

**HUMAN RIGHTS OBLIGATIONS OF CORPORATIONS UNDER
INTERNATIONAL LAW**

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In August 2003, the Sub-Commission on the Promotion of Human Rights of the UN's Human Rights Commission approved a document called the U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.¹ The document purported to be in large part a restatement of the existing obligations of corporations under the international law of human rights.² Its authors acknowledged, however, that the obligations set forth in the document went further in some respects than existing international law.³ To this extent, the authors hoped that the document would serve as the basis for the elaboration of a treaty or other binding international law instrument, or would contribute to the ripening of rules of customary international law recognizing additional obligations of corporations.⁴ (The

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¹ Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., Agenda Item 4, Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter "U.N. Norms" or "Norms"], reproduced below as an Appendix.

² David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business enterprises with regard to Human Rights*, 97 AM. J. INT'L L. 901, 901, 912.

³ *Id.* at 913 ("The nonvoluntary nature of the Norms therefore goes beyond the voluntary guidelines found in the UN Global Compact, the ILO Tripartite Declaration, and the OECD Guidelines for Multinational Enterprises.")

⁴ *Id.* at 913-15.

UN Norms themselves would lack the force of binding international law, even once approved by the U.N. Human Rights Commission.⁵) The principal author of the UN Norms has suggested that the document was designed to be controversial.⁶

This expectation has proved accurate. Soon after their approval by the Sub-Commission, the Norms were subjected to severe criticism from the business lobby. Prominent among the criticisms was the claim that the UN Norms would “represent a fundamental shift in responsibility for protecting human rights – from governments to private actors, including companies – effectively privatizing the enforcement of human rights laws.”⁷ Largely because of opposition from the corporate lobby, the Human Rights

⁵ Many have been confused by the authors’ statement that the Norms were meant to be mandatory – not voluntary – yet nonbinding. See Bernadette Hearne, *Proposed UN Norms on human rights: Is business opposition justified?*, ETHICAL CORPORATION, March 22, 2004, available at <http://www.ethicalcorp.com/content.asp?ContentID=1825> (“[The principal author admits] that while ‘the document cannot be binding or compulsory, it isn’t voluntary either.’”). The authors apparently mean that the document does not have the force of international law because it is not a treaty, but they are written as mandatory, not voluntary, rules. Thus, the UN Norms would impose mandatory obligations on corporations if they were incorporated into a binding legal instrument or if they ripened into customary international law.

⁶ Hearne, *supra* note ____.

⁷ U.S. Counsel for International Business, *UN to Review Proposed Code on Human Rights for Business*, Mar. 5, 2004 available at <http://www.uscib.org/index.asp?documentID=2846>. In a letter to the editor of the Financial Times, Thomas Niles, president of the U.S. Counsel for International Business explained, “However well intentioned, the draft norms would, if adopted, create a new international legal framework, cutting across virtually every area of business operation, with companies, rather than the governments that negotiated them, responsible for implementing international treaties and conventions. Not only would this create conflicting legal requirements for companies operating around the world, it would also divert attention from much-needed efforts to improve the capacity of national governments to implement and enforce existing human rights laws. Finally, although the proposed norms are said to be “non-voluntary” (which presumably means obligatory), it is totally unclear who would have the responsibility for enforcing their implementation.” Thomas Niles, *Letter to the Editor*, THE FINANCIAL TIMES (LONDON), Dec. 17, 2003, p. 18. In an interview on BBC Television, Mr. Niles argued, “Transnational corporations are responsible for obeying the laws of the countries ... where they’re doing business. What this set of norms purports to do essentially is to transfer some of the responsibility for implementing the various international conventions that cover aspects of what is covered in the norms ... from governments to corporations. [We], the International Chamber of

Commission in April of 2004 declined to adopt the Norms, instead tabling them for further study.⁸

This paper considers whether the critics of the UN Norms are right in claiming that they would represent a fundamental shift in international human rights law – and, if true, whether the step would nevertheless be worth taking. Part I discusses, by way of background, the reasons international regulation of multinationals is regarded by many as necessary. The fact that the operations of multinationals span many nations poses obstacles to their regulation through the municipal law of any one nation.⁹ Additionally, the economic power of many multinationals is thought to make them more powerful than many of the states that are supposed to regulate their activities. Part I considers obstacles to effective regulation of multinationals through municipal law, making international regulation necessary, in the view of some.

Commerce and the International Organization of Employers, [believe] this is totally inappropriate. Governments are responsible for enforcing government-to-government agreements.” He added, “...At the end of the day, governments have the authority to discipline companies that don't obey the regulations and laws that those governments establish. ... [T]his is really the way the system should work. And if governments do not have the right kind of laws or do not properly implement them, there are ways in which they can be assisted to acquire the right kind of legal frameworks and actually implement them. So we feel these norms are totally duplicative and unnecessary.” *Transcript available at* <http://www.uscib.org/index.asp?DocumentID=2729>.

⁸ Alex Blyth, *Compromise deal reached on UN Norms*, ETHICAL CORPORATION, April 21, 2004, available at <http://www.ethicalcorp.com/content.asp?ContentID=1947>; Bernadette Hearne, *Proposed UN Norms on human rights shelved in favor of more study*, ETHICAL CORPORATION, May 3, 2004, available at <http://www.ethicalcorp.com/content.asp?ContentID=1981>.

⁹ I use the term municipal law here in its international law sense – that is, as referring to national and subnational law. US Federal, state and local law are all “municipal” law as the term is used in international law.

Part II considers the extent to which international law already imposes human rights obligations on private corporations.¹⁰ I conclude that, to the extent the Norms contemplate the direct imposition of international-law obligations on private corporations, they would indeed represent a fundamental shift in international law. The international law of human rights, as it exists today, addresses the conduct of corporations and other non-state actors, but, with very few exceptions, it does so by imposing an obligation *on states* to regulate non-state actors. Thus, for the most part, international law regulates such non-state actors *indirectly*. In a very few circumstances, international law places obligations on non-state actors directly, but – contrary to the claims of some scholars and the authors of the UN Norms – the direct regulation of non-state actors remains very much a narrow exception to the general rule that international law directly imposes obligations only on states and supra-national organizations. To the extent the Norms contemplate the existence of a significant array of norms directly applicable to private corporations, they do not accurately describe international human rights law as it currently exists. Even scholars who argue that international law currently places significant obligations on private corporations appear to be referring to indirect obligations, under the terminology employed here. To the extent the Norms in this respect were meant to influence the future development of international human rights law, their adoption would indeed represent a fundamental shift in how international law regulates non-state actors.

To say that the change would be fundamental is not necessarily to conclude that the step should not be taken. International law imposes no conceptual obstacle to an

¹⁰ By “private corporations,” I mean those that are not owned or operated by governments. The term includes corporations whose shares are publicly traded.

agreement among states to impose obligations directly on private parties (although, as discussed below, there may be a semantic obstacle). The magnitude of the change is, however, a reason to think hard before taking the step. Part III explains the fundamental nature of the change to international law that would occur if that law were to begin to impose direct obligations on private corporations to any significant extent. The radical nature of the change can be appreciated by comparing it to the equivalent change in the governance structure of the United States upon the adoption of the Constitution, which was regarded by our Founders as representing a shift from a regime of international law to a truly national regime. Similar changes in the European Union¹¹ have led some commentators to argue that that entity is similarly on its way to becoming a nation.¹²

In the light of the fundamental nature of the contemplated change in international law, I consider in Part III the arguments that have been proffered by commentators in support of such a step. I conclude that the arguments are incomplete and unpersuasive. Additionally, I explain why the fundamental nature of the contemplated change makes it highly unlikely that states would ever agree to take the step. It thus makes sense to consider other ways to address the problem of corporate human rights violations. I consider some alternative strategies for addressing this problem in Part IV.

I.

¹¹ See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 484-85 (discussing how both the Treaty Establishing the European Community and the binding decisions of the European Council and Commission have created legal obligations which apply directly to corporations, without state action); J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 2413-16 (discussing the European Court of Justice's doctrines of Direct Effect and Supremacy).

¹² See, e.g., Weiler, *supra* note ____, at 2413 (arguing the EC is closer to a "federal state" than an international organization).

WHY INTERNATIONAL REGULATION OF MULTINATIONAL CORPORATIONS IS REGARDED AS NECESSARY

The responsibilities of multinational corporations in the protection of human rights have been the subject of significant attention and debate among scholars and activists in recent years. Concern about the contribution of such corporations to the degradation of the condition of the world's poor is one of the defining characteristics of the worldwide anti-globalization movement.¹³ On the other hand, concern that human rights advocates are seeking to place unreasonable standards on US businesses operating abroad underlies the recent backlash against the Alien Tort Statute.¹⁴ Web sites on business and human rights and corporate social responsibility have proliferated,¹⁵ as have books,¹⁶ magazines,¹⁷ and articles¹⁸ addressing those topics. The latest and most concrete

¹³ See, e.g., Jay Mazur, *Labor's New Internationalism*, JOURNAL OF FOREIGN AFFAIRS January/February 2000, available at <http://www.globalpolicy.org/soecon/global/labor.htm> (describing the negative effects of globalization and multinational corporations on labor, both domestically and abroad); Matthew Continetti, *Ironic Reversal*, DAILY STANDARD, Nov. 20, 2003 (reporting on "Gapatistas" protestors' concern about worsening work conditions due to globalization); John Otis, *Left Behind: Globalization's impact on Latin America*, HOUSTON CHRONICLE, Sept. 14, 2003, sec. A, p. 1 (discussing labor activists' concern about the "race to the bottom" of the Latin American banana industry); ALISON BYRSK, GLOBALIZATION AND HUMAN RIGHTS 98-99 (2002). JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 22, 170 (2004).

¹⁴ GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, 37-43, 55-56 (2003), available at: http://bookstore.iie.com/merchant.mvc?Screen=PROD&Product_Code=367; BHAGWATI, *supra* note ____, at 252.

¹⁵ See, e.g., <http://www.corpwatch.org>; <http://www.ethicalcorp.com>; <http://www.fairlabor.org>; <http://www.bsr.org/>.

¹⁶ See, e.g., BYRSK, *supra* note ____, JAMIE CASSELS, THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL 143-47 (1993).

¹⁷ See, e.g., ETHICAL CORPORATION, BUSINESS ETHICS, CORPORATE KNIGHTS.

¹⁸ See, e.g., Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45; Douglass Cassel, *Corporate Initiatives: A Second Human*

manifestation of the interest of human rights advocates in this subject was the approval in August 2003 of the UN Norms approved by the UN Sub-Commission on the Promotion and Protection of Human Rights,¹⁹ which aroused vocal criticism by the US and International Chambers of Commerce,²⁰ and are currently under study by the UN Commission of Human Rights.²¹

The prevailing view in the United States today is that the obligation of the directors of a corporation is to advance the interests of their principals – the shareholders.²² This is the so-called shareholder-primacy view.²³ This is not to say that

Rights Revolution?, 19 FORDHAM INT'L L. J. 1963 (1996); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705.

¹⁹ U.N. Norms, *supra* note ____.

²⁰ In addition to criticisms noted *supra* note ____, see Timothy Deal, *Speech to the Fund for Peace*, Feb. 6, 2004, available at <http://www.uscib.org/index.asp?documentID=2823> (attacking the Norms both procedurally, claiming the Sub-commission exceeded its mandate and did not operate transparently, and substantively, claiming the Norms are “hugely burdensome and impractical”); U.S. Counsel for International Business, *UN to Review Proposed Code on Human Rights for Business*, Mar. 5, 2004 available at <http://www.uscib.org/index.asp?documentID=2846>; International Organisation of Employers' & International Chamber of Commerce, *Joint Views of the IOE and ICC on the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, July 22, 2003, available at <http://www.uscib.org/docs/Joint%20IOE%20Statement%20July%202003.pdf>; Bernadette Hearne, *Proposed UN Norms on Human Rights: Is Business Opposition Justified?*, ETHICAL CORPORATION, Mar. 22, 2004, available at <http://www.ethicalcorp.com/content.asp?ContentID=1825> (discussing USCIB and IOE opposition).

²¹ In April 2004, the UN Commission on Human Rights declined to adopt the Norms recommended by the Sub-Commission, but rather tabled them for further study. Blyth, *supra* note ____; Bernadette Hearne, *Proposed UN Norms on human rights shelved in favor of more study*, ETHICAL CORPORATION, May 3, 2004.

²² Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 439, 440-41.

