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Cristina Baez

Michele Dearing

Margaret Delatour

Christine Dixon

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Multinational Enterprises and Human Rights

**Cristina Baez, Michele Dearing, Margaret Delatour, and
Christine Dixon***

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* Cristina Baez is currently a Juris Doctor candidate at the University of Miami School of Law. She received her B.A. from Florida International University. Ms. Baez looks forward to practicing public interest law in Miami, Florida.

* Michelle Dearing is currently with the law firm of Martin and Sibert, L.C. in Martinsberg West Virginia. She received her B.A. from West Virginia University in 1996 and her J.D. from the University of Miami School of Law in 1999.

* Margaret Delatour received her J.D. from the University of Miami School of Law in May 1999.

* Christine Dixon is currently a staff attorney with the Eleventh Judicial Circuit of Florida, Miami, Florida. She received her B.S. from Florida State University in 1994 and her J.D. from the University of Miami School of Law in 1999.

I. Introduction

While the Multilateral Agreement on Investments was being drafted in 1996, Renato Ruggiero, Director-General of the World Trade Organization, remarked, "We are writing the constitution of a single global economy."¹ The confidence underlying his remark may gauge ambition more accurately than accomplishment. Still, with the increasing worldwide emphasis on promoting market economies in every country and the integration of domestic economies into a complex web of international trade in goods and services, one can already begin to grasp the contours of an emerging international law governing the global economy.

No constitution written today should lack provisions respecting human rights. One might ask, what kind of protection should be written into the emerging global "constitution"? Is it enough that states and intergovernmental organizations be restrained by human rights law? The rise of multinational enterprises (MNEs) as powerful actors on the world stage strongly suggests that a bill of rights that offers no protection against the potential abuse of power by such actors will be wholly incomplete.

MNEs directly and indirectly influence more lives in developed countries and in less developed countries than any other global institutions, except for a few intergovernmental organizations such as the United Nations, the World Bank, and the International Monetary Fund. A vital presence in many national economies, MNEs have accumulated significant economic and political power. This power puts MNEs in a position to influence government policies in many areas, and makes them key players in basic human rights issues.

The increasing power of MNEs remains important to the field of human rights in a second way. Many MNEs' revenues today surpass the gross domestic products of several independent nation-states.² MNEs' wealth, resources, and information technology

¹ See Stephen J. Korbin, *The MAI and the Clash of Globalizations*, Foreign Policy, No. 112 (Oct. 12, 1998); see also Scott Nova & Michelle Sforza-Roderick, M.I.A. Culpa; see also *Multilateral Investment Agreement*, The Nation, at 5. (Jan. 2, 1997).

make them key players not only within the nation-states in which they operate, but also in the international arena. Some MNEs have more to say about policies that govern international trade and finance than do many of the less developed countries. Yet, driven by the search for profit, MNEs are often unaware of, or simply disregard, the adverse impact that their activities may and often do have on the spectrum of human rights.³

The substantial power of MNEs both domestically and internationally thus raises questions of whether and how human rights law ought to apply to them. While international law has traditionally been state-centered, support for the concept that international businesses should remain exempt from the scope of human rights law has steadily eroded. In the years following World War II, international law underwent a basic transformation that led to a general recognition that individuals hold certain *rights*. Today, international law is undergoing a second transformation in that it is recognizing that individuals hold certain *responsibilities*, as evidenced by the rise of the international criminal tribunals. It may be time for international law to undergo yet another basic transformation, to wit, recognizing that MNEs should be subject to international law and governed by many of the same duties to which nation-states are bound such as the respect and promotion of human rights.

However, if international law is to encompass MNEs within its scope, then this transformation cannot be as simple as equating MNEs to states, and imposing on them the same duties. A more finely calibrated adjustment is called for in two ways. First, while the power of MNEs rivals or exceeds that of some states in many ways, MNEs are not the exact equivalent of states. It would make no sense to arbitrarily impose the exact standard of state duties on MNEs. Indeed, whereas the whole point of human rights law is to

² Nations v. Corporations, <<http://www.ratical.com/corporations/NvC.html> (Source: The Conference Board, December 1991).

³ See *The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations, Report by the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. ESCOR, 50th Sess., Agenda Item 4(c), at U.N. Doc. E/CN.4/Sub.2/1998/6 (1998) [hereinafter Report by Sub-commission].

impose *duties* on states and *rights* on individuals while subjecting other entities to state regulation, it is debatable whether MNEs ought to have some rights under international human rights law. In particular, MNEs may have strong arguments about how to protect their property rights under a newly-adopted human rights law regime.

A second need for adjustment lies in the fact that the international enforcement mechanisms for human rights are mainly state-centered, and seem likely to remain so for the foreseeable future. For example, the UN Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights all have jurisdiction only over petitions against states. It would take a major amendment to the instruments on which their powers rest to give them jurisdiction over MNEs. This kind of jurisdictional limitation has substantive implications. It may make sense to formulate some regulations of MNEs for human rights purposes in terms of state duties. States that fail to regulate MNEs in the interest of human rights protection of individuals could then be adjudicated before the appropriate international bodies.

Any attempt to reformulate international human rights law to accommodate the growing concern over MNEs will necessarily be complex. This Article sets out and analyzes some of the key questions that will have to be explored in any such attempt. While the analysis here is by no means exhaustive, it aims to provide a basic understanding of what is at stake for human rights law as it gains consciousness about the role of MNEs in the global economy.

Part II of this Article discusses in some detail what "multinational enterprises" are, as well as what role they play in today's economy. Part II argues and concludes that human rights law should be made an integral part of the emerging law of the global economy. Part III addresses the place of MNEs in contemporary international law, and states that international law has long been concerned to protect MNEs through various countries' laws of foreign investment. This section notes that in recent decades, various countries' laws governing foreign investment have taken on an increasingly regulatory hue, and concludes that MNEs should generally be treated as subjects of international law, with rights and duties similar to those observed

by independent nation-states. Part IV surveys, through a series of case studies, those major aspects of the emerging human rights norms that are applicable to MNEs' activities. Finally, Part V proposes ways in which the emerging norms of human rights law applicable to MNEs may be implemented and enforced, and evaluates the efficacy of current regimes for protecting human rights.

II. The Role of Multinational Enterprises in the Global Economy

A. What Are "Multinationals"?

It might seem intuitively obvious to some observers what is and is not an MNE. In this intuitive view, a small family owned business is not multinational enterprise; a major corporation, with tens of thousands of employees and operations in a dozen countries, *is* a multinational enterprise. Yet even at this intuitive level, the question of defining an MNE is not simple. The family business might be owned by Cuban nationals in Miami, selling most of its goods and services abroad; the major corporation with operations in a dozen countries might be run exclusively by U.S. nationals from its headquarters in New York, with ninety percent of its employees located in the United States.

A more careful look at what constitutes a multinational enterprise is therefore in order. Even a cursory examination makes clear that multi-nationality has many dimensions, and may be examined from various perspectives such as economic, political, and legal. Consequently, many different approaches to defining MNEs remain possible. It may be wise to look at a number of different factors.

One factor is ownership. If this were the only factor, a corporation would be a multinational if it were owned by entities or persons of more than one nationality. For example, Shell and Unilever are controlled by British and Dutch nationals. By this test, only a small number of multinational enterprises in the colloquial sense could be called "multinational," for the ownership of the most MNEs is national.⁴

⁴ Multinational Corporations, "Definition" (Visited Nov. 15, 1998) <<http://www.econ.iastate.edu/classes/econ355/choi/mnc.html>>.

Another factor is the location of production or operations. If this were the only factor, a corporation would be a multinational if it directly owned plants or other sites of production or rendered services in more than one country. MNEs, however, often engage in foreign production through affiliates located in different countries,⁵ rather than by direct ownership of the foreign operations. Through these affiliates, which may be wholly or partially owned by the parent, an MNE can implement business strategies in production, marketing, research and development, finance, and staffing that transcend political boundaries. Taking into account the phenomenon of control of foreign production through affiliates, one might define a multinational enterprise as "two or more national companies operating in association in two or more countries, with one controlling the other in whole or in part".⁶

Where an MNE locates its headquarters in relation its operations is a third factor. If this were the only factor, a corporation would be a multinational if it had its headquarters in one country and its operations elsewhere. An example is General Motors which has its headquarters located in Michigan. Aside from its plants in the United States, General Motors has operations in Europe, Canada, Latin America, and Asia. Another example under this test is Disney. Though headquartered in the United States, it carries out its operations throughout the world, including China, Indonesia, Thailand, Vietnam, Haiti, El Salvador, Guatemala, and France.

A fourth factor is size. Size, while not sufficient to make a corporation multinational, might be a necessary factor. A

⁵ An example of an MNE with affiliates is the Ente Nazionale Idrocarburi (ENI), an Italian state-owned oil, petrochemical, and engineering company which has over 325 subsidiaries in 72 countries, including Agip, Agipcoal, and EniChem. ENI has entered into partnerships with DuPont, ICI, and Hoechst. Source: Hoover's Handbook of World Business 1993, p. 217. ENI's "Global 500" rank is number 61, with approximately \$37 billion in revenues. Source: Global 500 (visited Nov. 12, 1998) <<http://www.pathfinder.com/fortune/global500/ecomlist.html>> .

⁶ *Corporate Watch, USA: News on the Nike Campaign* (Visited April 11, 1999)<<http://www.corpwatch.org/news/labor/alerts/labor/news.html>>.

corporation's size can be measured in many ways such as by annual revenues, number of employees, number of offices worldwide, assets, land owned, level of economic interests in other companies, and number of subsidiaries owned. This test accords best with the intuitive image of MNEs as large enterprises with significant power.

A fifth factor is the percentage of sales made in foreign countries. If this were the only factor, one rule of thumb might be that a company becomes multinational when its foreign sales account for twenty-five percent or more of its total sales.⁷ For example, Exxon Corporation (a U.S. multinational enterprise now known as ExxonMobil) was ranked number seven in the Fortune Global 500 List in 1998.⁸ In 1995, Exxon Corporation ranked number fifteen in a list that compared the twenty-five largest non-financial corporations worldwide with the largest nation-states based on annual revenues.⁹

⁷ Multinational Corporations, *supra* note 4.

⁸ As of 1998, according to Fortune Global Top 500 List, Exxon Corporation was ranked number seven in terms of annual revenues. Exxon's revenues for 1998 were \$122 billion. According to Fortune Global 500 Top Performers List, Exxon Corporation is ranked number one. In 1997, Exxon's profits exceeded \$8.4 billion. Exxon's world-wide headquarters is located in Texas. Current oil exploration, production, and reserves include: Australia: 7.7 million acres onshore, 2.7 million acres offshore. Canada: Cold Lake and Athabasca Oil Sands: 21-year leases (1989-2010). Exxon's Canadian operations are conducted by Imperial Oil, which is 69.6 percent owned by Exxon. Colombia: 400,000 acres. Egypt: 100,000 in two areas. France: 1.9 million acres held. Germany: 6.6 million acres; Achim-Salzwedel gas pipeline linking western and eastern Germany. Indonesia: 1.5 million acres onshore, 2 million offshore. Malaysia: 4.8 million acres offshore. Netherlands: 2.6 million acres licenses, including the Groningen, one of the world's largest natural gas fields. Norway: 700,000 acres. Thailand: 600,000 acres in the Khorat concession. United Kingdom: 1.7 million acres licensed. Yemen: 900,000 acres. Exxon's proven petroleum reserves at the end of 1992 were: 6,478 billion barrels of crude oil and natural gas liquids; 6,805 billion barrels of oil sands; and 41,413 trillion cubic feet of natural gas. Exxon has petrochemical operations in Belgium, Malaysia, Russia, Korea, Italy, France, Germany, Hungary, Poland, and the Netherlands. There are lubrication oil facilities in Japan, Taiwan, Singapore, Tunisia, the U.S., and Mexico. Source: *Fortune Global Top 500 List* (Visited Sept. 21, 1998) <<http://www.violet.berkeley.edu/orourke/data/E.html>>.

⁹ See Michele Roth, *States and TNCs Compared*" (Visited Sept. 21, 1998) <<http://www.globalpolicy.org/soecon/tncs/tncstat.html>>. In 1995, Exxon's

Evidently, there are many factors to take into account in defining multinationals. These various factors reflect the diverse approaches taken by two international organizations that have long been concerned with the issue of multinational enterprises, to wit, the Organization for Economic Cooperation and Development (OECD) and the United Nations (UN). Under the OECD definition, multinational enterprises "usually [are] comprise[d] of companies or other entities whose ownership is private, state or mixed, established in different countries, and so linked that one or more of them may be able to exercise significant influence over the activities of others, and, in particular, to share knowledge and resources with the others."¹⁰

The United Nations distinguishes between "multinational corporations" (MNCs) and "transnational corporations" (TNCs). MNCs are "enterprises which own or control production or service facilities outside the country in which they are based."¹¹ MNCs are "not always incorporated or private," and may even operate as co-operatives or state-owned entities.¹² For example, Japanese Electric Power Development Co., a multi-national enterprise, is

revenues were \$110 billion. Only 13 nation-states have large enough national budgets to rank them in the league of these top 25 corporations. Financial institutions were not included. The only nation-states which had national budgets larger than Exxon were the United States, Germany, Japan, the United Kingdom, Italy, and France. Some other nation-states which did *not* make the list were: Kenya \$2.4 billion, Senegal \$9 million, Uganda \$6 million, and Nicaragua \$4 million.

¹⁰ OECD Guidelines For Multinational Enterprises, 21 June 1976, introduction, para. 8. See OECD, The OECD Declaration and Decisions on International and Multinational Enterprise 1991 Review (Paris, 1992), at p. 48. This is the official OECD definition for a multinational enterprise. The OECD was established in 1961 to promote the economic growth, financial stability, and social welfare of member countries, as well as to expand trade and stimulate such efforts within developing nations. Nearly all industrialized "free market" countries are members. The OECD collects and distributes economic and environmental information.

¹¹ See report of the Group of Eminent Persons, UN Doc.E/5500/Add 1 (Part I) 24 May 1974, p. 25.

¹² Corporate Watch, *supra* note 6, at 1, 29.

sixty-percent government owned.¹³ TNCs, rather than MNCs, arguably reflect more salient and essential features of business enterprises which engage in operations across national borders. However, the key common characteristic of both MNCs and TNCs is the ability of one firm to control the operations and movement of another firm located abroad.¹⁴

The range of relevant factors and the fact that no one standard definition has emerged from the study of international organizations requires a flexible approach incorporating the most important features of the various aforementioned tests. As used in this Article, the term “MNE” denotes a parent company that:

1. directly engages in foreign production in one or more countries besides the country in which the parent is located, or engages in such production through foreign affiliates over which it exercises significant control, and
2. implements business strategies in production, marketing, finance and staffing that transcend national boundaries.¹⁵

B. The Emerging Global Order

1. MNEs and the Global Economy: Implications for Human Rights

MNEs in the twentieth century are an outgrowth of the monopoly phase of capitalism that was marked by the concentration of capital on a world scale.¹⁶ There has been an

¹³ Mining Magazine, Aug. 1991, p. 105.

¹⁴ Peter Muchlinski, Multinational Enterprises and the Law 13 (Blackwell Publishers 1995).

¹⁵ See Multinational Corporations, *supra* note 4. See also *Id.* at 13-14. Of course, for certain purposes a much more precise definition may be in order. That would be the case, for example, if norms specifically applicable to MNEs and enforceable in international or domestic fora were created.

¹⁶ Muchlinski, *supra* note 14 at 13.

historical shift in the form of foreign investment from portfolio to direct investment carried out by large, centralized multinational enterprises. This change became manifested after World War II as the larger capitalist entities absorbed the weaker ones thus creating the emergence of large, vertically integrated firms.¹⁷ With the rise of stock markets in many developing countries, the 1990s have seen some shift back in the direction of portfolio investment. Nonetheless, the legacy of MNEs' direct investment abroad serves as the basis for today's globalized economy.

Globalization results from an economic push and pull. The "push" emerges from companies' effort to reduce production costs. As the world moves towards one economy, MNEs must continue to find ways to reduce costs in order to remain competitive. MNEs seek foreign production sites in developing nations because of comparatively lower labor costs and the lack of mandated environmental standards, which are less demanding than international standards and those imposed by the governments of industrialized countries. MNEs must keep costs low and maximize profits for shareholders.

In order to attract cost-conscious MNEs, host governments in developing countries often implement policies that ensure that labor and other costs will remain low enough for MNE businesses. Increasingly, developing nations see this strategy as a key to stimulating their sluggish economies and to decreasing unemployment. Technological advances in the areas of transportation, telecommunications facilitate this strategy, as do host countries' implementation of new laws regarding free-trade zones. For example, Nike has globalized its operations particularly in the areas of production and sales.¹⁸ Nike contracts with

¹⁷ *Id.*

¹⁸ Nike, Inc., a publicly-held corporation, (NYSE:NKE) is headquartered in Beaverton, Oregon. Nike is the world's leading designer and marketer of authentic athletic footwear, apparel, equipment, and accessories for a wide variety of sports and fitness activities. Wholly-owned Nike subsidiaries include Bauer Nike Hockey Inc., the world's leading manufacturer of hockey equipment; Cole Haan, which markets a line of high-quality men's and women's dress and casual shoes; and Nike Team Sports (formerly Sports Specialties), which markets licensed team products. Total revenues for the past twelve months ending as of February 28, 1999, were \$8.9 billion (USD). Nike has

factories in source countries which manufacture its products and then sells those products to markets in Europe, North and South America, and Asia.¹⁹

The “pull” is consumer demand. Consumers around the world make increasing demands for goods and services produced by MNEs. This new and increasing consumer demand can be attributed to several factors. One factor is a demand for better quality products than those which are locally produced. Another factor is highly advanced communication technologies which allow for the dissemination of information and advertising (i.e., cable and satellite television broadcast world-wide featuring MNE products and services). This global communications apparatus tells consumers everywhere about the availability of consumer products previously confined to the developed countries.

In this increasingly global economy, MNEs are active in the most dynamic branches, most notably telecommunications, computer technology and services, pharmaceuticals and personal products, chemicals, transport, banking, insurance, diversified financials, aerospace manufacturing, petroleum refining, crude-oil production, motor vehicles and parts, food and beverages, tobacco, utilities, gas and electric, forest and paper products, railroads, engineering and construction, energy, trading, securities, building materials, publishing and printing, retailing, wholesaling, and health care. MNEs have a presence in the vital sectors, and thus are in a position to block any moves towards respect for and protection of human rights.²⁰

The study prepared by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities

production facilities in many countries, including Thailand, China, Indonesia, Vietnam, Taiwan, Pakistan, Indonesia, Haiti, Italy, and South Korea. Over 70 percent of its products are manufactured and assembled in Indonesia and China.

