

196. *Id.* pt. I, ch. 1, arts. 20-27.

197. See, e.g., HIGGINS, *supra* note 72, at 161, 162-65 (criticizing the ILC for mixing primary rules and secondary rules). The most recent Special Rapporteur has proposed some major changes to the project to preserve the focus on secondary rules. See James Crawford, *First Report on State Responsibility*, U.N. GAOR, Int'l Law Comm'n, 50th Sess., paras. 12-18, U.N. Doc. A/CN.4/490 (1998).



1979 were attributable to Iran, and whether the acts of the Contras against Nicaragua were acts of the United States.<sup>198</sup> (The primary rules in those two cases concerned, respectively, the law of diplomatic immunity and the law on the use of force.) The Inter-American Commission and Court of Human Rights, as well as the European Commission and Court of Human Rights, have repeatedly engaged in this process as well.<sup>199</sup> Beyond these bodies, arbitral tribunals, UN committees that oversee implementation of human rights treaties, and other decisionmakers routinely make reference to concepts of state responsibility, at times quoting the ILC's Draft Articles as if they were a restatement of customary international law.<sup>200</sup>

Thus an examination of corporate responsibility must begin with these two sets of norms and consider their applicability to companies. For our purposes here, the primary rules at issue are those in the law of human rights. A number of secondary rules will prove pertinent, particularly with regard to attribution of and complicity in wrongful conduct.

#### B. *The Responsibility of Individuals: A (Shorter) Primer*

International law approaches to individual responsibility have not benefited from the sort of systematic, academic examination provided by the International Law Commission with respect to state responsibility. Nonetheless, a clear set of primary and secondary norms has emerged since the days of the International Military Tribunal through international criminal law treaties, domestic statutes, state practice, and important domestic and international court decisions (most recently those of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda).

For individual accountability, the primary rules are human rights protections that recognize various offenses, such as genocide, war crimes, crimes against humanity, and torture. They define a set of acts that give rise to individual criminal responsibility. As discussed above, the corpus of primary rules of individual responsibility is quite limited compared to the primary rules of state responsibility.<sup>201</sup>

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198. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 63-65 (June 27); *U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 30 (May 24).

199. *X v. Federal Republic of Germany*, 1958 Y.B. Eur. Conv. on H.R. 256, 304 (Eur. Comm'n on H.R.) (holding that the Federal Republic of Germany was not responsible for acts of East German courts); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995); *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988).

200. *See, e.g., Yeager v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 91, 103 (1987); General Comment No. 3, para. 1, in *Report of the Committee on Economic, Social, and Cultural Rights*, U.N. ESCOR, 1st Sess., Supp. No. 3, Annex III, at 83, U.N. Doc. E/1991/23 (1991).

201. *See supra* text accompanying notes 80-82.

The secondary rules of individual (criminal) responsibility, often termed the general principles of criminal law, essentially concern attribution of conduct to the individual, defenses, and other principles such as *nullum crimen sine lege*.<sup>202</sup> Derived from principles of criminal law common to many states, decisionmakers have recognized secondary rules widely through treaties and international court judgments. Among the most significant attribution rules are complicity and conspiracy, which hold that an individual may be guilty for aiding and abetting an offense that he did not directly commit; and command responsibility, which attributes certain acts of subordinates to the superior. Among the critical defenses recognized in international criminal law are coercion (or duress) and mental incapacity.<sup>203</sup> The law has also sharply limited one commonly asserted defense, namely, following orders.<sup>204</sup>

### C. *The Corporate Parallel*

Looking at this rich doctrine, one is naturally inclined to ask if it can address the problem of determining the scope of corporate duties. In a word, can decisionmakers transpose the primary rules of international human rights law and the secondary rules of state and individual responsibility onto corporations? If corporations are such significant actors in international relations and law, then can they not assume the obligations currently placed on states or individuals, based on those sets of rules of responsibility? I consider the challenges to applying primary and secondary rules in turn.

#### 1. *The Barriers to Transposing Primary Rules*

Any decision to extend primary human rights rules to corporations faces several problems. With respect to those human rights norms binding on states (the larger category), if, for the moment, we confine their scope to the provisions of the International Covenant on Civil and Political Rights, then some of the obligations specified therein are obviously not within the province of corporate activity. As an obvious example, the ICCPR grants criminal defendants numerous rights, such as the presumption of innocence, a speedy and fair trial, free counsel, the ban on self-incrimination, and

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202. For one useful grouping of these principles, see ICC Statute, *supra* note 80, pt. 3.

203. *Id.* arts. 25, 28, 31; RATNER & ABRAMS, *supra* note 54, at 129-42.

204. *See, e.g.*, ICC Statute, *supra* note 80, art. 33 (permitting the defense only if the defendant can show a legal obligation to obey the order and excluding its application to genocide and crimes against humanity on the theory that such orders are manifestly unlawful).

nonretroactivity of the law.<sup>205</sup> Some of these rights create duties only on the state insofar as guaranteeing these rights is within the unique province of states as part of their function of maintenance of public order. In that sense, it is, for instance, difficult and perhaps impossible to say that an individual's right to be informed of the reasons for her arrest or right to confront her accusers in a criminal trial can create any duty upon a corporation, as only the state can ensure these rights.<sup>206</sup>

Nonetheless, one can imagine hypothetical situations in which a private enterprise might somehow involve itself in the criminal process. For example, a company seeking to remove a union activist from the scene might conceivably provide false testimony or a fake document to the prosecutor (with or without the latter's knowledge) in order to support charges of illegal activity by the activist. Here the corporation has in some sense helped to deprive the defendant of a fair trial. Thus, the unique role for states in securing some rights (such as the right to free counsel) does not preclude duties for corporations with respect to other, related rights (such as other rights in the criminal field). The principal role for the state in securing some rights—for instance, its role as primary dutyholder in guaranteeing a fair trial—does not exclude extending duties to others for securing those rights.<sup>207</sup>

Second, simply extending the state's duties with respect to human rights to the business enterprise ignores the differences between the nature and functions of states and corporations. Just as the human rights regime governing states reflects a balance between individual liberty and the interests of the state (based on its nature and function), so any regime governing corporations must reflect a balance of individual liberties and business interests.<sup>208</sup> The rights of an individual to privacy and to free expression—rights that on their face create duties in both the state and

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205. ICCPR, *supra* note 129, arts. 9(2), 14, S. EXEC. DOC. E, 95-2, at 26-28, 999 U.N.T.S. at 176-77.

206. Cf. Laurence Dubin, *The Direct Application of Human Rights Standards to, and by, Transnational Corporations*, 61 INT'L COMMISSION JURISTS REV. 35, 41 (1999) (asserting that other rights—to asylum, to take part in government, and to a nationality—cannot be “reformulated” as applying to corporations); INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 101, para. 148 (“More work will be needed to show how [many civil and political rights] can be applied directly to non-state actors including businesses.”).

207. Cf. RAZ, *supra* note 82, at 182-86 (discussing the possibility of multiple dutyholders for any given right).

208. See ICCPR, *supra* note 129, arts. 4, 14(1), 18(3), 19(3), 21, 22(2), S. EXEC. DOC. E, 95-2, at 24, 27, 29-30, 999 U.N.T.S. at 174, 176, 178 (permitting derogations and restrictions to some rights); see also FRANCIS G. JACOBS & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 304-06 (2d ed. 1996) (describing legitimate bases for interfering with individual rights under the Convention); MCDUGAL ET AL., *supra* note 70, at 158-59 (categorizing acceptable derogations). For a recent application of this idea to the corporate context, see Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW*, *supra* note 38, at 75, 90-92.

private actors—surely create a different, and in all likelihood smaller, set of duties on the corporation (a point developed further in Section V.C below). In the end, we can say that duties on states are not simply transferable to corporations, but the same human rights that create duties for states may create the same or different duties upon corporate actors.

Third, the limited scope of the primary rules of individual responsibility makes their application to corporations conceptually easier than the application of the primary rules of state responsibility to corporations. Just as individuals might act alone to commit international crimes, so they might choose to act through corporate entities and thus justify decisionmakers to hold the entities responsible. *I.G. Farben* and other post-World War II cases discussed above effectively reached this conclusion under international law; many domestic legal systems have also accepted corporate criminal liability.<sup>209</sup> The difficulty, however, with building a theory of corporate responsibility solely upon these rules is that they are highly limited as a result of their evolution through the process of international *criminal* law. As discussed earlier, most human rights abuses do not give rise to individual responsibility.<sup>210</sup> More generally, as state responsibility makes clear, the criminal route does not exhaust the possibilities for creating duties.

It might be argued that the primary rules on individual responsibility under international criminal law are, in fact, perfectly adaptable to the corporate context—that corporate responsibility ought to extend no further than (although as far as) individual responsibility.<sup>211</sup> The recognition of the corporate entity as a juridical person in both domestic law and international law might support the idea of treating it the same as a natural person, with the result that businesses would be responsible for the same international crimes as individuals.<sup>212</sup> This limited view of corporate responsibility would certainly represent a conservative approach to the issue, although the states drafting the ICC Statute refused to take even this step.<sup>213</sup> But again it assumes that the norms developed through the criminal process are sufficient to address acts when noncriminal forms of responsibility are possible. It also ignores the potential differences between natural persons and juridical persons in terms of their access to resources, ability to harm

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209. See *supra* text accompanying notes 134-135. On corporate criminality in domestic law, see *infra* notes 326-327 and accompanying text. For one endorsement of this position, see Weissbrodt, *supra* note 16, para. 13.

210. See *supra* text accompanying notes 79-81.

211. I appreciate this argument from Gerald Neuman.

212. See *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 34-36 (Feb. 5).

213. For an account, see Clapham, *supra* note 151, at 143-60.

human dignity, and ability to avoid the control of the state.<sup>214</sup> In effect, then, just as the primary human rights rules binding on states are so broad and diverse as to make impossible any notion of simply transferring them to corporations, so the primary rules binding on individuals are so narrow as to make transferring them to corporations insufficient. Corporations might in theory commit war crimes or crimes against humanity, but as a practical matter, history does not suggest this is a prevalent practice; and NGOs and others monitoring corporate practices do not appear to be limiting their concerns to such massive or systematic abuses of basic human rights.

## 2. *The Barriers to Transposing Secondary Rules*

With respect to secondary rules, the answer to the problem of transferability is less obvious. At one level, some of the secondary rules of state responsibility are not transferable for the same reason that the primary rules are not transferable—because they are defined in terms of actions that only the state can carry out. For example, the preclusion of wrongfulness based on self-defense under the UN Charter would be inapplicable to corporations, which lack such a right under the Charter.<sup>215</sup>

The attribution principles can, however, play an important part in a theory of corporate responsibility. Some of them might easily apply in the corporate context, but others might not. For instance, one of the core rules of attribution to states posited by the ILC provides that the “conduct of an organ of a State or of a person or an entity empowered to exercise elements of the governmental authority” is an act of the state even if it “exceeds its authority or contravenes instructions.”<sup>216</sup> If we simply replace the word “state” with “corporation” (or “business enterprise”) and the phrase “governmental authority” with “corporate authority,” we have generated a new secondary rule, although one that raises new issues because of differences between states and corporations—notably the meaning of an “organ of a corporation” or an “entity empowered to exercise elements of corporate authority.” Defining these terms will be more challenging than with respect to the state, where constitutional, statutory, or regulatory provisions typically describe these relationships (although there is some international law jurisprudence finding state action by nongovernmental actors even in the absence of formal ties to the state<sup>217</sup>). Corporate theory

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214. On the conceptual problems that arise as the corporate entity approaches the individual, see the Conclusion.

215. U.N. CHARTER art. 51; *ILC 2001 Draft Articles*, *supra* note 195, pt. I, ch. 1, art. 21.

216. *ILC 2001 Draft Articles*, *supra* note 195, pt. I, ch. 1, art. 7; see also 1 BROWNIE, *supra* note 191, at 145-50 (citing numerous cases); 1 OPPENHEIM'S INTERNATIONAL LAW 545-48 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (same).

217. See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 35 (May 24) (holding that hostage-takers were agents of Iran).

assists in understanding the numerous ways in which the business entity may be defined, inviting questions as to whether organs and entities empowered to exercise elements of corporate authority include subsidiaries, contractors, suppliers, distributors, or dedicated customers.<sup>218</sup>

### 3. *A Methodology for Deriving Norms of Corporate Responsibility*

The route to building a theory of corporate responsibility that does not simply ignore decades of practice and doctrine about state and individual responsibility is to recognize explicitly where decisionmakers could apply such principles to corporations and where they could not. This determination will turn on the similarity or differences between corporate behavior in the area of human rights and individual or state behavior. In essence, the challenge is to construct a theory both *down* from state responsibility and *up* from individual responsibility that, in the end, develops new primary and secondary rules. Some principles of state and individual responsibility (both primary and secondary rules) are quite similar, permitting us to rely upon them in the corporate context. Such a methodology acknowledges that, in general terms, a corporation is, as it were, more than an individual and less than a state.

Lastly, it bears mentioning that this process will have benefits beyond the corporate human rights context. In particular, the secondary rules derived here, especially the principles of attribution, would likely work with other primary rules, for example, with those concerning the environment. Although the goal of this project is not to develop a comprehensive set of secondary rules for corporations, an incidental benefit of the theory would be the creation of such rules.

## V. CIRCUMSCRIBING CORPORATE DUTIES: A THEORY IN FOUR PARTS

Building upon these doctrinal foundations, the theory adopted here for developing a model of enterprise liability is based on an inductive approach that reflects the actual operations of business enterprises. It appraises the ways in which corporations might affect the human dignity of individuals and posits a theory that is sensitive to the corporations' diverse structures and modes of operating within a particular country. This theory asserts that corporate duties are a function of four clusters of issues: the corporation's relationship with the government, its nexus to affected populations, the

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218. See, e.g., PHILLIP I. BLUMBERG & KURT A. STRASSER, *THE LAW OF CORPORATE GROUPS* 9-18 (1998) (categorizing various relationships within the corporate group); Hugh Collins, *Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration*, 53 *MOD. L. REV.* 731 (1990) (urging a revision of common-law principles of liability with respect to integrated economic enterprises).

particular human right at issue, and the place of individuals violating human rights within the corporate structure.

A. *The Company's Relationship to the Government*

As discussed above, the doctrine of state responsibility has recognized that the government may act through a variety of actors in breaching its international obligations. International decisionmakers evaluate the connections between these actors and the government to determine whether the state has violated international law.<sup>219</sup> The reverse applies as well, i.e., the ties between the government and the TNE play a major role in determining the obligations of the corporation. Where an enterprise has close ties to the government, it has *prima facie* a greater set of obligations in the area of human rights.<sup>220</sup> This proposition follows from the government's possession of the greatest set of resources capable of violating human dignity—police and military forces, with accompanying weapons, as well as judicial processes capable of curtailing human rights. It also reflects the likelihood that such ties reduce the state's desire and ability to regulate the conduct effectively, necessitating the recognition of responsibility under international law. The critical issue then becomes determining the sort of ties to the state that are relevant for deriving corporate duties. I begin my analysis from the standpoint of state responsibility rules that describe the consequences of ties between states and private actors; I then consider the relationships that states and corporations are most likely to have and the legal ramifications of these relationships for the company.

1. *State Responsibility—The Mirror Image*

As an initial matter, the extant rules of state responsibility that make the state liable for the acts of some private actors can provide for the responsibility of those private actors as well. That is, because the state is responsible for certain acts of private actors, those actors can also be held responsible for that same conduct under international law. This principle already has some basis in domestic law. For instance, certain important U.S. statutes hold private defendants civilly and criminally liable for violations of civil rights on the theory that such entities may be acting

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219. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995).

220. Cf. *Costello-Roberts v. United Kingdom*, 247 Eur. Ct. H.R. (ser. A) 50, 58 (1993) (holding that a state cannot “absolve itself from responsibility by delegating its obligations to private bodies”).

“under color of law.”<sup>221</sup> U.S. courts have applied a variety of tests to determine whether the acts of private individuals were so closely linked with the state as to make them liable.<sup>222</sup> These cases demonstrate the rather obvious proposition that when a private entity acts, in some sense, on behalf of the state, it is as liable as the state for violations of human rights. In recent years, courts have applied these tests to determine whether acts of private corporations violate international law for purposes of the Alien Tort Claims Act (based on the view among those courts that most violations of international law require state action). For the most part, these tests set a relatively high standard, as a result of which plaintiffs have lost key cases alleging, for instance, that Unocal acted under color of law in Burma and Freeport acted under color of law in Indonesia.<sup>223</sup>

As significant as these cases are, any international law theory must transcend American notions of state action. International decisionmakers have also recognized a variety of ways in which private entities can become agents of the state. Some of these decisions do not entail affirmative findings of liability by the private actor because the particular forum—an international court or arbitral body—permits only suits against states; but other venues, such as international criminal courts, do reach such conclusions directly. Yet the multitude of arenas for law interpretation at the international level renders the task more difficult than simply restating clearly accepted principles of domestic law. I consider here three sets of relationships.