²³ As discussed below, some corporate law scholars criticize the shareholder-primacy view and urge adoption of an approach that gives greater representation in corporate governance to other constituencies. Most such critics recognize, however, that the shareholder-primacy view is the one that prevails in the United States. See, e.g., Hansmann & Kraakman, *supra* note ____, at

corporate directors must or should ignore the welfare of human beings with which the corporation comes into contact. It will often be in the interest of the shareholders for the corporation to have good relations with employees, consumers, and surrounding communities.²⁴ For example, as discussed in greater detail below, increasingly human rights abuses by corporations are becoming the target of consumer boycotts, which can in turn affect the corporation's bottom line and hence the value of its shares. However, under this approach to corporate social responsibility, the welfare of persons other than shareholders is the concern of corporate directors only indirectly, and only insofar as such concerns have an impact on the interests of the shareholders. This approach to corporate social responsibility is captured best by the Milton Friedman statement that a business's only social responsibility is to "make as much money as possible while conforming to the basic rules of society."²⁵

439, 440-41; Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 711-12. Some critics of the shareholder-primacy view maintain that, while the shareholder-primacy view prevails among corporate law scholars, it does not accurately reflect the US approach to corporate governance as reflected in corporate law doctrine. See, e.g., Margaret Blair & Lynn Stout, *A Team Production Theory*, 85 Va. L. Rev. 247, 251-2 (1999).

²⁴ William Safire, *The New Socialism*, N.Y. TIMES, Feb. 26, 1996, p. A13 available at <http://www.sierratimes.com/cgi-bin/ikonboard/printpage.cgi?forum=20&topic=18>. But see Stephens, *supra* note ___, at 63 (questioning market-oriented approach to corporate social responsibility, particularly in a repressive state).

²⁵ Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32 ("... [A] corporate executive is an employee of the owners of the business. He has [a] direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of society . . ."); see also Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32 citing MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962) ("There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.").

The corporate laws of some other countries – primarily in Europe – place on corporate directors the obligation to protect the interests of certain segments of society – referred to as “stakeholders” – in addition to the corporation’s shareholders.²⁶ Some US scholars find such an approach corporate law appealing as a way to advance the public interest in human rights, as well as other public interests such as environmental protection, and believe that US corporate law should move in this direction.²⁷ Other scholars believe that corporate law in other nations has been moving in the direction of the shareholder-primacy model, and that, for a variety of reasons, this model will inevitably prevail.²⁸ Proposals to advance human rights by moving US corporate law in the European direction might be denominated an “internal” strategy to advance corporate respect for human rights, as they contemplate legal changes within the four corners of corporate law.

The UN Norms, on the other hand, pursue what might be called an “external” strategy for advancing corporate respect for human rights, a strategy that is fully consistent with the shareholder-primacy model.²⁹ The shareholder-primacy view does

²⁶ Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 716-17; Hansmann & Kraakman, *supra* note ____, 447-48; Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 546-49 (discussing the German concept of codetermination).

²⁷ LAWRENCE E. MITCHELL, *PROGRESSIVE CORPORATE LAW*, 11-15, 50, 59 (1995) (discussing the “multifiduciary” and stakeholder models of corporate management); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 722-41 (explaining the limitations of environmental and labor regulations under the shareholder-oriented approach)

²⁸ Hansmann & Kraakman, *supra* note ____, at 439-41, 454.

²⁹ The strategy is “external” because it relies on the regulation of corporations through norms falling outside the domain of corporate law. For similar use of this terminology, see Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT’L L. 1, 4.

not necessarily reflect a complete disregard of the interests of stakeholders other than shareholders. Rather, it might be thought to reflect a division of responsibility for safeguarding the interests of the various stakeholders. The directors of the corporation are expected to exercise their discretion to advance the interests of shareholders, but their discretion is constrained by laws designed to protect the interests of other stakeholders.³⁰ The interests of other stakeholders are thus not wholly ignored by the shareholder-primacy model; rather, protection of those interests is regarded as the responsibility of government, not corporate directors.

With respect to a corporation that is incorporated in a democratic state and does all of its business there, this division of responsibility operates straightforwardly. The legislature representing the various segments of society can be relied on to enact laws necessary to protect the interests of employees in a minimum wage and safe working conditions, of the surrounding community in a clean environment, of consumers in safe products, and so on. Because the government can in theory be counted on to protect these other various stakeholders, the corporate managers and directors can be left to

³⁰ Hansmann & Kraakman, *supra* note ____, at 442. Whether corporate managers and directors have a duty under corporate law itself to comply with the laws that regulate corporate conduct, or instead only have a duty to comply with such law to the extent the shareholders' interests would be threatened through the imposition of penalties for violations, is a matter of some dispute. Cf. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1169 n. 57 (1980) ("[M]anagers not only may but also should violate the rules when it is profitable to do so.") with Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1270, and Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law could Reinforce International Law)*, 87 VA. L. REV. 1279, 1295-1296. This issue will be discussed further in Part III. For now, it suffices to note that the shareholder-primacy view accepts the prerogative of government to protect the interests of outside stakeholders by establishing legal rules to protect those interests and imposing penalties for the violation of such rules, and that the duty of managers and directors to their shareholders entails, at a minimum, the duty to avoid violations of laws to the extent the costs of such violations exceed the benefits.

advance zealously the interests of the corporation's shareholders, within the limits imposed by law.³¹

Complications arise when the corporation conducts activities in more than one state. If the laws of the relevant states differ, it must then be determined which of the relevant states' laws should be applied to particular activities of the corporation. These questions can be addressed using the usual tools of private international law – those addressing jurisdiction and choice of law. For many issues, the law of the home state will apply, while for other issues the law of the state where the activity occurs will govern. In certain circumstances, both states will exercise their jurisdiction to regulate and the company will be subjected to more than one set of legal obligations (meaning that the most restrictive will effectively apply). On the other hand, multinational companies might benefit from regulatory lacunae, and their multinational nature may permit them to

³¹ Progressive critics of the shareholder primacy model point out that powerful corporations have a tendency to capture the legislative process. *See generally* DAN CLAWSON ET AL., DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY (1998) (cited in Nicolas J. Minella, *Motives and Consequences of the FSC Dispute: Recent Salvo In a Long Standing Trade War Or Fashioning a Bargaining Chip?*, 27 BROOK. J. INT'L L. 1065, 1090 n.74). For this reason, they argue, outside stakeholders are not adequately protected by the legislative process and hence it is necessary to give such stakeholders a voice in corporate governance. An alternative response to this problem would be to reform the legislative process to insulate it from corporate capture. Of course, if the legislative process is already unduly influenced by powerful corporate interests, such reform may face severe obstacles. But the same obstacles would impede the effort to reform corporate governance in the way favored by progressive critics of the shareholder-primacy view.

Along the same lines, some scholars argue that the shareholder-primacy approach to corporate governance is inappropriate for non-democratic states, where the citizens cannot seek protection from corporations through their government. *See, e.g.*, Douglas Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L. J. 1963, 1977-81 (1996) (criticizing Milton Friedman's view of corporate social responsibility). As discussed below, here again an alternative to sidestepping the state would be to devote one's efforts to promoting democratic governance. *Cf.* Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

succeed at evading restrictive laws and policies.³² For these reasons, the multinational corporation has been thought to pose impressive challenges for private international law.³³

With respect to human rights issues, the choice of applicable law will usually pose a simpler choice – i.e., whether the corporation’s activities should be governed by the laws of its home state or that of the state of the persons directly affected by the corporation’s activities (the host state). The choice, moreover, is not a binary one: in theory, the corporation could be subject to legal obligations under the law of both states. Thus, the host state may impose an obligation to pay a minimum wage, and the home state might directly or indirectly (such as through an import ban) impose an obligation to pay an even higher wage. Usually, however, the home state will defer to the host state on such questions. As long as the home state and the host state are at a comparable level of a development, there would appear to be every reason to entrust to the host state with the protection of the welfare of its citizens and residents.

The same may not be true, however, when the home state is a developed country and the host state is a developing country, particularly a poor one with a small economy. Many have argued that, for a variety of reasons, the welfare of the host state’s people cannot be entrusted to the host state’s government in such circumstances. Some point out

³² Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 725-32 (arguing that the “mobility” of MNCs permits them to easily move operations to favorable regulatory climates); Ratner, *supra* note _____, at 463 (arguing the same); *see also* Debora Spar & David Yoffie, *Multinational Enterprises and the Prospects for Justice*, JOURNAL OF INTERNATIONAL AFFAIRS, Spring 1999, vol. 52, no. 2, p. 565 (citing mobility as a “necessary condition” contributing to a “race to the bottom”).

³³ *See* Stephens, *supra* note _____, at 54-60; Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 740, 743, 757, 780.

that market forces will often force small developing countries to relax their regulations in order to attract foreign investment, and that large multinationals have the economic power to extract significant concessions from such countries.³⁴ This is the fear of a race to the bottom.³⁵ Others observe that, even if the host state has adequate laws on the books to protect its citizens' welfare, they often lack the resources to enforce those laws effectively.³⁶ Still others observe that, in many small developing countries, government corruption will result either in inadequate laws or ineffective enforcement of adequate laws.³⁷ For these reasons, it is argued, the welfare of persons in the poor developing host countries must be protected in other ways.

One possibility is for the home countries to regulate the activities of their corporations abroad for the benefit of the people in the host countries. Although such extraterritorial regulation is certainly possible, and in many cases would satisfy international law rules of prescriptive jurisdiction based on the nationality principle,³⁸ this

³⁴ Ratner, *supra* note ____, at 462; BYRSK, *supra* note ____, at 100; Deva, *supra* note ____, at 49; Spar & Yoffie, *supra* note ____, at 559-61, 563-64.

³⁵ BYRSK, *supra* note ____, at 100 (“... an incentive for benign Third World countries to ensure that no country will ‘win the race [by] offer[ing] the cheapest, most exploited labor in the world’”).

³⁶ Ratner, *supra* note ____, at 461. Referring to the illegal union-busting practices of banana farm owners in Ecuador, one Labor Ministry official admitted, “This is the Third World. Sometimes the law can’t be enforced.” Otis, *supra* note ____.

³⁷ See Deva, *supra* note ____, at 49 n. 277; *e.g.* Otis, *supra* note ____ (“...[M]any Ecuadorian politicians are themselves banana growers and thus have little interest in enforcing the labor code....”)

³⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1986) (“... [A] state has jurisdiction to prescribe law with respect to ... the activities, interests, status, or relations of its nationals outside as well as inside its territory....”)

seems an unreliable strategy for protecting the welfare of people in the host country.³⁹ It seems unlikely that many home countries would altruistically impose burdens on their corporations for the benefit of foreign nationals, placing their corporations at a disadvantage compared to local businesses or multinationals based elsewhere.⁴⁰ Altruism at the expense of a powerful constituency such as multinational corporations seems unlikely to succeed in the legislative process. More importantly, even when such extraterritorial legislation purports to be altruistic, it will often be perceived as – and may in fact be – protectionist.⁴¹ For example, a developed country’s law requiring its corporations to pay foreign nationals employed abroad a particular minimum wage, while seemingly designed to benefit foreign nationals, will often have the effect of deterring the corporation from establishing operations abroad to take advantage of lower wage levels there, a result that would ultimately benefit workers in the home country and hurt the foreign nationals sought to be helped.⁴² Moreover, such extraterritorial legislation will override the sometimes legitimate policy judgments of the host state.⁴³ Because of economic forces beyond their control, poor developing countries will not usually be in a

³⁹ For an illustration of failed legislative efforts by both the United States and Australia to regulate corporations operating abroad through extraterritorial application of municipal law see Deva, *supra* note _____, at 57 n.26.

⁴⁰ MENNO T. KAMMINGA & SAMAN ZIA-ZARIFI, *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 80 (2000).

⁴¹ BYRSK, *supra* note _____, at 100.

⁴² See Nicholas D. Kristof & Sheryl WuDunn, *Two Cheers for Sweatshops*, N.Y. TIMES, Sept. 24, 2000, § 6 (Magazine), at 70-71.

⁴³ Jagdish Bhagwati, a free market economist, argues that the environmental and labor standards a foreign country applies to its own corporations is beyond U.S. jurisdictional reach. He adds, however, that the U.S. can and should regulate the environmental and labor standards of American corporations operating abroad. See Jagdish Bhagwati, *American Rules, Mexican Jobs*, N.Y. TIMES, Mar. 24, 1993, A21.

position to guarantee their citizens a higher wage. Governments of such countries may understandably prefer foreign multinationals to establish plants that pay their nationals a low wage if the alternative is unemployment. Indeed, even when multinationals engage in “outsourcing” to take advantage of lower wages abroad, the wages they pay abroad are usually higher than the wages paid for comparable work by local employers.⁴⁴ For these reasons, among others, reliance on extraterritorial home country legislation to protect the interests of people in the host state is problematic.