¹⁹ Based on Nike’s Third-Quarter Fiscal 1999 Earnings Worldwide Report, Nike generates income predominately from the following four regional markets: USA (\$1.1 billion in revenues), Europe (\$599 million in revenues), Asia Pacific (\$222.2 million in revenues), and Latin America (\$104.7 million in revenues) <<http://www.nikebiz/earningsrelease.html>>.

²⁰ Based on a report prepared by Senegalese jurist, El Hadji Guisse, one of the 26 independent experts sitting on the Sub-Commission, the main body of experts of the UN Commission on Human Rights. See *Report by Sub-commission*, *supra* note 3, at 3.

recognizes the complexity of the problems surrounding the activities of transnational corporations and the observance of economic and social rights. The study describes the important role played by transnational corporations in international economic life, pointing out that of the 100 biggest concentrations of wealth in the world, fifty-one percent are owned by transnational corporations and forty-nine percent are owned by nation states.²¹

For example, this study finds that "MNEs own income-generating assets in more than one location and use these in combination with local resources to produce goods and services."²² The income generating assets help the MNEs attain enormous competitive advantages over domestic firms:

MNEs have the capacity to locate productive facilities across national borders, to exploit local factor inputs, to trade across frontiers in factor inputs between affiliates, to exploit their know-how in foreign markets without losing control over it, and to organize their managerial structure globally according to the most suitable mix of divisional lines of authority... These factors permit MNEs to affect the international allocation of productive resources, and thereby to create distinct problems in the development of economic policy in the states where they operate.²³

Foreign direct investment (FDI) by MNEs, along with the transnational system of production and international economic transactions, are now dominant elements of the world economy, with MNEs increasingly influencing the size and nature of cross-border transactions.²⁴ The world's TNCs - 40,000 parent firms and 250,000 foreign affiliates - account for two-thirds of the world trade in goods and services, one-third in intra-firm transactions and

²¹ *Id.*

²² *See Muchlinski, supra* note 14, at 14.

²³ *See id.* at 15.

²⁴ *Id.* at 14.

one-third in inter-firm transactions.²⁵ This means that only one-third of world trade in goods and services is designated to free-trade. Consequently, foreign direct investment supersedes trade as the most important mechanism for international economic regulation.

2. The Emerging Law of the Global Economy

As noted earlier, the growing web of international agreements governing trade in goods and services, with the opportunities for foreign direct investment, amounts to an emerging law of the global economy. It is impossible to gain a full understanding of the status of human rights in this emerging law without, at least, some sense of the basic components of international trade and finance law today. Before embarking on a detailed discussion of MNEs and human rights, it will be worthwhile to review those basic components with an emphasis on their significance for human rights.

a. WTO/GATT

The World Trade Organization (WTO) is an international organization that oversees the rules of international trade. Established in 1995, its mandate is to:

1. help trade flow smoothly, in a system based on rules;
2. settle trade disputes between governments; and
3. organize trade negotiations.²⁶

Councils and committees, embodying the organization's entire membership, are the WTO's principal decision-making bodies.

²⁵ See U.N. Conf. On Trade & Dev. Div. On Transnat'l Corp. & Inv., U.N. World Investment Report 1995: Transnational Corporations and Competitiveness at xix-xx, U.N. Sales No. E.95.II.A.9 (1995). The United Nations Conference on Trade and Development (UNCTAD) focuses on international economic relations, and attempts to encourage economic growth and raise living standards in less-developed countries. The various UNCTAD committees meet at regular intervals, and the full body meets every few years.

²⁶ World Trade Organization, "About the WTO" (Visited Apr. 26, 1999) <<http://www.wto.org/wtoinbried.html>>.

Also, the WTO Secretariat established in Geneva provides the administrative and technical support.

The WTO originated from the General Agreement on Tariffs and Trade (GATT). The GATT agreement, which deals with trade in goods, has been incorporated into the WTO agreements.²⁷ Other WTO agreements include the General Agreement on Trade in Services (GATS), which deals with trade and services, and Trade-Related Aspects of Intellectual Property (TRIPS), which regulates areas such as copyright, trademarks, patents, industrial designs, and trade secrets. These agreements have been negotiated, ratified, and signed by most governments of the world's leading trading nations. The agreements provide the legal foundation for international commerce, and bind governments to set their trade policies within the organization's agreed limits. The fundamental goal of the WTO is "to improve the welfare of the peoples of the member countries."²⁸

Since 1995, the WTO has overseen the implementation of agreements reached at the trade talks of the Uruguay Round, and has negotiated to open markets in telecommunications and in information technology equipment. In addition, the WTO has been active in settling trade disputes.²⁹

Since its creation, the WTO has received approximately ninety cases for its review. According to the WTO, thirteen cases have been withdrawn after a consultation with the disputing members; sixty-six are heading into consultation, panel adjudication, or appeals procedures; five are in the final stage of implementing a solution; one has been settled and a solution implemented; and two have been closed without the need for any action by the organization.³⁰

The WTO has important implications for human rights in a variety of ways. For example, national laws intended to protect labor rights, the right to health, or the right to a clean environment

²⁷ World Trade Organization, "The Multilateral Trading System - past, present, and future" (Visited Apr. 26, 1999) <<http://www.wto.org/wto/multilateral/trading/HTML>>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ World Trade Organization, *supra* note 26.

might be viewed as trade barriers inconsistent with a state's international commitment to free trade. If a panel of the WTO rules that a particular national law violates the trade agreements, the state will be faced with the choice of repealing its national law or being treated as an international outlaw in the global economy. The result may sharply diminish a state's ability to protect important economic, social, and cultural human rights.

b. The Proposed Multilateral Agreement on Investments

The proposed Multilateral Agreement on Investments (MAI) would take the scope of the matters currently covered by international trade law a large step further. Since 1995, the twenty-nine governments of the OECD, consisting of the world's industrialized nations, have been negotiating the MAI. The MAI would operate as a free-standing international treaty open to all OECD members, the European Community and to any non-member states willing and able to meet its obligations. For now, the negotiations are on hold, in large part because of intense opposition by labor and environmental groups.

By providing a comprehensive and stable framework for international investment, the proposed MAI would give new impetus to growth, employment, and higher living standards.³¹ Investors see differing current national policies as obstacles to maximizing their profits, and are seeking uniform international treatment. Currently, there are few international laws that directly constrain governments from regulating multinational enterprises. The OECD claims that the MAI would also provide an effective means for settling investment disputes between states and between investors and states.³²

³¹ MAI, "The Multilateral Agreement of Investment" OECD Policy Brief No. 2-1997 (Visited Nov. 14, 1998) <http://www.oecd.org/publications/Pol_brief/9702_pol.html>.

³² *Id.*

The proposed MAI has a sweeping scope. It covers direct investment by corporations in factories and real estate;³³ portfolio investment, including stocks and bonds; intellectual property rights such as patents and trademarks; and contract rights and concessions rights, including rights to exploit government-owned natural resources.³⁴ Thus, the mining of Mozambique's diamonds by a South African company, a merger between American and German automobile manufacturers, and a mutual fund's purchase of shares in a Japanese company would all come under the aegis of the MAI in one form or another.

A country that ratified the MAI (once its text is eventually negotiated) would be required to give foreign investors "treatment no less favorable than the treatment it accords [under the circumstances] to its own investors."³⁵ In addition, the draft MAI states that "each Contracting Party shall ensure that all payments relating to an investment in its territory of an investor of another Contracting Party may be transferred into and out of its territory without delay."³⁶ This provision would give foreign investors the right to enter markets, buy short-term portfolio investments, and withdraw their money (profits and initial capital) at any time.

Furthermore, a country that ratified the MAI could not impose performance requirements on foreign investors. For example, governments could no longer require foreign investors to take on local partners, hire a certain number of local people, invest a minimum amount in the local community, or transfer environmentally beneficial technology to the local government or local companies.³⁷

³³ Over \$300 billion in foreign direct investment is generated annually, resulting in \$7 trillion in annual sales by the overseas affiliates of multinational enterprises. License to Loot, "The MAI and How to Stop It" (Visited Nov. 18, 1998) <<http://www.foe.org/ga/loot/html#intro>>.

³⁴ Organization for Economic Development, Directorate for Financial, Fiscal and Enterprise Affairs Negotiating Group on the MAI, Multilateral Agreement on Investment Consolidated Text and Commentary, DAF/MAI/NM (97), The MAI Negotiating Text (as of April 24, 1998) at 11.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

Under the draft MAI, foreign investors could file legal actions against governments in the international dispute resolution process. However, there are no mechanisms for citizens or governments to use the MAI dispute procedures to sue foreign investors for failure to abide by the law.³⁸

Other important provisions of the proposed MAI include:

- *Transparency:* A country's laws, regulations and procedures of general application must be made publicly available.
- *Expropriation:* A country may expropriate a foreigner's property only if undertaken for a public purpose and if the country provides the foreigner with prompt, adequate, and effective compensation.
- *Entry and Stay of Key Personnel:* Investors and key personnel, such as senior managers or specialized technicians, should be granted permission to enter and stay temporarily in order to work on MAI investments.³⁹

Like the WTO, the proposed MAI has important implications for human rights. Many human rights activists and NGOs strongly oppose the MAI because of its potential to strip legal and human rights mainly from the inhabitants of developing countries (non-OECD member nations). At stake are issues relating to sustainable livelihoods, collective survival rights, protection of the environment, and measures to eliminate discrimination and promote the equality of vulnerable groups in society. Finally, the stipulated conditions favoring foreign investors may eliminate the possibility of human rights and environmental accountability of non-state actors, specifically MNEs.

³⁸ See "The MAI and How to Stop It," *supra* note 33.

³⁹ MAI, *supra* note 31.

c. The World Bank

The World Bank is an affiliate of the United Nations. Its mandate is to assist development efforts by financing projects that promote economic development in Member Nations.⁴⁰ The World Bank Group consists of the International Bank for Reconstruction and Development (IBRD), International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).⁴¹

IBRD loans are made to governments and are individually negotiated. These loans typically include a five-year grace period, and governments are given fifteen to twenty years to pay back at market interest rates. The IDA was established in 1960 to make "soft" loans to the world's poorest countries that were unable to afford IBRD terms.

The IFC was established in 1956 as an affiliate of the World Bank, although it remains legally and financially separate. The IFC makes loans exclusively for private enterprises in World Bank-borrowing countries and may, for that purpose, bring together local and foreign, public and private capital, as well as its own. In addition to providing credit to local companies, the IFC has helped many transnational corporations to establish themselves

⁴⁰ See Daniel Bradlow, *The World Bank, the IMF, and Human Rights*, 6 Transnat'l L. & Contemp. Probs. 47, 53 (Spring 1996). "Not all Member States are eligible to borrow from the World Bank. Those states that have a per capita income of less than US \$5,295 (in 1995 dollars) can borrow from the IBRD and less than US \$1,465 (in 1995 dollars) can borrow from the IDA."

⁴¹ For a more detailed description of the institutions in the World Bank Group, see 2 Ibrahim F.I. Shihata, The World Bank in a Changing World: Selected Articles (1995). The Bank was created as a result of the UN Monetary and Financial Conference at Bretton Woods, New Hampshire, in July 1944. The Bank began operations in 1945-46, and made its first loan in 1948. Its headquarters is in Washington, D.C., and it employs over 7,000 people, including over 670 consultants. The staff consists of primarily American and British nationals. The President of the Bank is by tradition an American, and a Resident Representative is never a national of the country where he or she serves.

in developing countries.⁴² Founded in 1988, the MIGA's purpose is to encourage direct foreign investment in developing countries. MIGA provides insurance- guaranteeing investments against non-commercial risks, and gives policy advice to developing country governments concerning foreign investment.

The World Bank (hereinafter the Bank) finances projects for electric power, water supply, transportation, agriculture, forestry, and rural development. In smaller proportions of total Bank lending, loans are made to reform or develop university education, to improve the equity of access to and the quality of education, to promote health care for women and children, to provide assistance to indigenous peoples and other minorities, and to assist states in developing legal training programs. The Bank has also funded projects to assist countries in urban development, to create development finance institutions (development banks), as well as to provide technical assistance to industry, public sector management, and telecommunications.⁴³

As a specialized agency, the Bank's mandate is limited to the *economic* dimensions of the development process. Thus, the Articles of the IBRD and IDA state that:

The Bank and its officers shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1.⁴⁴

⁴² See Susan George & Fabrizio Sabelli, Faith & Credit: The World Bank's Secular Empire 12 (Westview Press 1994). Much of the basic World Bank information was taken from Susan George's book. She is the associate director of the Transnational Institute in Amsterdam, Holland. She works with a number of non-governmental organizations, and serves on the boards of Greenpeace International and Greenpeace France. See also Susan George (visited Oct. 28, 1999) <http://www.mediaweb-tv.com/dx/0715/index_e.html>.

⁴³ *Id.* at 13.

⁴⁴ Bradlow, *supra* note 40, at 54, 60.

Whether this attempted separation of politics from economics is possible remains an open question. The Bank argues that it considers only economic factors when it makes loans.⁴⁵ However, the size of the Bank's loans and the adverse consequences for debtor nations that fail to implement Bank policies suggest that such a separation may be unrealistic. For example, a government might seek political benefits from having a development project within its borders as a result of receiving the Bank's loans. Many local politicians would be delighted to show off a loan for a development project as a concrete sign that the government under their rule is truly interested in developing the nation's economy and making its people better off. Where the government is a human rights violator, however, what appears to be a blessing by the Bank could be viewed as support for human rights violations.

Nor are the political dimensions of the Bank's loans lost on MNEs. MNEs that partake in the Bank's economic development projects not only consider the economic feasibility of the project itself, but must and do explore the political dimensions which, if not studied carefully, can result in a loss of profits to the MNEs' shareholders. For example, a country with an unstable political infrastructure may be a risky investment. Despite this investment danger, the Bank has made loans to fund projects such as promoting judicial reform, strengthening property rights, encouraging land reform, fostering the efficiency of management in the public sector, and liberalizing policies in specific spheres of economic activity. Recently, the Bank funded projects that included bolstering local governments and basic governmental functions in Palestine, Burundi, Rwanda, and Haiti.⁴⁶ These kinds of projects and programs would appear to involve the Bank in deeply political matters.

The Bank wields enormous financial influence because the Bank's involvement in a project commonly generates substantial co-financing, and MNEs (foreign private investors and private banks) often will not become involved in a country unless the

⁴⁵ Third World Traveler, International Monetary Fund, World Bank, and Structural Adjustment (Visited November 18, 1998) <http://www.infoasis.com/people/stevetwt/IMF_WB_IMF_WB.html>.

⁴⁶ Bradlow, *supra* note 40, at 54.

Bank commits its resources and gives its seal of approval. Moreover, in many previously- isolated countries ranging from Bhutan to Rumania, World Bank projects provided the first contracts for MNEs to enter these countries.⁴⁷ The World Bank believes that foreign investment by MNEs is the key to economic advance: diversification, value-adding, larger market shares, and other measures meant to improve the economic situation in developing countries.

In addition, the World Bank, through its financing and advisory activities, influences the status of women, children, indigenous peoples, and other vulnerable groups in the Member States that borrow from it.⁴⁸ The Bank's governance operations, which address such issues as the rule of law in society, reform of the civil service, the management of the public sector,⁴⁹ democracy and democratic elections, have an impact on the civil and political rights offered by Borrower States.

This brief description of some of the Bank's operations illustrates the wide range of human rights issues that inevitably result from the Bank's activities. For example, the Bank influences the rights of individuals to be free from discrimination in education and health care when it finances projects that promote equity in access to health care or education. Additionally, the Bank gives people the ability to exercise their rights in communicating with their governments when their governments finance civil service reforms or attempt to reform management of the public domain.⁵⁰

When the Bank finances projects that reforms judicial branches of governments, the Bank, not only affects the adjudicative outcome of decisions, but also improves citizens' access to the judicial system. When the Bank finances projects that change the management of public universities, the Bank

⁴⁷ See George and Sabelli, *supra* note 42 at 12.

⁴⁸ See Bradlow, *supra* note 40, at 49.

⁴⁹ Third World Traveler, Mutinational Monitor, Gabriel Kolko, "Ravaging the Poor" (Visited June 1998) <http://www.infoasis.com/people/stevetwt/IMF_WB/RavagingPoorIMF.html>.

⁵⁰ See Bradlow, *supra* note 40, at 54.

widens academic freedom.⁵¹ Nonetheless, a restriction of academic freedom may occur if the new management of a university, heavily influenced by the Bank, determines that certain courses are no longer necessary for its students, and thereby deletes those courses from its academic curriculum. Clearly, the Bank's operations extensively influence citizens' rights when these citizens' governments borrow from it.

The Bank's main objective is to promote development.⁵² Development includes development policies of the Bank's Member States. In promoting development, the Bank exerts an enormous influence over its Member States' development policies through its lending operations, policy dialogue, technical assistance, and research programs.⁵³ The Bank's degree of influence depends on various factors such as the bargaining power of the Bank's Member States, the Bank's interpretation of the Borrower States' priorities and needs, the relationship between the relevant Bank officials and the Borrower State, the quality of the

⁵¹ *Id.*

⁵² The Bank does not define "development." The lack of a formal definition allows the Bank to determine which issues fall inside the scope of their mandate, thereby giving them immense discretion in deciding which projects they shall fund or assist. In 1992, Bank President Lewis Preston declared that "sustainable poverty reduction is the overarching objective of the World Bank," and added that "sustainable poverty reduction is the benchmark by which our performance as a development institution will be measured."

Former Bank President Preston has not specified how the Bank's performance will be measured. However, improvements such as the delivery of several thousand microwave ovens to the people of Cite Soleil (one of the poorest cities in Haiti), the worldwide increase of female children in primary school, higher worldwide per capita disposable income, and the elimination of cases of dengue fever or tuberculosis speak for themselves.

Nonetheless, current Bank President, James Wolfensohn has warned that the unequal distribution of income threatens global stability. At the World Bank's annual meeting in Hong Kong in September 1997, Wolfensohn called for a bank rooted in villages and poor countries, not in Washington. He has announced plans to send this staff to villages to learn about poverty. See Asad Ismi, *Plunder With A Human Face*, "Z" Magazine, Feb. 1998, at 1.

⁵³ Jonathan Cahn, "Challenging the New Imperial Authority: The World Bank and the Democratization of Development," 6 Harv. Hum. Rts. J. 159 at 170.