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221. *E.g.*, 18 U.S.C. § 242 (1994); 42 U.S.C. § 1983 (1994). U.S. civil rights laws also prohibit various forms of private discrimination, although the constitutional basis for those provisions does not involve the Fourteenth Amendment and its requirement of state action. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 420-44 (1968) (holding that 42 U.S.C. § 1982, which bans racial discrimination in real property transactions, was a proper exercise of congressional power under the Thirteenth Amendment).

222. *Compare, e.g.*, *Gallagher v. “Neil Young Freedom Concert,”* 49 F.3d 1442, 1447 (10th Cir. 1995) (“In order to establish state action, a plaintiff must demonstrate that the alleged deprivation of constitutional rights was ‘caused by exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.’” (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982))), *with George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996) (“If a private actor is functioning as the government, that private actor becomes the state for purposes of state action.” (quoting *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 508 (9th Cir. 1989))).

223. *See Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1307 (C.D. Cal. 2000), *aff’d*, 248 F.3d 915 (9th Cir. 2001) (“In order to establish proximate cause, a plaintiff must prove that the private individuals exercised *control* over the government official’s decision to commit the section 1983 violation.”); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), *aff’d*, 193 F.3d 161 (5th Cir. 1999); *see also* Craig Forcese, Note, *ATCA’s Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT’L L. 487 (2001) (examining shortcomings of the U.S. approach).



## 2. *Corporations as Governmental Agents*

Governments, international courts, and others have devoted significant time to appraising the legal implications of a state serving as a principal to private agents. A key issue here is the degree of control that a government must have over private actors in order to be responsible for their actions. In the *Nicaragua* case, the International Court of Justice held that the United States could be held responsible for the acts of the Contras in their war against the Nicaraguan government in the 1980s only if it had “effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”<sup>224</sup> In 1999, in *Prosecutor v. Tadic*, the first appeal brought before the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Appeals Chamber had to determine whether the Bosnian Serb army was part of the armed forces of Serbia; a positive finding would mean that the war in Bosnia was an interstate war and would thereby trigger the protections of civilians in the 1949 Geneva Conventions and make certain breaches of that treaty war crimes. The court criticized the *Nicaragua* test and adopted a looser formula—that the acts of an armed group are attributable to a state as long as the state “has a role in organising, coordinating or planning the military actions” of the group, not necessarily controlling its particular operations.<sup>225</sup> At the same time, the Chamber said that the acts of nonmilitary private groups were attributable to the state only if “specific instructions concerning the commission of that particular act had been issued” by the state, or the state “publicly endorsed or approved ex post facto” the conduct, a test very close to the ICJ’s *Nicaragua* test.<sup>226</sup>

In another forum, the European Court of Human Rights adopted an even looser test for attribution. It found Turkey responsible for the acts of the authorities of the self-styled “Turkish Republic of Northern Cyprus” on the basis of the Turkish army’s “effective” and “overall” control of that part of the island.<sup>227</sup> The members of the International Law Commission, for their part, seem to favor the strictness of the *Nicaragua* test, with the ILC’s latest proposal on state responsibility positing responsibility of the state if a person or group is “in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”<sup>228</sup>

As a least common denominator, then, if we posit that the responsibility of the principal entails the responsibility of the agent, this jurisprudence

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224. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. at 64-65.

225. *Prosecutor v. Tadic*, Case No. IT-94-I-A, para. 137 (Int’l Crim. Trib. for Former Yugoslavia Appeals Chamber July 15, 1999), <http://www.un.org/icty/tadic/appeal/judgement/index.htm>.

226. *Id.*

227. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 23-24 (1995).

228. *ILC 2001 Draft Articles*, *supra* note 195, pt. I, ch. 1, art. 8.

means that private enterprises would be liable for human rights violations where the government has instructed them to engage in those violations. This may well have been the case with some of the World War II business defendants.<sup>229</sup> But as a practical matter, such a relationship probably characterizes a fairly small category of corporate activity, either because governments do not typically make many such bald requests or because corporations do not comply with them. It would, however, cover an episode where the government has asked a company, through its private security force, to detain someone for interrogation where there is reason to believe that the detention will lead to a violation of human dignity (e.g., torture, disappearance, summary execution, or unfair trial).

Beyond responsibility emanating from governmental control over the particular violator, the secondary rules of state responsibility also provide that the state is responsible if private groups more broadly exercise governmental authority as empowered by the law of the state, or in the absence or default of official authorities.<sup>230</sup> (U.S. law on state action recognizes similar tests.)<sup>231</sup> The first category covers a very important class of parastatal actors; while the second covers those filling in for the government, a situation that the doctrine has considered quite exceptional on the theory that governments do not typically relinquish such power.<sup>232</sup> Yet with respect to corporations, both scenarios prove more than speculative. The practices of South American states and Indonesia with respect to foreign corporations would appear to amount, in essence, to granting these companies de jure or de facto control over the areas of the concessions. Under this view, private corporations have duties to protect the human rights of those under their control when they exercise quasi-state authority. The extent of the duties would depend on the extent of control.

### 3. *Corporations as Complicit with Governments*

Beyond situations where the private entity is an agent—de facto or de jure—of the state, other links might characterize the state-enterprise relationship. International law also accepts notions of complicity, whereby one entity engages in otherwise lawful conduct that serves to aid other

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229. See *supra* text accompanying notes 131-135.

230. *Yeager v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 92, 104 (1987); *ILC 2001 Draft Articles*, *supra* note 195, pt. I, ch. 1, arts. 5, 9.

231. See, e.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-53 (1974) (recognizing state action where a private entity exercises powers traditionally reserved to the state, but finding that the defendant did not do so); *Marsh v. Alabama*, 326 U.S. 501 (1946) (determining that the freedoms of speech and religion apply in a company town).

232. James Crawford, *First Report on State Responsibility: Addendum*, U.N. GAOR, Int'l Law Comm'n, 50th Sess., paras. 217-221, U.N. Doc. A/CN.4/490/Add.5 (1998); *1980 ILC Report*, *supra* note 194, art. 11.

entities in violating norms. With respect to state responsibility, numerous decisionmakers have held, either in the course of deriving or interpreting primary or secondary rules of conduct, that a state can be responsible for the acts of another state, based on a variety of tests involving its cooperation. Statements of the liability of states for complicity in illegal acts have emanated from decisions of the ICJ,<sup>233</sup> authoritative resolutions of the General Assembly and Security Council,<sup>234</sup> and ample state practice.<sup>235</sup> The ILC has attempted to codify such a standard too and has recently suggested that responsibility hinges upon a requirement that the state “aids or assists” another state “with knowledge of the circumstances” of the illegal act.<sup>236</sup>

The law on individual responsibility has long recognized notions of complicity as well. Thus, for example, Article III of the 1948 Genocide Convention states that conspiracy to commit genocide and complicity in genocide also constitute crimes.<sup>237</sup> The statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda make culpable those who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of one of the enumerated crimes.<sup>238</sup> The 1998 Statute of the International Criminal Court offers a detailed schema, providing for responsibility for a broad range of associated crimes, but conditioning guilt for certain of these crimes on completion of various acts or possession of various mental states.<sup>239</sup> The ICTY has interpreted its statute to mean that an accomplice is guilty if “his participation directly and substantially affected the commission of that

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233. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 15, 55-56 (June 21).

234. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142-43, U.N. Doc. A/9631 (1974) (holding that “the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State” constitutes illegal aggression); S.C. Res. 301, U.N. SCOR, 26th Sess., at 7-8, U.N. Doc. S/INF/27 (1971) (calling on states not to cooperate with South Africa’s occupation of Namibia).

235. See the lengthy discussion in John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. INT’L L. 77 (1986).

236. *ILC 2001 Draft Articles*, *supra* note 195, pt. I, ch. 1, art. 16.

237. Genocide Convention, *supra* note 77, art. III, S. EXEC. DOC. O, 81-1, at 7, 78 U.N.T.S. at 280.

238. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1), *annexed to Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, art. 6(1), *in* S.C. Res. 955, U.N. SCOR, 49th Sess., at 15, U.N. Doc. S/INF/50 (1994); *see also Report of the International Law Commission to the General Assembly on the Work of Its Forty-Eighth Session*, [1996] 2 Y.B. Int’l L. Comm’n, pt. 2, at 18-22 (reprinting Article 2 of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind and showing seven categories of participation); Torture Convention, *supra* note 76, art. 4(1), S. TREATY DOC. NO. 100-20, at 20, 1465 U.N.T.S. at 114.

239. *See* ICC Statute, *supra* note 80, art. 25.

offence through supporting the actual commission before, during, or after the incident,” and that guilt extends to “all that naturally results” from the act; as for mens rea, the court required that the defendant act with knowledge of the underlying act.<sup>240</sup>

Deriving duties of corporations from the law’s recognition that states are responsible for their complicity in illegal acts by others states, and that individuals are responsible for complicity in illegal acts by other individuals, must be done with care. Nevertheless, at a minimum, both the state (civil) and individual (criminal) standards clearly recognize such responsibility as long as the underlying activity is illegal and the state or individual involved in the illegal activity has, in some sense, knowledge of it. With respect to corporate activity, this view would suggest that if a business materially contributes to a violation of human rights by the government with knowledge of that activity, it should be held responsible as a matter of international law—to put it conversely, that a business has a duty not to form such complicit relationships with governments.<sup>241</sup>

Such a standard does not suggest that any ties, or even any significant ties, between the government and the corporation per se create corporate responsibility for the government’s acts (although other standards might suggest so). The international legal standards for complicity would, for instance, require a corporation not to lend its equipment to government forces with knowledge that it will be used to suppress human rights. Recognition of such duties would address many, perhaps most, of the ongoing concerns about corporate involvement in human rights abuses, for example, accusations of corporate involvement in harassment of government critics and loans of corporate equipment to military units suspected of human rights abuses.<sup>242</sup> But it would not require a corporation to divest, or not invest in the first place, in a country whose government

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240. Prosecutor v. Tadic, Case No. IT-94-I-T, para. 692 (Int’l Crim. Trib. for Former Yugoslavia Trial Chamber II May 7, 1997), <http://www.un.org/icty/tadic/trialc2/judgement/index.htm>; see Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, para. 61 (Int’l Crim. Trib. for Former Yugoslavia Trial Chamber I June 25, 1999), <http://www.un.org/icty/aleksovski/trialc/judgement/index.htm>; Prosecutor v. Delalic, Case No. IT-96-21-T, paras. 326-329 (Int’l Crim. Trib. for Former Yugoslavia Trial Chamber II Nov. 16, 1998), <http://www.un.org/icty/celebici/trialc2/judgement/index.htm>, *aff’d*, Case No. IT-96-21-A (Int’l Crim. Trib. for Former Yugoslavia Appeals Chamber Feb. 20, 2001), <http://www.un.org/icty/celebici/appeal/judgement/index.htm>; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, paras. 191-207 (Int’l Crim. Trib. for Rwanda Trial Chamber II May 21, 1999), <http://www.ictcr.org>; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, paras. 474-484 (Int’l Crim. Trib. for Rwanda Trial Chamber I Sept. 2, 1998), <http://www.ictcr.org>.

241. To the extent that regional human rights courts have derived from the duty of states to protect human rights a duty to protect citizens against abuse by private actors, see *supra* text accompanying notes 94-100, complicity in such a failure would also engender responsibility.

242. See, e.g., HUMAN RIGHTS WATCH, *supra* note 5, § VII (alleging use of a company helicopter); Neela Banerjee, *Lawsuit Says Exxon Aided Rights Abuses*, N.Y. TIMES, June 21, 2001, at C1; Paul Lewis, *After Nigeria Represses, Shell Defends Its Record*, N.Y. TIMES, Feb. 13, 1996, at A1.

abuses its citizens. Nor would it require, for instance, a paper company (or a soft drink company for that matter) to stop selling to a governmental bureaucracy that violates human rights insofar as this activity does not “directly and substantially” contribute to the violations. Nor would it even suggest that close personal or business ties between the government and the TNE give rise to the latter’s responsibility. More would have to be shown than such loose ties.<sup>243</sup>

Indeed, these sorts of distinctions proved critical to the South African Truth and Reconciliation Commission’s appraisal of the role of business in apartheid. The Commission drew lines establishing three levels of involvement: (1) companies that “played a central role in helping design and implement” apartheid, in particular, mining firms; (2) companies “that made their money by engaging directly in activities that promoted state repression,” with knowledge thereof, such as the arms industry; and (3) companies that “benefited indirectly by virtue of operating” in apartheid society.<sup>244</sup> The TRC found the first two levels reprehensible per se and thereby rejected many claims by business leaders of innocence based on their nonstate status.<sup>245</sup> Yet its nuanced conclusions regarding other businesses reflected an appreciation of the extent to which apartheid clearly benefited them and of the complexity of business interactions with the government.<sup>246</sup> In the end, while concluding that government and business “co-operated in the building of an economy that benefited whites,”<sup>247</sup> it rejected both a condemnation of all business people as collaborators as well as an exculpation of them for taming and helping end the system.<sup>248</sup> Although the TRC was not in a position to impose—or eliminate—legal, let alone criminal, liability upon corporations,<sup>249</sup> its sophisticated analysis represents an important element of state practice in favor of a duty on corporations to avoid complicit relationships.

One could go much further than the existing norms of international law for deriving corporate duties—for instance, by working from a moral starting point that a corporation has a duty not to invest at all in a repressive society, or a duty to ensure that it does not in any way benefit from the

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243. Cf. *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (dismissing claims because of the plaintiff’s failure to allege sufficient ties between actual abuses by the government and Freeport), *aff’d*, 197 F.3d 161 (5th Cir. 1999).

244. 4 TRUTH & RECONCILIATION COMM’N, *supra* note 4, ch. 2, paras. 23, 26, 28, 32.

245. See Beth S. Lyons, *Getting to Accountability: Business, Apartheid and Human Rights*, 17 NETH. Q. HUM. RTS. 135, 144-54 (1999).

246. 4 TRUTH & RECONCILIATION COMM’N, *supra* note 4, ch. 2, paras. 81-147.

247. 4 *id.* ch. 2, para. 97.

248. 4 *id.* ch. 2, paras. 140-147.

249. Section 20 of Promotion of National Unity and National Reconciliation Act 34 of 1995 (S. Afr.) (limiting the amnesty provisions to individuals).

government's lax human rights policy.<sup>250</sup> During the years of apartheid, many states and nonstate actors asserted such a duty with respect to South Africa, resulting in the divestment of many corporations from that country.<sup>251</sup> And those opposing investment in Burma today might well be seeking to advance such a legal duty. A note of caution, however, is required. To the extent that international actors have accepted the notion of complicity, they have generally hinged it on the direct involvement of the individual or state in violations of law. To extend complicity to corporations seems a reasonable—although, certainly in the view of many, unorthodox—step in the development of international norms.<sup>252</sup> To ignore completely the extant notions of legal responsibility in favor of a concept of accomplice liability that has little support in state practice risks defeating the entire enterprise.<sup>253</sup> I do not wish to exclude such responsibility as a possibility for the future, nor would I advise corporations to develop ties with repressive regimes that fall short of legal complicity.<sup>254</sup> But this version of corporate responsibility would need to derive from an acceptance by governments and other actors of a broader notion of complicity than they have expressed to date.

#### 4. *Corporations as Commanders?*

The need for care in transposing notions of individual responsibility into the corporate area is demonstrated by a special, significant form of culpability that international law recognizes for acts of omission—the doctrine of superior or command responsibility. It extends the liability of a military commander or civilian superior for acts of subordinates beyond those covered through the notion of accomplice liability to those where the superior plays a more passive role by failing to prevent certain actions of

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250. See, e.g., AMNESTY INT'L & PAX CHRISTI INT'L, *supra* note 57, at 51 (“To accept the benefits of measures by governments or local authorities to improve the business climate which themselves constitute violations of human rights, makes a company a party to those violations.”); HUMAN RIGHTS WATCH, *supra* note 5, at 105 (“Complicity occurs . . . when corporations benefit from the failure of government to enforce human rights standards.”).