Another possible approach would be for developed countries to permit nationals of the host country to sue their corporations in the home country’s courts, even if the home courts apply the host country’s laws. This approach would benefit persons from host countries that have adequate laws on the books but lack adequate enforcement mechanisms, whether for lack of resources or because of corruption. Since the home country’s courts would be applying host country law, the extraterritoriality problem would be less severe. Nevertheless, such an approach would override host country policies to the extent the beneficial laws were enacted only because of the lack of adequate enforcement mechanisms. More importantly, there would appear to be little incentive for home states to expend their judicial resources to benefit host country nationals at the expense of home country corporations. Where such lawsuits have been brought in the United States, they have typically been dismissed on *forum non conveniens* grounds.⁴⁵

⁴⁴ Empirical studies have found that MNCs pay a roughly 10% “wage premium” above the wages offered by local firms in the same industry or alternative jobs in the area. BHAGWATI, *supra* note _____, at 172-73.

⁴⁵ See, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984 (Bhopal Case), 634 F. Supp. 842, 867 (S.D.N.Y. 1986), *aff’d*, 809 F.2d 195, 197 (2d Cir. 1987); Aguinda

The futility or impropriety of relying on home country law and institutions to protect the human rights of host country nationals has led to a growing focus on international law and institutions as a source of protection. Even though under the shareholder-primacy approach the discretion of corporate managers and directors is constrained by legal regulation aimed at the protection of other stakeholders, until recently such managers could safely ignore international law and adjust their conduct to municipal law exclusively. That is not because international law has not addressed the conduct of corporations. To the contrary, numerous international legal instruments – many of them binding treaties – include provisions that address the conduct of business entities. For example, there are treaties that address the permissibility of bribing state officials. Such treaties, however, do not purport to impose obligations directly on corporations. Instead, they impose obligations on states to regulate corporations (and other entities) in particular ways. That such treaties are not directly applicable to non-state actors is a reflection of the oft-misunderstood proposition that states have traditionally been the subjects of international law. This idea has never meant that international law does not address the conduct of non-state actors. It has meant, instead, that international law regulates non-state actors through the states. To the extent that international law contemplates that non-state actors will have duties, it relies on states to impose and enforce such duties. Thus, even though the anti-bribery conventions contemplate that business will be prohibited from paying bribes to state officials, such

v. *Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 64-65 (S.D. Texas 1994); KAMMINGA & ZIA-ZARIFI, *supra* note ___, at 79-80; *see also* JAMIE CASSELS, *THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL* 143-47 (1993) (criticizing *forum non conveniens* in the Bhopal case). *But see, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101 (2000); *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp 1285, 1291 (2003) (dismissed, on other grounds).

bribes are not prohibited by virtue of the anti-bribery conventions themselves; rather, the conventions impose on states the obligation to prohibit such bribes. Until the states give effect to their obligation to prohibit the bribes, the businesses remain legally free to pay bribes.

Some of the human rights advocates who urge the development of international law to protect the human rights of host country nationals from being infringed by multinational corporations appear to have in mind indirect regulation of this sort. Such principles, if elaborated, would not legally bind corporations unless implemented in municipal law. The principles would become binding on corporations only if either the host country or the home country made them applicable to private parties through legislation (or otherwise). Insofar as the home countries would be expected to give effect to these principles, the existence of the principles would go far in alleviating the extraterritoriality problems discussed above. No longer would the home country be guilty of exporting potentially inappropriate legal standards to other countries. By hypothesis, the standards will have been agreed to by the international community, including presumably the host state.⁴⁶ Nevertheless, the political obstacles to such altruistic legislation on the part of the home state remain. Statutes that have been interpreted to permit such litigation, such as the Alien Tort Statute in the United States, have come under intense attack by the powerful corporate lobby.⁴⁷

⁴⁶ If the home state is a signatory to the relevant international instrument but the host state is not, the extraterritoriality problem would persist.

⁴⁷ Daphne Eviatar, *Profits at gunpoint: Unocal's pipeline in Burma becomes a test case in corporate accountability*, THE NATION, June 30, 2003 (discussing corporate lobbying of Congress to repeal or amend ATCA); *Big oil's dirty secret- Oil's dark side*, THE ECONOMIST, May 10, 2003 (discussing the same).

The existence of international standards might also make it more likely that the host state will adopt the relevant standard. In the absence of international standards, host states might be deterred from imposing regulations for fear that they would lose foreign investment to competing states. Elaboration of a universally applicable standard might forestall a race to the bottom. This is likely to occur, however, only if a significant number of the relevant states agreed to the relevant standard, implemented it through legislation, and effectively enforced it. Lack of resources, as well as the corruption problem, may make such a state of affairs unlikely. For this and other reasons, human rights advocates have searched for mechanisms that sidestep the state altogether.

The first such mechanism avoids formal law entirely. It involves NGOs articulating standards of corporate behavior by NGOs and monitoring compliance, enabling the ultimate “enforcement” of such standards through consumer boycotts and more generally through shaming techniques.⁴⁸ This approach dispenses with state action in both the articulation and the enforcement of norms. This approach might thus be said to reflect the privatization of international law insofar as the norms are directly addressed to private parties, are articulated by non-state actors, and enforced by private parties.⁴⁹ This new approach to advancing human rights harnesses the multi-national nature of

⁴⁸ See BYRSK, *supra* note ____, at 106-07.

⁴⁹ “[T]he fact that [consumer boycotts] have ... persuaded consumers to redirect their spending ... has afforded major [NGOs] substantial leverage with corporations and states before they go public with their efforts.... NGOs are trying to hold corporations to their word by extracting corporate agreement to independent monitoring of adopted standards.” Peter J. Spiro, *The New Global Potentates: Nongovernmental Organizations and the “Unregulated” Marketplace*, 18 CARDOZO L. REV. 957, 960-2 (1996); see also Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution*, 19 FORDHAM INT’L L.J. 1963, 1976-7 (1996); cf. BYRSK, *supra* note ____, at 106, 108-09 (2002) (discussing voluntary “market-based” labor standards enforced by NGO-led consumer boycotts).

MNCs made possible by globalization in the service of human rights. The fact that globalization makes possible this new enforcement technique suggests that, far from being the source of human rights problems in developing countries, globalization may in fact be part of the solution.

Norms articulated in this way, however, lack the legitimacy enjoyed by norms that arise through the ordinary processes of international law-making.⁵⁰ This strategy for protecting the human rights of people from developing countries suffers from many of the same defects as the extraterritorial articulation and enforcement of human rights norms by the corporation's home state. Most human rights NGOs are based in developed countries and obtain their resources from people in such countries. The imposition of norms articulated by such NGOs effectively subjects the people of developing countries to the choices of people from developed countries. The latter may believe they are acting altruistically, but this process for elaborating norms to be applied in developing countries lacks the legitimacy of norms emanating from the host state, or that emerge from a process that at least includes representatives of such states. This approach is perhaps even more problematic than extraterritorial regulation by the home state because the authors of the norms lack democratic credentials even in their home states. To the extent the NGOs limit themselves to enforcing established but not-directly-applicable international human rights obligations, their activities would smack less of imperialism. The NGOs would be serving as a substitute for host states who are, by hypothesis, violating their obligation to enforce these standards. Nevertheless, as discussed below, many of these international standards leave significant discretion to states regarding implementation. For self-appointed enforcers from developed countries to preempt the

⁵⁰ See Spiro, *supra* note _____, at 962-63.

judgment of developing countries with respect to how (and indeed whether) to implement these norms is problematic. In any event, this approach to promoting corporate compliance with human rights can be effective only with respect to corporations whose products are sold to consumers.⁵¹ The approach therefore cannot be the complete answer to the problem under discussion.

The second approach that sidesteps the state is the one taken in the UN Norms: the elaboration and adoption of international human rights standards directly applicable to corporations. The following section considers whether the critics of the Norms are correct in noting that the direct imposition of international human rights obligations on private corporations would represent a sharp break with existing international law.

II

THE HUMAN RIGHTS OBLIGATIONS OF PRIVATE CORPORATIONS UNDER EXISTING INTERNATIONAL LAW

Under what I shall call the “classic model” of international law, only sovereign states have legal personality. For purposes of our analysis, the classical position entails two distinct though related propositions. The first is that the primary rules of international law are addressed to states (and state officials), not non-state actors. The

⁵¹ There are other limitations to these types of voluntary codes. First, they are not as effective in regulating MNCs that make products whose prices are relatively high, such as automobiles. Rhys Jenkins, *Corporate Codes of Conduct: Self-Regulation in a Global Economy*, in VOLUNTARY APPROACHES TO CORPORATE RESPONSIBILITY 46-47 (2002). Second, they are generally limited to issues that will cause an emotive reaction in people from developed nations. *Id.* Third, this approach is ineffective when the products do not derive their value from a corporate or brand image. See Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 L. & POL’Y INT’L BUS. 139-150 (discussing this and other inadequacies in private enforcement mechanisms). Finally, such codes often suffer from weak auditing (e.g. inspections announced in advance) for compliance. KEVIN WATKINS, RIGGED RULES AND DOUBLE STANDARDS: TRADE, GLOBALISATION, AND THE FIGHT AGAINST POVERTY 197- 200 (2002).

second is that, under the secondary rules of international law, only states incur responsibility for the breach of the primary rules of international law.⁵² These propositions do not hold true for all rules of international law today. There are exceptions to both propositions. The claim by some scholars, reflected in the U.N. Norms, that international law today imposes significant obligations directly on private corporations, if true, would represent a significant exception to the classical position.

Before examining the extent to which international human rights law today departs from the classic model by imposing obligations on private corporations, it is useful to clarify what is *not* meant by these propositions. First, the classic model does not insist that only state conduct can give rise to a violation of international law. For example, the secondary rules of international law recognize that the conduct of a “person or group of persons” may give rise to international responsibility “if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the governmental authorities and in circumstances such as to call for the exercise of those elements of authority.”⁵³ On this basis, it has been argued that the conduct of a corporation might give rise to a violation of international law “in failed states” if “there is a complete non-regulation of corporate activities” and infringement of

⁵² The secondary rules of international law specify the legal consequences of a breach of the primary rules of international law. On the distinction between the primary and secondary rules of international law, see Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Comment 1, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter Commentaries on the Draft Articles].

⁵³ Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 9., U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles].

human rights result from the corporation's activities.⁵⁴ Be that as it may, the responsibility that results in such a case would be that of the state, not the corporation.⁵⁵ In such circumstances, the conduct of the corporation is attributable to the state for purposes of international law.⁵⁶ This is thus an application of, not an exception to, the classical position.

Similarly, the conduct of non-state actors can give rise to responsibility under international law "if and to the extent that the State acknowledges and adopts the conduct in question as its own."⁵⁷ The most famous example of this principle was the seizure of the U.S. Embassy in Teheran and the detention of its personnel by Iranian militants in 1979. As the International Court of Justice held, the endorsement of this conduct by Iranian authorities gave rise to international responsibility for what would otherwise have been private conduct.⁵⁸ Again, however, the international responsibility that resulted was that of Iran, not of the militants who perpetrated the seizure and detention.

Nor does the classical position maintain that the primary rules of international law do not address the conduct of private parties. Indeed, treaty provisions that specify that private conduct is either prohibited or permitted are commonplace. For example, as noted above, rather than criminalizing bribery itself, the Convention of Combating

⁵⁴ NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 142 (2002).

⁵⁵ See Draft Articles, *supra* note ____.

⁵⁶ *Id.* (conduct "shall be considered the Act of a State" under circumstances described).

⁵⁷ Draft Articles, *supra* note ____, Art. 11.

⁵⁸ See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

Bribery of Foreign Public Officials requires state parties to criminalize bribery of foreign public officials by any legal person (including a corporation), when such conduct is committed on their territory.⁵⁹ Similarly, the Convention on the Elimination of All Forms of Racial Discrimination⁶⁰ expressly addresses the permissibility of race discrimination “by any persons, group, or organization,”⁶¹ thus clearly covering discrimination by private corporations. It does not, however, directly impose on such organizations an obligation not to discriminate on the basis of race. Rather, it imposes *on states* the obligation to “prohibit and bring to an end” such discrimination.⁶²

Even when a treaty as phrased seems to establish rights and obligations of private parties, under international law what it really does is require the states-parties to recognize the rights and obligations set forth in the treaty. For example, the Warsaw Convention provides, *inter alia*, that “a carrier shall be liable for damage sustained [by] a passenger” in certain circumstances.”⁶³ The U.S. Supreme Court recently understood those words to “impos[e] liability on an air carrier” under the circumstances stated.⁶⁴ In

⁵⁹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 1, 2, 4, 37 I.L.M.1.

⁶⁰ Convention on the Elimination of All Forms of Racial Discrimination, Sept. 28, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 [hereinafter CERD].

⁶¹ *Id.* at art. 2(1)(d).

⁶² *Id.* Similarly, the Convention on the Elimination of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1979) (entered into force Sept. 3, 1981) [hereinafter CEDAW], a treaty that the United States has not yet ratified, obligates states to take measures “to eliminate private discrimination against women.” CEDAW art. 2(e).