Borrower State's own planning, the clarity of the Borrower State's own perspective on the services it needs from the Bank, and the State's access to alternative sources of funds.⁵⁴ From these factors, it is evident why development includes more than economic policies and considerations. It is also evident that if the Bank's policies do not influence the development policies of its Member States and Borrower states, then its objective of promoting development will be defeated, and the Bank will be critically ineffective.

d. The International Monetary Fund (IMF)

In July 1944, the United Nations Monetary and Financial Conference met at Bretton Woods, New Hampshire, to find a way to rebuild and stabilize a world economy that had been severely devastated by the Second World War. One result of the conference was the founding of the International Monetary Fund (IMF). The IMF, like the World Bank, is a specialized agency of the United Nations. According to its Articles of Agreement, the purposes of the IMF, *inter alia*, are to promote monetary cooperation, facilitate the expansion and balanced growth of international trade, encourage orderly and stable exchange rates, assist in the establishment of a multilateral system of payments for current transactions, and bolster Member States by helping them correct maladjustments in their balance of payments in a manner that is not destructive of either national or international prosperity.⁵⁵

To achieve its goals, the Bretton Woods Conference stated a number of conditions with which member nations were required to comply. Initially, the imposed restrictions, while significant, were still relatively limited in that each nation had agreed to establish a par value for its currency, defined as the fixed value of its currency in relation to either the U.S. dollar or gold. Under the par value system, the IMF's function is to monitor its Member States' international monetary policies in order to ensure that they are consistent with the maintenance of their currencies' par value.⁵⁶

⁵⁴ See Bradlow, *supra* note 40 at 54.

⁵⁵ Third World Traveler, *supra* note 45, at 2.

⁵⁶ See Bradlow, *supra* note 40 at 54.

The IMF also provides its members with short-term financing when they experience balance of payment problems.⁵⁷ The IMF's primary mechanism for monitoring its Member States' exchange rates and balance of payments policies is conducted through regular consultations with its Member States pursuant to Article IV consultations. Because the purpose of these periodic consultations is to determine a State's ability to maintain its par value, the consultations are often limited to those macroeconomic variables that directly affect the external value of the State's currency during the period under consideration, which is usually one year. Thus, the focus of the consultations is on issues such as interest rates, money supply, government debt, inflation, and the current account of the balance of payments. The scope of the discussions is also limited by Article IV, which requires that the IMF "respect the domestic social and political policies of members, and in applying these principles...pay due regard to the circumstances of members."⁵⁸

Beginning with the collapse of the par value system in 1971, however, the groundwork was laid for the IMF to take on a much more intrusive role in the affairs of the states to which it gave assistance. Today, the IMF's influence directly affects a wide range of policy issues concerning labor, health, education, and agriculture, to name just a few.

In 1971, currencies were allowed to float in relation to each other and according to global economic conditions. Floating exchange rates allow a country to correct a balance of payments problem by making adjustments either in the value of its currency or in its domestic economy.⁵⁹ Because of the introduction of floating exchange rates in 1971, the IMF now includes a wide range of issues in its consultations with Member States, thereby allowing the IMF to consider more aspects of the States' economy

⁵⁷ Some of the other devices the IMF has to assist members in balance-of-payments difficulties include standby arrangements, general arrangements to borrow, compensatory financing of export fluctuations, and special drawing rights (SDRs) *See Third World Traveler, supra* note 45.

⁵⁸ *See Bradlow, supra* note 40 at 54.

⁵⁹ *Id.*

in its surveillance of its Members' monetary policies. Discussions between the IMF and the individual Member State about issues such as labor policies, health care, and social security can influence economic and social rights in that State.⁶⁰ Furthermore, when the IMF seeks to promote the rule of law and good government as integral to development, the international organization also inevitably influences civil and political rights in Member States.⁶¹

Member States that have healthy economies are usually unlikely to need the resources of the IMF, and are therefore generally free to accept or reject its views. However, lesser-developed Member States do not have such great liberty to disregard the IMF's advice. Consequently, the IMF tends to yield a greater influence over the policies of Member States which use or expect to use the IMF's financing facilities.

Moreover, most of the World Bank aid and much of the development aid that nations give are dependent on a country's satisfaction of IMF criteria. Therefore, the IMF serves as a gatekeeper to official loans and aid, and has far more power than its direct funds suggest.⁶² The IMF exists to provide "balance of payments support." Because the majority of its loans are made to lesser developed Member states, these aid packages come with increasingly strict conditions. As a country's deficit and borrowing increases, the IMF often increases the number and the rigidity of the conditions placed on the loan.⁶³

One example from Haiti illustrates the scope of the IMF's power and its implications for human rights. In August 1991, one of the conditions set by the United States and the IMF was that the Haitian government (then led by President Jean-Bertrand Aristide)

⁶⁰ Third World Traveler, Marijke, "Reining in the IMF" *Multinational Monitor*, January/February 1998 p. 4 (Visited Nov. 20, 1998) <http://www.infoasis.com/peoplestevetwt/IMF_WB/ReiningIn_IMF.html>.

⁶¹ *Id.*

⁶² See Third World Traveler, *supra* note 45.

⁶³ Michael Barrat Brown and Pauline Tiffen, *Short Changed: Africa and World Trade XV* (Pluto Press/Transnational Institute 1992).

accept a program of structural adjustment.⁶⁴ It is not clear that President Aristide, the elected leader of Haiti, would have approved such a package without such coercion. Nevertheless, President Aristide had no choice but to accept the package in order to better his fellow countrymen's living conditions.

After the coup by the Haitian military in September 1991, Aristide remained in exile in the United States, and then returned to Haiti in 1994. Even though the temporarily-deposed leader's return marked a triumph over a military coup, Aristide had become even more dependent on the good will of the IMF and the U.S. government in trying to improve the Haitian economy after three years of international sanctions.

e. Structural Adjustment Programs

Structural adjustment programs are an increasingly important part of the emerging law of the global economy. To call them "law" may in one sense be inaccurate, as there is no binding legal obligation for any country to accept structural adjustment programs. But just as states within the United States of America find that the "strings" attached to federal aid function much like federal mandates, so many developing countries, facing the prospect that the availability of crucial loans and aid depends upon their adoption of structural adjustment programs, find that such programs function as regulations imposed on them by the "New World Order," rather than as voluntarily-undertaken commitments.

Structural adjustment loans were nominally intended to relieve the debt crisis, convert domestic economic resources to production for export, and promote the penetration of MNEs into previously restricted economies.⁶⁵ Most developing countries have undergone structural adjustment. In the 1990s, the program was

⁶⁴ Multinational Monitor. *An Interview with Camille Chalmers, Haiti's Latest Coup, Structural Adjustment and the Struggle for Democracy* (Visited May 1997) <http://www.infoasis.com/people/stevewt/IMF_WB/Haiti_Struct_Adj_MNM.html>. Prior to the 1991 coup, the economic policy of Haiti was based on priorities of the population. After the Haitian military's return to power, the program was one totally dictated by the international financial institutions (most notably, the World Bank and the IMF).

⁶⁵ See George & Sabelli, *supra* note 42, at 12.

extended to the former Soviet Union, the former socialist countries of Eastern Europe, and India.

Under structural adjustments, developing countries typically are required to devalue their currency, dramatically cut spending on social services (medical care, food stamps, agricultural subsidies, public transportation, environmental regulations, subsidized housing, and public education), eliminate barriers to foreign multinationals and trade, privatize national assets, deregulate business, decrease wages, restrict credit, and raise interest rates.⁶⁶

A standard requirement of structural adjustment is that the debtor nation must increase its level of exports at all costs, and the ultimate goal of structural adjustment is to restore a positive balance of payments so that the debtor government will have spare cash on hand to service its debts.⁶⁷ Much of the hard-earned foreign exchange is devoted to interest payments. For a country whose currency is unacceptable in international financial transactions (a category which covers virtually all developing countries), the only option is to earn cash through exports.⁶⁸ Government acceptance of structural adjustment is the condition for receiving financing from the IMF and the Bank, and consequently from other public and private sources (mainly private U.S. banks and investors).

The privatization of national assets has in certain cases helped multinationals gain control of strategic sectors of an economy. For

⁶⁶ See Susan Meeker-Lowry, *Mr. Budhoo's Bombshell*, Third World Traveler, Summer 1995, at 2. Mr. Davison Budhoo, a senior economist with the IMF for more than 12 years, publicly resigned in May 1988. A native Grenadian, Budhoo was responsible for designing and implementing Structural Adjustment Programs for African, Latin American and Caribbean nations. His 100-plus page open letter to Michel Camdessus, managing director of the IMF, entitled "Enough is Enough" sent shock waves around the world, making front page headlines in many countries (curiously, however, not in the United States). Budhoo was the first person to break the IMF's code of silence regarding the organization's internal affairs by exposing extensive statistical fraud carried out by the IMF in Trinidad and Tobago during the period of 1985 to 1987. (Source: Susan Meeker-Lowry).

⁶⁷ Brown & Tiffen, *supra* note 63.

⁶⁸ *Id.*

example, Haiti is currently under a structural adjustment program which calls for the privatization of enterprises that include the telecommunications company (Teleco), the electric company (EDH), the National Bank of Credit, the Popular Bank of Haiti, the ports, the flour mills, a Haitian cement company, and an oil-producing enterprise.⁶⁹ In 1996, of the 10 enterprises on which bids were placed, foreign corporations bid on nine.⁷⁰ Again, multinationals are concerned with maximizing their profits, not with supporting a national development plan. Moreover, national sovereignty of developing countries like Haiti is at stake.

C. Conclusion

There are good reasons for exploring the possibility of making international human rights law a part of the emerging law of the global economy. As this brief overview indicates, developments in the international economic field have the potential to exert powerful influence on human rights, particularly in the field of economic and social rights. As international financial institutions increasingly involve themselves in questions of political infrastructure and indeed, within the governmental infrastructure itself, there are valid concerns over whether human rights are given adequate consideration.

MNEs play several roles in these developments. First, much of the emerging law of the global economy is intended to give them relatively free access to the economies of countries around the world. Though freedom of movement of persons tends to be highly restricted, freedom of movement of capital is increasingly

⁶⁹ Multinational Monitor, *supra* note 64, at 3. Camille Chalmers is the executive secretary of the Haitian Platform for Alternative Development (PAPDA), the leading Haitian organization that is currently analyzing the impact of structural adjustment. Chalmers was also Chief of Staff of then-President Jean Bertrand Aristide during the period of 1993 and 1994. Chalmers resigned over disagreements with the development policy mandates of international donors. He has served as a professor of economics at the State University in Haiti since 1983, and was arrested and brutally beaten by the Haitian military regime in the early 1990s. See Third World Traveler <http://www.infoasis.com/people/stevewt/IMF_WBStrucAdj_MNM.html>.

⁷⁰ *Id.* Note that some of the bidders for the state-owned enterprises were MCI, Bell Canada, Telecom France, EDF (electric company of France), and Hydro Quebec.

the norm. Because of their size and power, MNEs, driven by the pursuit of profits, may use their access to national governments to promote their economic agenda in ways that are inconsistent with the national governments' policies of promoting its citizens human rights. They may also use their freedom of movement to threaten to "close up shop" and go elsewhere if the host government strays too far from policies acceptable to MNEs. Thus, the emerging law of the global economy may well bolster the already considerable power of MNEs vis-à-vis host governments. Accordingly, extending human rights law to cover activities of MNEs may be wise.

Second, armed with financial and political resources, MNEs use lobbyists to and other agents to exert significant influence on policies adopted by international financial institutions. For example, if an international financial institution considers denying loans to Indonesia because of its human rights violations, MNEs are likely to retain powerful lobbyists to dissuade the institution from making such a decision. This kind of influence also increases the power of MNEs when they are successful because the host government remains indebted for the MNE's use of political capital that the host government could not have afforded.

On the other hand, it is not enough simply to assert that human rights norms should govern the conduct of MNEs. Any attempt to extend the scope of human rights law will necessarily raise profound theoretical and practical issues, which are discussed in the following part. At the same time, it is also important to understand that while such a development would represent an extension of international law, it would by no means constitute an unprecedented development.

III. The Place of Multinational Enterprises in Contemporary International Law

A. A Brief History of Multinational Corporations in International Law

In one sense, the role of MNEs in international law has long been limited by the state-centered character of international law. Traditionally (at least since the nineteenth century), international law has regulated only relations among states. Entities such as natural persons, corporations, or other organizations were not

considered "subjects" of international law, an exclusion that had both substantive and procedural implications.

Substantively, the exclusion of non-state entities from the domain of international law meant that only states had rights and obligations. One major exception to this approach was that individuals and corporations did have rights to protect against both the arbitrary expropriation of their property and other kinds of mistreatment at the hands of a foreign state. In fact, individuals might have affirmative rights against foreign states, most notably in international law's requirement that states protect foreign nationals against mob violence.⁷¹

Procedurally, only states could take action in the diplomatic arena, and only states could press claims in international fora like *ad hoc* arbitral tribunals and international courts. Therefore, even if a corporation's property was expropriated by a foreign state in violation of international law, it had no "standing" to bring a claim directly against that state. The only hope of relief was to persuade its own state to espouse the claim and press it against the offending state.

This account of the substantive and procedural limitations of international law is potentially misleading, however. Even though international law theoretically pertained only to relations among states, a significant part of what the United States and many European states concerned themselves with in their international relations was how their own corporations were faring at the hands of other states. Although corporations had little, if any, formal doctrinal role, a central concern of international law throughout much of the nineteenth and early twentieth centuries was the activities of MNEs.

Typically, disputes concerned a claim by a European nation or the U.S. that another less powerful state (for example, a Latin American country) had failed to respect the European or U.S. company's contract or property rights. The era was marked both by sharp doctrinal contention, as evidenced by the controversy over the Calvo clause, and by gun-boat diplomacy, as colonial powers backed up their claims under international law with force.

Developments in many spheres brought about fundamental changes starting with the end of World War I. The new emphasis

⁷¹ Dinah L. Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 FORDHAM INT'L L.J. 1 (1990).

on the principle of self-determination brought to the forefront a new subject of international law, namely “peoples.” The almost exclusively state-centered character of international law doctrine began to break down. At the same time, the decline in gun-boat diplomacy and other forms of intervention, marked by the United States’ announcement of a “good neighbor policy” in the 1930s, lessened the occasions for acute conflict over the rights and privileges of MNEs. After World War II, the process of decolonization improved relations between the developed and developing countries.

The rise of the New International Economic Order (NIEO) in the 1970s reflected the realization by many developing countries that decolonization and national independence alone were not sufficient to bring about full autonomy.⁷² U.N. resolutions proclaiming a New International Economic Order asserted that greater control over natural resources was indispensable to the independence of many developing countries. Significantly, one of the most hotly disputed areas of the NIEO concerned developing countries’ attempts to treat the issue of expropriation of a foreign national’s property as primarily a matter for the expropriating state’s law, rather than as a matter of international law. For developing countries, this was an effort to assert greater control over MNEs; yet developed countries viewed this measure as an attempt to subject MNEs to arbitrary expropriation.

In the end, the NIEO failed to bring about a change in the international law regarding the rights of MNEs. The sudden appearance of the 1980s debt crisis, in which a number of developing countries found themselves on the brink of national insolvency, played the most important role in pushing the NIEO off the international agenda, as both developed and developing states struggled to deal with the crisis.

The NIEO was not, however, the only international effort to regulate MNEs. The UN has also engaged in other “regulatory” efforts relating to MNEs. For example, the UN’s consumer protection principles are in one sense an effort to place limits on the powers of MNEs. Non-governmental organizations that seek

⁷² F.V. García-Amador, The Emerging International Law of Development (1990).

to secure voluntary compliance by MNEs⁷³ have also promoted various model business principles and corporate codes of conduct.

B. The status of MNEs in contemporary international law: Should MNEs be treated as subjects of international law?

MNEs have long been a concern of international law in a variety of ways. At the same time, the traditionally state-centered character of international law has rendered their exact legal status uncertain. Thus, the Restatement (Third) of the Foreign Relations Law of the United States observes that the "multinational enterprise or corporation... is an established feature of international economic life, but it has not yet achieved special status in international law or in national legal systems."⁷⁴

This part of the article will address whether MNEs should be regarded as "subjects" of international law.⁷⁵ In essence, this part raises the question, to what extent *should* MNEs be regarded as having their own legal capacity under international law?

1. Recognition of other Entities as Subjects

As noted above, international law and relations have traditionally rested upon the conduct between nation-states exclusively, with notably limited exceptions.⁷⁶ In this regard, only states have enjoyed full legal personality as subjects under international law. However, the increasing importance of non-

⁷³ Restatement (Third) of the Foreign Relations Law of the United States § 213, Rep. Note 7 (1987).

⁷⁴ *Id.*

⁷⁵ The authors of this article define "subject" to mean "those entities or legal persons entitled to rely upon legal rights, obliged to respect legal duties, and privileged to utilize legal processes."

⁷⁶ Mark Janis, An Introduction to International Law 176 (2d ed. 1993) [hereinafter Janis].

governmental actors⁷⁷ has undermined the state's role as the sole actor on the international stage.⁷⁸

This discussion focuses on the emerging substantive and procedural status of non-state actors. "Substantive" here refers to whether the entity's status, powers, and relations with others are governed by international law, instead of domestic law. "Procedural" refers to whether the entity has access to international (as well as domestic) mechanisms for dispute resolution.

a. International Governmental Organizations

International governmental organizations are by definition subjects in the substantive sense, and have increasingly been recognized as "subjects" in the procedural sense as well. Since the second half of the nineteenth century, many public international organizations have come into existence as a result of international agreements among states to achieve common goals. Because these organizations are created by the express consent of the states through an international agreement, they gain international legal personality through the delegation of the states' sovereign powers.⁷⁹ Accordingly, these organizations typically have powers to enter into agreements with states,⁸⁰ establish new programs, and take a wide variety of other actions, at least insofar as their governing charter permits.

⁷⁷ This Note does not attempt to fully elaborate on public international organizations, the phenomenon of non-governmental organizations, the individual, or corporations. Rather, reference is made to these entities solely to illustrate the trend of other entities' acquiring legal personality alongside the state.

⁷⁸ For a discussion on how three fundamental systemic developments (global communication revolution, regulatory competition among states, and the diminished priority of territorial security) have undermined the durability of state power, see Peter J. Spiro, New Players On the International Stage, 2 Hofstra L. & Pol'y Symp. 19, 21-23 (1997) [hereinafter Spiro].

⁷⁹ Janis, *supra* note 76, at 188-189.

⁸⁰ Vienna Convention on Treaties Concluded Between States and International Organizations or Between International Organizations, U.N. Doc. A/CONF. 129/15 (March 20, 1986).