251. See *supra* note 166 and accompanying text.

252. See *infra* Section V.C for a discussion of corporate responsibility for acts without governmental conduct.

253. Cf. The Global Compact: From Policy to Practice: Human Rights, at <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/trhr2.htm> (last visited Oct. 20, 2001) (noting decisions by some states and governments not to invest in repressive states or use their influence “have not yet yielded a commonly-accepted guideline for determining whether and how companies can operate in countries where human rights violations are widespread”).

254. See ANDREW CLAPHAM & SCOTT JERBI, TOWARDS A COMMON UNDERSTANDING OF BUSINESS COMPLICITY IN HUMAN RIGHTS ABUSES (2001), at <http://www.globaldimensions.net/articles/cr/complicity.html> (noting that companies need to avoid accusations of direct complicity, indirect complicity, and silent complicity); Margaret Jungk, *A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS, *supra* note 187, at 171, 177-78.

subordinates. The rationale for such responsibility is that, by virtue of a hierarchical relationship between superior and subordinate, the former should be held criminally liable for failure to exercise his duties when the result is the commission of offenses by subordinates. In general, the doctrine holds that a superior is responsible for the acts of subordinates if (1) he knew or should have known that the subordinate had committed, or was about to commit, the acts, and (2) he did not take necessary and reasonable measures to prevent the acts or punish the subordinate.<sup>255</sup> This general starting point nonetheless leaves unanswered numerous questions regarding the precise scope of the superior's responsibility, including the definition of a superior<sup>256</sup> and the scope of his duty to be aware of activities by subordinates.<sup>257</sup>

NGOs have made claims against corporations based on the corporations' failure to inform themselves of certain conduct by the government.<sup>258</sup> Because all traditional forms of complicity assume knowledge of the illegal activity, the NGO claims stem essentially from a notion of superior responsibility. And inherent in such a claim is the belief that the company is effectively the superior and the state the agent. This starting point flips the traditional doctrine of state responsibility on its head insofar as the law generally works from the presumption that nonstate actors are the agents rather than the principal.<sup>259</sup> But it may accurately reflect some enterprise-state relations. If, for instance, the company utilized governmental forces to maintain security around the perimeter of a mine,

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255. For excellent overviews, see Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573 (1999); L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319 (1995); and William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

256. See, e.g., Prosecutor v. Delalic, Case No. IT-96-21-A, paras. 188-198 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Feb. 20, 2001), <http://www.un.org/icty/celebici/appeal/judgement/index.htm>; Prosecutor v. Blaskic, Case No. IT-95-14-T, paras. 300-301 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber I Mar. 3, 2000), <http://www.un.org/icty/blaskic/trialc1/judgement/index.htm>; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, paras. 217-223 (Int'l Crim. Trib. for Rwanda Trial Chamber II May 21, 1999), <http://www.ictt.org>.

257. Compare Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, art. 86(2), 1125 U.N.T.S. 3, 43 (imposing liability on those who "knew, or had information which should have enabled them to conclude in the circumstances at the time" of the activities), with ICC Statute, *supra* note 80, art. 28(a)(i) (imposing liability on military commanders if they "either knew or, owing to the circumstances at the time, should have known" of the activities), and *id.* art. 28(b)(i) (imposing liability on other superiors who "either knew, or consciously disregarded information which clearly indicated" that a crime was being committed). See also Prosecutor v. Delalic, Case No. IT-96-21-A, paras. 235-241 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Feb. 20, 2001), <http://www.un.org/icty/celebici/appeal/judgement/index.htm> (finding a superior responsible only where the superior had information putting him on notice of subordinates' offenses).

258. See, e.g., HUMAN RIGHTS WATCH, *supra* note 6, pt. IX, at 6 (stating that oil companies have the responsibility to "monitor security force activity in the oil producing region"); HUMAN RIGHTS WATCH, *supra* note 5, at 110-11.

259. See *supra* notes 224-228 and accompanying text.

and those forces engaged in serious human rights abuses, one can speak of a form of superior responsibility of the company for the acts of the governmental forces.<sup>260</sup> Utilizing, as an example, the standard in the ICC Statute for the responsibility of civilian superiors for acts of subordinates, the corporation would be liable for acts of those under its “effective authority and control” where it “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes” and where “the crimes concerned activities that were within the effective responsibility and control of the superior.”<sup>261</sup>

Determining “effective responsibility and control” and what sort of information “clearly indicates” the commission of human rights abuses is, of course, no simple matter. Hard cases would arise if, for instance, the business agreed to invest in exchange for a government promise to “secure” (so to speak) an area from opponents of the investment or the regime, and if the investor knew what that term in fact meant. Human rights NGOs involved in the drafting of the Rome Statute found even its standard of knowledge too high.<sup>262</sup> Indeed, if my theory is to derive a set of duties applying to corporations generally rather than simply those duties that give rise to criminal liability, a lower standard of knowledge seems justifiable, one more akin to the negligence standard imposed on military commanders.<sup>263</sup> But, regardless of how these details are resolved, command responsibility itself seems a justifiable basis for corporate duties in situations where corporations are indeed superiors to governmental actors.

#### B. *The Corporation’s Nexus to Affected Populations*

The second element in a theory of corporate responsibility arises from a fundamental distinction between states and companies. States generally have human rights obligations toward all persons on their territory, although some duties do not run to nonnationals.<sup>264</sup> This stems from an assumption that governmental control and jurisdiction is determined on a territorial basis. For TNEs, however, a territorial scope for determining the

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260. For a practical set of principles for corporations reflecting these ideas, see PWBLF & AI, *supra* note 63, at 13, 45-47.

261. ICC Statute, *supra* note 80, art. 28(b).

262. See, e.g., Amnesty Int’l, *The International Criminal Court: Making the Right Choices—Part V: Recommendations to the Diplomatic Conference* 43 (Jan. 5, 1998), at <http://www.amnesty.org/ailib/index.html>; Human Rights Watch, *Summary of the Key Provisions of the ICC Statute* § 8 (Sept. 1998), at <http://www.hrw.org/campaigns/icc/docs/icc-statute.htm>.

263. ICC Statute, *supra* note 80, art. 28(a)(i) (finding guilt when a commander “knew or, owing to the circumstances at the time, should have known” of abuses).

264. See, e.g., ICCPR, *supra* note 129, art. 25, S. EXEC. DOC. E, 95-2, at 30-31, 999 U.N.T.S. at 179 (limiting the right to participate in public affairs to citizens); ICESCR, *supra* note 177, art. 2(3), 993 U.N.T.S. at 5 (allowing developing-world states to limit economic rights to nationals).



universe of relevant rightholders will not work insofar as businesses do not exercise such a geographically fixed form of jurisdiction. Therefore, the determination of enterprise duties must address the company's links with individuals possessing human rights. My analysis of this factor is grounded in premises from moral philosophy about interpersonal duties and is buttressed by extant international practice.

The extent to which obligations of one actor toward other actors turn on the former's ties with the latter has engaged moral philosophers for centuries.<sup>265</sup> Contemporary scholars have framed the debate in terms of partiality and impartiality. In its purist (and indeed most extreme or absurd) form, impartiality is seen by its supporters to flow inevitably from Kant's Categorical Imperative and to endorse equal treatment of all persons under all circumstances (regardless of family or group connections); partiality, on the other hand, would favor overt identification with close relatives and limited moral duties toward others.<sup>266</sup> Nonetheless, many philosophers have rejected pure impartiality as unrealistic and pure partiality as immoral, and have instead found common ground that explicitly acknowledges the morality of certain preferences toward family, community, association, or country. Arguing in different ways, scholars such as Alan Gewirth and Brian Barry have shown that partialist conceptions of duties are not inconsistent with—and indeed can flow from—an overall moral theory of impartiality and equal respect for all persons.<sup>267</sup> Communitarian political philosophers such as Michael Walzer and Yael Tamir have adopted similar ideas to demonstrate how liberalism and nationalism need not collide.<sup>268</sup> Without delving into the philosophical differences among these and other thinkers, the overall conclusion remains that the idea of equal respect for all humans, central in human rights theory and law, is consistent with the notion that, under certain circumstances, individuals and institutions owe

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265. For the debate among classical schools, see JULIA ANNAS, *THE MORALITY OF HAPPINESS* 249-90 (1993), which discusses Aristotelian and Stoic views of self-concern and other-concern, and John Cottingham, *The Ethics of Self-Concern*, 101 *ETHICS* 798 (1991), which discusses Christian and Continental thinkers.

266. For helpful reviews of the modern debate, see Marilyn Friedman, *The Practice of Partiality*, 101 *ETHICS* 818 (1991); Barbara Herman, *Agency, Attachment, and Difference*, 101 *ETHICS* 775 (1991); and Hugh LaFollette, *Personal Relationships*, in *A COMPANION TO ETHICS* 327 (Peter Singer ed., 1993). The principal modern advocate of the partialist stance is Bernard Williams. See BERNARD WILLIAMS, *MORAL LUCK* (1981).

267. See, e.g., BRIAN BARRY, *JUSTICE AS IMPARTIALITY* 217-33 (1995); Alan Gewirth, *Ethical Universalism and Particularism*, 85 *J. PHIL.* 283 (1988); see also ROBERT E. GOODIN, *PROTECTING THE VULNERABLE* 109-44 (1985) (grounding duties in the need to protect those vulnerable to our acts).

268. MICHAEL WALZER, *SPHERES OF JUSTICE* 31-46 (1983); see also Yael Tamir, *LIBERAL NATIONALISM* 95-116 (1993) (arguing for the "morality of community"); WALZER, *supra*, at 33 ("People who do share a common life have much stronger duties."); cf. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 89-90 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) (describing the need for a system of law because of the proximity of people to one another).

greater duties to those with whom they have special associative ties than to others beyond that sphere.

In the corporate context, this premise argues for viewing the ties as falling within concentric circles emanating from the enterprise, with spheres enlarging from employees to their families, to the citizens of a given locality otherwise affected by their operation (admittedly a broad and amorphous category), and eventually to an entire country. This, of course, represents an oversimplification in the case of TNEs, since by their very nature they operate in different localities and different countries. But in general, as the circles widen, the duties of the corporation will diminish. In Gewirth's terms, these circles represent social groupings, with the bonds (and corresponding intra-group structures and rules) strongest among the corporation and its employees and weaker with respect to other communities. (Certain members of the groupings, such as neighbors of a plant, may not have chosen to be part of the social group, just as family members do not choose to be a part of a social group, but this does not diminish—indeed it arguably increases—the enterprise's duties toward them.)<sup>269</sup>

The nexus factor thus suggests, all other things being equal, that as the proximity of the corporation to individuals—the extent to which the enterprise and the population form a meaningful association—lessens, the duties of the corporation toward those individuals lessen as well. For example, the ICCPR's requirement that the law prohibit any discrimination based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"<sup>270</sup> would suggest a duty upon corporations not to discriminate on these grounds in their employment practices—their relations with the group enjoying the closest nexus to the corporation.<sup>271</sup>

Moving further out in the spheres of influence, the corporation's duties to its customers might well suggest an obligation to ensure that the product is sold (perhaps through its franchisers or distributors) in a way that does not entail those invidious forms of discrimination. At a certain point, however, the nexus to the affected population fails to generate duties concerning this right—it would be difficult to conclude, for example, that the corporation has a duty to ensure that its product is sold in all parts of the

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269. Gewirth, *supra* note 267, at 292-94.

270. ICCPR, *supra* note 129, art. 26, S. EXEC. DOC. E, 95-2, at 31, 999 U.N.T.S. at 179; *see also* General Comment No. 18, para. 12, in *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, vol. I, Annex VI, at 173, 175, U.N. Doc. A/44/40 (1990) (noting that the article "prohibits discrimination in law or in fact in any field regulated and protected by public authorities").

271. I leave aside here the question of how the content of a given right affects the particular duties on corporations and how they may be different from the duties on states, an issue discussed *infra* Section V.C.

country in order to ensure access for all different religious, national, or social groups.

The nexus factor might also have a purely territorial element to it, such that a corporation's duties depend upon the extent to which the corporation physically controls a certain area. Thus, where the enterprise effectively manages a particular piece of territory, as in the case of mineral or timber concessions, it would have a certain, presumably larger, set of duties to those living within that territory, distinct from those to persons living outside it. The enterprise operates as a quasi-state whose special obligations to those under its control are accepted in both moral philosophy and international law doctrine.<sup>272</sup> On the other hand, insofar as the corporation has important ties with persons within a broader area, it would have some duties to them as well. For instance, if the activities of the corporation poisoned the only supply of drinking water of an adjacent area, then the human right to "the highest attainable standard of physical and mental health"<sup>273</sup> would appear to place some duties on the corporation to prevent or respond to such damage.<sup>274</sup> Similar examples might apply to the duties of the corporation to those persons in the immediate vicinity of a factory as compared to those living further away from it.

States have already accepted this concept through the development of international labor standards. Whatever one's view on whether those treaties place direct or merely indirect duties on companies, their promulgation by institutions such as the ILO suggests that governments, labor unions, and business leaders view the sphere of employer-employee relations as an appropriate target for detailed international regulation (one that, as noted, preceded the international human rights movement by a generation). International law has not, for the most part, extended these duties to cover larger spheres potentially influenced by private enterprises, although ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries,<sup>275</sup> while principally drafted to impose

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272. See TAMIR, *supra* note 268, at 111-16; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 54 (June 21) ("Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.").

273. ICESCR, *supra* note 177, art. 12, 993 U.N.T.S. at 8.

274. As discussed *infra* Section V.C, the precise duties remain somewhat unclear, because the Covenant's recognition of the right does not equate with a requirement on states to guarantee the right. Rather, the obligations of the state are much more ones of best efforts. See ICESCR, *supra* note 177, art. 2(1), 993 U.N.T.S. at 5 (requiring the state to "take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights" in the Covenant); General Comment No. 3, *supra* note 200 (providing an interpretation of the idea of progressive realization). For key cases under tort law, see *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991); and *Charan Lal Sahu v. Union of India*, 118 I.L.R. 452 (India 1989).

275. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *adopted* June 27, 1989, <http://ilolex.ilo.ch:1567/english/convdisp2.htm>.

obligations on governments, does at least hint of corporate duties toward those groups.<sup>276</sup>

More recently, the United Nations, the OECD, the EU, and human rights and corporate NGOs have endorsed such an approach. For instance, the UN Secretary-General, in establishing in 1999 the UN's Global Compact program (a joint project of the UN and world business leaders), noted two distinct sets of duties of corporations: to respect human rights "within their sphere of influence" and to avoid being "complicit in human rights abuses"<sup>277</sup>—the latter term referring to corporate involvement in governmental action. The OECD's 2000 Code of Conduct for TNEs urges companies to "[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."<sup>278</sup> The European Commission's Directorate of Employment and Social Affairs has noted, in the context of the reach of corporate codes of conduct, that "[w]hat seems to matter is the degree of control a company has over the employment conditions of all workers employed by its subcontractors."<sup>279</sup> Both Amnesty International and the Prince of Wales Business Leaders Forum have distinguished corporate responsibility for a company's own operations from duties extending to the broader environment in the state.<sup>280</sup>

But is there a circularity here? Are these institutions and I simply asserting that as long as the corporation engages in activities that trigger duties, it will have duties? Is not the notion of ties so amorphous that the spheres themselves are not fixed but merely move with the given human right? For example, what happens if corporate agents were physically to attack persons who were seemingly unrelated to the company's operations but were in fact representing some sort of threat to the company? Would the theory argue that these persons are beyond some objective sphere of influence and thus the corporation owes no duty to them, or that the

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276. *Id.* art. 15 ("The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded."); *id.* art. 16 ("[T]he peoples concerned shall not be removed from the lands which they occupy.").

277. The Global Compact: The Nine Principles, at <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/thenine.htm> (last visited Oct. 20, 2001).

278. 2000 OECD Guidelines, *supra* note 184, § II.2.

279. Eur. Comm'n Directorate for Employment & Soc. Affairs, *Codes of Conduct and Social Labels*, EUR. SOC. DIALOGUE, May 1999, at 7, [http://www.europa.eu.int/comm/employment\\_social/soc-dial/social/newsletter/special\\_en.pdf](http://www.europa.eu.int/comm/employment_social/soc-dial/social/newsletter/special_en.pdf).