⁶³ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 17, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

⁶⁴ *See Olympic Airways v. Husain*, 124 S. Ct. 1221, 1229-30 (2004).

reality, however, the Convention merely obligates the states-parties, in resolving disputes coming within the scope of the Convention, to apply the substantive rules of liability set forth in the Convention. The Convention does not, strictly speaking, “impose” liability on an air carrier. Only a state can violate the Convention or incur international responsibility for a breach. Under the domestic constitutional law of some states, such as the United Kingdom, the treaty has no effect on private parties until implemented by the legislature. Under the domestic law of other states, the treaty may have domestic legal force by virtue of their domestic constitutional provisions. In the United States, air carriers have a liability under U.S. law by virtue of the Warsaw Convention in combination with the Supremacy Clause, which declares that all treaties of the United States are the “Law of the Land.”⁶⁵ Because international law is generally indifferent as between the British and the American approach to treaties, it cannot be said that private parties incur obligations directly under treaties such as the Warsaw Convention as a matter of international law. They incur such obligations by virtue of whatever domestic laws give domestic legal force to the rights and obligations contemplated by the treaty.

Treaties such as these are not an exception to the classic model. The primary obligations they impose are obligations of states – that is, the obligation to take steps to prohibit particular private conduct or to give effect to specified liabilities. Private discrimination on the basis of race does not violate CERD; only the state’s failure prohibit and take other steps to eradicate such discrimination would constitute a violation. In the event of a breach of that obligation, only the state would incur international responsibility. Although the treaties do contemplate the imposition of obligations on

⁶⁵ U.S. CONST., art. VI.

non-state actors, they do not themselves impose such obligations. One might say that the treaties regulate private parties indirectly, not directly.

One might also say that, with respect to private parties, the treaties are not self-executing. It is important to clarify, however, that the treaties are non-self-executing as a matter of international law. This should be distinguished from the question whether the treaties are self-executing under the domestic law of any given state. As noted above with respect to the Warsaw Convention, some countries have constitutional rules that give domestic legal force to certain treaties upon ratification. In the United States, for example, treaties are directly enforceable in domestic courts by private parties if they are “self-executing.”⁶⁶ Whether a treaty is self-executing depends in part on the language of the treaty – if the treaty’s language purports to “ac[t] directly on the subject,”⁶⁷ as does the language of the Warsaw Convention specifying the liabilities of air carriers, then it is self-executing under U.S. law and hence enforceable in the courts without the need for implementing legislation. But the self-executing nature of a treaty under U.S. law should be distinguished from its self-executing nature under international law. As noted, under the classic model, a treaty is never self-executing under international law with respect to the obligations of private parties. Such obligations are never imposed by the treaty itself, only by the domestic legal provision – be it statutory or constitutional – that gives the treaty domestic legal force. (To avoid possible confusion between the international and domestic doctrines concerning self-execution, I avoid that term in this paper.)

⁶⁶ On the distinction between self-executing and non-self-executing treaties, *see generally* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695.

⁶⁷ *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 314.

Most of the examples that have been proffered of international legal norms that impose obligations on corporations are in fact of the indirect variety that does not conflict with the classic position. Thus, much is made of the European concept of *Drittwirkung*, under which certain provisions of the European Convention of Human Rights are understood to contemplate “horizontal effect,” meaning that they apply as between private parties.⁶⁸ The European authorities demonstrate, however, that the state has the obligation in these circumstances to take steps to ensure that private parties behave in certain ways towards other private parties. As recognized by a prominent defender of the horizontal effect of the European Convention on Human Rights:

The opinions in favour of *Drittwirkung* show various degrees of commitment, but no one assumes that the Convention rights and freedoms have exactly the same legal force for private persons as they have for the States parties. Those rights may be applicable between private persons, but their extent will depend on the domestic law and the Convention’s status therein. . . .

[I]f the ECHR is valid as between private parties, only States can be held responsible at Strasbourg. Defects in protection against violations by other individuals are to be construed as due to the State: the fault of domestic legislation, of the courts, or the administrative authorities. This *Drittwirkung* is indirect

The legal position of the private party, the wrongdoer, is unaffected; he is neither forced to repair the wrong nor is he punished. For that matter, punishment would probably be contrary to Article 7: *nulla poena sine lege previa*.⁶⁹

⁶⁸ See, e.g. Ratner, *supra* note ____, at 471; JAGERS, *supra* note ____, at 36-37.

⁶⁹ Evert Albert Alkema, *The third-party applicability or “Drittwirkung” of the European Convention on Human Rights*, at 37.

Also frequently cited⁷⁰ is the decision of the Inter-American Court of Human Rights in the Velásquez-Rodríguez case.⁷¹ However, in this watershed decision, the Inter-American Court recognized that the Inter-American Convention on Human Rights had a horizontal effect similar to that of the European Convention. It affirmed the responsibility of the state for its failure to prevent or punish private conduct that infringed human rights, it did not hold that private individual who inflict such injuries are guilty of violating the Convention.

Many norms of international law do not apply to non-state actors even indirectly. Establishing that certain norms have a horizontal effect, and adding to the list of such norms, could well represent an important advance in the protection of human rights.⁷² Nevertheless, the recognition of an obligation of states to impose obligations on private parties, including corporations, would not be a conceptual departure from the classic model. International law has long recognized a state's obligation to prevent or remedy injuries to private parties at the hands of other private parties. The long-standing international law rule against denial of justice to aliens – which the Founders of the U.S. Constitution were anxious to comply with⁷³ – is an example of this sort of obligation.⁷⁴

⁷⁰ See, e.g., JÄGERS, *supra* note ___, at 147-48; Ratner, *supra* note ___, at 470; Greenfield, *supra* note ___, at 1375 n.290.

⁷¹ Velásquez-Rodríguez Case, Inter-Am. Ct. H.R. (ser. C), No. 4, (1988).

⁷² For further discussion, see *infra* Part IV

⁷³ See THE FEDERALIST NO. 80, at 476 (A. Hamilton) (C. Rossiter ed. 1961).

⁷⁴ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 comment a (1987) (“[D]enial of justice’ ... refer[s] to injury consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil [for which a state is responsible]”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Part VII Introductory Note

Having clarified what the classic model does not deny, we are now in a position to consider what would count as an exception to the classic position. Easiest to identify are exceptions to the second of the two propositions – i.e., that only states are responsible for breaches of international law. Obvious exceptions to the second proposition include situations in which the international community has established international mechanisms to adjudicate the international responsibility of non-state actors. This has happened in the context of international criminal law. The Nuremburg Rules, for example, provided for individual responsibility for crimes against peace, war crimes, and crimes against humanity.⁷⁵ Most of the prosecutions at Nuremburg were against state officials; these prosecutions reflected an exception to the second proposition but not the first. But some prosecutions occurred against the managers of certain corporations implicated in Nazi atrocities.⁷⁶ The corporations themselves were not prosecuted because the tribunal possessed jurisdiction only over natural persons.⁷⁷ Nevertheless, it has been argued that the Nazi corporations were themselves guilty of violating the primary norms and escaped

(1987) (“International law has long held states responsible for ‘denials of justice’ and certain other injuries to nationals of other states.”)

⁷⁵ Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 279 [hereinafter Nuremberg Statute] (“The following acts ... are crimes ... within the jurisdiction of the Tribunal for which there shall be individual responsibility....”)

⁷⁶ See *U.S. v. Krauch* (“The Farben Case”), 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, (1952); *U.S. v. Flick* (“The Flick Case”), 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952); *U.S. v. Krupp* (“The Krupp Case”), 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, (1950); see also *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1309-10 (briefly discussing the these cases).

⁷⁷ See Stephens, *supra* note ____, at 76; see also Nuremberg Statute, *supra* note ____, at art. 6 (granting the tribunal authority “to try and punish persons... acting as individuals or members of organizations.”)

prosecution only because of a jurisdictional limitation of the tribunal.⁷⁸ In support of this conclusion, it has been noted that the military tribunal had the power to declare certain organizations to be criminal enterprises,⁷⁹ and certain corporations were declared such.⁸⁰

If an international mechanism is established for enforcing an international norm against a non-state actor, then it may clearly be said that the international norm applies directly to non-state actors. Scholars have stressed, however, that the absence of such a mechanism does not necessarily establish the opposite.⁸¹ A rule of international law imposing obligations directly on individuals and non-state actors without establishing an international enforcement mechanism could become enforceable through the subsequent establishment of an international mechanism to impose criminal penalties, as was done with respect to the International Criminal Tribunals for the Former Yugoslavia and for Rwanda.⁸² (If meant to be enforced exclusively through national mechanisms, the norms would be more accurately described as indirectly regulating private parties.) But

⁷⁸ See Stephens, *supra* note ___, at 76.

⁷⁹ Nuremberg Statute, *supra* note ___, arts. 9, 10.

⁸⁰ See JÄGERS, *supra* note ___, at 222-225.

⁸¹ *Id.* at 256-57.

⁸² Both tribunals have the temporal jurisdiction to impose criminal penalties for violations that occurred before their respective formation. See Statute of the International Criminal Tribunal for Rwanda, art. 7, available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html> (adopted November 8, 1994 and establishing temporal jurisdiction over all specified crimes occurring after January 1, 1994); Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 8, available at <http://www.un.org/icty/legaldoc/statuteindex.htm> (adopted May, 25, 1993 and establishing temporal jurisdiction over all specified crimes occurring after January 1, 1991). If the legal norms for which these tribunals have the power to impose penalties were not directly operative on individuals at the time the violations occurred, there would be a problem under the principle of *nulla poena sine lege previa*. On the other hand, the Rome Statute establishing the International Criminal Court defines the crimes for which prosecutions are possible and authorizes prosecutions only for crimes committed after the entry into force of the treaty. Rome Statute of the International Criminal Court, July 17, 1998, art. 11 [hereinafter ICC Statute], available at <http://www.un.org/law/icc/statute/romefra.htm>.

identifying such norms is not an easy task. As the Warsaw Convention example shows, the language of the norm is not dispositive.

Some scholars argue that all human rights norms must be regarded as directly applicable to non-state actors because such norms have their basis in natural law – i.e., they simply restate inalienable rights possessed by all persons. If all persons have a right to life, it seems to make little sense to say that the right is violated when the conduct of a government official results in death but not when the very same conduct by a private individual has the same result. Whether international human rights law is indeed based on natural law is not universally accepted, however.⁸³ Even if it were, it would not follow that the obligations imposed by human rights instruments bind private parties as well as the state. In the United States, the natural-law origins of human rights were expressed in the Declaration of Independence and possibly alluded to in the Ninth Amendment, yet the Bill of Rights even today is largely understood to place obligations only on states. Indeed, until Reconstruction they were understood to apply only to the *federal* government. For the most part, the U.S. Constitution today is not understood to establish even indirect obligations on private parties in the manner of the European *Drittwirkung*.⁸⁴ That the rights are regarded as having their basis in natural law is not a reason to construe the instruments protecting those rights as imposing obligations on private parties directly as opposed to indirectly. The distinction can be understood as

⁸³ See, e.g., Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 287, 252-3 (1999).

⁸⁴ With the notable exception of the Thirteenth Amendment, prohibiting slavery and involuntary servitude.

reflecting a choice about how best to advance these natural rights. The natural-law basis of a right does not help us make that choice.

Some scholars rely on language from the Preamble to the Universal Declaration of Human Rights as establishing that human rights norms are directly applicable:

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples of all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.⁸⁵

Referring to this part of the Preamble, Professor Henkin, in an oft-quoted passage,⁸⁶ emphasized that “[e]very individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, and no cyberspace. The Universal Declaration applies to them all.”⁸⁷ This is true, but it is important to keep in mind what exactly the Preamble expects of such individuals and organs: that they “promote” respect for the rights set forth in the Declaration by “teaching and education” and by supporting “progressive national and international measures.” The language is thus consistent with the idea that legal obligations bind corporations only to the extent further “national and international measures” are taken. Additionally, it should be kept in mind that the Declaration, being just a declaration, does not as such have binding force, and that the language in question appears in the *preamble* of that instrument. Many of

⁸⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); see, e.g., Jordan Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT’L L. 801, 810-11 (2002).

⁸⁶ Deva, *supra* note ____, at 13; Stephens, *supra* note ____, at 77.

⁸⁷ Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT’L L. 17, 17 (1999).

the rights set forth in the Declaration are thought to have attained the force of customary international law, but even supporters of imposing international human rights obligations on corporations acknowledge that this portion of the preamble has not itself attained the force of customary international law.⁸⁸

Of the human rights that the UN Norms set forth as directly applicable to corporations, some are widely recognized to be directly applicable to private individuals under existing international law. For example, the UN Norms provide that

[t]ransnational corporations and other business entities shall not engage in . . . war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law or other international crimes against the human person as defined by international law.⁸⁹

Some of those international norms are recognized to apply directly to private parties.⁹⁰

Recognizing that such norms apply to corporations as well as private parties presents no significant conceptual problems.⁹¹

⁸⁸ INT’L COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL OBLIGATIONS OF COMPANIES 61 (2002) (stating that the preamble to the UDHR has at best “indirect legal effect”).