Not only are they recognized as "subjects" in the substantive sense, but also international governmental organizations enjoy some procedural legal capacity. Even though public international organizations are unable to bring claims to the International Court of Justice ("ICJ"), they may have the power to request advisory opinions from the ICJ on matters within their competence.⁸¹ In addition, international organizations have been able to bring claims before regional international courts.⁸²

b. Non-governmental organizations

Non-governmental organizations ("NGOs") are entities of non-national definition and not-for-profit orientation. Hailed today as the harbinger of an "international civil society," they have roots dating prior to WWII.⁸³ Unlike international organizations, NGOs are not created by treaties, nor do NGOs partake in international legal personality through the express delegation of states. Nonetheless, they have played significant roles in international law. The most notable example is the International Committee of the Red Cross ("ICRC"), which plays a key role in administering the four Geneva Conventions and other bulwarks of international humanitarian law.⁸⁴

In addition, NGOs that satisfy certain basic criteria are extended "consultative status" pursuant to article 71 of the U.N. Charter. This status affords them the opportunity to have access to ECOSOC proceedings, to advance oral and written interventions, and to propose agenda items.⁸⁵ NGOs have also increasingly received the right to participate in U.N. world conferences.⁸⁶

⁸¹ Charter of the U.N., Art. 96, 59 Stat. 1031, T.S. 993, 3 Bevans 1153.

⁸² Janis, *supra* note 76, at 190.

⁸³ For a discussion on pre-WWII history of NGOs, see Lyman White, International Non-Governmental Organizations: Their Purposes, Methods and Accomplishments (1951).

⁸⁴ Janis, *supra* note 76, at 174-175.

⁸⁵ For a more detailed discussion (including citations) on the limited formal status of NGOs, see Spiro, *supra* note 78, at 25-28.

⁸⁶ *Id.*

c. Individuals

Traditionally, the rights and obligations of individuals have not been governed directly by international law. This phenomenon has been changing over the years, as individuals have increasingly been afforded some degree of legal personality. Substantively, individuals have been afforded protections under international human rights treaties and customary law.⁸⁷ In addition, obligations of individuals have been recognized under international law since the Nuremberg Tribunal. In this manner, individuals have been held accountable for crimes for which punishment may be imposed.⁸⁸ Procedurally, individuals have the right to bring cases before various international human rights tribunals (e.g., the European Court of Human Rights).

d. Corporations

Not only have the non-state actors enumerated above enjoyed both substantive and procedural legal capacity, to some extent, but corporations under international law have also been a part of this trend as well. For example, corporations have contractual rights under long-term development contracts with foreign states, and are governed by international law instead of domestic law. As one arbitral tribunal stated, "...Contracts between States and private persons can, under certain conditions, come within the ambit of a particular and new branch of international law: the international law of contracts."⁸⁹

⁸⁷ See generally, Universal Declaration of Human Rights, U.N.G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter "Universal Declaration"]. Please note that the Universal Declaration is not a binding international obligation, and rather is treated as customary international law.

⁸⁸ For a discussion on the individual and international criminal responsibility, see Ian Brownlie, Principles of Public International Law 561-563 (4th ed. 1990) [hereinafter Brownlie].

⁸⁹ Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic, award dated January 19, 1977, para. 32, reprinted in 17 ILM 1 (1978) [Eng. trans.].

Corporations can also enjoy legal capacity in a procedural sense. One example of this attribute is their legal capacity pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.⁹⁰ The International Center for Settlement of Investment Disputes ("ICSID") administers both conciliation and arbitration proceedings for the settlement of investment disputes between governments and foreign investors.⁹¹

2. Should MNEs be Recognized as Subjects of International Law?

As the preceding discussion suggests, the emerging global stage continues to develop as non-state actors play an enhanced role. This development might suggest one approach to the question of MNEs and human rights law. In essence, if states are bound by international law to respect human rights, then perhaps MNEs should be treated as subjects just like states, with all the corresponding obligations. Both the decline of the state monopoly of power in the international community and the rising power of MNEs suggest such an approach.

Before turning to whether MNEs should be regarded as subjects, however, it is useful to examine more closely what is entailed in the question. Specifically, one might ask whether such an all-or-nothing approach is necessary. As stated previously, the state is the paradigmatic subject in international law in the substantive sense. International law directly places a wide range of rights and duties on states. Equipped with the capacity to maintain its rights under the widest range of international forums, the state is also the paradigmatic subject in a procedural sense.⁹² There is no reason, however, why these characteristics must necessarily be

⁹⁰ On March 18, 1965, the Executive Directors of the International Bank for Reconstruction and Development (the World Bank) approved the text for the Convention for submission to member states for signature and ratification. See Aron Broches, Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law 164 (1995).

⁹¹ *Id.*

⁹² See Brownlie, *supra* note 88, at 58.

bundled together in precisely this form. It may be useful to disaggregate them.

To begin with, the substantive and procedural characteristics of a subject can be separated. These characteristics do not need to be bundled together in order to create a legal personality. For example, as noted in Part III(A), foreign individuals and corporations have long had rights under international law that regulated situations such as when the host government sought to expropriate the corporation's property. However, for a long time, individual or corporate investors lacked an international forum in which to bring a claim for violation of their rights. Instead, through diplomacy or possibly arbitration, the state in which the individual or corporation was a national could espouse the claim and seek redress against the offending state. In short, individuals and corporations had rights under international law, but they did not have a procedure pursuant to which they could impose enforcement on their own.⁹³

The substance of the rights and duties, moreover, can be direct or indirect. To the extent that international law comes to impose duties on MNEs, that imposition could be accomplished by any of the following three routes, or some combination of the three. Each route, along with its advantages and disadvantages, will be discussed at length below.

a. Imposing duties on states to regulate MNEs

International law may answer the question of whether MNEs should be subjects of international law indirectly by placing a duty on states to regulate MNEs, either collectively or individually. Under this theory, international law would not place duties directly on MNEs. Rather, state regulation would subject MNEs to international norms. This is not a new approach. States currently have an affirmative duty to prevent and punish conduct that

⁹³ Even though distinct, the substantive and procedural aspects of legal capacity often merge, as illustrated by the tendency to regard the arbitrary expropriation of a foreign investor's property not as a wrong under international law to the investor, but rather to the state of which the investor was a national. See generally, Brownlie, *supra* note 88, at 518-552, and Janis, *supra* note 76, at 237-240.

violates protected human rights norms. Under this approach, the central issue lies in deciding which norms states should be required to enforce against MNEs. In order to make this approach successful, a state's failure to regulate MNEs would result in enforcement against that state.

This approach would require the least deviation from the traditional state-centered character of international law, and this continuity could thus prove advantageous. States are powerful actors because they possess a wide range of enforcement powers. Rather than creating new international enforcement mechanisms, the international community could use existing domestic enforcement mechanisms to regulate MNEs.

On the other hand, this approach does have disadvantages. In particular, this approach is vulnerable to today's global realities. As highlighted in Part II, MNEs are becoming increasingly more powerful and their operations often extend beyond the reach of states. Additionally, because of MNEs' position in the global economy, states may be reluctant to regulate the same companies that improve a country's economic future. The fear among states is that efforts to hold an MNE accountable could force the company to close its operations in that country and instead move to a more lenient and compromising state. Such an action by an MNE could cause a "race to the bottom" effect, thereby giving MNEs more power over states as host governments in developing countries grow reluctant to question and deter an MNE's business activities. Separate from this concern, states are notoriously inconsistent in their respect for and enforcement of international human rights. Therefore, placing strict enforcement of human rights obligations into the hands of states as a method of regulating MNEs could prove problematic.

1. Imposing duties on MNEs directly, with a state action requirement

Another alternative would be to impose duties on MNEs directly when MNEs meet a "state action" requirement. Where there was no state action, the regulation of MNEs would be left to states' domestic law rather than international law.⁹⁴ But, in

⁹⁴ Whether states would have full discretion in that regard, or would instead be subject to duties under international law, remains a separate question.

situations in which the MNEs' conduct amounted to state action, the companies would be held liable on the same grounds as a state. This approach is by no means unprecedented, as cases against MNEs under the Alien Tort Statute show.⁹⁵

Pursuant to this approach, the central question remains, what activities are sufficiently "state-like" in order to be deemed state action? In terms of enforcement, the question is, who may bring an enforcement action. In addition, it would be necessary to address the question of creating appropriate international adjudicatory forums.

As with the first approach, imposing duties on MNEs directly would require relatively little departure from the existing structures of international law. Furthermore, one of the greatest advantages to this approach is that it would make MNEs responsible in instances where their actions most resemble those of states. However, the current structure of international law may not be fully suited to appreciate the wide range of human rights concerns applicable to MNEs. Because some norms are not completely set forth and consistent among all states, some inadequacies may arise.

c. Imposing duties on MNEs directly, without a state action requirement

The third approach would be to impose duties on MNEs in accordance with international law. Unlike the second approach, there would be no need for a state action requirement, and unlike the first approach, states would be under no international obligation to regulate MNEs.

To some extent, this third approach has also been utilized.⁹⁶ In further utilizing this approach, the main question would be whether an MNE violated a particular norm. International norms

⁹⁵ For a discussion on characterizing private action as state action as a means of expanding which entities should be held accountable under international law, see Ariadne Sacharoff, Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?, 23 Brooklyn J. Int'l L. 927 (1998).

⁹⁶ See Part IV.A of this article, which discusses the concept of holding MNEs accountable for use of slave or forced labor.

could be enforced in domestic courts, but the creation of appropriate international I would also be needed to ensure some degree of uniformity.

The greatest advantage of placing duties directly on MNEs is that it would combat the very real problem of the amount of power MNEs hold without any accountability. In essence, the problems discussed in Part II could be adequately addressed. Additionally, this approach would help develop consistent equal treatment among all MNEs, regardless of the host countries' willingness or ability to enforce certain human rights.

Imposing duties directly on MNEs, however, would require the greatest departure from the existing conceptual structures of international law. Such a departure may be feasible only where the norm itself is universally recognized and relatively concrete. Where the norm is vague or contested, the eagerness of states in their competition for MNEs' investment would almost certainly undermine the norms. Finally, this approach would depend heavily on creating new institutions for enforcement and compliance. In other words, this approach may be optimal, but its full import could demand more by way of institutional innovation than the international community can deliver, at least for now.

2. Conclusion

Given that each approach has its advantages and disadvantages, it would seem preferable not to adopt any one approach exclusively. Rather, it may be preferable to select the approach (or combination of approaches) best suited for a particular substantive area. The discussion in the next part examines the advantages and disadvantages of each in connection with the rights and duties of MNEs in three selected areas: the right to life, the right to health and a healthy environment, and labor-related norms.

3. The Rights and Duties of Multinational Enterprises under International Law

A. The Nature of Human Rights and Duties

Just as any discussion of whether MNEs should be “subjects” of international law must explore what that question itself means, so is it necessary to consider what is a human rights norm. Discussions of human rights norms often draw two types of distinctions. The first distinction is between positive and negative rights, and the second distinction is between civil and political rights and economic and social rights.

These two distinctions often merge, as some commentators assert that the only real human rights are negative rights, and civil and political rights are the only negative rights. This Article proceeds on a different basis, to wit, that the full range of human rights needs to be considered in discussing the human rights norms applicable to MNEs. Without this basic theoretical premise, the task of addressing the human rights concerns generated by the rise of MNEs’ power would be wholly incomplete.

Civil and political rights have often been characterized as negative rights because an obligation is imposed on state parties to abstain from activities that would violate them. It has also been said that civil and political rights are cost-free rights, which means that protection of these rights can be achieved without incurring significant costs. Therefore, civil and political rights are considered to be capable of full and immediate realization. All the state must do is enact legislation that outlaws the activities that violate these rights.

Part 3 of the International Covenant on Civil and Political Rights (ICCPR) sets out what are often considered to be negative civil rights. They include the right to life, the right to be free from torture and inhuman treatment, the right to be free from slavery and forced labor, the right to liberty and security, the right of detained persons to be treated with humanity, the right to move freely and to choose one’s residence, aliens’ right to be free from arbitrary expulsion, the right to a fair trial, the right to free association, and the right to privacy.

On the other hand, positive rights are thought to require active intervention by governments in order to implement initiatives that would achieve their success. Economic, social, and cultural rights are typically cited as the prime example of positive rights. These rights are protected by a variety of instruments. On the international level, such protections are codified in the International Covenant on Economic, Social, and Cultural Rights. On the regional level, positive rights are protected under the European and Social Charter, the Protocol to the American Convention on Human Rights, and the relevant articles of the African Charter on Human and Peoples' Rights. These instruments safeguard the right to work, education, health, an adequate standard of living, and cultural life, as well as the right to enjoy the benefits of scientific progress.

Economic, social, and cultural rights have been attacked as raising issues that are inherently intractable and unmanageable, and thus too complex to be dealt with as rights. Such rights have also been viewed as culturally relative. To such critics, only civil and political rights relate to widely shared values to which governments are committed. Finally, the positive norms of economic, social, and cultural rights are seen as ideological, thereby necessitating an unacceptable degree of intervention in the domestic affairs of states, and as inherently incompatible with free market economies.

As a philosophical matter, there is no basis for affirming civil rights as the only rights. First, civil and political rights are positive as well as negative. It may well take affirmative government protection to ensure that one's right to life is respected.⁹⁷ Protecting civil rights requires a strong and independent judiciary, and creating such a body is an affirmative project that requires massive resources and years of work. Conversely, economic rights can be negative. For example, rights to unionize are traditionally thought of as economic rights. At the very least, they require the government not to prevent workers from arbitrarily forming unions. Indeed, the right to unionize looks very much like the right to the freedom of association.

⁹⁷ Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy 13-34 (2d ed. Princeton University Press 1996).

Second, civil and political rights cannot be sharply distinguished from economic and social rights by the degree of universality. Civil and political rights are not absolutely universal. For example, different states take different approaches in reconciling their beliefs in freedom of speech and in the prohibition of racial discrimination, at least regarding hate speech. Likewise, the more political of these rights, i.e., those having to do with government and governance, are intrinsically linked with the particular system of government existing in a particular state.⁹⁸ As there is no universal agreement on a particular political system, there can be no universal agreement on whether such political rights may be recognized or even enforced. Conversely, economic and social rights are not purely relative. For example, the universal response to famine – to seek to alleviate it by international aid – strongly suggests that there is a degree of commonality on the issue of the right to food.

Thus, it is important to reject a simple-minded favoring of civil and political rights over economic and social rights in the “bill of rights” of the new constitution of the emerging global order. Of course, some rights are more fundamental than others, and some are more costly or difficult than others to implement.⁹⁹ What those inescapable facts cannot do, however, is justify ignoring a whole category of human rights, specifically, economic, social, and cultural rights.

Indeed, the kinds of concerns that MNEs raise for human rights do not fit neatly within one category or the other. Thus, both positive and negative rights are of particular concern when it comes to MNEs, and are most often interrelated or intertwined. For example, the right to freedom from slavery and forced labor (considered a negative right) can be and is most often linked to the right to just and favorable conditions of work, the right to form and join trade unions, and the right to strike (all of which are

⁹⁸ *Id.*

⁹⁹ It is also true that the institutional context of the enforcement of human rights norms may have a bias one way or the other. If enforcement is largely left to adjudicative bodies with limited powers, for example, the tendency may well be for those bodies to emphasize negative rights. Even so, there is no reason to expect that such rights will be exclusively civil and political rights.

considered positive rights). Both types of rights, negative and positive, make up the strata of labor rights that concern the status of the worker in the international context.

B. The Duties of MNEs

1. Introduction

There is no definitive or comprehensive international code or standard specifying the responsibilities of MNEs under international law. Like everyone else, corporations have a duty under the International Bill of Human Rights¹⁰⁰ to respect the rights of others. Provisions under each of the internationally recognized covenants state that no private entity may "engage in activity, which treads upon another person's rights and freedoms." However, for the most part, these covenants do not legally bind individual entities to prevent abuses of international human rights, and instead bind the states that ratified these agreements.

Legally, these states are charged with the responsibility of regulating MNEs' activities. For example, in *Doe v. Unocal Corp.*,¹⁰¹ the plaintiffs alleged that Unocal had violated various international human rights, such as forced labor and summary execution and torture, in furtherance of their joint venture with the state in the Yagana gas pipeline project. The court held that "torture and summary execution when not perpetrated in the course of genocide or war crimes, are proscribed by international law only when committed by state officials or under the color of law."¹⁰²

¹⁰⁰ The International Bill of Human Rights, U.N. GAOR, 3d Sess., Supp. No. 1, at 71, U.N. doc. A/565 (1948), includes the Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., 67th plen. Mtg. At 1, U.N. Doc. A/811 (1948); the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ESC Covenant]; the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); and the Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

¹⁰¹ *Doe v. Unocal Corp.*, 63 F.Supp 880 (1997).

¹⁰² *Id.*; see also *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 116 S. Ct. 2524 (1996).

At the same time, international law is arguably changing in this regard. One sign of such a change is the argument that some commentators have made to the effect that MNEs have an ethical duty to recognize and respect international human rights.¹⁰³ In this view, MNEs have a duty not to be the instruments of, or a contributing factor to, a state's violation of human rights. The precise implications of the duty depend largely on the position or impact a given MNE has within the economy of the host state.

To be sure, this ethical approach has severe limitations. For one thing, most MNEs either reject this approach or take a very narrow view of it, articulating instead a policy of not becoming involved in internal domestic affairs. More importantly, asserted moral or ethical duties imposed upon MNEs will have little meaning without any legal force to support it. One thing is certain: The ethical duties approach will signal a shift in the direction of recognizing human rights duties on the part of MNEs.

Another indicator is the increasing recognition that certain activities when conducted by MNEs (or by MNEs in concert with governments) amount to violations by MNEs of human rights norms directly applicable to them. The most obvious example is the *Unocal* case, in which the court held that the norm against forced or slave labor, as well as certain other crimes like genocide, applied directly to MNEs without the implementation of any state action requirement.

This discussion focuses on three basic norms applicable to MNEs: (1) the right to life; (2) the right to health and a healthy environment; and (3) labor-related norms. A comprehensive discussion of all the conceivable norms that might apply to MNEs would represent an enormous undertaking. Similarly, such norms cannot be prescribed in detail at once, but rather must emerge from on-going efforts to make human rights norms apply to MNEs. In this sense, the formation of a bill of rights in the emerging constitution of the global economy cannot be a mere drafting exercise. It must be a living process.

In an effort to illustrate the usefulness of the basic norms approach, this Part will establish a more concrete context. Subsection two sets out a series of five "case studies" of incidents

¹⁰³ Mark Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?*, 24 U. Miami Inter-Am. L. Rev. 399, 409 (1992-93).

and situations that illustrate the kinds of human rights concerns that can arise with respect to MNEs. Subsection 3 discusses the norms in lights of these case studies.