280. AMNESTY INT'L, HUMAN RIGHTS PRINCIPLES FOR COMPANIES (1998), at <http://www.amnesty.org>; PWBLF & AI, *supra* note 63, at 28-29; *see also* AMNESTY INT'L & PAX CHRISTI INT'L, *supra* note 57, at 47-54 (noting three "levels of influence": (1) where the TNE has "control," (2) where it "can exercise influence over a situation," and (3) where it "can contribute to the creation of an enabling environment"); INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 101, paras. 161-163 (describing the spectrum of potential victims from employees and consumers to broader society); Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963, 1981-84 (1996) (proposing five "gradations of responsibility").

corporation would have effectively extended its sphere of influence, and thus the violation of their physical integrity would render the company liable? The theory addresses this question in the important “all other things being equal” qualification to the premise noted above. In general, the corporation’s duties can be defined in spheres. However, there may well be circumstances (or certain rights) for which the spheres of influence factor is irrelevant. Gewirth and Raz, for instance, have both written of certain absolute rights, such that, in the former’s words, “agents and institutions are absolutely prohibited from degrading persons, treating them as if they had no rights or dignity.”<sup>281</sup> For such rights, the corporation may well have equal duties toward all.

### C. *The Substantive Rights at Issue*

Once decisionmakers identify the corporation’s connections to the government and to affected populations, they must turn to the nature of the right being impinged. For any particular human right may well place a different set of duties upon a corporation than the sort of duties that the primary rules of state responsibility place on states. I argue below that, for those rights that business enterprises can infringe, corporate duties turn on a balancing of individual rights with business interests and rights. This approach circumscribes corporate duties in a manner that considers the nature of business activity.

#### 1. *Can the Corporation Infringe the Right?*

A preliminary issue in appraising how particular rights give rise to duties is whether the corporation can even have a duty with respect to all human rights. As discussed above in Part IV regarding primary and secondary rules, for some human rights, the government represents the principal dutyholder insofar as only the government can directly infringe upon those rights. Thus, I sought to differentiate between those sorts of rights that the corporation can directly infringe and those that only the government can directly infringe, for example, between the right against cruel, inhuman, or degrading treatment and the right to cross-examination in criminal trials.<sup>282</sup> The duties of the corporation with regard to the latter

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281. Alan Gewirth, *Are There Any Absolute Rights?*, in THEORIES OF RIGHTS 91, 108 (Jeremy Waldron ed., 1984); see also RAZ, *supra* note 82, at 182 (observing that some rights, such as personal security, are against the world while others are against “certain persons in virtue of a special relation they have to the right-holder”).

282. See *supra* text accompanying notes 205-206; see also ICCPR, *supra* note 129, arts. 7, 14, S. EXEC. DOC. E, 95-2, at 25, 27-28, 999 U.N.T.S. at 175-77; cf. Torture Convention, *supra* note 76, art. 1(1), S. TREATY DOC. NO. 100-20, at 19, 1465 U.N.T.S. at 113-14 (defining torture

are only the complicity-based duties discussed in Section V.A above. Thus, for those rights that only the government can directly infringe, the links between the corporation and government (the first factor in the theory) are a necessary factor for the derivation of company duties. Indeed, the links with the government would seem to be a sufficient factor for determining enterprise duties so that the issue of the corporation's nexus to the victims (the factor in Section V.B above) becomes irrelevant. In such cases, the state is violating the rights of its citizens, and the enterprise has a duty not to be complicit in this effort, whether the affected population consists of its own employees or individuals far from its normal sphere of influence.

Which other rights belong in this category? In addition to many rights concerning criminal defendants, others would include the right to enter one's country without arbitrary restrictions; the right of a child to nationality, registration, and a name; the right to marry; the right to vote and run for office; and the right to equality before the law.<sup>283</sup> Of course, the scope of this list can itself be the subject of some dispute. Purists opposed to a notion of corporate duties might argue that the vast majority of human rights, especially in the civil and political realm, are capable of being violated only by the state. They might argue that the right to leave one's country can be directly infringed only by the state (through its interior ministry or immigration bureaucracy) and that it therefore gives rise to corporate duties only through the notion of complicity.<sup>284</sup> Yet private actors are capable, through physical force, of preventing their employees from leaving the country, as the problem of forced prostitution makes clear.<sup>285</sup>

But what of the large number of rights that do not belong in this category, that is, those that are capable of direct infringement by private actors and corporate entities, as well as by the state?<sup>286</sup> As a preliminary matter, it bears clarifying that the complicity-based duties that arise when the government can directly abuse rights also arise when both the government and the corporation can abuse the rights. As long as the state can violate the right, the corporation has a duty not to be complicit in such conduct.

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that states are required to punish as that with a nexus to state action, though the perpetrator need not be a governmental official).

283. ICCPR, *supra* note 129, arts. 12(4), 23(2), 24, 25(b), 26, S. EXEC. DOC. E, 95-2, at 27, 30-31, 999 U.N.T.S. at 176, 179.

284. *See id.* art. 12(2), S. EXEC. DOC. E, 95-2, at 27, 999 U.N.T.S. at 176.

285. *See generally* ASIA WATCH & THE WOMEN'S RIGHTS PROJECT, A MODERN FORM OF SLAVERY (1993) (discussing the trafficking of Burmese women and children to Thailand for prostitution); Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65 (1998) (discussing the trafficking of women beyond prostitution).

286. At least one right in the ICCPR, while it can be infringed by both state and corporation, seems to place duties primarily on private actors—the right against slavery and forced labor. ICCPR, *supra* note 129, art. 8, S. EXEC. DOC. E, 95-2, at 25-26, 999 U.N.T.S. at 175.

More important, because other human rights are capable of direct infringement by business actors, they give rise to obligations on those actors beyond the duty to avoid complicity in the government's violation of them. But in order to derive the duties from all those other rights—whether the right to life, liberty, and security of the person, to free association, free assembly, and free speech, or to participation in public affairs—we need to take into account the differences between corporations and states, as well as the various types of duties that can arise from the same right.

## 2. *The Imperative of Balancing Interests*

Human rights law is generally based on a balancing between the interests of the state and the rights of the individual. As Raz notes from a jurisprudential perspective, a right does not simply translate into some corresponding duty. Rather, “[i]t is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding that other person to have the duty.”<sup>287</sup> The ICCPR (and its regional counterparts in Europe and Latin America) identifies these interests—national security (including preservation of the nation in the event of a national emergency), public order, public health or morals, and the rights or freedoms of others—although it also recognizes that some rights cannot be suspended under any circumstances.<sup>288</sup> Business enterprises, however, have different goals and interests that fundamentally rest on the need to maintain a profitable income stream. To talk about duties of business entities vis-à-vis individuals necessitates taking into account not only the rights of the individuals, but also these interests. Indeed, as noted earlier, businesses themselves have some human rights, including privacy and association rights that, when exercised, inevitably have an impact upon individuals with whom they interact.<sup>289</sup>

Consequently, the company's responsibility must, as an initial matter, turn on a balancing of the individual right at issue with the enterprise's interests and on the nexus between its actions and the preservation of its interests. Such a view simply parallels the basic notion of human rights law that the state may limit many rights to the extent “necessary in a democratic

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287. RAZ, *supra* note 82, at 171; *cf.* *Dennis v. United States*, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring) (“The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests . . .”).

288. *See, e.g.*, ICCPR, *supra* note 129, arts. 4, 12(3), S. EXEC. DOC. E, 95-2, at 24, 27, 999 U.N.T.S. at 174, 176.

289. *See supra* note 187 and accompanying text; *see also* Andrew Clapham, *The “Drittwirkung” of the Convention*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 163, 202-03 (R. St. J. Macdonald et al. eds., 1993) (discussing theoretical difficulties of duties on entities other than states).

society,” with its concomitant notion of proportionality between means and ends.<sup>290</sup> To give a simple example, the right to free speech requires governments to refrain from penalizing individuals for speech critical of the government (as well as much other speech);<sup>291</sup> but it would not require a company to refrain from penalizing employees for public speech that insults the company to consumers, lures away employees, or gives away trade secrets, since these actions impinge on core interests of the company. In general, however, it would bar a company from taking disciplinary measures against an employee for his speech critical of the government.

Just as domestic constitutional courts, regional human rights courts, and UN human rights bodies grapple with determining the limits of lawful governmental interference with individual liberties, so the balancing of corporate interests and individual rights may prove difficult. For example, with respect to the right against arbitrary or unlawful interference with privacy, family, home, or correspondence, a corporation would not be able to use its resources to break into anyone’s home, wiretap conversations there, or intercept mail, since the means are disproportionate to the ends.<sup>292</sup> The corporation would not, however, be violating the human rights of employees by videotaping them surreptitiously while on the job in order to prevent pilfering of products.

Decisionmakers would also apply the balancing test if the corporation’s rights were at issue. One difficult example would concern whether a media company’s rights to free speech violated the individual’s right to privacy if it published embarrassing information about celebrities, politicians, or criminal suspects. One might argue that the individual is too far removed from the corporation—that their associative ties are too weak—to create any duties in the latter. Some decisionmakers might, however, regard their ties (given the nature and purpose of the media company’s business) as close enough to justify corporate duties; in that case, they would have to balance the reputational harm to the individual against the right of a business to speak.<sup>293</sup> This individual rights/business rights balancing—what might be called horizontal balancing—seems by its nature more difficult than the individual rights/business interests—i.e., vertical—balancing more akin to the sort done by human rights bodies and domestic constitutional

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290. See, e.g., ICCPR, *supra* note 129, art. 21, S. EXEC. DOC. E, 95-2, at 29-30, 999 U.N.T.S. at 178; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9(2), 213 U.N.T.S. 221, 230; *Silver v. United Kingdom*, 61 Eur. Ct. H.R. (ser. A) at 37-38 (1983).

291. See, e.g., *Lingens Case*, 103 Eur. Ct. H.R. (ser. A) at 36-38 (1986) (discussing a journalist’s right to criticize a government official).

292. Cf. General Comment No. 16, para. 8, in *Report of the Human Rights Committee*, U.N. GAOR, 43rd Sess., Supp. No. 40, Annex VI, at 181, 182, U.N. Doc. A/43/40 (1988) (discussing a state’s responsibilities during searches).

293. Cf. RAZ, *supra* note 82, at 170 (“In matters of libel, the right to free expression may be completely defeated by the interests of people in their reputation.”).



courts. Yet the former sort of balancing takes place all the time when legislatures and courts grapple with issues of libel and other so-called private law.<sup>294</sup> Indeed, the use of the third-party effect doctrine by German and Dutch courts as well as by the European Court of Justice in cases concerning exclusively private parties suggests that balancing that considers the rights (or interests) of private parties faces no larger theoretical bar than do the more paradigmatic cases of balancing governmental interests with individual rights.<sup>295</sup>

In the end, the balancing test offers a uniform approach for those deriving specific corporate duties—whether through domestic statute, treaty, or soft law. Of course, one set of decisionmakers, such as a legislature, might prove unwilling to do the balancing itself, leaving the final determinations to administrative officials or courts. That balancing does not guarantee uniform outcomes is no more an argument against corporate duties than it is against governmental duties in the human rights area, which are derived by the same methodology and may assume different contours from region to region.

Beyond balancing, certain rights with which the state may never interfere—such as the right to life and physical integrity and the rights against torture, slavery, or debt imprisonment—would be just as nonderogable against the corporation. The nature of those rights determines their nonderogability, such that no state or corporate interests can override them.<sup>296</sup>

While some readers may see such balancing as too theoretically complex for its own good, decisionmakers may well find as a practical matter that deriving a set of corporate duties based on balancing is hardly an unmanageable exercise. Corporations have already begun this task. For instance, the Norwegian Confederation of Business and Industry has derived a list of twelve human rights, primarily based on the Universal Declaration, and suggested various obligations they might put on corporations. The list notably prohibits corporations from interfering with individual political freedoms and proscribes corporal punishment.<sup>297</sup>

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294. I appreciate this insight from Eyal Benvenisti.

295. See *supra* text accompanying notes 103-107; see also MARKESINIS, *supra* note 104, at 194-213 (discussing German principles on the limits of the third-party effect doctrine).

296. See, e.g., *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, 181 (justifying the absolute ban on torture).

297. See PWBLF & AI, *supra* note 63, at 124-26; see also ROYAL DUTCH/SHELL GROUP OF COMPANIES, *supra* note 9 (“A company should . . . ensure that its own personnel, and any security forces engaged by them, are thoroughly familiar with and committed to international guidelines and standards for the use of force in policing . . .”); Weissbrodt, *supra* note 16.

### 3. *Derivative Duties on Corporations*

Beyond not violating rights directly, how far do corporate duties extend? Under the International Covenant on Civil and Political Rights and its regional counterparts, states must not only directly refrain from abuses; they must also “respect and ensure” the rights in the Convention, which include in particular the obligation to provide an “effective remedy” in the event of a violation of the right.<sup>298</sup> The UN Human Rights Committee has, for instance, stated that many rights give rise not only to duties on the government not to impinge them directly, but positive duties as well (e.g., the right against torture implies a state duty to train police and prison guards in order to prevent torture).<sup>299</sup> The question thus arises whether, for example, the right against torture creates a duty on corporations to train their security personnel properly. Or does the human right to form a family create a duty upon a corporation to provide a certain amount of paid or unpaid maternal and paternal leave to the parents? Or a duty not to discriminate on the basis of pregnancy or maternal status in hiring and promotion? Beyond these derivative duties, as noted in Section II.A above, regional human rights courts have required states to prevent certain abuses by private actors on their territory.<sup>300</sup>

The scope of such related duties turns in part on the extent to which fulfillment of the derivative duty is necessary for compliance with the principal duty. In the case of torture, the close link between training security personnel and preventing torture argues strongly for such a duty. As for the right to form a family, this right does not, in the current state of international human rights law, create an obligation on states to provide parental leave, so it would not create such an obligation on businesses.<sup>301</sup> In addition, these duties turn on the enterprise’s nexus to affected individuals, as discussed in Section V.B above. The closer the nexus, the greater the

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298. ICCPR, *supra* note 129, arts. 2(1), 2(3)(a), S. EXEC. DOC. E, 95-2, at 24, 999 U.N.T.S. at 173-74.

299. See General Comment No. 20, para. 10, in *Report of the Human Rights Committee*, U.N. GAOR, 47th Sess., Supp. No. 40, Annex VI, at 193, 194, U.N. Doc. A/47/40 (1992) (“Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training.”); General Comment No. 21, in *Report of the Human Rights Committee, supra*, at 195.

300. E.g., *A. v. United Kingdom*, 1998-VI Eur. Ct. H.R. 2692; *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4, at 91 (1988).

301. General Comment No. 19, para. 5, in *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, Annex VI, at 175, 176, U.N. Doc. A/45/40 (1990). On protection against termination of employment based on pregnancy as gender discrimination, see U.S. NAT’L ADMIN. OFFICE, PUBLIC REPORT OF REVIEW OF NAO SUBMISSION NO. 9701 (1998), <http://www.dol.gov/dol/ilab/public/media/reports/nao/pubrep9701.htm>, a report by the U.S. Department of Labor under the North American Agreement on Labor Cooperation finding that Mexican employer practices in maquiladora industries violated Mexican and international labor law.

extent of corporate duties. If, for example, the corporation enjoys control over territory equivalent to that of a state, it has duties beyond the duty not to infringe directly the right itself, more akin to those of states. It would also have some duties to protect the welfare of those closest to it, such as employees, and to ensure that actors, whether private or governmental, do not violate their human rights. The Prince of Wales Business Leaders Forum and Amnesty International, for example, have asserted that if labor activists are arrested, state security forces abuse rights at a TNE site, or a worker disappears, “for a [company] not to raise these concerns . . . with government officials, while adopting the argument of political neutrality or cultural relativism, is to fail to fulfill its responsibility to uphold international human rights standards.”<sup>302</sup> In the many situations short of these sorts of ties, the company’s duties will be significantly less.

As a practical matter, the nexus analysis suggests that the company will usually have only negative duties or those positive measures clearly necessary to effect them.<sup>303</sup> That is, the company’s duties will typically be to avoid directly infringing upon the right based on the balancing test above, including through some prophylactic measures. Other derivative duties might be appropriate where the nexus between the enterprise and the individual is particularly close. But to go further than this position would effectively ignore the functional differences between states and businesses; it would thereby ask too much of the corporation, especially at this stage of the international legal process, when the broad notion of business duties in the human rights area is just emerging.

This position a fortiori calls into question the applicability to business entities of state duties under human rights law to go beyond immediate preventive action (such as the training of security forces) and promote respect for human rights generally.<sup>304</sup> Promotion is a secondary duty compared to directly respecting or protecting rights, as it calls upon the dutyholder to create a general atmosphere or public consciousness of human rights, rather than to refrain from the conduct itself or to undertake necessary measures to ensure that it will not engage in the conduct.<sup>305</sup> In the end, improvement of the overall human rights situation of the population seems attenuated from the corporation’s key purposes, whereas it is one of

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302. PWBLF & AI, *supra* note 63, at 29.

303. For a critique of the negative/positive duties distinction in human rights law, see SHUE, *supra* note 71, at 35-64; and Alston & Quinn, *supra* note 140, at 172-73.

304. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, art. 5, 1249 U.N.T.S. 13, 17 (imposing a duty to “take all appropriate measures . . . to modify the social and cultural patterns of conduct of men and women”); Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 2, S. EXEC. DOC. C, 95-2, at 2 (1978), 660 U.N.T.S. 195, 216, 218 (imposing a duty to “pursue by all appropriate means and without delay a policy of . . . promoting understanding among all races”).

305. STEINER & ALSTON, *supra* note 71, at 180-82.

the central purposes of government (or at least of liberal government).<sup>306</sup> The business enterprise might have resources at its disposal that, if improperly used, could violate human rights, thus necessitating the derivation of duties to ensure that it does not do so; and it may well be both good corporate policy as well as good human rights policy to encourage corporations to promote human rights, especially when they operate in countries with poor human rights records.<sup>307</sup> But to extend their duty away from a dictum of “doing no harm”—either on their own or through complicity with the government—toward one of proactive steps to promote human rights outside their sphere of influence seems inconsistent with the reality of the corporate enterprise.

*D. Attribution Principles: The Relevance of Corporate Structures*

The final element of the theory of responsibility addresses the structure of the enterprise as an actor and the place of the human rights violator (or person(s) complicit with the government) within that structure. This Section derives a set of attribution principles that connect individual violators to the company. These critical secondary rules of corporate responsibility must confront the reality of the modern business organization.

As noted above, part of the difficulty of transplanting notions of state responsibility to the corporate area lies in the differences between states and corporations. The former are constituted and organized in overtly legal terms—through constitutions, statutes, regulations, policies, and practices, all defining the relationship of the various parts to the whole. This characteristic of states forms the basis for a core secondary rule of state responsibility—that states are responsible for the acts of all state organs and state officials acting as such, however low or high in the governmental hierarchy and however close or far from the state’s governmental center.<sup>308</sup>

The business entity, however, is defined in more diverse ways. The status of many individuals as direct employees justifies attribution of their company-related acts to the corporation based on ideas of state responsibility (although questions of the standard of fault arise in this connection, an issue considered below<sup>309</sup>). Beyond employees, other

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306. See, e.g., *Universal Declaration of Human Rights*, *supra* note 91, pmbl., para. 6; LOCKE, *supra* note 86.

307. See AMNESTY INT’L, *supra* note 280. For one example of an exceptionally forward-looking view, see Body Shop, Human Rights, at <http://www.bodyshop.com/usa/aboutus/body-hrights.html> (last visited Nov. 1, 2001).

308. See, e.g., *Elletronica Sicula S.p.A. (ELSI)*, 1989 I.C.J. 3, 52 (July 20) (assuming acts of the mayor of Palermo are attributable to Italy); *ILC 2001 Draft Articles*, *supra* note 195, pt. I, ch. 1, art. 4; Crawford, *supra* note 232, para. 158 (discussing the principles of the “unity of the State”).

309. See *infra* Section V.E.

relationships are more complex. As Blumberg and Strasser note, the subsidiary's relationship with the corporation turns upon a number of distinct factors, namely, stock ownership, economic integration, administrative, financial, and employee interdependence, and a common public persona.<sup>310</sup> The corporate group may extend beyond this paradigm to include a variety of enterprises with which the main corporation maintains close relations, such as franchisees and licensees.<sup>311</sup>

The relations among parts of a business enterprise can make the determination of the very boundaries of that entity difficult. A corporate entity may operate through joint ventures with other businesses, contractors, and subcontractors; and it may rely upon obtaining inputs from certain suppliers and selling outputs to certain buyers, each creating a variety of economic ties.<sup>312</sup> In some cases, these links originate in contracts establishing long-term relationships; in others, the economic interactions result from the economic importance of the corporation to the supplier or purchaser. A theory of corporate duties must take these relationships into account through some guidelines regarding attribution.

The touchstone for determining the relevance of enterprise structures for duties must be the element of control. As Hugh Collins writes, corporate relations are not merely a function of ownership (subsidiaries) or contractual ties (contractors, distributors, or franchisees). Rather, they extend to a variety of what he calls "authority relations" that "arise wherever the economic dependence of one party upon the other effectively requires compliance with the dominant party's wishes."<sup>313</sup> In such situations, attributing to the controller actions of the controlled entity is entirely appropriate. This concept, of course, resonates with principles of state and individual responsibility noted above; in the corporate realm, it is gaining some acceptance as a basis for assessing corporate responsibility under domestic law.<sup>314</sup>

Several issues immediately arise concerning the role of control. First, control is not a monolithic concept. A corporation's control over its wholly-owned subsidiary might be total, requiring the former to assume

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310. BLUMBERG & STRASSER, *supra* note 218, at 9-12.

311. *Id.* at 13-17.

312. *Id.* at 19 (describing a tripartite scheme of domination or control by one unit of another, economic integration between the units, or both).

313. Collins, *supra* note 218, at 734; *see also* INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 101, para. 166 (endorsing this view).

314. Compare Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295 (1996) (reviewing U.S. law incorporating intra-enterprise liability based on control), with Ian M. Ramsay, *Allocating Liability in Corporate Groups: An Australian Perspective*, 13 CONN. J. INT'L L. 329 (1999) (highlighting inconsistencies of the Australian approach to corporate groups).

responsibility for all the latter's acts.<sup>315</sup> But what of a corporation's control over a joint venture partner, subcontractor, supplier, or buyer?<sup>316</sup> As a first take, one might distinguish between the corporation's control over the contractor and subcontractor for human rights abuses related to the particular contract, and its control over the contractor for acts on a project not involving that corporation. With respect to the former, the corporation might be said to control the contractor; with respect to the latter, it would not.

Yet such a dichotomy is too simple insofar as it might not accurately take into account the question of economic interdependence central to Collins's theory. Thus, what if demand for particular contractors so exceeded supply that the corporation effectively had to work with the contractor on the latter's terms and had no real control of its operations? Do the contractual links between them alone serve to make the enterprise responsible for the acts of the contractor? Conversely, what if supply for particular contractors so exceeded demand, or the corporation provided such a large part of the contractor's business, that the contractor effectively had to work with the corporation on the latter's terms? In that case, the corporation would appear in a position to control the contractor, even on the contractor's projects not involving that corporation.<sup>317</sup>

One approach to this problem would lie in a set of rebuttable presumptions: The corporation would be *prima facie* responsible for acts of contractors and subcontractors concerning the contracted-for projects, and *prima facie* not responsible for other acts by those entities. The two presumptions could be overcome if it were shown, respectively, that the corporation did not exercise real control over the execution of the contracted-for project, or, conversely, that it had actual dominion over the contractor.

Dependence may also turn upon technical cooperation arrangements among entities. If, for example, one TNE lends numerous expert personnel to a local entity such that the latter becomes dependent upon it for its

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315. For a British case addressing this issue currently, see *Lubbe v. Cape PLC*, 4 Law Reports 268 (H.L. 2000) (appeal taken from S. Afr.). In a suit by South African laborers against a U.K. company for asbestos-related damage caused by a wholly-owned subsidiary, the court held that the "[r]esolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group." *Id.* at 276. For a practical perspective on this question in which a former TNE official notes that responsibility should be "very high," but not legal in nature, see Worth Loomis, *The Responsibility of Parent Corporations for the Human Rights Violations of Their Subsidiaries*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS, *supra* note 187, at 145, 145.

316. Collins also discusses the possibility that a creditor might have control over a corporation, a question I leave for another day. Collins, *supra* note 218, at 733-34.

317. For a more broadsided attack on the notion of responsibility for the work of contractors, which argues that "[t]he preponderance of the business community rejects the notion that companies can be held responsible for the overall behavior and policies of their subcontractors and suppliers throughout the supply chain," see U.S. Council on Int'l Bus., *supra* note 181.

effective functioning, then the TNE is, for all intents and purposes, exercising control over the latter. But even here, actions by individuals within the local entity who have no real connection to the expert personnel would not give rise to responsibility by the corporation.

Deriving such presumptions for suppliers and purchasers based on a linchpin of control proves more difficult. Does one attribute to the corporation the abuses of a buyer of its products simply by virtue of the corporation's having supplied a core input? Are the acts of a seller to the company attributable to the latter simply if the company is the seller's largest customer? These difficulties might be resolved by ascribing a certain knowledge standard to the company. Indeed, at a certain point, the rules of attribution—determining the scope of the corporation's component entities—begin to merge with the principles of agency and complicity discussed above.<sup>318</sup> (The difference between this scenario and that discussed in Section V.A is that we are now considering the liability of a company for acts of another company, rather than complicity by one company in the acts of the government.) The test for determining the responsibility of a company for acts of a buyer or seller (or even of a contractor or subcontractor) may thus turn on the mindset of the company rather than merely on economic ties. I do not seek to resolve these issues here, but merely point out the possible limitations of a test that hinges on control.

Of course, such a proposition could also be attacked from the other side, i.e., that the mere presence of economic contacts between the corporation and other entities suffices to attribute to the corporation the acts of all those with whom it works. But this seems far too slender a reed upon which to hang a theory of responsibility. It would require as a general matter that enterprises cut off all ties from entities that might abuse human dignity, even if the abuses stem from activities completely unrelated to the enterprises' connection with the violator entities. To extract a general notion of attribution (just like complicity) from economic ties alone has no basis in domestic or international law.<sup>319</sup>

Second, economic dependence must take account of the attenuated influence of the corporation as one moves further down the chain of production. If a multinational corporation making shoes in Vietnam hires a contractor to make the cotton laces, who hires a subcontractor to provide the cotton cloth, who hires a subcontractor to grow the cotton, who hires a subcontractor to actually pick the cotton, and this last actor uses forced labor in his practices, can the corporation be said to be responsible for his activities—even if each was somehow dependent upon the entity directly

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318. See *supra* Section V.A; see also *infra* Section V.E (discussing duties of care).

319. Cf. *supra* text accompanying note 166 (taking a broad view of complicity with the South African government, though not suggesting that entities buying or selling from companies doing business in South Africa were themselves responsible).

above it for its continuing livelihood? If one were to base a theory of responsibility upon multiplying the degree of dependency, an eighty-five percent dependency for four levels of dependency translates to just over fifty percent.<sup>320</sup> (If the cotton-picker were acting in his spare time, the conduct would clearly be totally private.)

Finally, the control test might not suffice for determining the responsibility of joint venture partners for the activities of their newly created entity. If four companies joined forces to create a local mining company, with each owning twenty-five percent of the company's shares and appointing a quarter of its directors or senior managers, none might control the entity in the sense of being able to force through decisions or block the decisions of others. Yet state responsibility principles increasingly recognize the concept of joint and several liability for such joint acts by states.<sup>321</sup> The extension of this principle to joint ventures seems justified on the same underlying ground, namely that because the companies have created the joint venture specifically for the purpose of gaining the benefits of cooperation from its conduct, they assume the risks should the venture violate human dignity.

#### E. *A Brief Word on Fault*

Lastly, any discussion of corporate duties must address the degree of fault (if any) that creates enterprise responsibility. Governments, international institutions, and legal scholars have long wrestled with the standards of fault required for determining whether the state has violated international law. Treaties, courts, arbitral bodies, individual governments, and other decisionmakers have adopted various standards in elaborating primary rules of state and individual responsibility.<sup>322</sup> As a general matter, fault is not required for violations by states. Thus, for instance, human

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320. See, e.g., Stephanie Strom, *A Sweetheart Becomes Suspect: Looking Behind Those Kathie Lee Labels*, N.Y. TIMES, June 27, 1996, at D1 (noting that Wal-Mart's blouses were made by a New York company that subcontracted to an Alabama company, which then subcontracted to a New Jersey company, which in turn subcontracted to another New York company with apparently poor conditions for employees).

321. See, e.g., Convention on International Liability for Damage Caused by Space Objects, *opened for signature* Mar. 29, 1972, art. V, 24 U.S.T. 2389, 2394, 961 U.N.T.S. 187, 190 (declaring that states jointly participating in the launch of a space object are "jointly and severally liable for any damage caused"); see also John E. Noyes & Brian D. Smith, *State Responsibility and the Principle of Joint and Several Liability*, 13 YALE J. INT'L L. 225 (1988) (reviewing situations of multiple state responsibility for breaches of international law); cf. James Crawford, *Third Report on State Responsibility*, U.N. GAOR, Int'l Law Comm'n, 52d Sess., paras. 267-278, U.N. Doc. A/CN.4/507/Add.2 (2000) (recognizing each state's responsibility in the case of joint action, but not equating this principle with common-law joint and several liability).

322. 1 BROWNIE, *supra* note 191, at 40-46; ILC 2001 Draft Articles, *supra* note 195, pt. I, ch. 1, arts. 4, 9 (dictating attribution for activities of state organs having acted in that capacity). On standards of fault as primary and not secondary rules, see Crawford, *supra* note 197, paras. 12-18.



rights courts do not require victims to demonstrate that the government was negligent in restraining its officials; rather, the acts of such officials are simply attributed to the state (a secondary rule) and the state is liable for the violation.<sup>323</sup> For other primary rules binding on states, such as duties to prevent certain injuries to individuals by wholly private actors, courts and other decisionmakers have found violations only after finding the state at fault in its failure to exercise due diligence.<sup>324</sup>

With respect to individual responsibility, international criminal law conventions and cases include the defendant's mens rea as part of the definition of a crime. Intent and knowledge are typically required, although the extent of the defendant's knowledge and intent regarding each element of the crime can vary from crime to crime; and under the concept of superior responsibility, the defendant need not have had either intent or knowledge regarding the underlying act.<sup>325</sup>

Can either of the above approaches to standards of care be shifted to the corporate sector? On the one hand, the individual accountability standards require such a significant level of fault as to be inappropriate for a general scheme of corporate responsibility that goes beyond criminal sanctions. Even with respect to criminal liability, different national systems have adopted sharply contrasting concepts of the degree of fault (if any) required of the corporation for criminal liability, suggesting the absence of general principles of law upon which one might rely.<sup>326</sup> On the other hand, we can ask whether the state responsibility standard, which generally does not require fault, should apply to corporations. Perhaps, as the discussion on attribution makes clear, the business enterprise is different enough from the state that the former should be liable only if it fails to exercise due diligence

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323. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 64 (1978) (holding that a state is "strictly liable" for the conduct of subordinates); 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 216, at 511 n.15 (noting the difference between liability and attribution). For an example from the environmental field, see Convention on International Liability for Damage Caused by Space Objects, *supra* note 321, art. II, 24 U.S.T. at 2392, 961 U.N.T.S. at 189, which makes a state liable for damage caused by its space objects to aircraft and to objects on Earth.

324. See, e.g., *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988); *British Property in Spanish Morocco Case*, 2 R.I.A.A. 616, 636 (1925); *Janes Case*, 4 R.I.A.A. 82, 86 (1925); BRIAN D. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT 36-43 (1988); see also General Comment No. 3, *supra* note 200, para. 10 (discussing economic limitations as a factor in determining due diligence in meeting obligations under the ICESCR).

325. See ICC Statute, *supra* note 80, arts. 28, 30; *Finalized Draft Text of the Elements of Crimes*, Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

326. See WELLS, *supra* note 118, at 94-122; Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 INT'L & COMP. L.Q. 493 (1994). The Council of Europe's anti-corruption convention requires states to punish corporations only if someone who "has a leading position" within the enterprise commits the acts or is an accessory thereto, or if he fails to supervise someone under his authority. In either case, the act must be committed for the company's benefit. Council of Europe Corruption Convention, *supra* note 160, art. 18, 38 I.L.M. at 509. The line between principles of fault and principles of attribution becomes a bit thin here, as the corporation is effectively liable for the acts of certain employees but not for those of others.

over its agents, including by not engaging in corrective measures after the fact.<sup>327</sup> Moreover, business enterprises will likely resist any standard of strict liability.

In the end, it would seem that the ultimate standard of care will turn upon the particular forum in which the norms are formulated, whether civil, penal, administrative, or otherwise. The state responsibility approach seems most appealing as a general matter insofar as it views the business enterprise, like the state, as a unit engaged in a particular function, with its own internal structures. In that sense, it seems appropriate that it should be per se responsible for all its components acting under color of corporate authority without any separate requirement of fault by the business.<sup>328</sup> For those duties for which the corporation might have to prevent actions by persons not connected with the business enterprise, a lesser standard, such as due diligence, would apply, as the human rights courts have recognized. If, however, severe sanctions were envisioned, it would seem justifiable to limit the enterprise's responsibility to situations where it failed to exercise due diligence over its agents.