⁸⁹ U.N. Norms, *supra* note ____, art. 3. The article also says that transnational corporations shall not “benefit from” such acts. In this respect, the Norms may go beyond what international law itself prohibits. *See Doe vs. Unocal Corp.* 110 F. Supp. 2d. 1294, 1310 (holding that international law prohibits complicity in state violations of human rights norms, but defining complicity more narrowly than “benefit[ing] from”).

⁹⁰ *See* Nuremberg Statute, *supra* note 74 and accompanying text (discussing individual responsibility under the Nuremberg Statute for war crimes and crimes against humanity); *Unocal*, 110 F. Supp. 2d. at 1307-09 (finding that norms against forced labor are directly applicable).

⁹¹ *See* Ratner, *supra* note ____, at 473-74 (discussing and rejecting arguments that norms applicable to individuals not applicable to corporations, as distinguished from the specific individuals acting on the corporation’s behalf).

Other international obligations that the U.N. Norms require private corporations to respect appear to be, at best, indirectly applicable to private parties under existing international law. For example, the U.N. Norms provide that “[t]ransnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other advantage”⁹² As discussed above, the international instruments addressing the permissibility of bribery contemplate that states will prohibit certain conduct. They do not purport to regulate the conduct of private parties directly. The same is true of the labor standards that the Norms expect private corporations to respect⁹³ (other than the prohibition of forced labor⁹⁴). The ILO instruments on which these human rights rest make it clear that they are rights that governments are required to recognize and protect.⁹⁵

The U.N. Norms also require private corporations generally to

[r]espect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression.”⁹⁶

⁹² U.N. Norms, *supra* note ____, art. 11.

⁹³ The U.N. Norms require corporations to “respect the rights of children to be protected from economic exploitation,” art. 6, to “provide a safe and healthy working environment,” art. 7, to provide workers with remuneration that ensures an adequate standard of living for them and their families,” and to “ensure freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing . . . , art. 9.

⁹⁴ See *supra* note ____.

⁹⁵ See, e.g., ILO Convention Fixing the Minimum Age for Admission of Children to Industrial Employment, June 13, 1921.

⁹⁶ U.N. Norms, *supra* note ____, at art. 12.

Even scholars who support the imposition of human rights obligations on private corporations concede that most civil and political rights are either applicable to private corporations only indirectly,⁹⁷ or are not intended to be operative on private parties at all.⁹⁸

Scholars have argued that, to a greater extent than civil and political rights, economic and social rights are directly applicable to private parties, including corporations.⁹⁹ The argument, which relies primarily on the conclusory statements of the UN Committee on Economic and Social Rights,¹⁰⁰ seems counterintuitive. These rights are by their terms subject to “progressive” development. The Covenant on Economic and Social Rights provides that

[e]ach State Party to the present Covenant undertakes to take steps . . . to the maximum extent of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁰¹

The Covenant’s requirement that the rights are to be achieved progressively and to the maximum extent of a state’s resources means necessarily that the instrument leaves much to the discretion of the various states-parties. For example, what constitutes “just and favorable conditions of work,” “fair wages,” “a decent living,” or “safe and healthy

⁹⁷ JÄGERS, *supra* note ____, at 71.

⁹⁸ *See id.* at 51-69 (discussing several human rights that do not apply to private parties, for example the right to seek asylum and the right to nationality).

⁹⁹ *See id.* at 71.

¹⁰⁰ *See id.* at 59, 68 (relying on General Comment stating without elaboration that economic and social rights apply directly to private parties).

¹⁰¹ U.N. Covenant on Economic and Social Rights, art. 2(1).

working conditions”¹⁰² will turn in any given state on the balancing of a number of factors, and in particular in the case of developing countries the need to attract foreign investment. Similarly, what constitutes “the highest attainable standard of health”¹⁰³ in a particular country will depend on the resources available to provide free health care through government or on calculations about the economic impact of requiring private employers to provide health care directly or through insurance schemes. It seems obvious that these judgments have to be made by entities representing all segments of a particular society. It is difficult to understand how rights of this nature could operate directly on private corporations. Is a corporation required to pay the maximum wages that it can afford? Is it to provide health care to its employees, or even to the surrounding community, to the maximum of its available resources? In determining how much of its resources are “available” for this purpose, do we take into account its need to make a profit in the international market in order to survive? If so, then it would appear that the Norms contemplate a distinction between adequate and excessive profits. This seems like a thicket into which it would be unwise for international law to wade.

Finally, some of the obligations the U.N. Norms impose on private corporations appear not to be established in existing international law at all, except possibly at the regional level (to the extent we regard the European Union as system of international law). For example, the Norms require corporations to “act in accordance with fair business, marketing and advertising practices and . . . take all necessary steps to ensure the safety and quality of goods and services they provide, including observance of the

¹⁰² *Id.* at art. 7.

¹⁰³ *See id.* art. 12.

precautionary principle. Nor shall they produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers.” Art. 13. These matters are usually regulated by municipal law. The international standards referred to in the Commentary to the Norms are either aspirational or require state implementation.

In sum, the UN Norms go considerably further than existing international law in imposing human rights obligations on private corporations. They require private corporations to respect some rights that, under existing international law are either (a) not widely recognized, (b) unprotected from private infringement or (c) intended to be protected from private infringement through the domestic laws of the states-parties. With respect to economic and social rights, it is unclear how the rights could translate into obligations of private corporations. Very few of the rights which the UN Norms expect private corporations to comply with are recognized under existing international law to be directly operative on private parties.

III

THE FUNDAMENTAL NATURE OF THE CONTEMPLATED CHANGE IN INTERNATIONAL LAW

The previous section demonstrated that existing international law does not significantly depart from the classic model by directly regulating the conduct of private corporations. Although a few human rights norms apply directly to private parties – and by extension to corporations – most such norms regulate private parties, if at all, only indirectly. The question then is whether international law should move in the direction of imposing obligations directly on corporations.

Those who have argued that this step should be taken base their arguments primarily on the claim that private corporations have become increasingly powerful in recent decades, and that the result of this increasing power has been a deterioration of human rights. The argument put forward is that the increased power of corporations in the international arena, and hence their increased ability to have a detrimental impact on human rights, must be met with increasing responsibilities under international law.¹⁰⁴

Although both premises have been disputed, the disputes may be set aside for present purposes. With respect to the first point, advocates of imposing direct obligations on corporations often cite figures establishing that the fifteen largest corporations now have greater revenue than all but thirteen nation-states and that GM, for example, is larger than the national economies of all but seven states.¹⁰⁵ Jagdish Bhagwati has disputed this claim¹⁰⁶ and maintains that, if apples are compared to apples, it turns out that only two of the top fifty economies are corporations.¹⁰⁷ Whatever the precise figures, however, we may grant that some multinationals have become powerful enough to exert significant pressure on many governments.¹⁰⁸

¹⁰⁴ See, e.g., JÄGERS, *supra* note ___, at 5-6, 8-10; Stephens, *supra* note ___, at 56-58; Ratner, *supra* note ___, at 461; KAMMINGA & ZIA-ZARIFI, *supra* note ___, at 78.

¹⁰⁵ See, e.g., Stephens, *supra* note ___, at 57.

¹⁰⁶ BHAGWATI, *supra* note ___, at 166. Bhagwati argues that because these figures compare corporations' sales volume (rather than value added) to national GDPs (which is a measure of value added), they compare apples to oranges. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Bhagwati would still argue, however, that, given the fierce competition among MNCs, weak nations may still play off one giant corporation against another. He cites the example of Poland choosing between Airbus and Boeing. *Id.*

The claim that multinationals are on the whole bad for human rights has also been disputed. William Meyer, for example, concluded from a multi-factored statistical analysis that the presence of MNCs is positively correlated with both civil liberties and political freedoms in developing countries.¹⁰⁹ Although there is by no means a consensus view on this point,¹¹⁰ we may put this debate to one side as well. Even if multinationals are on the whole beneficial for human rights, there is no doubt that corporations sometimes violate human rights, sometimes egregiously. By analogy, it may be admitted that states are on the whole beneficial to human rights – indeed, according to our Declaration of Independence, governments were instituted among men in order to protect such rights¹¹¹ -- yet this fact has not deterred the international legal system from imposing obligations directly on states. The fact that states sometimes violate such rights egregiously has sufficed to justify the imposition of human rights obligations on states. That corporations are on the whole good for human rights should be no greater reason to exempt corporations from international human rights norms.

That corporations are powerful and sometimes violate human rights are necessary but not sufficient conditions for concluding that international law should directly impose human rights obligations on private corporations. Left out of the equation has been any

¹⁰⁹ William H. Meyer, *Human Rights and MNCs: Theory versus Quantitative Analysis*, 18.2 HUM. RTS. Q. 368, 392 (1996).

¹¹⁰ See, e.g., Stephen Hymer, *The Multinational Corporation and the Law of Uneven Development*, in PETER J. BUCKLEY & PERVEZ N. GHURI, *TRANSNATIONAL CORPORATIONS AND WORLD ORDER* 21- 47 (1999) (arguing that MNCs are detrimental to the political and economic development of the Third World); Jackie Smith, Melissa Bolyard & Anna Ippolito, *Human Rights and the Global Economy: A Response to Meyer*, 21 HUM. RTS. Q. 201 (1999) (disputing Meyer's methodology and findings),

¹¹¹ DECLARATION OF INDEPENDENCE [¶2] (1776) (“All men are created equal ... with certain unalienable Rights [and] to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed...”)

consideration of a key feature of international law that would be altered by a move to impose direct obligations on private parties to any significant extent. Such a move – if backed by an effective international mechanism to enforce those obligations – would represent a significant disempowering of states. As such, it would be a fundamental change that is likely to be strongly resisted by states. If not backed by an effective enforcement mechanism, the strategy is likely to fail and to trivialize international law in the process.

The classic model appears to disfavor states by subjecting them to international obligations and responsibility, and to favor non-state actors by leaving them unregulated. It is true that, by imposing international legal obligations on states, international law limits state sovereignty. Paradoxically, however, the classic model serves in an important though underappreciated way to *empower* states. Although states are required by international law to comply with their international legal obligations, the fact that international law makes states and only states responsible for violations makes it possible for states to violate their international obligations. To understand this paradoxical aspect of the classic model, assume that international legal norms operated directly on private parties – both state and non-state actors – and included an effective enforcement mechanism, such as criminal penalties sufficient to deter private parties from violating their obligations. Under this model, violations of international law would rarely occur.¹¹² More importantly, states would have no control over whether violations occurred –

¹¹² This is true because I am hypothesizing an effective enforcement mechanism. I consider below the possibility of imposing international human rights obligations directly on states without establishing an effective enforcement mechanism. I am leaving aside entirely very large issues about what sort of mechanisms would be effective.

violations would be the result of the calculations of particular private parties based on factors such as the magnitude of the penalty and the risk of detection and prosecution.

Compare international law under the classic model: because only the state can be held responsible, the state can insist that its nationals conform their conduct to international law only to the extent the state, through its legislature or otherwise, has instructed them to do so. Because individuals incur no personal responsibility for violating international law, they would be deterred from violating international law only to the extent the state has “implemented” such law by imposing domestic penalties for its violations. Under such a regime, it is prudent for an individual to do whatever the state asks him to do. The classic model, in other words, permits the state to hold individuals harmless from violations of international law. Control over compliance with international law rests ultimately with state.

The most prominent departures from the classic model have been in the context of international criminal law. Examination of legal doctrine in this area confirms that the point of individual liability is to disable the state to authorize violations. It is well known that following orders is not a defense to individual criminal liability.¹¹³ This aspect of the doctrine disables the state, through higher level officials, to insist on a violation of the primary norm. The unavailability of a superior orders defense is simply an application of the general principle that international responsibility cannot be excused by national law.¹¹⁴ One could in theory have a regime of individual responsibility in which

¹¹³ See, e.g., Nuremberg Statute, *supra* note ____, at art. 8; ICC Statute, *supra* note ____, at art. 33.

¹¹⁴ See Draft Articles, *supra* note ____, at art. 3 (“The characterisation of an act of a State as internationally wrongful is governed by international law [and] not affected by the characterisation of the same act as lawful by internal law.”).

compliance with national law, or superior orders, was a defense, but such a regime would seem to have little point. The purpose of individual criminal responsibility is avowedly to make the underlying prohibition more effective by deterring the only entities that can be effectively deterred through criminal penalties – natural persons.¹¹⁵ To recognize that a state can effectively confer immunity would make the individual liability regime virtually indistinguishable from the state responsibility regime.