2. Case Studies

There are ample grounds for thinking that human rights norms should be applied to MNEs. The case studies discussed in this section reflect serious human rights violations in a multitude of commercial and industrial activities that span across political and socio-economic borders. The effects stemming from the activities of MNEs range from environmental devastation to harming the health of citizens, from leaving millions in abject poverty¹⁰⁴ to helping morally bankrupt regimes perpetuate human rights violations by oppressing, killing, maiming, and torturing thousands of citizens in host countries.

In their defense, MNEs typically make at least two assertions. The first is a denial that MNEs engage in human rights violations. The other assertion is that even if their activities include what others consider to be human rights violations, the MNEs' presence in a country helps the country move towards democracy, thereby contributing to greater respect for human rights in the long run.¹⁰⁵

¹⁰⁴ Some may argue that because these people were already living in abject poverty, they are no worse off. While this point has some validity, someone who is living in abject poverty and becomes employed (directly or indirectly through subcontractors) by a multinational enterprise has legitimate expectations of professional advancement. Some of these expectations include earning enough to feed one's family, afford basic housing accommodations, purchase basic necessities (clothes, shoes, etc.), and send one's children to school. When the employee realizes that he/she must work approximately ten or more hours a day, six days a week, in an environmentally-hazardous workplace where the employee is subject to mental and verbal abuse, those initial expectations may be dashed, and the worker may actually feel worse-off than before.

¹⁰⁵ See Sacharoff, *supra* 95 at 927, 928. Multinationals Texaco and Unocal, which do business in former Burma (now called Myanmar), claim that they are providing an alternative to dictatorship (that is, a model of democracy), and that moves to divest from Myanmar will only isolate the country and prolong the duration of Burma's military dictatorship. Multinationals such as Texaco and Unocal raise this defense in response to the assertion that their presence the Burmese military dictatorship. These two companies view it as their corporate responsibility to remain in Myanmar and not to divest.

MNEs take this position because generally dictatorships and totalitarian regimes lead to political instability. Understandably, political instability in a country does not encourage foreign investment. By steering a country away from totalitarianism and towards more democratic principles, MNEs believe that greater economic development prepares a country's infrastructure economically and politically, thereby lessening political instability. It is true that MNEs have the capacity to serve as a force for good if they use their resources, technology, labor, capital, training, knowledge, skills, and significant political influence to assist in the development and promotion of human rights around the world. In this sense, MNEs implicitly have the power to assist in paving a trajectory towards democracy and development.¹⁰⁶ These enormous commercial entities wield tremendous political and economic power that, if harnessed correctly, could improve the quality of life for millions of people.¹⁰⁷

However, there are reasons for doubting this defense. At the very least, it is disingenuous for an MNE to claim that its presence will help achieve democracy in the long run if its activities in the host country include the use of forced labor, suppression of unionization, and other human rights violations. Furthermore, it is unclear that today's victims of human rights violations will ultimately benefit or have a higher standard of living as a result of MNEs' activities.¹⁰⁸ Even if economic development could be

¹⁰⁶ Walter Rodney, How Europe Underdeveloped Africa 3 (1974). "Development," as defined by the late Walter Rodney, a Guyanese political scientist and the author of How Europe Underdeveloped Africa, means "self-sustaining growth." On an individual level, Mr. Rodney defines "development" as greater freedom, creativity, self-discipline, responsibility, material well-being, and increased skill and capacity. On a social level, Rodney defines "development" as the ability to regulate both internal and external relationships. Development becomes a matter of combining land, population, capital, technology, specialization, and large-scale production.

¹⁰⁷ Corporate Watch U.S.A., *supra* note 6, at 1. Unocal, a multinational enterprise claims that by laying down a gas pipeline in the Karen and Mon states of Burma (now known as Myanmar), the people in the vicinity will prosper because of the improved standard of living.

¹⁰⁸ How long should an oppressed and exploited people wait? One year? A generation? A century? Even if we assume that an exploited people are willing to await the benefit from the activities of multinationals, is there any guarantee

correlated in the long-term with improved respect for human rights, it would offer little solace to those imprisoned, tortured. There is little solace to those children who toil 10 - 12 hours a day under deplorable conditions in environmentally unsafe and hazardous surroundings.¹⁰⁹ In any event, for every liberalizing Taiwan or South Korea, there is a Burma (now officially known as Myanmar), Indonesia, Nigeria, Mozambique, China, or Peru, where economic growth has so far simply sustained an authoritarian regime.¹¹⁰ Multinationals find developing countries desirable because they provide the most efficient production in today's market.¹¹¹ This source of abundant and cheap labor is the

that that group will in fact ultimately benefit? In the Disney case, CEO Michael Eisner earned a whopping \$575 million (or approximately \$277,000 an hour) in 1998. Yet, the producers of Disney products and garments in Haiti earned an average of 12 cents a day. The Disney factories have been in Haiti during the past several decades. Haiti's sweatshop workers have yet to "benefit" from the activities of Disney, and given Disney's history in Haiti, it is doubtful the sweatshop workers will ever receive anything substantial or significant anytime soon, if at all. Similarly, an argument can be made on the behalf of the American consumer who has yet to "benefit" from the activities of Disney. American consumers of Disney products are also the victims of massive corporate exploitation. American consumers are paying exaggerated prices at retailers, considering what Disney pays its garment workers, as well as the lack of environment laws or enforcement mechanisms currently available in Haiti, Disney's low transportation costs, and low taxes -all of which help keep Disney's costs low. Many American consumers mistakenly believe they are doing "better" because they are able to afford some Disney goods and services or Nike products. Even the May 1999 issue of Money magazine currently boasts that "Everyone's getting rich!" But everyone is not getting rich. In the growing gap, the top 1 percent of households in America now have more wealth than the bottom 95 percent. See Ellen Goodman, Another Day, Another Million, Miami Herald, April 16, 1998, at 23A.

¹⁰⁹ Douglas Cassel, International Security in the Post- Cold War Era: Can International Law Truly Affect Global Political and Economic Stability? Corporate Initiatives: A Second Human Rights Revolution?, 19 Fordham Int'l L.J. 1980.

¹¹⁰ *Id.*

¹¹¹ Multinational enterprises thrive on host countries mainly because these countries often do not enforce the same environmental and labor standards that are found in the countries in which the MNEs have their headquarters. As of yet, the MNEs are not required to follow any international or home standards for the treatment of the environment and their employees, and instead are only

prime characteristic that interests MNEs. It is unclear that their mere presence in a developing country will promote human rights in the long run.

In short, the case studies below reveal a situation in which on-going, concrete violations are taking place. It seems inadequate to respond to the call for greater protection of human rights with a promise that MNEs' role in promoting a global economy will indirectly promote democracy and respect for human rights.

a. Royal Dutch Shell in Nigeria

This section discusses human rights violations related to oil production by Netherlands-based Royal Dutch Shell ("Shell") in the Niger River Delta.¹¹² The Niger River Delta has been the site

required to comply with the laws and standards of the host country. Because the host country's standards typically do not conform with international standards for labor and the environment, or when they do conform, usually there are no enforcement mechanisms available to enforce those standards, the MNEs' costs are substantially lower. In the Nike Vietnam case study set forth in Chapter IV of this article, the factories often times exceeded the Vietnamese legal limits for chemicals and glues (in part because of the use of toluene, a toxic chemical), as reported in 1996 by the Ho Chi Minh City Health Department. The report also provided many recommendations that seek to ameliorate these problems. As of March 12, 1997, the Sam Yang factory management did not implement any of the recommendations in the report. The factory management ignored the recommendations made by Nike's labor practice department, such as the recommendation that the management leave factory doors open in case of fire. *See Practices in Vietnam*, <<http://www.saigon.com/nike/reports/report1/html>>.

These conditions are precisely what attracts the MNE to the host country. If one host country enforces its environmental and labor laws or enacts more stringent regulations, the MNE will find another host country which does not. For example, in the Philippines, two shoe factories in the Bataan export zone have announced that they will close because Nike has pulled its orders. At another factory in the nearby Cavite Export Processing Zone, hundreds of Filipino workers may lose their jobs as a result of another withdrawn Nike contract. The factory workers in the Philippines have worked hard to get their legal rights enforced, and also to receive higher wages. Notably, the wages of Philippine factory workers are among the highest in the region. *See Boycott Nike*, *supra* note 18.

¹¹² Some of the other multinational enterprises that have the largest share of Nigerian oil production are: Shell (a Dutch-British entity), Chevron (American), Mobil (American), Texaco (American), Elf Aquitaine (French), and Agip (Italian). In 1958, Shell discovered petroleum near the Niger River Delta in

of major confrontations between the people who live there and the Nigerian government security forces, resulting in extra-judicial executions, arbitrary detentions, and draconian restrictions on the rights to freedom of expression, association, and assembly.¹¹³ These violations of civil and political rights have been committed principally in response to protests about the activities of the multinational companies that produce and refine Nigeria's oil.

For several years, Ken Saro-Wiwa led an activist group of the Ogoni ethnic minority in the Niger River Delta. The Ogoni people claimed that Shell drilling and pipelines had polluted their waters and poisoned their lands, ruining not only their environment but their livelihoods, which depended on fishing and farming.¹¹⁴ The Ogoni also claimed that they were not benefiting from Shell's exploitation of their land. Although Shell claims to have supported dozens of projects in Ogoniland,¹¹⁵ the Ogoni maintain that most of the money from oil production that stayed in Nigeria went into the pockets of corrupt members of Nigeria's military regime.¹¹⁶

In the early 1990s, members of an ethnic activist group allegedly sabotaged Shell's equipment. To preserve its investment in Nigeria, Shell called upon the local authorities to protect its

Nigeria. Since then, Shell has extracted over \$30 billion worth of oil and natural gas from its drillings in Nigeria. Shell, Mobile, Chevron, Texaco, Elf Aquitaine, Agip, and other oil companies generate eighty percent of Nigeria's annual revenue. See Hoover's Handbook of World Business 217 (1993).

Even though Nigeria is the world's sixth-largest oil producer, many Nigerians (Hausa, Yoruba, Ibo Ogoni, etc.) live without running water, paved roads, or electricity. See *Democracy Now, Voices from the Nigerian Resistance: Nigerian Youths Release Oil Workers* (Visited Mar. 22, 1999) <<http://www.pacifica.org/programs/nigeria/html>>.

¹¹³ Human Rights Watch World Report, 1999 Chapter. The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities, (Visited March 22, 1999) <<http://www.hrw.org/hrw/press/1999/feb/nigsumm.html>>.

¹¹⁴ Cassel, *supra* note 109, at 1963, 1965.

¹¹⁵ Shell purports to have supported dozens of community projects in Ogoniland and recently boosted its budget for environmental improvements to over US \$100 million. See Human Rights Watch World Report, *supra* note 113.

¹¹⁶ *Id.*

property. However, the local authorities are ruled by a corrupt and repressive military regime led by General Sani Abacha.¹¹⁷

According to an investigation conducted by The New York Times, Shell called in the Nigerian military's hit squad, and according to Dr. Owens Wiwa, brother of Ken Saro-Wiwa, the security forces killed 2,000 Ogoni and destroyed approximately thirty villages.¹¹⁸ Evidently, the New York Times' investigation unveiled that Shell helped to transport troops, provided boats, and even paid salary bonuses to troops that participated in the aggression against the Ogoni people.¹¹⁹ Subsequently, Mr. Ken Saro-Wiwa and several other activists were arrested, jailed, convicted, and sentenced to death in late 1995. The witnesses called on behalf of the military regime recanted their testimony, claiming that they had been bribed, and one key witness swore in an affidavit that he had been promised Shell contracts and money "from Shell and the government" if he incriminated Mr. Saro-Wiwa.¹²⁰ Even though Shell's Chairman sent a last-minute request for clemency based on humanitarian grounds, Mr. Ken Saro-Wiwa and eight other Ogoni peoples activists were executed on November 10, 1995.¹²¹

Approximately four years later, Nigerian newspapers reported that military forces killed up to nineteen people near export terminals owned by Shell Oil.¹²² The killings occurred in the Niger River Delta region, where dissension between multinational oil-producing companies and local communities had grown

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Paul Lewis, Blood and Oil: A Special Report: After Nigeria Represses, Shell Defends its Record, N.Y. Times, Feb. 13, 1996, at A1.

¹²⁰ Human Rights Watch World Report, *supra* note 113.

¹²¹ Directory of Transnational Corporations, Public Information Network Directory of Transnational Corporations, February 1996 Edition, Compiled by George Draffan, (Visited March 22, 1999) <<http://violet.berkeley.edu/~orourke/data/E.html>>.

¹²² See Democracy Now, Voices from the Nigerian Resistance, *supra* note 112.

intensely in recent months. In January 1999, Nigerian leader General Abdulsalami Abubakar ordered troops into the Niger River Delta region after protests erupted against environmental destruction and growing impoverishment.

b. The Gap in El Salvador, Central America

Acquiescing to mounting criticism from activists, consumers, and labor organizers over human rights abuses in Central American maquiladoras (assembly plants), The Gap, Inc. has become the first major multinational retailer to agree to independent monitoring of its contractors.¹²³ In December 1995, representatives from The Gap and the National Labor Committee Education Fund in Support of Worker and Human Rights in Central America (NLC) signed an agreement pursuant to which observers from the Human Rights Ombudsman Office in El Salvador, the Washington, D.C.-based Interfaith Center for Corporate Responsibility (ICCR), and other human rights groups gained access to the plant of The Gap's Salvadoran contractor, Taiwanese-owned Mandarin International.¹²⁴ However, according to a spokesperson for The Gap, the agreement applies only to the independent monitoring of the company's assembly contractors in El Salvador.¹²⁵

Eighteen year-old Judith Viera worked in the Mandarin plant making tee-shirts for The Gap. She described the conditions during her employment with Mandarin as a sweatshop.¹²⁶ Even

¹²³ Multinational Monitor, Behind the Lines: The U.S.-Salvador Gap (Visited Mar. 15, 1999) <<http://www.essential.org.monitor/hyper/0195.html>>.

¹²⁴ *Id.*

¹²⁵ *See id.* The spokesperson for The Gap, Ms. Kathleen Bertlesen declined to comment on whether The Gap would permit similar monitoring of its other overseas contractors. According to The Gap's Annual Report for 1994, the company purchases 70 percent of its merchandise from overseas vendors in 47 different countries.

¹²⁶ The terms "sweatshop" and "sweating" were initially used in the 19th century to describe a subcontracting system where the middlemen earned their profit from the margin between the amount they received from a contract and the amount they paid their workers. This margin was "sweated" from the

workers because they received minimal wages for excessive hours worked under unsanitary conditions.

The concept of sweating is pervasive and vibrant in today's garment industry, which is best described as a pyramid where big-name retailers and brand-name manufacturers contract with sewing shops, who in turn hire garment workers to make the finished product. Retailers and manufacturers at the top of the pyramid dictate how much the workers earn in wages by controlling the contract price given to the contractor. With these prices declining each year by as much as 25%, contractors are forced to "sweat" a profit from garment workers by working them long hours at very low wages.

The U.S. General Accounting Office has developed a working definition of a sweatshop as "an employer that violates more than one federal or state labor, industrial homework, occupational safety and health, workers' compensation, or industry registration." More broadly, a sweatshop is a workplace where workers are subject to extreme exploitation, including the absence of a living wage or benefits, as well as poor working conditions and arbitrary discipline.

Despite hard-won laws for minimum wage, overtime pay, and occupational safety and health, sweatshops are commonplace in the United States garment industry, and are spreading rapidly throughout developing countries. In the U.S.A., garment workers typically toil 60 hours a week in front of their machines, often without minimum wage or overtime pay.

The Department of Labor estimates that more than half of the country's 22,000 sewing shops violate minimum wage and overtime laws. Many of these workers labor in dangerous conditions including blocked fire exits, unsanitary bathrooms, and poor ventilation. Government surveys reveal that 75% of U.S. garment shops violate safety and health laws. Workers commonly face verbal and physical abuse, and are intimidated from speaking out, fearing job loss or deportation.

Overseas, garment workers routinely make less than a living wage, working under extremely oppressive conditions. Workers in Vietnam average \$0.12 per hour, and workers in Honduras average \$0.60 per hour. Sweatshops can be viewed as a product of the global economy. Fueled by an abundant supply of labor in the global market, capital mobility, and free trade, garment industry giants move from country to country seeking the lowest labor costs and the highest profit. See Corporate Watch, Blood, Sweat & Shears, Facts on the Global Sweatshop, Rethinking Schools, Vol. 11, No. 4. (Visited March 15, 1999). <<http://www.sweatshopwatch.org/factsheet.html>> and <<http://corpwatch.org/factsheet/sweatshops.html>>.

Average hourly wages for garment workers:

Bangladesh	\$0.10-0.16	Burma	\$0.10-0.18	Canada	\$9.88
China	\$ 00.20-0.68				
Columbia	\$ 1.05	Costa Rica	\$2.38	France	\$7.81
Germany	\$ 23.19				
Haiti	\$ 0.49	Honduras	\$1.31	India	\$0.26
	\$ 0.34			Indonesia	

though the workweek was supposed to be only 44 hours long, However, at least eight additional hours of overtime was required, and workers were not compensated for the overtime hours. High production quotas (music is piped in to encourage a relentless pace), and long work days sparked exhaustion. Accidents were common, and there was no unemployment or disability insurance. The women were frequently sexually harassed. An employee's refusal to work overtime commonly resulted in termination the next day. The drinking water in the plant was contaminated, and the air choked with dust. During work hours, talking was strictly forbidden. Bathroom visits required special passes, and were restricted to only two per day.¹²⁷

Ms. Viera was among the Mandarin workers who formed the Union of Workers of the Mandarin International Company (SETMI) in February 1995. The Union's fundamental goal was to protest the low wages and inhumane conditions at the sweatshop. Nonetheless, almost immediately after the creation of the Union, Mandarin International began a campaign of brutality and terrorism designed to dismantle the union.¹²⁸

Although El Salvador recently instituted sweeping reforms concerning labor codes to guard against abuses, its Ministry of Labor is short-staffed, under funded, and is not in a position to enforce its own rules.¹²⁹ For now, assembly plant workers along

Italy	\$14.00	Jamaica	\$1.80	Macau	\$2.41
Mexico	\$ 1.08				
Pakistan	\$ 0.21	Sri Lanka	\$0.31	U.K.	\$7.38 U.S.
\$ 9.56					
See: <u>Women's Wear Daily</u> , December 31, 1996 (Visited March 15, 1999)					
< http://corporatewatch.org/factsheet/sweatshops > .					

¹²⁷ Multinational Monitor, *supra* note 123, at 4.