#### VI. A RECAPITULATION AND SOME APPLICATIONS

The above analysis offers a framework for global and domestic actors to begin to derive a set of duties under international law for business enterprises regarding the protection of human rights. In essence, it posits that the duties of a company are a direct function of its capacity to harm human dignity. Consequently, corporate responsibility will depend upon the enterprise's proximity to the violation as determined by its relationship to the government, its nexus to the affected populations, the individual right at issue, and principles of attribution that connect those committing the violations to the company. These propositions can be summarized as follows:

- (1) All other things being equal, the corporation's duties to protect human rights increase as a function of its ties to the government. If the corporation receives requests from the government leading to violations, knowingly and substantially aids and abets governmental abuses, carries out governmental functions and causes abuses, or, in some circumstances, allows governmental actors to commit them, its responsibility flows from that of the state.

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327. See FRENCH, *supra* note 118, at 156 (discussing the requirement that the responsible party adopt a course of action to prevent repetition).

328. See WELLS, *supra* note 118, at 130-35; Fisse & Braithwaite, *supra* note 114, at 483-88.

(2) All other things being equal, the corporation's duties to individuals increase as a function of its associative ties to them. These connections may, for example, emanate from legal ties (as with employees), physical proximity, or possession of de facto control over a particular piece of territory. As these connections dissipate, the duties do as well. For certain severe abuses, the corporation's duties will not turn on such ties.

(3) In situations not involving cooperation with the government in its own human rights violations, the enterprise's duties turn on a balancing of the right at issue with the corporation's interests (and in some cases, rights), except for certain nonderogable human rights. The nexus factor will need to be taken into account in determining any derivative duties. The company's derivative duties will not extend to duties to promote observance of the rights generally.

(4) The attribution of responsibility within the corporate structure depends upon the degree of control exercised by the corporation over the agents involved in the abuses, not simply financial or contractual links with them.

(5) The extent to which the corporation must have some fault to be responsible will depend upon the particular sanction envisioned. It is not a required element of responsibility with respect to corporate agents acting under corporate authority, but should be an element regarding the duty of the corporation to prevent violations by actors not connected with it.

Viewed differently, the theory attempts to answer three basic questions: (1) Who is violating the right—the government, the corporation, or both? And which actors within the corporate structure? (2) Whose rights are violated—those of people with special ties or not? and (3) Which rights are violated, in terms of the particular duties that they impose on corporate actors?

The theory ultimately results in two sets of duties upon the corporation. First are the complicity-based duties that the corporation not involve itself in illegal conduct by the government; these duties rise, in those circumstances in which the corporation's links to the government are akin to those in the doctrine of superior responsibility, to a duty to prevent abuses by governmental forces. For these duties, the factor of the nexus to affected populations drops out. Second is a set of duties on the corporation not to infringe directly on the human rights of those with whom it enjoys certain ties, with the possibility of greater duties depending upon the scope

of those links.<sup>329</sup> The duties in the first group are conceptually simpler insofar as they are grounded in the sort of human rights abuses that fall within the existing paradigm, namely those committed by governments. The duties in the second set are more complex insofar as they do not assume governmental involvement and move human rights more into the private sphere.<sup>330</sup>

The utility of this theory ultimately turns on its effectiveness as a tool for decisionmakers in domestic and international arenas to appraise and resolve the competing claims regarding corporate conduct in the human rights area. With this challenge in mind, one can examine several claims asserted against corporations in recent years. For purposes of this appraisal only, I will take as given the facts asserted by the relevant NGOs, not because I know them to be true, but simply because the absence of impartial decisions or independent investigation (by the author or others) renders an independent evaluation impossible, and, more importantly, because the utility of the theory does not turn on the truth or falsity of the underlying claims. I will also not rehash all the claims made against those TNEs, but simply those most relevant to the theory.

#### A. *Enron Corporation in Maharashtra State (India)*

In its lengthy January 1999 report, Human Rights Watch (HRW) accused Enron of “complicity in human rights violations” regarding the operations of the Dabhol Power Corporation (DPC), a joint venture of Enron, General Electric, and Bechtel Corporation, that had a contract with the Indian state of Maharashtra to build an electrical power plant.<sup>331</sup> HRW discussed the extensive opposition to the plant from the local community and the actions of the Indian government in suppressing this dissent. It ultimately accused Enron of complicity based on (1) having benefited from human rights violations by the state government; (2) having paid and materially supported state forces that committed human rights abuses, insofar as Enron compensated the state for the salaries of state police protecting the site and allowed state police to use company helicopters to monitor and harass local labor and human rights activists; (3) not having responded to complaints that DPC contractors directly attacked or threatened local villagers opposed to the project.<sup>332</sup>

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329. The case of corporations serving as de facto governmental authorities over territory probably falls under both categories of duties, as their authority emanates from the state, yet they can directly infringe the rights without the involvement of the state in the immediate violation.

330. *See supra* text accompanying notes 94-110.

331. HUMAN RIGHTS WATCH, *supra* note 5, § VII.

332. *Id.*

Under the theory, two of the claims, if true, would point to violations of Enron's duties under international law. The first is claim (2), which is, under the scheme above, a paradigmatic claim of a violation of a complicity-based duty. HRW has alleged that the links between DPC and the Maharashtra state police—financing of their operations and lending of equipment—point to a case of complicity in human rights violations committed by those forces. (As noted earlier, such accusations were also leveled at Freeport McMoRan's operations in Indonesia,<sup>333</sup> although in that case, the accusations that Freeport exercises de facto control over a large part of Irian Jaya require, under my theory, a discussion of a larger set of duties.) The principles of attribution also make Enron's duties clear insofar as the actors involved are all employees of DPC, which HRW asserts was largely an Enron entity.<sup>334</sup>

The second is claim (3), which concerns a direct infringement of the rights to physical integrity and freedom of opinion without any governmental involvement. The affected populations are close to Enron—the villagers in the area of the power plant. (In the case of the right to physical integrity, the nexus may not be relevant at all.) The actors alleged to have engaged in the conduct are contractors of DPC, although HRW noted that a number of the attacks were by pro-DPC villagers not clearly linked to the company.<sup>335</sup> With respect to the first of the two rights, because the right to physical integrity is nonderogable, the corporation would have a duty not to engage in such conduct. With respect to freedom of opinion, although a corporation might be permitted to fire employees who publicly criticize the company, intimidation of villagers affected by the operations of the plant (and thus still with a close nexus to the corporation) is not a proportionate response to further a legitimate goal. As to attribution, it would be necessary to determine the degree of control over the contractors to determine whether their activities are attributable to Enron. Those attacks by villagers who were not contractors cannot be attributed directly to Enron. And because Enron's operations seem more in the form of routine business construction than de facto territorial control, it seems difficult to conclude that it has a responsibility (even under the due diligence standard) to prevent violations by those unrelated actors.

Claim (1) would clearly not rise to the level of a corporate violation of human rights. The claim is based on a concept of complicity not accepted in international or domestic law—that if one party merely benefits from the misdeeds of another without more, it has breached some legal duty owed to

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333. See *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 374-75 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

334. HUMAN RIGHTS WATCH, *supra* note 5, § II (“In the eyes of the public, the DPC was Enron, and it is often colloquially referred to as ‘the Enron project’ . . .”).

335. *Id.* § V.

the victims of the misdeeds. Although it is desirable for the promotion of human rights for corporations in such situations to object to such conduct, and even in some circumstances divest, it seems premature to allege that this sort of conduct violates a legal duty.

B. *Diamonds and the Sierra Leone Civil War*

United Nations actions with respect to diamond companies stem from a concern by interested governments that these businesses are purchasing diamonds from the Revolutionary United Front (RUF), which has committed gross human rights violations during Sierra Leone's civil war. (These same charges have been leveled against companies for aiding the UNITA guerrillas in their long insurgency against the government of Angola.) Were companies that bought the diamonds violating human rights? The above approach suggests treating this problem as one of a potential violation of complicity-based duties, since governments and NGOs do not generally allege that the diamond companies themselves or their agents are directly violating human rights.<sup>336</sup> Nonetheless, one would not wish to rule out the possibility that those engaged in human rights violations are de facto agents of the diamond companies due to long-term sales relationships and the possibility of the violators' dependence upon the diamond companies. Participants and observers offer differing views on this question.<sup>337</sup>

Under the complicity-based set of duties, the diamond companies would be violating human rights if they substantially aided or abetted the commission of human rights violations by the RUF, with knowledge of the underlying abuses.<sup>338</sup> The notoriety of the RUF's atrocities—especially amputations of the limbs of innocent civilians—suggests, as a prima facie matter, that the diamond companies that knew they were trading with the RUF also knew of the abuses. More difficult factual determinations would be required with respect to activities of diamond companies that did not know the origin of the diamonds. In such cases, they may not have known that their activities were contributing to the RUF's activities, although a somewhat lower standard for complicity would suggest responsibility insofar as, in many circumstances, they would have very good reason to

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336. See, e.g., S.C. Res. 1306, *supra* note 1, pmbi., para. 1 (expressing concern at the role of the diamond trade in "fuelling the conflict in Sierra Leone").

337. See, e.g., Norimitsu Onishi, *Africa Diamond Hub Defies Smuggling Rules*, N.Y. TIMES, Jan. 2, 2001, at A1 (reporting disagreement over the relations between traders and rebels).

338. For purposes of analysis, I apply the complicity principles applicable to complicity with the government, since the RUF claims to be one. On international law's imposition of human rights obligations on such insurgent groups, see *supra* text accompanying note 74. See also S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., at 2, U.N. Doc. S/1315 (2000) (endorsing a special court for prosecuting atrocities by all sides in Sierra Leone).

suspect the origin of the diamonds.<sup>339</sup> As to whether purchasing of diamonds constitutes material assistance to the group rising to the level of aiding and abetting, one can lean in favor of a positive answer as it seems that the RUF depended heavily upon the diamonds as a source of income.<sup>340</sup> In domestic criminal law in many states, the financiers of criminal enterprises are routinely held responsible for complicity in the underlying activity.<sup>341</sup> But as noted earlier, merely doing business with the diamond traders is not sufficient.

### C. *Clothing Production in Latin America and Asia*

A third example concerns the numerous claims made by unions and NGOs against industry regarding conditions of work at apparel and other factories in the developing world, in particular Latin America and South and Southeast Asia. Such concerns prompted the U.S. government, businesses, and NGOs to establish the Apparel Industry Partnership, which prepared the Workplace Code of Conduct noted in the Introduction.<sup>342</sup> Although a full discussion is beyond the scope of this Article, a number of thoughtful commentators have examined the sweatshop phenomenon and challenged the common understanding that such factories create oppressive conditions for workers and doom them to a life of poverty.<sup>343</sup> The question here is more limited: whether any human rights abuses in these settings point to a violation of duties by the multinational corporations.

Here the accusations are primarily leveled at the corporations as actors directly abusing human rights, rather than as actors complicit in government violations (although such accusations are made as well).<sup>344</sup> In this case, the theory would appraise the allegations of inhuman working conditions as follows. First, the nexus to the affected population—typically the employees working in factories—is very close. With respect to

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339. *Compare Illegal Diamond Trade Funds War in Sierra Leone*, UNITED METHODIST NEWS SERVICE, Apr. 19, 2000, at <http://umns.umc.org/00/april/210.htm> (“By accepting Liberian exports as legitimate, the international diamond industry actively colludes in crimes . . . .” (internal quotation marks omitted)), with *Illegal Trafficking in Sub-Saharan Diamonds: Hearing Before the Trade Subcomm. of the House Ways and Means Comm.*, 106th Cong. 39 (2000) (statement of Matthew Runci, President and Chief Operating Officer of Jewelers of America, Inc.) (noting that diamonds may pass through a dozen hands before reaching the retail counter and asserting the impossibility of tracking them accurately).

340. See S.C. Res. 1306, *supra* note 1.

341. See, e.g., Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1962 (1994).

342. See *supra* text accompanying note 3.

343. See, e.g., THE SWEATSHOP QUANDARY (Pamela Varley ed., 1998); Nicholas D. Kristof & Sheryl WuDunn, *Two Cheers for Sweatshops*, N.Y. TIMES, Sept. 24, 2000, § 6 (Magazine), at 70.

344. *Special Issues: Corporations and Human Rights: The Apparel Industry*, in HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1998, at <http://www.hrw.org/hrw/worldreport/Back-06.htm> (last visited Sept. 1, 2001).

attribution, the place of the potential violators within the corporate structure seems clear in many situations—typically the factories are owned by contractors of the TNE. In such situations, the presumption above is that the TNE is able to control the activities of the contractor on these projects, although this could be rebutted in individual cases.

As for the rights affected, the concerns tend to center around the extent to which sweatshops undermine worker safety and health. These claims necessitate an inquiry as to the exact rights of laborers in such circumstances. International labor law is generally quite weak in guaranteeing individuals any particular wage, with ILO treaties (which lack many ratifications) giving states great flexibility.<sup>345</sup> With respect to health and sanitary rights, international labor law has created somewhat more detailed standards,<sup>346</sup> though ratification numbers are still low on most of the relevant conventions. In the end, a detailed inquiry regarding the solidity of current international labor norms will be needed. If the NGOs are able to demonstrate that working conditions are significantly detrimental to health to the point of harming physical integrity, the corporation will have a duty to refrain from such conduct.

## VII. IMPLEMENTING THE THEORY—SOME PRELIMINARY POSSIBILITIES

The theory posited above offers a starting point for global actors to develop a corpus of law that would recognize obligations on businesses to protect human rights. The modes by which this theory can be implemented are numerous and reflect the diverse processes by which international norms develop and are applied. This Part briefly sketches out five principal methods, from those originating within the corporation to those created by governments at the international level. As noted at the beginning of this Article, whatever the arena, all key claimants—corporations, governments, and victims' representatives (including NGOs)—will need to participate together in prescribing and applying the law.

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345. For example, the Minimum Wage Fixing Convention states that the elements for determining minimum wage

so far as possible and appropriate in relation to national practice and conditions, include (a) the needs of workers . . . taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups; [and] (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of . . . a high level of employment.

Convention Concerning Minimum Wage Fixing, with Special Reference to Developing Countries, adopted June 22, 1970, art. 3, <http://ilolex.ilo.ch:1567/scripts/convde.pl?C131>. The Convention has been ratified by forty-three states. *Id.*

346. See International Labour Standards on Safety and Health, at <http://www.ilo.org/public/english/standards/norm/whatare/standards/osh.htm> (last visited Sept. 1, 2001); see also PWBLF & AI, *supra* note 63, at 52 (“Companies should have explicit policies and procedures in place to ensure that they do not violate any of [the seven key ILO conventions].”).



### A. *Corporate-Initiated Codes of Conduct*

The most basic starting point for implementing the above theory is through a form of self-regulation. Indeed, many businesses have adopted formal policies and practices in order to avoid any form of external regulation.<sup>347</sup> In many cases, they may be responding to market pressures from consumers or demands of key shareholders. Ideally, self-regulation based on acceptance of duties from the theory, coupled with transparency, would best address the overall issue. In the end, for optimal effect, corporations will need to internalize such norms in their decisionmaking.<sup>348</sup> This point resonates with the key insight from international relations theorists and others that internalization is critical to successful implementation of international norms, whether in human rights or other areas of the law.<sup>349</sup>

The corporate-initiated code of conduct represents industry's most public response to the claims leveled against corporations in the area of human rights. These codes are voluntary commitments made by companies, business associations, or other entities, which put forth standards and principles for business activities.<sup>350</sup> Although such codes date back at least to the beginning of the twentieth century, they have proliferated in the last twenty years due to shareholder and consumer interest in corporate behavior, and now number in the hundreds.<sup>351</sup> One recent study found that these codes focused on labor and environmental issues and that many included consumer protection, bribery, competition, and information disclosure.<sup>352</sup> The codes typically address a limited range of human rights issues—forced labor, child labor, conditions of employment, and the right to unionize. One offshoot of the corporate code of conduct is social

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347. Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 677-89 (1995).

348. Weissbrodt, *supra* note 16, para. 22.

349. See generally THE POWER OF HUMAN RIGHTS (Thomas Risse et al. eds., 1999) (presenting case studies analyzing the impact of international norms); Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) (suggesting that nations obey international law when they internalize norms); Weissbrodt, *supra* note 16, para. 22 (noting that any UN code "will be most effective if it can be internalized as a matter of company policy and practice").

350. KATHRYN GORDON & MAIKO MIYAKE, DECIPHERING CODES OF CORPORATE CONDUCT 31 (OECD Directorate for Fin., Fiscal & Enter. Affairs, Working Paper on International Investment No. 1999/2, 2000). This definition would also cover codes drafted by international organizations.