Defenders of direct obligations for corporations under international law might well respond: “So much the better if direct regulation and enforcement against non-state actors makes international law more effective. We have taken the step with respect to the norms prohibiting war crimes and crimes against humanity, let’s now take the step for other international human rights norms.” But this response overlooks another paradox of international law: the fact that, under international law, violations of legal norms have a jurisgenerative effect. While holding states responsible for their violations, international law paradoxically recognizes that violations of such norms may over time produce the crystallization of a new norm of international law. In this limited sense, international law actually countenances violations – or at least recognizes that they sometimes have value. Violation of existing norms permits the evolution of international law over time.

As noted, the classic model makes violations of international law possible by recognizing a state’s power to insist that its officials and nationals behave in contravention to the international legal norm (coupled with the absence of effective mechanisms to enforce international law against recalcitrant states). A shift to a model

¹¹⁵ “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.” Nuremburg Judgment, Law Reports of Trials of War Criminals, vol. XXII, p. 447.

of private party liability accompanied by effective international enforcement mechanisms would prevent violations from occurring. To the extent that we believe in the gradual evolution of international legal principles, therefore, a move away from the classic model would involve the loss of a potentially valuable escape valve. While it is appropriate to dispense with the escape valve for norms that are clearly not going to be reconsidered – such as those prohibiting war crimes and crimes against humanity – closing the valve is less appropriate for norms that are less firmly established. The possibility that the violation of a particular legal norm might be regarded as justifiable under certain circumstances is likely to lead state leaders to resist the imposition of direct private party duties backed by an effective enforcement mechanism.¹¹⁶

The radical nature of the contemplated change can be appreciated by noting that a similar shift was perhaps the most important change made by the Framers of the U.S. Constitution.¹¹⁷ Before the Constitution's adoption, the United States were governed by the Articles of Confederation. Under the regime established by the Articles, the central government could act only upon the States of the Union, much as international law under

¹¹⁶ It is true that the leaders of states sometimes favor adhering to international human rights norms in order to entrench the norms and thus tie the hands of successors whom they may not trust. This is frequently a reason that states adhere to human rights instruments in the aftermath of a particularly brutal dictatorship. *See, e.g.,* Stacie Jonas, *The Ripple Effect of the Pinochet Case*, 11 NO. 3 HUM. RTS. BRIEF 36, 36 (2004) (describing several advances in the application of human rights law after Pinochet left power, such as a vast increase in the number of cases brought and a reinterpretation of amnesty law); *Galtieri Arrested in Argentina on Human Rights Abuse Charges*, DEUTSCHE PRESSE-AGENTUR, July 11, 2002, available at LEXIS, DPA File, cited in Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 at 527 (discussing increased human rights enforcement in Argentina). This is not inconsistent with the point made in the text. Current leaders might favor entrenching human rights obligations because they do not trust their possible successors, but they will do so only if *they themselves* believe that violations are never justifiable.

¹¹⁷ For elaboration of the points addressed in this paragraph, see generally Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097-1114 (1992).

the classic model operates only on states. The central government lacked the power to address its directives to the individuals living in the States. The arrangement was regarded as defective because the central government's directives to the States were frequently violated, and there was no mechanism to force the States to comply. The Founders addressed this problem by giving the central government the power to address its laws directly to the individuals within the states. They also created an effective mechanism for enforcing the federal obligations of such individuals by providing for federal courts with jurisdiction over disputes concerning federal legal obligations. (In the view of the Framers, the central government's power to direct its laws to individuals was closely linked to the possibility of effective enforcement mechanisms, as they believed that norms addressed to States as political bodies could not be effectively enforced through judicial tribunals.¹¹⁸)

The shift urged by those who urge that international law directly regulate corporations is quite similar to the change that transformed the flawed regime of the Articles of Confederation into a national government. In the Founders' view, the difference between a regime in which norms operate on states and one in which norms operate directly on individuals was what distinguished an international regime from a national one. They frequently described the Articles of Confederation a "mere Treaty" precisely because the central government lacked the power to act directly on individuals,¹¹⁹ and they asserted that, by giving the central government the power to legislate for individuals, they were creating a nation.¹²⁰

¹¹⁸ See Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097, 1104 (1992).

¹¹⁹ THE FEDERALIST NO. 33, at 207 (Alexander Hamilton).

A similar transformation is now occurring in Europe, where under the established doctrines of Direct Effect and Supremacy, the European Community can create legal obligations that apply directly to individuals and trump any conflicting municipal laws.¹²¹ With acceptance by the European Court of Justice and the EU member states, these doctrines are now the cornerstones of the EU legal system,¹²² rendering the legal relationships between member states comparable to constitutional federal states.¹²³ According to some observers, member-states within the Community are no longer governed by an international law regime, but by a constitutional government.¹²⁴

No one is advocating the creation of a global legislative body with the power to legislate for corporations. The proposal is for states themselves to agree that certain human rights norms are directly operative on and enforceable against private corporations. Nevertheless, the elaboration of such norms and the creation of an international institution to enforce the obligations directly against private parties would be a major step in the same direction. The elimination of the discretion states now possess to determine if and when to comply with international obligations offers a striking parallel to the change that is understood to have brought into being a nation in the Western Hemisphere, and that is said by some to be in the process of doing the same in Europe. The parallel illustrates the significance of the proposed departure from the

¹²⁰ *Id.*

¹²¹ Weiler, *supra* note ____, at 2413-2415.

¹²² Ratner, *supra* note ____, at 485.

¹²³ Weiler, *supra* note ____, at 2413.

¹²⁴ *Id.* at 2407.

classic model, which in turn suggests that the proposal should be approached with caution.

This concern could be allayed if the human rights norms made directly applicable to corporations were not backed by an effective international enforcement mechanisms.¹²⁵ After all, we are accustomed in international law to legal obligations not backed by coercive sanctions of the Austinian sort. Indeed, as noted above, the international legal system to a certain extent expects that its norms will be violated from time to time, and even recognizes that such violations may give rise to new customary law.

It is unlikely that the authors of the UN Norms would find such an option appealing, as their effort was propelled by their conclusion that voluntary schemes to improve the human rights performance of corporations has been ineffective. Their skepticism of corporate obligations not backed by enforcement mechanisms, moreover, seems well-founded, as it seems likely that the absence of enforcement mechanisms would be more of a problem for norms that operate on corporations than for norms that operate on states. It is true that states have been known to violate international legal norms, but, as Professor Henkin has famously asserted, “[i]t is probably the case that

¹²⁵ If what is contemplated is the enforcement of these norms by domestic courts, then this regime would differ only slightly, if at all, from a regime in which the obligations operated on corporations indirectly. Though in theory the norms would operate on corporations whether or not the domestic law of any nation made such norms applicable to them, the norms could still not be enforced against corporations unless the domestic law of states authorized their courts to enforce them. Relying on states to authorize the judicial enforcement of such norms suffers from many of the same problems as relying on states to make such obligations operative on corporations in the first place. The value of human rights obligations that are directly applicable to corporations but enforceable only in domestic courts seems no greater than the value of human rights norms that regulate corporations indirectly. I shall therefore treat this possibility as a proposal for the indirect regulation of corporations through international law, a strategy I discuss further in Part IV.

almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”¹²⁶ Some commentators have responded that, to the extent this is true, it merely reflects the fact that international law to a large extent requires states to do what they would do in the absence of international law. If that were the whole explanation for behavior that conforms to international legal norms, however, the effort to advance corporate respect for human rights by elaborating international legal norms on the subject would be chimerical. I shall assume that the existence of international legal norms pertaining to a matter does, at least sometimes, cause states to behave in conformity with the norm even in the absence of an enforcement mechanism. A variety of theories have been advanced to explain why nations comply with international legal norms in the absence of coercion. These theories suggest that international legal norms addressed to private corporations are far less likely to be observed in the absence of effective enforcement mechanisms.¹²⁷

¹²⁶ LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

¹²⁷ The analysis that follows combines elements of several compliance theories, each of which might all be regarded as falling in the “rationalistic instrumentalist strand that views international rules as instruments whereby states seek to attain their interests in wealth, power, and the like.” See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2632 (1997). The analysis below is admittedly sketchy and oversimplified, put forth just to explain my intuition that the authors of the U.N. Norms are right in being skeptical of voluntary compliance by private corporations. For more thorough expositions of rationalistic instrumentalist theories of compliance with international law, see HENKIN, *supra*; Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 *CALIF. L. REV.* 1823 (2002), and sources cited in Koh, *supra*, at 2632 & nn. 171-174. Application of such theories to hypothetical international law norms that operate directly on private corporations is a subject that merits further research.

Professor Koh has argued that the rationalistic instrumentalist explanation for state compliance with international law is incomplete. See Koh, *supra*. Some of the complementary theories he identifies, however, seem to me to fit within the rationalistic instrumentalist strand, properly understood. For example, Koh identifies “constructivism” as a distinct strand, yet a key insight of at least one version of constructivism is that “states follow specific rules, even when inconvenient, because they have a longer-term interest in the maintenance of law-impregnated international community.” Koh, *supra*, at 2634 (quoting Andrew Hurrell, *International Society*

Under the classic model, international legal norms are made by states for states. The community of states, though larger than it was a mere generation ago, consists of very few “members” compared to the number of natural and legal persons that exist in a single state, let alone in the world. The community of states thus resembles a club, and compliance with the rules of international law might be thought of as the price of membership. Moreover, the substantive rules of international law for the most part bind only those states that have agreed to them. (This is particularly true of treaty-based norms. Since the proposal under consideration appears to contemplate the establishment of obligations for corporations through treaty, I shall focus here on this form of international law.) There is probably some pull towards compliance that derives from the mere fact that the state itself agreed to be bound by the rule. Furthermore, the rules of international law reflect each state’s judgment that it has more to gain from other states’ compliance with the rule than with it has to lose from having to comply with the rule itself. Compliance is thus often a reflection of self-interest. But what if circumstances arise that make it advantageous for the state to violate the rule? To determine its true self-interest, the state would then have to ask itself whether the short-term gain that would result from violation is outweighed by various types of potential losses it could suffer if it violated the rule. First, because under international law, the breach of one obligation by a state justifies injured states to breach legal obligations it would otherwise

and the Study of Regimes: A Reflective Approach, in REGIME THEORY AND INTERNATIONAL RELATIONS 49, 59 (Volker Rittberger ed., 1993). I have included this “longer-term interest” among the rationalist instrumentalist reasons why states comply with rules of international law. In any event, I also consider below the relevance of some alternative theories (the managerialist approach of the Professors Chayes and the legitimacy approach of Professor Franck).

owe to the violating states,¹²⁸ the state would have to weigh in the analysis its vulnerability to such countermeasures. Such countermeasures may well wipe out the benefit expected from the violation. Second, breach of a rule of international law will affect the state's reputation for compliance with its promises. A reputation for breaching international obligations could be expected to deter other states from entering into treaties with it, treaties that could be potentially beneficial to the breaching state. Third, as noted, violations of international legal norms lead over time to the weakening of the rule and ultimately its passing. The state must thus consider the extent to which it benefits from the rule and the extent to which its violation would contribute to its demise. Finally, the state must consider the general benefits that it derives from the existence of the international legal system as a whole. Because the very existence of this system depends to a significant extent on the willingness of states to comply with their obligations, a cavalier attitude towards international legal obligations threatens to bring down the entire edifice. To be sure, a state may face circumstances that would lead a rational leader to violate a particular rule of international law even after taking all of the foregoing into account. Violations might also result from miscalculations or irrationality on the part of a state's leaders. Nevertheless, the constellation of factors discussed above will frequently lead a state to forego the short-term gains it expects from violating the rule.

These reasons for expecting a significant degree of compliance by states with their international legal obligations in the absence of compulsion do not apply equally to private individuals. Private individuals are typically regulated by municipal legal

¹²⁸ See Draft Articles, *supra* note _____, at art. 22, 49.

systems, and coercion is a universal feature of such legal systems.¹²⁹ This is not because most people are prone to law-breaking and must therefore be deterred through coercion. Rather, it is because some people are prone to law-breaking and, in the absence of a mechanism for deterring free riding by this segment of the population, the rest will soon lose their disposition to comply. Additionally, even though in democratic states the rules are made by the peoples' representatives, it is not the case – as it is in international law with respect to treaties – that persons are only bound by the rules to which they agreed. People are bound by laws even if their representative voted against the law. We do find more voluntary compliance with respect to contracts than in other contexts,¹³⁰ but the proposal to place international legal obligations directly on corporations does not contemplate obligations of a contractual nature. (That is, indeed, one reason to expect less voluntary compliance with treaties by private parties than by states, as treaties are a type of contract between states.) National law of a non-contractual sort does not reflect the judgment of those bound by the rules that the rules are beneficial to them in the long term. Moreover, the long term is much shorter for an individual than for a state. Reputational considerations will be less of a constraint where the society consists of thousands or millions of persons than where it consists of 191.¹³¹ Concerns that a person's violation of the law will cause the entire legal system to fall apart will also be

¹²⁹ See, e.g., JOSEPH RAZ, *PRACTICAL REASON AND NORMS* at 158 (1975); H.L.A. HART, *THE CONCEPT OF LAW* 195 (1962).