¹²⁸ *Id.* According to the NLC, Mandarin International "hired two dozen ex-military, plain-clothed, armed 'security guards.'" The women workers were told that their union would have to disappear one way or another, or "blood will flow." Since the creation of the union, the plant's 850 workers have endured multiple lockouts, more than 100 union members have been terminated, and union sympathizers have been beaten and threatened with termination unless they renounce the union.

¹²⁹ *Id.*

with various activist groups continue to struggle for the right of garment workers to earn living wages¹³⁰ and work in universally recognized and acceptable environments, under conditions which do not threaten the physical, emotional, and mental health of the workers.

c. Disney in Haiti and the Caribbean Basin

Although Haiti was the first black republic to gain its independence in the Americas in 1804, Haiti remains one of the poorest and least developed countries in the region. After decades marked by foreign intervention, political turbulence, and extreme economic hardship, a democratically based political system was established and subsequently restored in 1994, with the return of the popularly elected President Jean-Bertrand Aristide.

Like most developing countries, some of the most important goals of the Haitian government include building up the economy, developing the infrastructure, and creating employment opportunities for its people. One way of accomplishing this goal is by attracting foreign investors such as multinational enterprises.¹³¹

Some multinational enterprises contract with factories in Haiti in order to take advantage of low labor costs, low shipping costs (Haiti is a mere 700 miles away from the United States), and Haiti's inability to effectively enforce violations of its labor laws. Another looming issue is that Haiti may not be in a position to impose "stiff" sanctions against multinational enterprises who violate laws concerning the minimum wage. Haiti needs

¹³⁰ A "living wage" is a wage that provides for a family's basic needs. A "living wage" in a general sense means that every member of the household can eat at least one meal per day, children are able to attend school, and a family's very basic shelter costs are met.

¹³¹ Multinational enterprises can help a developing nation's government to develop its resources by offering technology, efficiency, manpower, skills, training, capital resources mainly used for development projects, and by creating employment opportunities for a wide segment of its population. Multinational corporations [generally] have the capacity, manpower, and resources to "move" developing nations closer to the ranks of developed nations. On the other hand, multinational enterprises yield enormous political and economic power to the extent that they can weaken and destabilize these already fragile economies.

multinational enterprises in order to generate employment opportunities for many of its unemployed. Furthermore, Haiti needs the revenues generated from taxes that are assessed to these companies in order to pay its civil servants and run its government. Thus, Haiti's need for a multinational presence to achieve economic surpasses its ability to regulate multinational enterprises. Sensing the country's weak position, multinationals have been able to dictate the terms pursuant to which they establish operations in Haiti.

In 1995, the Haitian government raised the legal minimum wage from 15 gourdes (\$1.00) a day to 36 gourdes (\$2.40) a day to combat pervasive worker abuses. This law formally requires employers to ensure that piece-rate workers earn at least the minimum wage.¹³² However, in practice more than half of the approximately 50 assembly plants producing goods for U.S. markets pay their workers less than the statutorily-required minimum wage.¹³³

Some observers (such as a prominent Haitian broadcast correspondent) believe that if workers push multinational enterprises (such as Disney, Wal-Mart, K-Mart, H.H. Cutler/VF) to respect worker's rights and pay a wage that comes close to meeting basic subsistence needs, the multinational enterprises will choose to leave Haiti and move to similarly repressive countries such as China.¹³⁴ Some Haitian factory owners claim that they cannot afford to pay more than they do, and argue that higher wages will

¹³² The World Fact Book 1998: Haiti (Visited Mar. 15, 1999) <<http://odci.gov/cia/publications/nsolo/factbook/haiti.html>>.

¹³³ Corporate Watch, *supra* note 126.

¹³⁴ Corporate Watch, National Public Radio Report Seriously Distorts Struggle for Worker Rights in Haiti, (Visited Mar. 15, 1999) <[http://clr@igc.org/corporate watch/action alerts](http://clr@igc.org/corporate%20watch/action%20alerts)>. Mr. David Welna of the National Public Radio (NPR) broadcasted a story on July 8, 1998, in which he maintained that it was the misguided efforts of human rights advocates in the United States that were driving Disney and H.H. Cutler to pull out of Haiti. The commentator went on to say that multinational enterprises have the unassailable right to roam the world in search of misery and high unemployment, where multinational enterprises will choose the host countries in which workers will be paid the lowest wages and the government will impose the least restrictions on the multinational enterprise.

make them lose business to other businesses and producers in other countries within the Caribbean basin that are able to provide substantially similar goods and services.¹³⁵ Interestingly, wages in Haiti remain the one of the lowest in the entire western hemisphere, if not the world.¹³⁶

In Haiti, sweatshop seamstresses earn approximately 28 to 30 cents per hour sewing Disney's Pocahontas tee-shirts, nighties, and Lion King outfits for children, which sell at Wal-Mart for \$11.95.¹³⁷ Sweatshop workers' grievances¹³⁸ include the

¹³⁵ *Id.*

¹³⁶ See Corporate Watch, *supra* note 126.

¹³⁷ Corporate Watch, Disney Week: International Week of Action Against Disney Sweatshop Labor (Visited Mar. 15, 1999) <<http://www.corpwatch.org/feature/sweatshops.html>>.

¹³⁸ Some examples of companies (contractors) which produce goods in Haiti for the U.S. market which continues to violate Haitian Labor Laws include:

- At the SONAPI industrial park (which produces for Kmart), the average worker earned \$1.67 per day, and received no overtime on weekends.
- Seamfast Manufacturing produces for Ventura Ltd. and sells its products to Kmart and J.C. Penny. These workers earn 87 cents for an eight-hour day.
- Chancelleries S.A. produces undergarments which eventually are sold to J.C. Penny, and smaller retailers pay workers an average of \$1.73 to \$1.80 per day. It is reported that the a chief supervisor verbally abuses the workers on a regular basis.
- Excel Apparel Exports, jointly owned and operated with the Kellwood Co., produces women's underwear and other undergarments for women for Hanes, a division of Sarah Lee Corporation, Sears Roebuck, and Bradlees. Workers earn less than \$1.33, and since the passage of the new minimum wage law, production quotas have been increased by more than 100%.
- Alpha Sewing (owned by the Apaid family) produces industrial gloves for Ansell Edmont of Coshocto, Ohio. Workers report skin and respiratory problems because of lengthy and continuous exposure to noxious chemicals. Workers work approximately 78 hours per week, and 75% of the women do not earn the Haitian minimum wage.
- L.V. Myles, a Walt Disney contractor, pays its workers about half the minimum wage. Workers must meet extraordinarily high production quotas. The workers, overwhelmingly women, are under constant abuses and threats of being laid off or terminated. Some of the female workers face constant sexual harassment from their supervisors. On May 12, 1997, a leaflet was anonymously circulated within the factory. The leaflet addressed abusive conditions within the factory, and called for workers to

following: threats if they attempt to organize and claim the right of collective bargaining, illegal firings, verbal abuse, sexual harassment, no access to potable water, unsanitary facilities, inadequate lighting and ventilation, and the constant pressure to work an enormous pace.

Disney is an American-owned multinational enterprise that contracts with multiple garment factory owners in Haiti. As previously mentioned, L.V. Myles, a Disney licensee, its workers \$1.00 a day, which calculates to 12 cents an hour.¹³⁹ It is possible to earn a bonus, but the high piece-rate prevents even the most experienced women from ever earning such a bonus.

On the opposite side of the earning spectrum, Disney Chief Executive Officer, Michael Eisner earned \$203 million from salary and stock options in 1993, which translates to \$97,000 per hour.¹⁴⁰ In 1994, Eisner's salary alone amounted to \$8 million.¹⁴¹ In 1996, Eisner received \$8.7 million in salary, combined with \$181 million in stock options, making his total compensation reach over \$189.7 million (\$101,000 an hour).¹⁴² In 1998, Michael Eisner earned \$575 million between stock options and salary earnings.¹⁴³ Walt Disney's profit amounted to \$1.1 billion in 1994.¹⁴⁴ Despite wide profit margins, Disney still claims that it cannot pay more to the producers of Disney's very profitable items.¹⁴⁵

organize and defend their rights. During that same week, four workers were arbitrarily terminated, and a systematic campaign of intimidation was started by the management, with threats of an impending 40 additional firings. See Corporate Watch, *supra* note 126.

¹³⁹ *Id.* at 3.

¹⁴⁰ *Id.* at 4.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Ellen Goodman, *supra* note 108, at 23A.

¹⁴⁴ *Supra* note 138 at 4.

¹⁴⁵ *Supra* note 138 at 4.

Meanwhile, workers and human rights activists continue to struggle for compliance with all national wage and hour laws and regulations related to minimum wages, overtime, maximum hours, piece rates, and other elements of compensation.¹⁴⁶ These same groups continue to seek a safe and healthy workplace, ensuring at a minimum reasonable access to potable water, sanitary facilities, fire safety, and adequate lighting and ventilation. Furthermore, they want producers to respect the legal right of employees to associate, organize, and bargain collectively in a lawful and peaceful manner without the fear of termination or interference. Finally, these groups continue to struggle to convince manufacturers to authorize local and international human rights organizations to engage in monitoring activities to confirm compliance with Disney's Code of Conduct, including unannounced on-site inspections of manufacturing facilities and private interviews with employees.

d. Child Labor in India

In India, the use of child labor is confined mainly to the agricultural sector. The agricultural sector includes family farms and large-scale agricultural business outfits such as fishing plantations, tea plantations, and orchards. Most of the produce (coffee, tea, fish, and food grains), grown with the assistance of child labor, finds its way into international markets.

India's child laborers also work in the industrial sector. Some of the industries include carpet manufacturing, diamond cutting and polishing, glass and glassware production, and footwear manufacturing. Much of the products manufactured in the industrial sector are subsequently purchased by multinational enterprises via subcontractors. The multinational enterprises then sell these consumer goods mainly to European and American markets.¹⁴⁷

¹⁴⁶ Charles Kernaghan, a labor rights activist whose congressional testimony blew the whistle on the Honduras factory, says that Disney relies on exploited Haitian labor. Mr. Kernaghan said, "The wages are so low that the indentured workers live from debt to debt in utter misery." See Albion Monitor and Norman Solomon, Kathy Lee, Disney, and the Sweatshop Uproar (Visited Mar. 18, 1999) <<http://www.monitor.net/monitor/sweatshops/ss-solomon.html>>.

¹⁴⁷ Some of the Multinational Enterprises that purchase goods from these industries in India include Federated Department Stores, Sears, J.C. Penny, K-

The Carpet Industry Approximately 350,000 Indian children between the ages of ten and fifteen work in the manufacture of hand-knotted carpets, the most sought-after carpet in the international market today.¹⁴⁸ Retailers sell these much desired hand knotted carpets throughout the United States and Europe.¹⁴⁹ India's carpet weaving child-laborers sustain serious injuries to their fingers, hands, arms, and backs. These children also suffer from eyestrain, skin disorders, worn out limbs, endemic tuberculosis, and other respiratory diseases.¹⁵⁰

In 1993, India exported more than \$170 million worth of carpets to retailers and other distribution outlets in the United States alone.¹⁵¹

The Diamond Industry. India's children cut and polish diamond chips for export to the United States and Europe. Children between the ages of twelve and thirteen years were found polishing diamonds for an average of seven to nine hours a day in unsanitary conditions. The children suffered from eyestrain, headaches, leg and shoulder pain, malaria, discoloration of hair, rotten teeth and dysentery.¹⁵² In 1993, India exported more than \$1 billion worth of gemstones of which an overwhelming majority of stones were sold by department stores and other retailers to consumers in Europe and the United States.¹⁵³

Mart, Wal-Mart, Target, and Service Merchandise. See Human Rights Watch (Visited Apr. 2, 1999). <<http://www.hrw.org/summaries/s.india969.html>>.

¹⁴⁸ Corporate Watch, Those That Be In Bondage: Child Labor and IMF Strategy in India (Visited Nov.1, 1999) <<http://www.corpwatch.org/feature/india/profiles/child/foil.html>>.

¹⁴⁹ *Supra* note 147, at 2.

¹⁵⁰ The National Council of Applied Economic Research study found that the children surveyed appeared to be famished and had stunted growth. See S. Vijayagopalan, Child Labour in the Carpet Industry 56 (National Council of Applied Economic Research 1993).

¹⁵¹ Kernaghan, *supra* note 146, at 3.

¹⁵² By the Sweat & Toil of Children: The Use of Child Labor in American Imports 78 (U.S. Department of Labor 1994).

¹⁵³ Kernaghan *supra* note 146, at 4.

Glass and Glassware Industry. In a May 1994 report, the International Labor Rights Education and Research Fund described the glass factories in India as “Dante’s Inferno” due to the intense heat of the furnace, lack of ventilation, broken glass everywhere, dangling electric wires, and the presence of workers without protective equipment.¹⁵⁴ Some children who work in the glass industry in the Uttar Pradesh district suffer from tuberculosis, asthma, bronchitis, liver ailments, mental retardation, chronic anemia, severe burns (which are not treated), and fundamental damage to their genetic matter.¹⁵⁵ The average age of children reported in the glass and glassware industry is thirteen.¹⁵⁶ In 1992, India exported more than \$20 million worth of glass and glassware products to retailers in the United States.¹⁵⁷

Footwear Industry. According to the United States Labor Department, some footwear factories that use child labor in India were found to be “cramped in poorly lit rooms, suffer from continuous skin contact with industrial adhesives, and breathe vapors from glues.”¹⁵⁸

In 1993, the United States imported more than \$107 million worth of footwear from India.¹⁵⁹ In 1986, the Indian government passed the Child Labor (Prohibition and Regulation) Act that banned the employment of children under fourteen years of age from hazardous occupations (including glass and glassware, fireworks and matchmaking, and carpet weaving). The Indian government established the National Policy on Child Labor, which framed action policies for education, health, nutrition, integrated child development and vocational employment. Even with the

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 5.

¹⁵⁷ CIA World Fact Book: India (Visited April 2, 1999). <<http://www.odci.gov/cia/publications/nsolo/factbook/india.html>>. Some of the retailers who purchased glassware products from India include K-Mart, Wal-Mart, Target, J.C. Pennys, and Federated Department Stores.

¹⁵⁸ Kernaghan, *supra* note 146, at 4.

¹⁵⁹ Human Rights Watch, *supra* note 147, at 83.

passage of the Child Labour Act, Indian child-workers continue to die while at work.¹⁶⁰

e. Nike Factory Workers in Asia

This section documents human rights violations related to the production of athletic footwear, sportswear, sports gear and equipment by Nike Inc. ("Nike") in factories located in Vietnam.¹⁶¹

Through its Asian subcontractors,¹⁶² Nike produces over one million pair of athletic footwear each month in Vietnam.¹⁶³ In order for Nike to maintain current levels of production, factory workers must work at least over 55 hours a week in Vietnam and in certain cases, workers worked over 200 hours of overtime per year, a clear violation of Vietnamese labor law.¹⁶⁴ Furthermore, it was found that Nike's subcontractors violated many other critical Vietnamese labor regulations, including night shift wages and Sunday wages. Some workers even had irregularities in compensation (based on visual inspections of their pay stubs), which suggests a systematic form of wage cheating.¹⁶⁵

¹⁶⁰ Kernaghan *supra* note 146, at 11.

¹⁶¹ Nike also subcontracts with factory owners in other parts of Asia, namely in Indonesia, China, Taiwan, South Korea, the Philippines, Thailand and Pakistan. Nike also assembles its products in Italy and in Haiti. See Boycott Nike, *supra* note 18.

¹⁶² Nike uses Asian subcontractors to produce Nike products. The Asian subcontractors own the plants, and contract with Nike in order to produce athletic footwear, sportswear, sports gear, and equipment, all of which is subsequently sold worldwide. Some of the Asian subcontractors that manufacture products for Nike include Sam Yang Plant, Pouchen Plant, Dona Victor Plant, and Tae Kwan Vina Plant.

¹⁶³ Boycott Nike, *supra* note 18.

¹⁶⁴ Vietnam Labor Watch, Nike Labor Practices in Vietnam, An Open Letter to Concerned Americans, Nike Shareholders and Consumers, (Visited Apr. 26, 1999) <<http://www.saigon.com/nike/reports/report1.html>> .

¹⁶⁵ *Id.* at 3. Additionally, in January 1997, the Independent Sports Shoes Monitoring Network, a collection of respected Indonesian non-governmental organizations, charged that "cheating" continues despite the presence of Nike

Over 90 percent of the Nike factory workers in Vietnam are women, mainly from the provinces, and most of them are between the ages of fifteen and twenty-eight.¹⁶⁶ A uniform complaint among the women workers interviewed was that they were not being paid a livable wage. For example, the daily wage is approximately \$1.60 and the cost of three simple meals is \$2.10 per day. The workers are literally left with having to make a daily choice between eating a balanced meal or paying rent for single rooms that most of them rent out.¹⁶⁷

The factory managers' treatment of the workers is unethical and in many cases even criminal. The Vietnamese press contain frequent allegations of verbal, physical, and sexual abuse of workers, charges which are echoed by Thuyen Nguyen of the New York City-based Vietnam Labor Watch.¹⁶⁸ Corporal punishment is often used by the factory managers because it is believed to be the best way to assure that workers meet daily production quotas and high qualitative standards.

On March 8, 1997, which happened to be International Women's Day in Vietnam, a day on which most women receive flowers and gifts from employers, fifty-six women employed at a factory making Nike athletic footwear in Dong Nai, were punished because they had not worn regulation shoes to work.¹⁶⁹ Factory officials ordered the women employees outside and made them run around the factory in the hot sun. Twelve of the women suffered shock symptoms, collapsed, and were taken to a local hospital.¹⁷⁰

Similarly, workers cannot go to the bathroom more than once per 8 hours shift, and they cannot drink water more than twice per

hired monitors from the accounting firm Ernst and Young. *See also* Jeff Ballinger, Nike Does It to Vietnam, *Multinational Monitor*, March 1997.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Ballinger, *supra* note 165, at 1.

¹⁶⁹ *See Corporate Watch*, *supra* note 6. (Visited Apr. 11, 1999) <<http://www.corpwatch.org/news/labor/alerts/labor/news.html>>.

¹⁷⁰ *Id.* at 3.

shift.¹⁷¹ It is also a common occurrence to see workers faint from exhaustion, heat, and poor nutrition during their shifts. Some workers coughed up blood before fainting in the Sam Yang factory.¹⁷² With over 6,000 employees at the Sam Yang factory, there are only two nurses and one doctor, who is present at the plant for two hours a day, even though this factory operates 20 hours a day.¹⁷³

At Nike's Tae Kwan Vina facility, women workers were forced by their supervisors to kneel down with their hands up in the air for twenty-five minutes because of mistakes in sewing.¹⁷⁴ Furthermore, in the Sam Yang plant, a Korean floor manager beat fifteen team leader workers with a Nike shoe, two of whom had to

¹⁷¹ *Id.* at 3.