351. *Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labeling and Other Private Sector Initiatives Addressing Labour Issues*, ILO Working Party on the Social Dimensions of the Liberalization of International Trade, ILO Doc. BG.273/WP/SDL/1 (Rev.1) (Nov. 1998), <http://www.ilo.org/public/english/standards/reIm/gb/docs/gb273/sdl-1.htm>.

352. GORDON & MIYAKE, *supra* note 350, at 12. For a sample list, see Weissbrodt, *supra* note 16, para. 10 nn.23-25.

labeling, whereby industry groups agree, often in cooperation with NGOs, to certify products as resulting from processes that do not involve certain deleterious practices (e.g., “dolphin-safe” tuna and the Rugmark label on carpets from the Indian subcontinent that are not produced with child labor).<sup>353</sup>

Inclusion of a larger set of human rights commitments within corporate codes of conduct could have a positive impact on corporate behavior. Many corporations are now ensuring that their internal decisionmaking processes, including their relations with contractors, reflect the commitments undertaken in their codes.<sup>354</sup> At the same time, business groups are reluctant to accept uniform standards of behavior, claiming that each industry must develop its own set of guidelines.<sup>355</sup> And the voluntary nature of corporate codes of conduct creates the clear potential for some TNEs to treat them as purely a public relations exercise, leading human rights NGOs to downplay their effectiveness.<sup>356</sup> NGOs and labor unions have pressed corporations to address this shortcoming by including procedures for independent monitoring. Yet this effort has fallen short, as many TNEs resist such provisions; and while some monitoring provisions have clearly improved conditions of workers, even those codes with monitoring provisions have fallen prey to industry capture.<sup>357</sup> The overall impact of such codes on corporate behavior is thus unclear, with different companies and industries adopting stronger or weaker codes, each of which is observed with varying degrees of seriousness.

The route of corporate-initiated codes of conduct nonetheless seems useful in the process of addressing violations of human rights, as it will at least raise corporate awareness of these issues and permit the possibility of monitoring (either by independent monitors paid by the industry or by NGOs). Undoubtedly, corporations will adopt various, even inconsistent, codes as a substantive matter, and human rights NGOs will object to that

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353. Compa & Hinchliffe-Darricarrère, *supra* note 347, at 673-74, 677-89.

354. Gary Gereffi et al., *The NGO-Industrial Complex*, FOREIGN POL’Y, July-Aug. 2001, at 56.

355. U.S. Council on Int’l Bus., *supra* note 181, at 3 (“The business community rejects the notion that standardization is necessary or desirable.”).

356. E.g., *Who Can Protect Workers’ Rights?: The Workplace Codes of Conduct Debate*, HUM. RTS. DIALOGUE, Fall 2000, at 1; California Global Corporate Accountability Project, Summary of Concerns (1999), at <http://www.nautilus.org/cap/codes/summary.html>.

357. E.g., U.S. DEP’T OF LABOR, THE APPAREL INDUSTRY AND CODES OF CONDUCT: A SOLUTION TO THE INTERNATIONAL CHILD LABOR PROBLEM? § IIF.3 (1998), <http://www.dol.gov/dol/ilab/public/media/reports/iclp/apparel/main.htm#Table> (noting the absence of monitoring from most codes); Steven Greenhouse, *Report Says Global Accounting Firm Overlooks Factory Abuses*, N.Y. TIMES, Sept. 28, 2000, at A12 (describing a report finding that the world’s largest factory-monitoring firm did a “shoddy” job). For a pro-labor critique, see David Moberg, *Bringing Down Niketown: Consumers Can Help, but Only Unions and Labor Laws Will End Sweatshops*, NATION, June 7, 1999, at 15. For a review noting successes and failures, see CHRISTOPHER L. AVERY, BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE ch. 3.4 (1999), <http://www.business-humanrights.org/Chapter3.htm>.

inconsistency. But the process of international lawmaking often begins with such private codes, which create expectations of appropriate conduct among diverse actors and can lead over time to other forms of lawmaking.

### B. *NGO Scrutiny*

NGOs have already demonstrated their interest in monitoring corporate activity and recognized it as a priority for future work.<sup>358</sup> They should consider the adoption of more detailed norms for business enterprises than have been developed to date, and seek to ground their scrutiny of corporate behavior in those principles. In addition, to the extent other institutions develop law regarding corporate duties, NGOs can help with the monitoring process—just as they do regarding state obligations in the area of human rights. They remain central actors in mobilizing shame upon violators, leading to the termination of offensive conduct.<sup>359</sup> At the same time, NGOs have clear responsibilities in light of their lack of accountability to anyone other than their members or donors.<sup>360</sup> Though organizations like Amnesty International and Human Rights Watch are accustomed to making arguments based on legal principles and insisting on high standards of accuracy in reporting, other NGOs seem to fall prey to a visceral anti-TNE bias that only arouses suspicions by TNEs of the bona fides of the human rights agenda.<sup>361</sup>

### C. *National Legal Regimes*

If self-regulation and NGO scrutiny prove insufficient, decisionmakers will need to consider the expansion of domestic public and private legal regimes to create duties upon businesses along the model specified above. National regimes would take advantage of the state's power over its territory and respond to those critics who might view corporate responsibility as an abdication of the role of the state. By developing a regulatory scheme through statutes, regulations, and policy directives, governments could monitor corporate human rights activity in the same

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358. See Robin Broad & John Cavanagh, *The Corporate Accountability Movement: Lessons and Opportunities*, 23 FLETCHER F. WORLD AFF. 151 (1999).

359. See ALFRED ZIMMERN, *THE LEAGUE OF NATIONS AND THE RULE OF LAW 1918-1935*, at 460 (1936).

360. See generally Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957 (1996) (appraising consequences of increased NGO roles).

361. See, e.g., U.S. Council on Int'l Bus., *supra* note 181, at 4 ("[B]usiness rejects as a matter of principle the imposition of a right to outside monitoring by groups with no responsibility with regard to a company's performance and with no accountability."); see also Ethan B. Kapstein, *The Corporate Ethics Crusade*, FOREIGN AFF., Sept.-Oct. 2001, at 105 (criticizing NGOs for having short-sighted demands).

way they monitor corporate environmental, anticompetitive, securities, or bribery-related activity. Indeed, parts of this model could be incorporated into existing labor laws. Companies violating their duties could face sanctions ranging from mere publication of a list of companies whose practices appear to fall below acceptable standards, to loss of particular benefits, such as preferential loans for overseas investments or permits for the import or export of commodities, up to criminal fines. Although private litigation might prove a cumbersome way to enforce such duties, legislatures or courts could also develop law recognizing private rights of action for victims of human rights abuses.

The effectiveness of national regimes will turn in part on international expectations regarding the scope of a state's jurisdiction to legislate. Most governmental regulation is based upon either the principle of territoriality, whereby a state can make and apply law that covers acts committed within its borders (which are often broadly defined), or the principle of nationality, which gives a state jurisdiction over a business incorporated there, regardless of the situs of the conduct.<sup>362</sup> Yet states differ sharply on some jurisdictional issues. The United States—whether the President, Congress, or the courts—has argued with much of the rest of the world over the extent of the reach of the territoriality principle,<sup>363</sup> the applicability of the nationality principle to foreign-incorporated wholly owned subsidiaries,<sup>364</sup> and the requirement of an overall test of reasonableness that would limit a state's jurisdiction if other states had a greater interest in regulating the particular activity.<sup>365</sup> Some treaties attempt to overcome these differences; for instance, in the bribery context, the OECD's Convention requires states to criminalize based on the territoriality principle, but does not preclude use of the nationality principle, and calls for consultations in the event of

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362. *E.g.*, IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 303-06 (5th ed. 1998); Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in 2 *INTERNATIONAL CRIMINAL LAW* 33 (M. Cherif Bassiouni ed., 2d ed. 1999) (giving other bases of jurisdiction).

363. *Compare* Joined Cases 89, 104, 114, 116, 117 & 125-129/85, *Ahlström v. Commission*, 1988 E.C.R. 5193 (approving the application of EU anticompetition law to overseas producers based on the implementation of the plan within the EU), *with* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (holding that the Sherman Act “applies to foreign conduct that was meant to produce and did in fact produce some substantial [domestic] effect”). *See also* *Opinion of the Inter-American Juridical Committee in Response to Resolution 3375/96 of the General Assembly of the Organization*, OAS Doc. No. CJI/SO/II/doc.67/96rev.5 (Aug. 23, 1996), *reprinted in* 35 *I.L.M.* 1329 (rejecting the legality of the 1996 U.S. legislation permitting suits against foreign companies doing business in Cuba on previously expropriated land).

364. *See* *European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.* (July 1982), 21 *I.L.M.* 891 (arguing that certain U.S. sanctions violated international law).

365. *Compare* *Hartford Fire*, 509 U.S. 764 (recognizing a limitation on U.S. jurisdiction only if compliance with U.S. law would violate foreign law), *with* *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 403 (1987) (endorsing a reasonableness test).

disputes,<sup>366</sup> while the Council of Europe's Convention requires the use of territoriality- and nationality-based jurisdiction in most situations.<sup>367</sup>

As a result, national regulation has both promises and pitfalls. States would agree that each state can regulate the human rights abuses that take place on its territory (even by foreign-based TNEs) as well as the activities of TNEs headquartered on the territory (even if the abuses take place overseas). If both the state of nationality and the territorial state (which is also likely to be the state of any victims of abuses) choose to regulate the activity, the result may well be an effective regime if the two states did not place different demands on corporations. But the developing world states might well place fewer requirements on businesses, in which case companies would seek to challenge the more restrictive laws. Litigation or diplomatic disputes over the limitations of jurisdiction—in particular the relevance of the reasonableness test—would inevitably arise.

What of the possibility to regulate conduct based on universal jurisdiction, which permits a state to legislate over offenses particularly harmful to mankind, regardless of any nexus the state may have with the offense, the offender, or the victim?<sup>368</sup> Beyond the potential for conflicts of jurisdiction noted above, two obstacles lie in the way of expecting states to endorse this option. First, it is not at all clear that universal jurisdiction extends beyond the grave human rights abuses noted in Section II.A and a small number of transnational crimes such as aircraft hijacking and sabotage. If a state tried to regulate corporate conduct over a broad range of human rights activities (e.g., violations of free speech), it might face protests from other states. Such protests would suggest an absence of acceptance of universal jurisdiction.<sup>369</sup> Second, as a practical matter, despite the increased tendency in recent years of states to prosecute foreign nationals for human rights abuses committed abroad, they remain, on the whole, rather hesitant to legislate or prosecute based on universal

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366. OECD Bribery Convention, *supra* note 156, art. 4.

367. Council of Europe Corruption Convention, *supra* note 160, art. 17. For a treaty failing to overcome differences and thus providing only a weak division of jurisdiction, see Agreement on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, U.S.-E.C., State Dep't No. 98-106, 37 I.L.M. 1070.

368. See Brigitte Stern, *À propos de la compétence universelle*, in LIBER AMICORUM JUDGE MOHAMMED BEDJAOUÏ 735 (Emile Yakpo & Tahar Boumedra eds., 1999); see also Blakesley, *supra* note 362, at 70-73 (discussing offenses that any nation obtaining personal jurisdiction over the perpetrator may prosecute). Offenses subject to universal jurisdiction include: piracy, slave trade, war crimes, genocide, crimes against humanity, torture, crimes against diplomats, and aircraft hijacking and sabotage. See, e.g., Prosecutor v. Furundzija, Case No. IT-95-17-T, para. 156 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II Dec. 10, 1998), <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 216, § 435; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987); Blakesley, *supra* note 362, at 70-73.

369. See RATNER & ABRAMS, *supra* note 54, at 165 n.19.

jurisdiction.<sup>370</sup> Some governments fear foreign policy repercussions of trials based on universal jurisdiction; others are concerned about the diversion of resources entailed by such prosecutions or civil suits, especially since the evidence and witnesses are typically located abroad. These factors would suggest an even greater hesitancy by states to regulate purely extraterritorial activity by foreign corporations. Even if a state had jurisdiction, a court might dismiss the case based on *forum non conveniens* or analogous grounds.<sup>371</sup>

#### D. *Soft International Law*

Shifting to interstate arenas of lawmaking, international organizations could elaborate corporate duties through soft law instruments. To identify the appropriate fora for the development of such law, and for harder forms as well, one must consider the views of states, international organizations, corporations, and human rights NGOs as to an institution's legitimacy or authority in this area. This, in turn, will depend on its ability to represent the views of key participants and garner their acceptance, as well as its expertise on the subject.<sup>372</sup>

At least four organizations are promising candidates for prescribing soft law. First, the International Labour Organization would constitute a useful arena because its tripartite structure overtly incorporates labor and business viewpoints, and because it has previously produced significant hard and soft law regarding corporate behavior. Nonetheless, with the exception of the unions, the ILO does not include the potential groups of rightholders in the debate over corporate accountability. Second, the OECD, because it includes the home states of most significant TNEs, has a credibility that would aid the process. However, the absence of developing world states—the home of a sizeable share of businesses and potential victims—and the general lack of transparency of its methods cast some doubt on its authority, as shown during the 1998 debacle over the proposed Multilateral Agreement on Investment.<sup>373</sup> Third, the United Nations, due to its universal membership and long history as the leading international organization for the promulgation of human rights standards, represents a possible venue for soft lawmaking. Nonetheless, the UN's authority in this area is significantly tarnished in the eyes of TNEs and some Western states, particularly the

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370. *Id.* at 185-86.

371. See INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 101, paras. 74-77; see also *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99-108 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001) (discussing the limits of *forum non conveniens* in suits under the Alien Tort Claims Act).

372. Cf. McDougal & Reisman, *supra* note 14, at 356-57 (discussing the importance of authority in prescriptive arenas).

373. See *supra* note 47 and accompanying text.

United States, as a result of the debates of the 1970s and 1980s over the New International Economic Order and the planned UN Code of Conduct.

Fourth, the World Bank enjoys respect not only from its near-universal membership but in particular from its promulgation of the most important modern soft law instrument regarding foreign investment—the 1992 Guidelines for the Treatment of Foreign Investment.<sup>374</sup> Those guidelines, the result of a process within the Bank that included consultation with states both North and South, elaborate norms for states regarding foreign investment in a way that balances many of the competing claims of host states and investors. The Guidelines appear to have gained significant acceptance from key decisionmakers.<sup>375</sup> The Bank's competence in the area of foreign investment and development would make it a potentially promising candidate for drafting guidelines regarding corporate conduct as well. Its key shortcoming lies in its lack of deep expertise and experience with human rights issues, which might cause its product to reflect state and corporate views to the detriment of human rights concerns. Nonetheless, in recent years, the Bank has begun to make some strides in considering quite explicitly the human rights implications of the projects that it finances.<sup>376</sup> Its views could also be incorporated into the decisionmaking of regional development banks in Asia, Africa, and Latin America.

Soft law can even result from bilateral understandings. In December 2000, the United States and British governments, companies, and NGOs agreed on Voluntary Principles on Security and Human Rights in the Extractive Sectors. This document reiterates that public forces should follow international human rights law and includes strong recommendations to companies to ensure that private security forces also respect human rights, relying on soft law United Nations documents concerning law enforcement personnel.<sup>377</sup>

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374. WORLD BANK, REPORT TO THE DEVELOPMENT COMMITTEE AND GUIDELINES FOR THE TREATMENT OF FOREIGN INVESTMENT (1992), *reprinted in* 31 I.L.M. 1363, 1379. *See generally* IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: "THE WORLD BANK GUIDELINES" (1993) (discussing the process leading to the development of the Guidelines and placing the Guidelines in the broader context of continuing international efforts to improve investment climates).

375. *See, e.g.*, Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, para. 35, 37 I.L.M. 1378, 1385 (July 11, 1997) (identifying the Guidelines as a "major multilateral instrument[]").

376. *See, e.g.*, Richard E. Bissell, *Recent Practice of the Inspection Panel of the World Bank*, 91 AM. J. INT'L L. 741 (1997).

377. *See* Voluntary Principles on Security and Human Rights in the Extractive Sectors (Dec. 2000), at [http://www.state.gov/www/global/human\\_rights/001220\\_fsdril\\_principles.html](http://www.state.gov/www/global/human_rights/001220_fsdril_principles.html).

E. *The Treaty Process—A Binding Code of Conduct*

States could promote uniformity of regulation of TNEs for activities with human rights implications through a multilateral instrument recognizing certain obligations upon corporations. The OECD's Bribery Convention and the various environmental conventions noted earlier represent the clearest examples of multilateral efforts to regulate corporate activity. And the World Health Organization's ongoing efforts to draft a Framework Convention on Tobacco Control evidence further moves in this direction.<sup>378</sup> Such a convention could obligate enterprises based on the theory above; it could also work through the framework of state responsibility by imposing duties on states to regulate corporate conduct, as is the case with much international labor law.