¹³⁰ Contract law scholars have concluded that compliance with contract terms in the business community is relatively unaffected by the ultimate legal enforceability of the contract. Bernard Black and Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996) citing STEWART MACAULAY ET. AL, *CONTRACTS IN ACTION* 413 (1995).

¹³¹ This is the number of U.N. member states. See <http://www.un.org/Overview/unmember.html>.

less of a constraint on an individual within a nation than on a state in the international community.

In one respect, corporations are more like states than individuals: they are abstract entities with a potentially unlimited life span. Other attributes of corporations, however, suggest that they are likely to comply with legal obligations only to the extent it is in their economic interest to do so. Their need to survive in the marketplace makes it likely that they will comply with norms that prescribe conduct that is not independently in the corporation's economic interest only to the extent the penalties attached to a violation alter the economic calculus. If so, then international legal norms that operate on corporations but are not backed by sanctions are very likely to be violated. The result will be that human rights would not be advanced and international human rights law will be trivialized.

As discussed in Part I, under the shareholder-primacy model that prevails in the United States, it is regarded as the duty of a corporation's directors to advance the interests of the corporation's shareholders.¹³² This duty is sometimes said to be subject to the qualification that the managers and directors should advance the shareholders'

¹³² As Professors Blair and Stout have noted, "[d]espite their many differences and disagreements, both the law and economics scholars and their progressive opponents share a common assumption: that, as a descriptive matter, American corporate law follows the shareholder primacy model." Blair & Stout, *supra* note _____, at 287. Blair and Stout argue that both are mistaken, and that in fact the duty of corporate directors is to protect the interests of "the legal entity known as the 'corporation.'" *Id.* at 288. They defend a "team production" theory of corporate law under which the "corporation" should be understood for this purpose as encompassing not only shareholders, but also "executives, rank-and-file employees, and equity investors." *Id.* To this extent, the theory helps assuage concerns about corporate violations of the human rights of its employees, but does little to assuage concerns about the human rights of persons outside the corporation. They mention the possibility that "in particular cases the corporate team may also include other stakeholders such as creditors, or even the local community if the firm has strong geographic ties." *Id.* They do not elaborate on this last possibility.

interests only within the bounds of the law. But, in the view of some prominent scholars, the managers and directors have a duty to comply with the law only insofar as a breach of the law would adversely affect the corporation. Thus, it has been argued that “managers not only may but also should violate the rules when it is profitable to do so.”¹³³ On such a view, a human rights norm not backed by sanctions need not – indeed, should not – be complied with (unless the violation would produce other adverse effects on the corporation’s bottom line, such as a consumer boycott).

Not everyone agrees with this description of the duties of corporate managers and directors. Progressive critics of the shareholder primacy model argue that corporate law imposes a duty on managers and directors to comply with the law even when it is not profitable to do so.¹³⁴ But even these critics acknowledge that

[e]nsuring that corporations obey the law is difficult to achieve. Commentators have suggested that the greatest practical problem for corporate social responsibility is getting corporations to act in accordance with established public policies, like compliance with the law. . . . [S]ome scholars and judges have suggested that corporations may view laws not as a limit on corporate behavior but as a mere cost of doing business. Thus, in deciding whether or not to obey the law, corporate managers may perform a cost-benefit analysis and consider such factors as the likelihood of detection and amount of penalties compared with potential profits. Perhaps more importantly, even if the positive duty that corporations must obey the law was clear, society would have great difficulty in ensuring that corporations actually obey the law. In fact, it is much easier to make individuals law-abiding. Culpable corporate agents are harder to identify than individuals, and corporations are not subject to personal sanctions. By their very nature, corporations cannot have “personal values” that could

¹³³ Easterbrook & Fischel, *supra* note ____, at 1169 n.57.

¹³⁴ See Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1270; Patrick J. Ryan, *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.01(a) of the American Law Institute’s Principles of Corporate Governance*, 66 WASH. L. REV. 413, 501-02; Greenfield, *supra* note ____, at 1295-1296; Peter C. Konstant, *Team Production and the Progressive Corporate Law Agenda*, 35 U.C. DAVIS L. REV. 667, 670.

motivate them to obey the law. The problem is exacerbated by a non-nuanced duty of managers to maximize shareholder wealth which further helps to undermine compliance with the law. Thus, Dean Robert Clark has observed that, under our current legal system, managers often distort the sense of their fiduciary duties to defend non-compliance "by complaining that the devil of fiduciary duties to shareholders made them do it."¹³⁵

The progressive critics' proposals to remedy this problem show that they do not reject the need for sanctions to procure corporate compliance with policies designed to protect the general public. Rather, the critics seek to supplement the law's existing sanctions with changes in corporate law providing, as it were, additional legal sanction to back the laws in question. For example, Kent Greenfield has urged recognition that the ultra vires doctrine retains force to the extent that "modern state statutes and articles of incorporation nevertheless charter corporations only for 'lawful' purposes."¹³⁶ This means that shareholder derivative actions could be brought to enjoin a managers and directors from violating applicable legal norms. Thus, far from disavowing the need for coercion, this proposal would add to the arsenal of sanctions available to address corporate law-breaking.¹³⁷

For purposes of our analysis, whether the corporate directors are thought to have a duty to obey legal norms not backed by sanctions is less important as whether corporations will in fact do so. But the fact that the directors' legal duty under U.S.

¹³⁵ Konstant, *supra* note ___, at 687-88 (quoting Robert C. Clark, *Corporate Law*, 16.2, at 686 (1986)) (other citations omitted).

¹³⁶ Greenfield, *supra* note ___, at 1282.

¹³⁷ Greenfield argues that such suits would be available to enjoin corporate violations of international human rights norms applicable to corporations. It is not at all clear that the remedy, if recognized for violations of domestic law, would be extended to violations of international human rights norms. If it were, this would be an example of the existence of domestic law mechanisms to enforce international obligations of corporations. As such, it would be, in effect, an indirect regulation of corporations by international law. In this case, state law rather than federal would be providing the remedy.

corporate law to follow such laws is disputed does not bode well for voluntary strategies for promoting corporate respect for human rights. As noted above, the corporate laws of some countries seek to foster an ethic among corporate managers and directors that might make compliance with such norms more likely. Yet fully 40% of large multinational corporations are based in the United States. Moreover, some scholars perceive a global convergence towards the model of corporate governance that prevails in the United States.¹³⁸

In any event, as just discussed, the proposals for reform advocated by progressive corporate law scholars contemplate adding domestic-law sanctions – albeit sanctions internal to corporate law – to give efficacy to otherwise unenforceable international human rights standards.¹³⁹ In this respect, these are ultimately proposals for the indirect regulation of corporations through international human rights law. Although the substantive standard would be articulated internationally, and in theory the standard would be operative on corporations by virtue of international law, the actual enforcement of the standard would come through domestic law. The proposals thus recognize that enforcement mechanisms of some sort are required. In the absence of such mechanisms, the norms will be not be effective and international law will be trivialized.

It might be objected that my analysis so far has set up a false dichotomy – norms backed by a fully effective international enforcement mechanism (which would probably be unacceptable to states) or norms with no enforcement mechanism whatsoever (which are likely to be wholly ineffective, if not counterproductive). I have left out options falling between those two extremes. Perhaps states would be willing to articulate norms

¹³⁸ Hansmann & Kraakman, *supra* note ____, at 440.

¹³⁹ See Greenfield, *supra* note ____, at 1372-74.

directly applicable to private corporations backed by an international enforcement scheme not so strong as to be threatening to the states but not so weak as to be entirely inefficacious. The work of Professors Chayes suggests that the creation of institutions in which states and their representatives discuss the relevant norms makes compliance more likely. They call this the “jawboning” technique for achieving compliance.¹⁴⁰ My intuition is that, given the dictates of the marketplace, norms addressed to corporations but not backed by strong enforcement mechanisms are unlikely to have much effect, but proposals of this sort are surely worth further consideration. The managerialists’ insights suggest, however, that the articulation of norms should be accompanied by the creation of institutions having jurisdiction over the norms, if not the power to enforce them. Professor Franck’s work on the importance of legitimacy to compliance suggests, further, that the addressees of the norms should be included in the process of articulating the norms. Franck stresses the importance to legitimacy of perceived “right process” in the generation of norms.¹⁴¹ If the question is whether corporations will comply with norms addressed to them, Franck’s analysis suggests that one important determinant will be the degree to which corporations were involved in the process of generating the norms. The insights of Franck and the Chayeses, combined, suggest that the first step in the effort to articulate international norms addressed directly to corporations should be the creation of a forum that includes private corporations as well as states, and perhaps other stakeholders, in which the relevant interests can be ventilated. My analysis suggests that, at a minimum, the resulting scheme will have to steer clear of enforcement

¹⁴⁰ ABRAM CHAYES AND ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

¹⁴¹ THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

mechanisms so effective as to be threatening to states and of mechanisms so weak as to be threatening to international law. Whether options that avoid both pitfalls exist is an open question.

IV

SOME ALTERNATIVES

If the adoption of international human rights norms that operate directly on private corporations and are backed by an effective international enforcement mechanism is infeasible, and the adoption of such norms not backed by such a mechanism is counterproductive, how should the problem of corporate human rights violations be approached? This section takes a preliminary look at some possibilities.

As discussed in Part I, ordinarily one would depend on the host state to protect its citizens from abuse at the hands of foreign corporations. But developing countries cannot always be counted on to protect the interests of their citizens in such circumstances because the governments of such countries are often dysfunctional. This is one reason that human rights advocates often turn to the home country to regulate its corporations for the benefit of people in the host country. As discussed above, regulation by home countries of the foreign operations of their corporations will often be permissible under international law notions of prescriptive jurisdiction,¹⁴² but a home

¹⁴² Such regulation would often be permissible as an exercise of jurisdiction based on nationality. Jurisdictional questions may arise if the corporation's foreign operations are conducted through subsidiaries incorporated in the host state (or a third state). There is substantial authority, however, for the conclusion that international law permits the piercing of the corporate veil in this context. *See, e.g.,* Diane F. Orentlicher, *Public Law, Private Actors: The Impact of Human Rights*

state may be unlikely to burden its own citizens – particularly politically powerful constituencies like multinational corporations – for the benefit of aliens abroad. They are far more likely to burden their corporations operating abroad in order to protect another domestic constituency, such as workers who might otherwise lose their jobs to cheap foreign labor. Even when truly motivated by altruism, imposition and enforcement of standards for developing countries by developed countries smacks of imperialism and can harm rather than help the human rights of the people in the target countries.

This latter problem would be ameliorated if home states limited themselves to enforcing internationally-recognized human rights standards. Because the substantive standards in such circumstances would not be imposed by the home state, but would in principle have been agreed to by the host state as well,¹⁴³ this strategy for protecting human rights would not entail the extraterritorial application of primary norms articulated unilaterally by the home state. This strategy does assume the existence of indirectly-applicable human rights standard under international law – that is, human right standards designed to be made operative on corporations through domestic legislation and enforced in domestic courts. As explained in Part II, some existing human rights norms are recognized to have a horizontal effect of this sort, although not as many as is sometimes contended. The recognition of such norms does not represent a conceptual departure from the classic model of international law. The adoption of additional human rights

On Business Investors In China, 14 NW. J. INT'L L. & BUS. 66, 104 (1993) (justifying US regulation of overseas conduct of US companies on the nationality principle of jurisdiction).

¹⁴³ I am assuming that the home state would enforce the norm only with respect to the conduct of its corporations in host states that have signed on to the relevant human rights instruments. If the norm is enforced with respect to operations in host states that have not accepted the norm, the problems noted above would persist.

additional norms having such horizontal effect may well be a significant advance for human rights protection.

The enforcement of human rights norms against U.S. corporations under the Alien Tort Statute is an example of this method of protecting the human rights of people in host countries.¹⁴⁴ Enforcement of international human rights norms through the ultra vires doctrine, as proposed by Professor Greenfield, would be another.¹⁴⁵ On the other hand, the political power of large multinationals, and the political powerlessness in developed countries of the beneficiaries of these norms, offer grounds for pessimism that such mechanisms will be adopted or retained.