¹⁷² Vietnam Labor Watch, *supra* note 164, at 9. Workers fainted often while working in Nike factories in Vietnam. About three incidents of fainting occur per day. A union representative witnessed one worker cough up blood and faint while working on the assembly line. Thirty-five workers were interviewed, and confirmed that at least once a week they saw or heard about someone who fainted while working in the factory. As to the reason, they attributed them to stress, exhaustion, heat, the smell of chemical glue and paint in the factory, as well as to people not eating in an effort to save extra money. In September 1996, the Ho Chi Minh City Health Department described problems at Sam Yang facility. The major problem was that many areas of the factory have a high concentration of toluene, reaching 180 mg per square meter when the legal limit is 100 mg per square meter.

¹⁷³ Corporate Watch U.S.A., *supra* note 169, at 3. Additionally, in Qinqdao, China, the SAMHO Factory (another Asian Nike subcontractor), owned by Mr. Y.K. Park, has 6,750 workers in that plant. By Nike's own admission, there are only 2 doctors, 1 nurse, 9 beds, computerized patient and pharmacy records, AC and heat at the SAMHO facility. Some of the other benefits and activities for workers include an on-site beauty salon; monthly birthday parties whereby factory president, Mr. Y.K. Park officiates, hands out gifts, and has even learned to sing happy birthday in Chinese; weekly movies; free karaoke; evening television; and sports facilities with volleyball and badminton courts. *See also Nike Factory Profile* (Visited Apr. 28, 1999) <<http://www.nikebiz.com/factorytours/samho-qingdao~china.html>>.

Additionally, conditions in Nike's Chinese footwear factories are not any better than their Vietnamese counterparts. The Washington Post reported horrible incidents in Nike's Chinese shoe factories where several women workers were locked in cages guarded by dogs for poor sewing.

¹⁷⁴ Vietnam Labor Watch, *supra* note 164 at 7.

be sent to the hospital.¹⁷⁵ There are also widespread reports of employees having their mouths taped shut for talking, workers forced to stand in the hot sun (known as sun drying) for several hours to workers writing down their mistakes over and over again like parochial school children and workers cleaning the toilet and sweeping factory floors.¹⁷⁶

In Pakistan, Nike products are also made through the use of child labor.¹⁷⁷ When Nike was caught using Pakistani child labor in the production of soccer balls, the company had its contractor set up a stitching center where only adults would be employed.¹⁷⁸

Nike's Chairman and CEO, Philip H. Knight, claims either that he is not aware of these situations or that they are not as serious as the press proclaims.¹⁷⁹ Knight announced proposed

¹⁷⁵ Boycott Nike, *supra* note 18. Fifteen team leaders were singled out and punished by their Korean supervisor, Madame Baeck. The beatings were in retaliation for poor sewing. Madame Baeck beat all the 15 team leaders in turn from the first one to the last, on the head, neck and in the face. The beatings were widely reported in the Vietnamese newspapers as violent acts against the 15 workers. Madame Baeck's reply was "it's not a big deal. It's just a method for managing workers."

¹⁷⁶ *Id.* at 7. On November 26, 1996, 100 workers at the Puchen factory, a Nike facility in Dong Nai, were forced to stand in the sun for an hour over lunch because one worker had spilled a tray of fruit on an altar. After 18 minutes, one employee (Nguyen Minh Tri) refused to remain in the hot sun, and walked away. He was subsequently fired. However, Mr. Nguyen Minh Tri was reinstated after intervention by Nike management and the local labor federation officials. The three supervisors who abused the workers are still employed at the factory as of March 20, 1997.

¹⁷⁷ Half of all soccer balls sold in the United States are made in Pakistan. *See* Joel D. Joseph, Our Purchases Keep Children in Chains (Visited Apr. 26, 1999) <<http://www.saigon.com/~nike/childrenlabor.html>>.

¹⁷⁸ Corporate Watch, Nike Critics Voice Hopes and Reservations Campaign for Labor Rights (Visited Apr. 26, 1999) <<http://www.corpwatch.org/weatshops/nikecampaign.html>>.

¹⁷⁹ Vietnam Labor Watch, *supra* note 164, at 3. Concerning the incident with Madame Baeck, Mr. Knight told shareholders that it was only one worker who was hit, and that she was hit on the arm. Madame Baeck was subsequently prosecuted and convicted for assaulting the workers. Nonetheless, she was allowed to leave the country.

changes to Nike's labor practices, including raising the minimum age of Nike shoe workers to eighteen, increasing air quality standards in Nike contract factories, offering educational opportunities to Nike workers, funding studies of international business practices, and including NGOs in the independent monitoring of conditions in Nike contract factories in Asia.¹⁸⁰ Knight did not mention whether his Asian factory employees would be paid living wages, which is what the workers need.¹⁸¹ The 25,000 Asian workers who "Just Do It" do not share in Nike's huge profits. They work six days a week for approximately \$40.00 a month, just 20 cents an hour-making Nike athletic footwear.¹⁸² Meanwhile, Nike's profits have made its Nike founder one of the richest individuals in the U.S.A..¹⁸³

As of today, few if any of Nike's proposals have materialized. In March 1999, Nike finally opened up a Vietnamese factory to outside health and safety monitors who found much safer conditions.¹⁸⁴ Vietnamese assembly-line workers in Nike factories still are not earning minimum wages or the living wage, neither are they receiving the legally-required compensation when they work overtime or during holidays. Finally, independent monitoring is the key to the rest of issues Nike touches upon. Without an effective, independent and accountable monitoring process in

¹⁸⁰ Corporate Watch, Are we feeling the winds of change or just more hot air? (Visited Apr. 22, 1999) <<http://www.corwatch.org/sweatshops/nike/maquila.html>>.

¹⁸¹ According to Nike, "there is no common, agreed-upon definition of the living wage." Nike claims that "definitions range from complex mathematical formulas to vague philosophical notions." The athletic company also claims that by "using a whole range of studies and inputs, Nike will endeavor to ensure that factory workers making Nike products earn a fair compensation package." See Wages and Nike, (Visited Apr. 30, 1999) <<http://www.nikebiz.com/sociallabor/faq.html>>.

¹⁸² Boycott Nike, *supra* note 18. Nike athletic footwear products sell mainly in the range from \$70.00 to \$190.00 (US).

¹⁸³ *Id.* at 7.

¹⁸⁴ Naomi Klein, Philippines: Trying to Feel Good About Nike, The Toronto Star (Visited Apr. 29, 1999) <<http://www.corpwatch.org/news/philippines/nike.html>>.

place, compliance with any of Nike's stated goals cannot be assured.¹⁸⁵

f. Garment Industry Workers in El Monte, California, USA

On August 2, 1995, a multi-agency task force led by the California Department of Industrial Relations raided a fenced seven-unit apartment complex in El Monte, California, a small community near Los Angeles. What they found was one of the most horrendous U.S. sweatshops in modern times.

Approximately 72 Thai garment workers were found sewing for some of the nation's top manufacturers and retailers¹⁸⁶ surrounded by armed guards who enforced their continued "productivity."¹⁸⁷ The sewing "factory" had operated since 1988 in an apartment complex surrounded by walls topped by barbed wire.¹⁸⁸ The workers were paid less than 60 cents an hour, and were not permitted to leave their place of employment. Investigators found that the Thai nationals, most of them women, had been working eighteen-hour days in slave-like conditions.¹⁸⁹

¹⁸⁵ Corporate Watch, *supra* note 178, at 1.

¹⁸⁶ Corporate Watch, Corporate Watch Interview with Attorney Julie Su. Ms. Su represents the 72 Thai workers in a federal action against the following retailers and manufacturers: B.U.M. International, Mervyns, Montgomery Ward, Miller's Outpost, Tomato, LF Sportswear. She is a member of the Asian Pacific American Legal Center, an organization that provides legal services and carries out community education on garment worker issues. Finally, Ms. Su is also a co-founder of Sweatshop Watch.

¹⁸⁷ Corporate Watch, *supra* note 126.

¹⁸⁸ See Erik Nelson, Sweatshop Workers' Settlement: \$2 Million, Mervyn's Montgomery Ward Among Retailers Involved (Visited Apr. 26, 1999) <<http://channel2000.com/news/stories/news-971024-004548.html>>. Other manufacturers and retailers that utilize El Monte labor include R & D, F 40 California, Balmara, Point Zero, Paragraff Clothing, A&M Casulas, Ms. Tops of California, New Boys/Voltage, Excuses Sports Wear, Bermo Enterprises, US Boys, Diane Samadi, Foley's Petite, Meir and Frank, Hecht's, Kaufman's, Dayton Hudson, Broadway, Sears, Venture, Lerner, Macy's West, Robinson's May, Filene's, Neiman Marcus, Rich's, Fred Meyer, and J.C. Penny.

¹⁸⁹ *Id.*

The workers lived in crowded conditions where they sewed in one room, and slept in another room; and where eight to ten of them would share one bedroom in a small apartment.

Eight people who ran the El Monte sweatshop pleaded guilty in February 1996, and were sentenced to terms ranging from two to seven years in prison.¹⁹⁰ In 1996, a federal action was commenced against several manufacturers and retailers and in October 1997, the sweatshop workers reached a \$2 million-plus settlement with five manufacturers and retailers.¹⁹¹

3. The norms

In light of the grounds for concern about the impact of MNEs on human rights issues, what fundamental norms should apply to their conduct? This subsection will explore that question, using four norms that address that most pressing social and human rights issues raised by MNEs' conduct.

a. The Right to Life

The right to life has been called the most fundamental of all human rights recognized in international law. It encompasses the right to be free from actions that are injurious to the inherent dignity and security of the human being. It is non-derogable, that is, a state is obliged to protect this right even in the times of threats to national security.

The right to life is featured in every major human rights instrument. It is expressly provided for in the Universal Declaration,¹⁹² the International Covenant on Civil and Political

¹⁹⁰ Nike policies, *see supra* note 162.

¹⁹¹ *Id.* Thai and Latino sweatshop workers were involved in the settlement. Mervyn's, Montgomery Ward, L.F. Sportswear, and B.U.M. International agreed to pay a total of \$2 million to the workers. In a separate settlement, Hub Distributing/Millers' Outpost agreed to pay an undisclosed sum of money. The Latino employees worked at a "front" shop for the El Monte shop. Clothes were sent to the Los Angeles facility for finishing.

¹⁹² Universal Declaration, *supra* note 87, G.A. Res. 217, U.N. Doc A/810, at art. 3 (1948).

Rights,¹⁹³ the European Convention,¹⁹⁴ the American Convention,¹⁹⁵ and the African Charter.¹⁹⁶ The vast majority of world states have ratified at least one major human rights treaty, and each party has agreed to uphold the right to life of all human beings present within that respective country's borders.

In addition to these treaties, the right to life arises from customary international law. Governmental practice in negotiating and approving international instruments has been accorded an increasingly important role in the development of customary law.¹⁹⁷ In the field of human rights, widespread acceptance of treaties, declarations, resolutions, and other instruments arguably has become more significant than actual practice in creating binding law.¹⁹⁸

Finally, the right to life may well have achieved the status of *jus cogens* because of this right's fundamental nature and widespread acceptance. A *jus cogens* norm is a preemptory rule of international law that prevails over any conflicting international rule or agreement.¹⁹⁹

The right to life has steadily evolved from the more restrictive reading that appeared when the Universal Declaration was first drafted, and has now come to encompass a more expansive meaning which demands protection of the elements necessary for a

¹⁹³ International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. Doc. A/6316, at art. 6 (1966) [hereinafter Civil and Political Covenant].

¹⁹⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2(1), 213 U.N.T.S. 221 (entered into force on Sept. 3, 1953) [hereinafter European Convention].

¹⁹⁵ American Convention on Human Rights, Nov. 22, 1969, art 4(1), 9 I. L. M. 673 (1970) (entered into force on July 18, 1978).

¹⁹⁶ African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 59 (entered into force on Oct. 21, 1986) [hereinafter African Charter].

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987).

human being's survival. The Inter-American Commission on Human Rights declared that with regard to the right to life, all governments are obligated "to strive to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition, and education."²⁰⁰ As the Commission's observation indicates, the right to life is a positive as well as a negative right.

While there is universal acceptance of the right to life, there is much debate as to its interpretation. For example, there is universal acceptance that each person has a right to life, but there is profound disagreement about whether such a right effectively outlaws capital punishment, abortion, or the use of weapons of mass destruction.²⁰¹ Nonetheless, it seems clear that certain types of conduct violate the right. One violation consists of systematic killing that discriminates on the grounds of race, ethnicity, or national origin. That is, the right to life prohibits actions, whether by purely private actors or not, that amount to a systematic pattern of killing or that recklessly threaten life, particularly when the pattern of killing is motivated by race, ethnicity, national origin, or other prohibited bases of discrimination. The high degree of condemnation is reflected in the fact that international law mandates individual responsibility in such cases. In addition to genocide, other forms of systematic mass taking of human life constitute a violation of international law, with or without state involvement.²⁰² Individual responsibility under international law is

²⁰⁰ Inter-American Commission on Human Rights, Ten Years of Activities, 1971-1981 at 322 (1982).

²⁰¹ See International Human Rights Law and Practice (Francisco Forrest Martin, et al. eds. 1997).

²⁰² A number of international treaties and other instruments provide for individual responsibility in the case of systematic mass killing. For example, Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide, provides that "[p]ersons committing genocide" shall be punished, whether they are constitutionally responsible rulers, public officials, or mere private individuals. Reflecting this severe condemnation, international law clearly provides for finding individual responsibility with the crime of genocide. See Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, art. 4, I.L.M. 1159, 1172; see also Charter of the International Military Tribunal, Aug. 8, 1994, art. 6, 859 Stat. 1544, 82 U.N.T.S. 279; Agreement for

not, however, limited to genocide, as courts in the United States have recognized.²⁰³ Finally, the simple fact that the private actor is a corporation does not exempt it from human rights responsibility. U.S. courts have consistently ruled that corporations can be sued for violations of the Alien Tort Statute.²⁰⁴

The second type of conduct is a failure to ensure respect for right to life. For example, Article 2(1) of the ICCPR states that each State Party “undertakes to respect and to ensure” the protection of human rights. There is a duty to “respect” human rights, to refrain from violating them, and to act affirmatively to “ensure” their protection even against private parties. For example, it includes the failure of a state to comply with its obligation to ensure the protection of the right to life against both governmental and non-governmental actors. This violation arises when two elements are satisfied:

- a. the individual was wrongfully deprived of his or her life (i.e., the person was intentionally killed); and
- b. the state either had sufficient control of the conduct that led to the wrongful deprivation of life, or knew or should have known of the conduct and failed to take effective action to protect the victims.

For example, in *Association X v. the United Kingdom*,²⁰⁵ the European Commission of Human Rights interpreted Article 2 of the European Convention, which protects the right to life, to place affirmative obligations on states. The petitioner alleged that a vaccination program resulted in the deaths of fifteen percent of the children who were vaccinated. The Commission rejected the claim only after making factual findings that Britain had undertaken careful and comprehensive measures to fully inform people of the risks, to avoid giving the vaccination to those at risk, and to

the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (‘London Agreement’).

²⁰³ See *Kadic v. Karadzic*, *supra* note 102, at 238-241.

²⁰⁴ See *Doe v. Unocal*, *supra* note 101 at 891-92.

²⁰⁵ *Association X v. United Kingdom*, App. No. 7154/75, 14 Eur. Comm’n H.R. Dec. & rep. 31, 32 – 34 (1978).

follow-up on cases of adverse reactions. It emphasized that the norm against wrongful deprivation of life "enjoins the State not only to refrain from taking life 'intentionally' but, further, to take appropriate steps to safeguard life."²⁰⁶

This element reflects the fact that respect for the right to life encompasses not only an obligation to refrain from taking it arbitrarily, but also to affirmatively protect individuals from the arbitrary deprivation of life. Such positive obligations are routinely imposed on states through international human rights treaties.

The case studies discussed above reveal a number of instances in which MNEs have directly participated in activities that are contrary to the right to life. The execution of the Ogoni activists in Nigeria, threats to the lives of union activists in El Salvador, and the life-threatening punishments of workers at Nike factories in Asia provide striking examples. For such violations the first and second approaches to applying human rights duties to MNEs would be warranted, and possibly the third as well. That is, all states have undertaken a duty not only to refrain from wrongfully taking or threatening the taking of human life, but also to protect human life from deprivations by third party actors, including MNEs. Thus, the first approach - imposing a duty on states to protect the right to life - would certainly be justified.

The second approach - holding MNEs themselves liable under international human rights law where they are state actors - would also be appropriate in some cases. Where an MNE becomes involved in transporting troops and providing military equipment, for example, it may well cross the line from private party to state actor. One reason for imposing human rights duties on states is the very fact that they have access to such potentially oppressive military power. When MNEs implicate themselves in that power, it seems only appropriate that they should be subject to the same duties. Shell's activities in Nigeria, as described in the New York Times investigation, would appear to fit this criterion.

The first and second approaches would require no extension of existing human rights law. Rather, they would require greater efforts at enforcement and implementation (as discussed in Part V below). The third approach - making MNEs directly liable for any

²⁰⁶ *Id.* at 32.

deprivation of the right to life regardless of state action - would be the most problematic. Not every murder is a human rights violation. Currently, deprivation of the right to life in peacetime situations leads to individual (as opposed to state) responsibility only when it amounts to genocide (killing members of a national, ethnic, racial or religious group with intent to destroy the group) or a crime against humanity (a killing that is part of a widespread or systematic pattern, undertaken as a matter of policy). Where such acts could be shown, of course, the MNE would be individually liable. But in other instances the first two approaches would have to be followed.

It might well be desirable to extend the existing contours of human rights law in this area. The right to life is universally recognized, and (compared to many other norms of human rights law) fairly concrete. Thus, as discussed in section III.B.2.c, the right to life is an appropriate to make directly applicable to MNEs, regardless of state action. Doing so would not necessarily mean that all deprivations of life, even by individuals, would suddenly be counted as human rights violations. The power of MNEs provides sufficient ground for distinguishing them from the ordinary criminal individual who wrongly kills someone.

b. The Right to Health and Healthy Environment

The “enjoyment of the highest attainable standard of health” has been recognized as a “fundamental right” by the international community since the adoption of the Constitution of the World Health Organization [WHO] in 1946.²⁰⁷ Since then, the right to health has been codified in several human rights treaties. The International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and obligates state parties to take steps necessary for “[t]he improvement of all aspects of environmental and industrial hygiene” and for the prevention, treatment and control of epidemic, endemic and

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Virginia A. Leary, The Right to Health in International Human Rights Law, 1 Health and Hum. Rts. 25, 32 (1994).

occupational and the other diseases. . ."²⁰⁸ The Universal Declaration guarantees the right to "a standard of living adequate for the health and well-being of himself and his family."²⁰⁹

Intertwined with the right to health is the right to a healthy environment. One of the first efforts to clearly link environmental protections and human rights occurred at the 1972 United Nations Conference on the Human Environment. Principle 1 of the Conference's "Stockholm Declaration" stated:

Man has a fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies of apartheid, racial segregation, discrimination, colonialism and other forms of oppression and foreign domination stand condemned and must be eliminated.²¹⁰

Some twenty years later, this effort was revisited with the creation of Principle 1 of the Rio Declaration,²¹¹ which endorsed the concept of "sustainable development." In addition, several

²⁰⁸ International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, U.N. Doc. A/6316, at art. 12 (1996). [hereinafter Economic, Social and Cultural Covenant].