For an international institution to serve as the arena for the prescription and application of hard law, decisionmakers must agree not only upon its legitimacy and expertise (as is the case with soft law); they must also view the organization as capable of creating and overseeing a regime with enforcement mechanisms that will prove effective.<sup>379</sup> The ILO, OECD, and United Nations could also serve as fora for treaty-drafting as well as soft lawmaking, although their shortcomings noted above remain of concern. Moreover, despite success in achieving widespread ratification of its fundamental conventions, the overall record of the ILO on ratification and implementation of its conventions is rather poor, and another convention forgotten over time would undermine the purpose of the exercise.<sup>380</sup> Another possibility is the World Trade Organization, which enjoys near-universal membership and is now the leading global institution concerning international commerce. At the same time, the WTO and its members have started to consider the impact of trade on other issues only in the last decade; and while the organization has begun to address environmental issues in both intergovernmental discussions and dispute-settlement decisions, members have been reluctant to consider human rights and labor issues as part of its mandate.<sup>381</sup>

A component of a hard law instrument, of course, would be its control or enforcement mechanisms. Several options are possible. First, the convention could set up a monitoring body akin to the committees

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378. See, e.g., *Elements of a WHO Framework Convention on Tobacco Control*, WHO Doc. A/FCTC/WG1/6 (Sept. 8, 1999); *Proposed Draft Elements for a WHO Framework Convention on Tobacco Control: Provisional Texts with Comments of the Working Group*, WHO Doc. A/FCTC/INB1/2 (July 26, 2000).

379. McDougal & Reisman, *supra* note 14, at 356-57.

380. See PWBLF & AI, *supra* note 63, at 52 (discussing the ratification of ILO conventions).

381. Sarah H. Cleveland, *Human Rights Sanctions and the World Trade Organization*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 199, 201-02 (Francesco Francioni ed., 2001).



established under the various global human rights instruments and the ILO Constitution.<sup>382</sup> The treaty could authorize the body to receive reports from states, NGOs, or multinational corporations, or even hear complaints about conduct from local community representatives or NGOs. Its findings, while not judicial in nature, would create a public—and, one hopes, objective—record of the activities of certain companies, allowing other actors, state and nonstate, to mobilize shame against them.

Second, the convention could call for domestic enforcement as do the Bribery Convention, the environmental conventions, and the international criminal law conventions that incorporate obligations to prosecute. States would be encouraged or required to investigate suspected abusers and impose appropriate sanctions—through administrative or criminal procedures—on the corporation. They could also be required to permit civil suits by those alleging violations of the treaty. The treaty would have to include jurisdictional provisions to clarify which states incur these obligations. One obvious model to follow is that employed in the modern international criminal law conventions, which typically obligate states to pass criminal laws based on several types of jurisdiction (e.g., territoriality, nationality, and passive personality), without prejudice to the right of states to criminalize based on any other links with the offending activity.<sup>383</sup>

Third, it is at least conceivable that such an agreement could set up a free-standing body composed of representatives of the parties (and perhaps others) authorized to determine corporate violations of duties and impose sanctions. This body might, for instance, have the power to order or authorize states to fine the offending company or increase tariff barriers on the exports and imports of the firm; to order or request that international arbitral bodies, such as the International Centre for the Settlement of Investment Disputes, refuse to hear claims brought by those companies; to order or request intergovernmental bodies that include corporate participants to preclude participation of violating entities;<sup>384</sup> or to prohibit international organizations from signing contracts with the offending firm.<sup>385</sup> If enacted under the auspices of the WTO, such an agreement could

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382. See generally THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING (Philip Alston & James Crawford eds., 2000) (discussing institutional arrangements designed to monitor compliance with UN human rights treaties). For other suggestions on the use of existing monitoring bodies, including OECD and World Bank panels, see INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 101, paras. 237-255.

383. See, e.g., Torture Convention, *supra* note 76, art. 5, S. TREATY DOC. NO. 100-20, at 20, 1465 U.N.T.S. at 114; OECD Bribery Convention, *supra* note 156, art. 4.

384. E.g., Int'l Telecomm. Union, Sector Membership—Participation, at <http://www.itu.int/members/sectmem/participation.html> (last visited Sept. 1, 2001) (explaining the role of the telecommunications companies in ITU rulemaking).

385. E.g., United Nations System: General Business Guide for Potential Suppliers of Goods and Services, at <http://www.un.org./partners/business/procure.htm> (last visited Sept. 1, 2001) (noting that the UN issues 135,000 contracts and purchase orders annually).

employ that organization's existing—and robust—mechanism for compliance, which allows states that prevail in dispute settlement proceedings to suspend benefits of the General Agreement on Tariffs and Trade against the losing party.<sup>386</sup> That process might allow for findings of violations against the state of incorporation of a particular enterprise, or even against the enterprise itself.<sup>387</sup> Again, however, the new nature of this concept suggests that states would be unlikely to contemplate such a robust enforcement process immediately.

### VIII. CONCLUSION

The path of international law over the last century has been one of increasing both the breadth and the depth of its coverage. Its breadth has grown through the addition of new areas for regulation, whether the environment, telecommunications, health, or human rights; and its depth has expanded through erosion of much of the notion of the *domaine réservé*, the area seen as falling exclusively within the domestic jurisdiction of states.<sup>388</sup> Proposing international norms of corporate responsibility for violations of human dignity continues the trajectory that the law has taken, but it also represents new challenges for the enterprise. It challenges the state's exclusive prerogative (what some might call sovereignty) to regulate business enterprises by making them a subject of international scrutiny; it makes them entities that have their own duties to respect human rights.

With the theory now justified, elaborated, and applied in at least some preliminary ways, I would anticipate that it has sown the seeds of a number of core objections to the project of enterprise accountability. I thus conclude by treating four objections that demand a considered response. First, it might be argued that even if, as a matter of moral philosophy, human rights give rise to duties by more than just states, the inevitable result of my theory is essentially to make all private wrongs into human rights abuses. The theory effectively merges human rights law with private tort law. As a result, human rights are no longer special, human rights claims are no longer distinctive, and human rights law is inhibited from its primary goal,

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386. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 22, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125, 1239-41 (1994).

387. For endorsements of this venue, see INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 101, paras. 200-214; and Daniel S. Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 140, at 163.

388. Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 291 (1999). *But see* David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 NORDIC J. INT'L L. 385 (1996) (emphasizing the need to reject the idea of international law as making inevitable progress).

the protection of individuals against governments. One concrete concern might be that human rights bodies would be overwhelmed with complaints about corporate behavior and diverted from considering complaints against states.<sup>389</sup>

Several responses are in order. First, to the extent an individual can point to a specific internationally recognized human right that he or she claims has been violated, that person has made a bona fide human rights claim; it is still special in that sense. The victim of, for instance, privately initiated torture or private discrimination based on religion is not a mere plaintiff in a tort case; that person's human rights—stated in core human rights instruments—were violated. Second, the theory is one based on human rights, not human desires. International human rights law has developed limits as to what certain rights against the state actually mean. For example, the individual right of members of national minorities to have their own schools does not require the state to pay for a religious establishment, nor would it require corporations to do so.<sup>390</sup> Because corporate duties derive from existing rights, not new ones, the danger of outrageous claims is diminished.

Third, and most critically, the possibility that relevant international decisionmakers will derive human rights duties for corporations does not mean that those obligations will be coextensive with the obligations on states. The differences between corporations and states regarding both their internal structures and those to whom they owe duties, as well as the need to respect corporate interests and rights, will inevitably limit the list of duties. For example, with respect to the right to privacy, those applying the theory might well find a duty not to invade people's homes, but not a duty to avoid publishing embarrassing information about public figures. The focus by respected NGOs, corporations, and governments on business behavior directly affecting physical integrity suggests a recognition of the need to proceed cautiously in making claims of corporate duties. I suspect that, over time, decisionmakers are likely to find a set of duties on corporations larger than those on individuals under international criminal law but noticeably smaller than those on states under existing human rights law.

A second, related, criticism is that this enterprise cannot be logically separated from an attempt to address duties by all other nonstate actors. In other words, if corporations can violate human rights, then why not sports clubs, unions, NGOs, universities, churches, and, ultimately, individuals? Of course, that individuals have some legal duties in the human rights area

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389. I appreciate this critique from John Knox.

390. See, e.g., Framework Convention for the Protection of National Minorities, *done* Feb. 1, 1995, art. 13(1), 34 I.L.M. 351, 356; see also *supra* note 301 and accompanying text (noting limitations on the right to form a family).

has been obvious since Nuremberg.<sup>391</sup> The concern must then be that new categories of dutyholders will inevitably arise, or new duties will fall on individuals. Indeed, this criticism suggests that my project inadvertently advances the cause of some world leaders who seek to give the state new powers over individuals through, for instance, the idea of a code of human responsibilities to complement the various codes of human rights.<sup>392</sup>

Clearly, the theory does broach the private-public divide in a way that invites the possibility that the law will recognize new dutyholders in the future. But why the concern? If, for example, the Rwandan Catholic Church participated in the 1994 genocide in that country, as has been alleged by respected observers, why not regard it as having violated the human rights of the victims?<sup>393</sup> If other entities have the ability to deprive individuals of recognized human rights, this theory might provide a framework for doing so, or the basis for a broader framework addressing more actors. If, at some point, decisionmakers end up recognizing more duties for the individual than those now encompassed in international criminal law, they need not have brought about an increase in state power relative to the individual. For any duties of individuals derive only from *human* rights; because the government does not and cannot itself have human rights, the individual has no new duties toward the government. If the concern is that new individual duties would empower the government to limit the human rights of some in order to guarantee the rights of others (and thus fulfill the former's duties to the latter), the prerogative—indeed the responsibility—of the state to protect individuals from each other is well enshrined in human rights law.<sup>394</sup>

Other skeptics could make claims not about the danger of the doctrine, but of its futility. First, it could be argued that tort law remains equipped to deal with corporate abuses of rights, and that reformulating corporate duties

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391. See *supra* text accompanying notes 74-78.

392. See, e.g., Universal Declaration of Human Responsibilities (Sept. 1, 1997), <http://www.asiawide.or.jp/iac/UDHR/EngDec11.htm>; Theo van Boven, *A Universal Declaration of Human Responsibilities?*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 73 (Barend van der Heijden & Bahia Tahzib-Lie eds., 1998). For a balanced evaluation, see INT'L COUNCIL ON HUMAN RIGHTS POLICY, TAKING DUTIES SERIOUSLY (1999).

393. INT'L PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS, SPECIAL REPORT ch. 14, para. 14.66 (2000), <http://www.oau-oua.org/document/ipep/report/Rwanda-e/EN-14-CH.htm>; see also PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 135-42 (1998) (discussing the involvement of clergy in the 1994 Rwandan genocide).

394. See, e.g., *Universal Declaration of Human Rights*, *supra* note 91, art. 29(2), at 77 ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others . . ."); ICCPR, *supra* note 129, art. 5(1), S. EXEC. DOC. E, 95-2, at 25, 999 U.N.T.S. at 174 (stating that there is no right of a state, group, or person to "perform any act aimed at the destruction of any of the rights and freedoms" in the Covenant); *id.* arts. 12(3), 18(3), 19(3), 21, 22(2), S. EXEC. DOC. E, 95-2, at 27, 29-30, 999 U.N.T.S. at 176, 178 (permitting states to limit rights as necessary to protect rights and freedoms of others); see also RAZ, *supra* note 82, at 184 (exploring conflicts of rights and conflicts of duties).

as human rights duties accomplishes nothing. But such a position assumes too much about tort law and too little about human rights law. While high-profile tort cases in the United States against corporations for human rights and environmental harms may be proceeding, the practice is hardly uniform. Most states provide no realistic possibility of such recovery. Transforming the controversy into a human rights issue is hardly a cure-all, as victims will always face such barriers to recovery as recalcitrant legislatures, inept courts, and powerful economic pressures. But reformulating the problem of business abuses as a human rights matter might well cause governments and the population to view them as a legitimate issue of public concern and not as some sort of private dispute.<sup>395</sup> In addition, using human rights, rather than tort law, as the prism through which to examine certain business abuses offers some possibility of more uniform global treatment of the issue rather than reliance upon the divergences of domestic tort law.

Second, skeptics might well seize on the cautious tone of Part VI and ask why, assuming that governments are unable or unwilling to regulate business activity now, the proposed scheme will somehow improve matters. In the end, does not resistance by the state doom the prospects for enterprise accountability? What possible incentives could states have to get such a process started? Will not corporations simply move to states that refuse to impose new obligations on them? It is, of course, unexceptionable that if states are so uninterested in regulating the activities of corporate actors, they will neither create domestic regimes nor cooperate to prescribe more hard or soft international law. The corporation can no more easily replace the government as having the first duty to protect human rights than can an international organization.

But even if states remain reluctant for the short term to prescribe new domestic or international norms on this issue, the derivation of enterprise duties still serves a critical function, insofar as it sets standards for businesses that can be monitored by nongovernmental organizations, international organizations, or the corporations themselves. The changing of expectations regarding appropriate behavior by transnational actors must often begin with civil society before governments can be expected to respond. Recognizing duties on enterprises, rather than merely on governments, also has the advantage of putting pressures directly on them not to seek refuge in some state that may be lax about enforcement. Thus even if the host states do not enforce the new duties, the outside scrutiny

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395. Cf. Ole Esperson, *Human Rights and Relations Between Individuals*, in RENÉ CASSIN AMICORUM DISCIPULORUMQUE LIBER, *supra* note 108, at 177, 180 (rejecting the application of human rights law to private entities in the abstract, but recognizing that new “legal terminology” can itself have positive results).

will elicit compliance.<sup>396</sup> Moreover, it is possible that courts, domestic and international, that remain somewhat insulated from such economic pressures could jump-start this process through the sorts of rulings the European Court of Justice has issued regarding nondiscrimination in the private sector.<sup>397</sup>

Indeed, the same broad claim about government reluctance could be (and has been) leveled at the entire enterprise of human rights law, which is premised on the notion that domestic law may not offer sufficient protections for human dignity. And yet states have still come together over the last fifty years to draft an impressive corpus of human rights instruments and empower various institutions to monitor compliance and even adjudicate violations. This revolution has clearly affected the way that governments act toward their citizens and even promoted wide-scale changes in governmental structures to promote democracy.<sup>398</sup> As for the obvious reluctance of many governments to curb their abuses in practice even as they promulgate and promise to adhere to human rights norms, this cognitive dissonance represents one of the ways in which international law and institutions can improve state and nonstate behavior over time, as targets of norms find it increasingly difficult to walk away from their professed commitments.<sup>399</sup>

In the end, this exercise's strongest defense is its possibility of providing a framework and rationality to the dialogue of the deaf that seems to be transpiring among businesses, those affected by their operations, governments, and NGOs. One of law's great purposes is to provide a set of bookends that exclude certain claims by various sides from the table and thereby narrow the range of differences.<sup>400</sup> If these four participants in the accountability dynamic can focus their debate on what are truly human rights violations, the possibilities for constructive solutions loom larger. As the South African Truth and Reconciliation Commission said when it rejected both the view that all apartheid-era businesses should be condemned and that they were blameless, the duties of corporations turn on "[i]ssues of realistic choice, differential power and responsibility."<sup>401</sup>

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396. I appreciate this argument from David Wippman.

397. See *supra* note 94 and accompanying text.

398. Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591 (2000).

399. Peter M. Haas, *Choosing To Comply: Theorizing from International Relations and Comparative Politics*, in COMMITMENT AND COMPLIANCE, *supra* note 179, at 43, 45, 58-61; see also Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS, *supra* note 349, at 1, 14-17 (discussing the reaction of states to outside pressures).

400. See Ratner, *supra* note 398, at 627-29 (discussing the use of minority-rights norms to reject extreme claims by government and minorities).

401. 4 TRUTH & RECONCILIATION COMM'N, *supra* note 4, ch. 2, para. 146.

This is not to suggest that the law is the end of the story: Political and economic interests will surely drive the various actors as they make their claims and work to accommodate them, just as they do in other areas where international law is relevant. And both corporations and NGOs will have reasons for discussing enterprise activities that do not breach legal standards. Nonetheless, the law can, as it does in countless other areas of international affairs, offer a common language in this debate, as well as a set of standards that can be enforced. The duties resulting when these actors work through the above theory will clearly satisfy no group fully. But if prescribed and applied by legitimate and effective institutions, or enforced through corporate self-regulation, these norms represent the beginning of a more global and coherent response to new challenges to human dignity.