Nicola Jägers has argued, contrary to the conventional wisdom, that home states have not just the power, but also the obligation to ensure that their corporations operating abroad comply with international human rights norms that are (indirectly) applicable to them.¹⁴⁶ Most commentators assume (as I have done above) that states have the obligation to ensure that indirectly-applicable human rights norms are not infringed *on their territory*. Jägers argues that states have a “due diligence” obligation that requires them to ensure that corporations within their control do not cause human rights violations abroad. In her view, this conclusion follows from the principle articulated in the Corfu Channel case that every state has “an obligation not to allow knowingly its territory to be

¹⁴⁴ The extent to which an international norm must be “directly applicable” under international law in order to be enforceable under the Alien Tort Statute is unsettled. Indeed, a great deal about the scope of the Alien Tort Statute remains to be ironed out after the Supreme Court’s decision in *Sosa v. Alvarez Machain*, 124 S. Ct. 2739 (2004).

¹⁴⁵ See Greenfield, *supra* note ___, at 1377-78.

¹⁴⁶ JAGERS, *supra* note ___, at 166-172.

used for acts contrary to the rights of other states.”¹⁴⁷ She also relies on the decision of the European Court of Human Rights in the *Soering* case to the effect that the U.K. would be violating its obligation not to engage in torture or inhuman or degrading treatment if it were to extradite a German citizen to Virginia, where he would be subject to the death penalty.¹⁴⁸ These authorities and others establish that a state’s international obligations can sometimes be violated through conduct of its nationals or others abroad. The conclusion that states have not just the power but the obligation to enforce international human rights norms against their nationals operating abroad, however, is in tension with one of the paradoxical aspects of international law noted above. As already explained, the classic model serves to empower states by leaving to them the decision whether and how to comply with international obligations. Recognition that home states have the duty to enforce indirectly applicable international law norms with respect to their nationals operating abroad goes far to deprive host states of this power.

Moreover, it is not clear that such a duty would be desirable, at least with respect to economic and social rights. It would limit the host state’s options in attracting foreign investment in a way that could ultimately make worse the situation of those sought to be helped. As discussed above, economic and social rights by their nature leave a great deal of discretion to the implementing state. A strong argument can be made that developed countries are or should be required to promote these rights internationally by providing aid to poor developing countries to build their capacity to respect and promote the rights

¹⁴⁷ *Id.* at 167 (quoting *Corfu Channel Case*, (United Kingdom v. Albania), I.C.J. Rep., 9 April 1949, p. 4, para. 22).

¹⁴⁸ *Id.* (citing *Soering v. United Kingdom*, Eur. Ct. of H.R., Judgement of 7 July 1989, Series A, vol. 161).

of their citizens.¹⁴⁹ But for developed countries to “promote” these rights by imposing on their corporations the obligation to comply with certain norms, or even to provide direct payments to the host state, could be counterproductive to the extent the corporations retain the option to exit the host state. In such circumstances, the enforcement of such rights by developed countries would appear to be a usurpation of the developing countries’ discretion under the Covenant.

The alternative to enforcement of such norms by the home country would be to rely on host states to do so. As noted, however, this strategy faces significant obstacles. It is these obstacles, indeed, that has lead human rights advocates to look to home states and to international law for protection. It may be, however, that the most promising strategy for addressing the problem of corporate human rights abuse would be to tackle the root cause of the problem by promoting democracy and combatting corruption in the host states. If the governments of the developing countries could be relied on to represent adequately the interests of their citizens, a major step out of this conundrum will have been taken.

International law can play a role in this process. For example, it has been noted that an international norm of democratic governance is emerging.¹⁵⁰ Additionally, a number of instruments aimed at combating government corruption have been concluded

¹⁴⁹ See U.N. Covenant on Economic and Social Rights, art. 2(1) (contemplating that economic and social rights will be advanced “through international assistance and cooperation, especially economic and technical”).

¹⁵⁰ See Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 46 (1992).

in the past decade.¹⁵¹ Although elimination of corruption and the other barriers to the effective governmental representation of the people in developing countries will not be easy – such problems continue to plague even developed countries – it may be that increased efforts of human rights advocates on this front will lead to a superior outcome to the problem of corporate abuse of human rights than an attempt to address the problem directly through the elaboration of international law norms for private corporations.

Even if developing-country governments become dependable representatives of the interests of their citizens, the economic circumstances of such countries may severely limit their options in dealing with powerful multinationals. Economic realities will make it difficult for the governments of poor developing countries to advance the interests of their citizens even if they are sincerely seeking to do so. The fear of some scholars is that poor countries competing with other poor countries for foreign investment will be induced to lower their standards in order to attract such investment. Although some scholars are skeptical about the danger of a race to the bottom,¹⁵² the possibility cannot be disregarded.

One way for developing countries to address this problem would be to agree with similarly situated countries not to compete on human rights. They can do this by agreeing to adhere to certain basic human rights standards in their dealing with foreign multinationals. Such an agreement among developing countries will enable them to

¹⁵¹ See, e.g., Council of Europe Criminal Law Convention on Corruption, Jan. 27, 1999, ETS No. 173, 38 ILM 505 (1999); Inter-American Convention Against Corruption, Mar. 29, 1996, OAS Doc. B-58, 35 ILM 724 (1996); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, OECD Doc. DAF/IME/BR(97)20, 37 ILM 1 (1998).

¹⁵² See, e.g., BHAGWATI, *supra* note ____, at 127-32; Debora L. Spar, *The Spotlight and the Bottom Line*, FOREIGN AFFAIRS, Vol. 77 No. 2, p. 9-10; Spar & David, *supra* note ____, at 579-581.

retain their comparative advantage while forestalling a race to the bottom on human rights. Developing countries would in this way be forming a united front against multinationals when it comes to human rights while retaining the ability to compete along other dimensions. The solution to the problem may thus be not the adoption of globally applicable human rights norms for private corporations, but the negotiation of such norms by developing countries for developing countries.

This may be easier said than done, however, as the developing countries with the least to offer foreign investors along other dimensions may find themselves with no choice but to compete with respect to human rights. This may show that the only real solution to this problem in the end lies in efforts to reduce global poverty. Efforts to reduce global poverty are currently a high priority of numerous international institutions. It may be that this should be a greater focus of human rights activists as well. I do not mean to suggest that efforts to address the problem of corporate human rights violations short of eliminating global poverty are not worth pursuing. Such efforts, however, should be both realistic and likely to improve the situation of the intended beneficiaries. For the reasons set forth above, the approach taken by the U.N. Norms is either unrealistic (if intended to be accompanied eventually by a coercive enforcement system) or likely to be inefficacious or even counterproductive.

APPENDIX

**UNITED
NATIONS**

E



**Economic and Social
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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Norms on the responsibilities of transnational corporations and
other business enterprises with regard to human rights*

Preamble

Bearing in mind the principles and obligations under the Charter of the United Nations, in particular the preamble and Articles 1, 2, 55 and 56, inter alia to promote universal respect for, and observance of, human rights and fundamental freedoms,

Recalling that the Universal Declaration of Human Rights proclaims a common standard of achievement for all peoples and all nations, to the end that Governments, other organs of society and individuals shall strive, by teaching and education to promote respect for human rights and freedoms, and, by progressive measures, to secure universal and effective recognition and observance, including of equal rights of women and men and the promotion of social progress and better standards of life in larger freedom,

Recognizing that even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational

corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights,

Realizing that transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the four Geneva Conventions of 12 August 1949 and two Additional Protocols thereto for the protection of victims of war; the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the Rome Statute of the International Criminal Court; the United Nations Convention against Transnational Organized Crime; the Convention on Biological Diversity; the International Convention on Civil Liability for Oil Pollution Damage; the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; the Declaration on the Right to Development; the Rio Declaration on the Environment and Development; the Plan of Implementation of the World Summit on Sustainable Development; the United Nations Millennium Declaration; the Universal Declaration on the Human Genome and Human Rights; the International Code of Marketing of Breast-milk Substitutes adopted by the World Health Assembly; the Ethical Criteria for Medical Drug Promotion and the "Health for All in the Twenty-First Century" policy of the World Health Organization; the Convention against Discrimination in Education of the United Nations Educational, Scientific, and Cultural Organization; conventions and recommendations of the International Labour Organization; the Convention and Protocol relating to the Status of Refugees; the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Charter of Fundamental Rights of the European Union; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development; and other instruments,

Taking into account the standards set forth in the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the Declaration on Fundamental Principles and Rights at Work of the International Labour Organization,

Aware of the Guidelines for Multinational Enterprises and the Committee on International Investment and Multinational Enterprises of the Organization for Economic

Cooperation and Development,

Aware also of the United Nations Global Compact initiative which challenges business leaders to "embrace and enact" nine basic principles with respect to human rights, including labour rights and the environment,

Conscious of the fact that the Governing Body Subcommittee on Multinational Enterprises and Social Policy, the Governing Body, the Committee of Experts on the Application of Standards, as well as the Committee on Freedom of Association of the International Labour Organization have named business enterprises implicated in States' failure to comply with Conventions No. 87 concerning the Freedom of Association and Protection of the Right to Organize and No. 98 concerning the Application of the Principles of the Right to Organize and Bargain Collectively, and seeking to supplement and assist their efforts to encourage transnational corporations and other business enterprises to protect human rights,

Conscious also of the Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, and finding it a useful interpretation and elaboration of the standards contained in the Norms,

Taking note of global trends which have increased the influence of transnational corporations and other business enterprises on the economies of most countries and in international economic relations, and of the growing number of other business enterprises which operate across national boundaries in a variety of arrangements resulting in economic activities beyond the actual capacities of any one national system,

Noting that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities,

Noting also that new international human rights issues and concerns are continually emerging and that transnational corporations and other business enterprises often are involved in these issues and concerns, such that further standard-setting and implementation are required at this time and in the future,

Acknowledging the universality, indivisibility, interdependence and interrelatedness of human rights, including the right to development, which entitles every human person and all peoples to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized,

Reaffirming that transnational corporations and other business enterprises, their officers - including managers, members of corporate boards or directors and other executives - and

persons working for them have, inter alia, human rights obligations and responsibilities and that these human rights norms will contribute to the making and development of international law as to those responsibilities and obligations,

Solemnly proclaims these Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and urges that every effort be made so that they become generally known and respected.

A. General obligations

1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

B. Right to equal opportunity and non-discriminatory treatment

2. Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, for the purpose of eliminating discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age - except for children, who may be given greater protection - or other status of the individual unrelated to the inherent requirements to perform the job, or of complying with special measures designed to overcome past discrimination against certain groups.

C. Right to security of persons

3. Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

4. Security arrangements for transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.

D. Rights of workers

5. Transnational corporations and other business enterprises shall not use forced or compulsory labour as forbidden by the relevant international instruments and national

legislation as well as international human rights and humanitarian law.

6. Transnational corporations and other business enterprises shall respect the rights of children to be protected from economic exploitation as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

7. Transnational corporations and other business enterprises shall provide a safe and healthy working environment as set forth in relevant international instruments and national legislation as well as international human rights and humanitarian law.

8. Transnational corporations and other business enterprises shall provide workers with remuneration that ensures an adequate standard of living for them and their families. Such remuneration shall take due account of their needs for adequate living conditions with a view towards progressive improvement.

9. Transnational corporations and other business enterprises shall ensure freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without distinction, previous authorization, or interference, for the protection of their employment interests and for other collective bargaining purposes as provided in national legislation and the relevant conventions of the International Labour Organization.

E. Respect for national sovereignty and human rights

10. Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate.

11. Transnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage, nor shall they be solicited or expected to give a bribe or other improper advantage to any Government, public official, candidate for elective post, any member of the armed forces or security forces, or any other individual or organization. Transnational corporations and other business enterprises shall refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights. They shall further seek to ensure that the goods and services they provide will not be used to abuse human rights.

12. Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy,

education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.

F. Obligations with regard to consumer protection

13. Transnational corporations and other business enterprises shall act in accordance with fair business, marketing and advertising practices and shall take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle. Nor shall they produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers.

G. Obligations with regard to environmental protection

14. Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.

H. General provisions of implementation

15. As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

16. Transnational corporations and other business enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent and independent and take into account input from stakeholders (including non-governmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other business enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms.

17. States should establish and reinforce the necessary legal and administrative

framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.

18. Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.

19. Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law, nor shall they be construed as diminishing, restricting, or adversely affecting more protective human rights norms, nor shall they be construed as diminishing, restricting, or adversely affecting other obligations or responsibilities of transnational corporations and other business enterprises in fields other than human rights.

I. Definitions

20. The term "transnational corporation" refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.

21. The phrase "other business enterprise" includes any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.

22. The term "stakeholder" includes stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises. The term "stakeholder" shall be interpreted functionally in the light of the objectives of these Norms and include indirect stakeholders when their interests are or will be substantially affected by the activities of the transnational corporation or business enterprise. In addition to parties directly affected by the activities of business enterprises, stakeholders can include parties which are indirectly affected by the activities of transnational corporations or other business enterprises such as consumer groups, customers, Governments, neighbouring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations, and others.

23. The phrases "human rights" and "international human rights" include civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system.

* Adopted at its 22nd meeting, on 13 August 2003.