²⁰⁹ Universal Declaration, *supra* note 87, at art. 25.

²¹⁰ Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF. 48/14/Rev. 1, U.N. Sales No. E. 73. II.A.14 (1972). [hereinafter Stockholm Declaration].

²¹¹ Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26, vol. I (1992). During the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, Brazil, the participating states provided that "human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

regional human rights instruments have recognized the link between human rights and environmental protection.²¹²

In addition to these conventions, the United Nations formally addressed the link between human rights and environmental protection in 1989. Madame Fatma Zohra Ksentini, Special Rapporteur on Human Rights and the Environment for the United Nations Sub-Commission on the Prevention of the Discrimination and the Protection of Minorities, conducted a study on this link.²¹³ Madame Zohra's Final Report was published in 1994.²¹⁴ As a result, in May 1994, a team of experts met, and then created the 1994 Draft Declaration of Principles on Human Rights and the Environment. The Draft Declaration is the first comprehensive international instrument that recognizes environmental human rights, and affirms that "[a]ll persons have a right to a secure, healthy, and ecologically sound environment."²¹⁵

In contrast to the right to life, there is no consensus on whether the right to health has become a binding norm of customary law, let alone whether it has reached the status of *jus cogens*.²¹⁶ Similarly, while the instruments discussed above do recognize a link between the environment and human rights, its recognition as a right is less clear. Although the inclusion of the right to a healthy environment in international law documents and national constitutions evidences the requisite state practice, this practice is not uniform and consistent. Nor has there been a showing that the state practice is engaged in out of a sense of obligation. Rather, states seem to view the right as a mere

²¹² African Charter, *supra* note 196, at art. 24 and 45, 21 I.L.M. 59 (1982).

²¹³ For a discussion on the United Nations study process, see Adriana Fabra & Neil A. F. Popovic, Lawmaking in the United Nations: The UN Study on Human Rights and the Environment, 3 Rev. Eur. Community & Int'l Env'tl. L. 197, 201 (1994).

²¹⁴ Fatima Zohra Ksentini, Final Report 90, U.N. Doc. E/CN.4.Sub.2/1994/9 (1994). [hereinafter Ksentini].

²¹⁵ *See Id.*

²¹⁶ Beth Gammie, Human Rights Implications of the Export of Banned Pesticides, 25 Seton Hall L. Rev. 558, 588 (1994).

aspiration, and not as a legal obligation.²¹⁷ In short, despite signs of possible recognition by the international community of a right to a clean and healthy environment, the precise scope of that right remains unresolved.²¹⁸

Significantly, however, the right to health and the right to a healthy environment are inextricably interwoven with the right to life, which is expressly included in many of the major human rights instruments. The rights are also interwoven in a more practical sense: Whatever threatens one's health and the environment in which one lives may well threaten one's life. At least insofar as the right to health and the right to a healthy environment have a bearing on one's life, these rights would seem to have the status of customary international law.²¹⁹ As a practical matter, dealing with violations of this extreme sort is likely to help protect against actions that also threaten lesser degrees of harm to people's health and their environment.

In this area, too, positive and negative rights are also intertwined. Definitions of health are often presented in two forms: negative and positive. Negative health refers to the impairment of the biological functioning of the human body; thus, negative health is defined in terms of being free from disease. Positive health is more abstract, open to different cultural perceptions of what it means to be healthy or unhealthy. Positive health means a state of affirmative well-being.

The basic need for both physical and mental health encompasses the preventative, as well as the curative, dimensions of health care. The World Health Organization (hereinafter WHO), which addresses health concerns in a variety of cultural and social contexts, defines health as a "state of complete physical, mental and social well-being, and not merely the absence of disease or

²¹⁷ Joshua P. Eaton, Note, The Nigerian Tragedy, Environmental Regulation of the Transnational Corporations, and the Human Right to a Healthy Environment, 15, B.U. INT'L L.J. 261, 298-99 (1997).

²¹⁸ Judith Kimerling, Recent Development: The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Injustice or Business As Usual?, 7 Harv. Hum. Rts. J. 199, 210 (1994).

²¹⁹ Gammie, *supra* note 216, at 588.

infirmity.”²²⁰ Thus, it would appear from that definition that the right to health and a healthy environment encompasses and defines in particular a state’s obligation to provide the conditions necessary for good health and social well-being to occur and continue.

The Universal Declaration sets out a two-pronged approach to health by entitling individuals to the right to a certain standard of living by which the basic needs for health and well-being can be met. This same Declaration also entitles each person to social protection when his or her health impedes the ability to earn an adequate standard of living.²²¹ The ICCPR emphasizes more the negative aspect of health. Though it does not recognize a right to health *per se*, it does protect other rights, such as a right to life and freedom from torture, all of which have a direct bearing on the right to health. Finally, the International Covenant on Economic, Social and Cultural Rights²²² suggests an approach that the concept of a right to health as aspirational and distinct for differing social systems.

It might be argued that there is a tension between the right to health and a healthy environment, on the one hand, and a right to development (if there is one) on the other. The two duties could obligate state parties to assume potentially conflicting duties of providing both economic development and environmental protection. By requiring that a state guarantee a standard of living by which basic needs for health and welfare can be met, the rights obligate state parties to foster economic programs that will help individuals to acquire the means to satisfy their basic health requirements. But unless these programs are designed with environmental considerations, the obligations to provide economic development will collide with the state’s duty to guarantee the improvement of all aspects of environmental and industrial hygiene as set out in the International Covenant on Economic,

²²⁰ Constitution of the World Health Organization, opened for signature July 22, 1946, Preamble, Official Records of the World Health Organization, vol. 2, at 100 (1946).

²²¹ See Steven D. Jamar, The International Human Right to Health, 22 S. U. L. Rev. 1, 28 (1994).

²²² Civil and Political Covenant, *supra* note 193, at art. 6.

Social and Cultural Rights. The resolution of the tension would require that states undertake economic development that has a minimal effect on the environment so as to foster a high standard of living and health for their citizens.

On the regional level, the way the right to health is defined differs in each regional instrument. The African Charter provides that "every individual shall have the right to enjoy the best attainable state of physical and mental health."²²³ Even though this definition seems familiar, the articulation of the steps to be taken by a state differs from those set out in the Economic and Social Covenant. Each state is obligated to "take necessary measures to protect the health of their people," and a specific duty is placed on states to ensure that citizens "receive medical attention when they are sick."²²⁴ In this way, the African charter emphasizes the need for medical attention as a part of the right to health. The Additional Protocol of the American Convention on Human Rights provides for the right to health by specifically referring to language similar to that of the WHO.²²⁵ However, Article XI of the American Declaration, which is incorporated by reference into the American Convention, provides that "every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing, and medical care, to the extent permitted by public and community resources."²²⁶ On the European level, the right to health is defined in more limited terms. The European Social Charter asserts in Article 11 the right to the protection of health, which places an obligation on states to guard against causes of ill health.

International law recognizes that the right to health can be violated in two ways: 1) by the state's failure to ensure the right to protection against external risks likely to endanger health; and 2)

²²³ African Charter, *supra* note 196, at art. 16(1).

²²⁴ Constitution of the World Health Organization, *supra*, note 220, at 100.

²²⁵ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador'), Nov. 14, 1988, art. 10, 28 ILM 156 (1989).

²²⁶ Pan-American Union, Final Act of the Ninth Conference of American States, Res. XXX, at 38-45 (1948).

by the state's inability to make available adequate health services and access to medical care. International treaties and regional conventions treat the right to health as requiring states to establish, support, and guarantee access to health-related programs designed to make progress toward certain health objectives.

Because of the uncertain scope of environmental human rights, the idea of what constitutes a violation is difficult to discern. It appears that the trend is to look at recognized human rights in an environmental context.²²⁷ However, the uncertainty of what would constitute a violation of an environmental human right makes it difficult to decide among the three different approaches to treating MNEs as subjects under international law.²²⁸ The uncertain scope and status of environmental human rights does argue strongly against the third route to making MNEs subjects, that is, against an approach that would make norms directly applicable to MNEs. As noted earlier, such an approach is likely to work best where norms are widely recognized and have been specifically delineated.

There is a strong argument that states already have a duty to regulate those activities of MNEs that have adverse environmental impacts. To be sure, different states have different environmental standards, and developing states may tend to have more relaxed environmental regulations and enforcement. One reason for the difference may be a willingness among lesser developed countries to sacrifice environmental concerns for economic development. The more one adopts a relativist approach to human rights, the more the flexibility offered by the first approach (that imposes a duty on states to regulate MNEs) seems desirable. Another reason for developing countries more relaxed environmental standards, may be their relative lack of power as compared to MNEs. To the extent that this factor explains the difference in standards, the second approach (that is, imposing a duty on MNEs with state action requirement) may be more desirable. In limited areas in which MNEs' actions most closely resemble exercises of state power, MNEs might be held responsible on a "state action" theory.

²²⁷ Neil A. F. Popovic, In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment, 27 Colum. Hum. Rts. L. Rev. 487, 514-600 (1996).

²²⁸ The three routes or approaches are discussed in Part IV(B) of this article.

Although there appears to be no clear cut solution to the problem, what does remain is the international reality of environmental degradation. With this negative development, the "constitution" of a global economy must take into account today's environmental realities.

c. Labor Related Norms

The right to work and other labor related rights belong to the positive or economic, social, and cultural rights that are enunciated in various treaties and conventions. However, unlike other economic, cultural, and social rights, labor-related rights are recognized throughout the world in domestic policies and international treaties. Basic labor rights have been incorporated into various human rights instruments such as the Universal Declaration and the International Covenant on Civil and Political Rights on Economic, Social, and Cultural Rights. All of these instruments guarantee the right to freedom of association, including the right to form and join trade unions, and the right to freedom from discrimination.

Despite this widespread acceptance, enforcement of the various labor provisions at the international level remains extremely limited. Since the establishment of the International Labor Organization (ILO), over one hundred and seventy-seven conventions setting forth a variety of labor rights have been promulgated.²²⁹ The ILO has expertise to provide technical assistance and to oversee labor conditions, but has no ability to impose sanctions nor undertake measures to ensure compliance, even though its members are considered bound by its core human rights conventions. Nonetheless, the ILO plays an important role in enunciating international fair labor standards and managing an extensive oversight function and complaint procedure.

The right to labor provisions under the Universal Declaration include the freedom of association,²³⁰ the right to work, the right to

²²⁹ International Labour Organization, Human Rights: Human Rights in the Working World (visited Mar. 30, 1999) <<http://www.ilo.org/public/english/50normes/human.html>>. [hereinafter ILO, Human Rights].

²³⁰ Universal Declaration, *supra* note 87, at art. 20.

free choice of employment, the right to just and favorable conditions of work, and the right to protection against unemployment.²³¹ Article 23 also provides for the right to equal pay for equal work, favorable remuneration, and the right to form and join trade unions. Article 24 of the Declaration provides for the right to rest and leisure, reasonable working hours, and holidays with pay.

The International Convention on Economic, Social and Cultural Rights²³² specifically outlines the labor standards that are protected. Article 6 provides for the right to work and obligates a state party to “take steps to realize the full realization of this right by providing technical and vocational guidance.” Article 7 recognizes the “enjoyment of just and favorable conditions of work.” As defined, this includes fair remuneration, safe and healthy working conditions, reasonable working conditions, and equal opportunity for promotion. Article 8 states that “the State Parties to the present Covenant undertake to ensure the right to form trade unions, the right of trade unions to establish national federations, the right of trade unions to function freely, the right to strike.” The Article provides in subsection (2) that “this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.” This provides for derogation, and does not specify whether this policy is allowed only in times of emergency.

The Convention on the Rights of the Child, which was adopted in 1989, brought to fruition a sixty-five year push for formal international legal recognition of the human rights of children. Article 32 provides that “state parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education.” It also provides in subsection two of the same article that “states Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article.” To this end, and in light of the relevant provisions of other international instruments, state

²³¹ *Id.* at art. 23.

²³² Economic, Social and Cultural Covenant, *supra* note 208, at art. 12.

parties shall in particular provide for a minimum age, or minimum ages, for admission to employment; legislate and enforce the appropriate regulation of the hours and conditions of employment; and provide for appropriate penalties or other sanctions in order to ensure the effective enforcement of the present article.²³³

The Convention was drafted in response to the needs of children in the aftermath of World War I.²³⁴ Interest in the Convention on the Rights of the Child did not develop quickly.²³⁵ In fact, some Western nations (the United States in particular) viewed the Convention as an Eastern Bloc-supported project because it focused mostly on economic, social and cultural rights, something that many governments viewed more as "good social policy" than actual tangible rights.²³⁶

On the regional level, the European Union has given attention to the question of workers' rights. The Social Charter,²³⁷ which is a part of the 1992 Maastricht Treaty,²³⁸ is the most developed of such agreements, and obligates the parties to respect: (1) freedom of movement; (2) employment and fair remuneration; (3) living and working conditions; (4) social protection; freedom of association and collective bargaining; (6) vocational training; (7) equal pay for men and women; (8) information, consultation, and participation rights; (9) workplace health and safety; (10) the

²³³ United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. G.A.O.R. 3d Comm., 61st Plen. Mtg., Annex, U.N. Doc. A/44/736 (1989), reprinted in 28 I.L.M. 1448 (1989). (adopted Nov. 20, 1989).

²³⁴ *Id.*

²³⁵ *Id.* at 1449.

²³⁶ *Id.*

²³⁷ See *Protocol on Social Policy*, Feb. 7, 1992, 31 I.L.M. 357, 357-58 (entered into force Nov. 1, 1993); Agreement on Social Policy Concluded Between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, Dec. 10, 1991, 31 I.L.M. 358, 358-61 (entered into force Nov. 1, 1993).

²³⁸ Treaty Establishing the European Community, Feb. 7, 1992, art. 117, O.J. (C. 224) 45 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC Treaty].

protection of children; (11) the protection of the elderly; and (12) the protection of the disabled.

The Social Charter also contains a mandate that allows the Commission to create the Action Programme, which consists of recommendations and options for member states' implementation of the Social Charter, as well as proposed directives, regulations and decisions. Article 117 of the EC Treaty provides for "upward harmonization" of worker rights. The directives set out by the Commission establish a floor level below which no member state may go. Additionally, states are encouraged to provide protections in excess of the directives, and implement directives according to their "choice of forms and methods."²³⁹ Most importantly, the labor provisions enunciated are enforceable before both a European Union member's national courts as well as before the European Court of Justice of the European Communities (hereinafter ECJ). The Treaty sets forth a complaint procedure for both member states and individuals. National courts may also request advisory opinions on EU law arising in domestic litigation.

Other regional treaties such as the North American Free Trade Agreement (NAFTA) provide for workers' rights through its North American Agreement on Labor Cooperation (NAALC).²⁴⁰ The NAALC is the first international trade agreement conditioned on labor protections that the United States has signed. It is also the first regional agreement among the United States, Canada, and Mexico. The NAALC provides that NAFTA member countries must comply with and enforce their domestic labor laws, and ensure the fair adjudication of labor disputes. It also established an international complaint process pursuant to which individuals may challenge a country's compliance with domestic labor laws. Sanctions may be imposed only for violations of norms dealing with child labor, occupational health and safety, or minimum wage standards. A country that has established a "persistent pattern" of non-enforcement may also be subject to sanctions.²⁴¹

²³⁹ *Id.* at art. 189.

²⁴⁰ Canada-Mexico-United States: North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499. [hereinafter NAALC].

²⁴¹ *Id.* at art. 27.

The NAALC has been criticized as lacking the sufficient independence and enforcement authority so as to operate effectively.²⁴² Labor critics often point to the limited availability for sanctions and the lack of impetus for improvement or harmonization of labor standards in the member states. On the other hand, a few may argue that at least the "procedures have forced companies and the government to review their own actions, and to have subordinate officials explain their decisions to superiors."²⁴³

International law recognizes a violation of labor-related norms through the disregard of prohibited in the various international and regional instruments. As discussed earlier, the major instruments prohibit instances of slavery, forced labor, and child labor, as well as violations of an individual's right to form trade unions and the opportunity for safe and healthy working conditions.

There is a technical distinction drawn in International Law between slavery and forced labor. Slavery has been defined in the 1926 Slavery Convention as "the status and condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."²⁴⁴ Forced labor on the other hand requires involuntariness, and is defined in the ILO forced labor convention as "all work or services which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."²⁴⁵ Because the Forced Labor Convention is the most widely ratified instrument of the ILO

²⁴² See AFL-CIO Task Force on Trade, NAFTA Action Source Book 7 (1993).

²⁴³ See Lance A. Compa & Stephen F. Diamond, Human Rights, Labor Rights, and International Trade: Law and Policy Perspectives (1996).

²⁴⁴ International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, art. 1(1), 46 Stat. 2183, 2191, 60 L.N.T.S. 253, 263 [hereinafter 1926 Slavery Convention].

²⁴⁵ Convention Concerning Forced or Compulsory Labour (No. 29), June 28, 1930, 39 U.N.T.S. 55, reprinted in 1 Labour Conventions and Recommendations, 1919-1991, at 115 (entered into force May 1, 1932) [hereinafter Forced Labour Convention].

(143 states have signed the agreement), the prohibition on forced labor is now widely recognized as customary international law²⁴⁶

The right to form trade unions has been a fundamental part of labor provisions within all international and regional treaties. Although collective bargaining could be considered a separate right from the freedom of association, in actuality, the two support each other.²⁴⁷ The right to form a trade union would be of little use if that trade union were deprived of its collective bargaining with management for better working conditions.²⁴⁸ Trade unions serve various purposes such as protecting the interests of staff and workers, supervising management's implementation of labor protections, and ensuring that labor insurance is maintained and wage standards are respected.

Most importantly, trade unions allow for union representation and collective bargaining. Collective bargaining, in turn, enables workers to negotiate with employers so as to establish more mutually favorable terms of employment, and provides workers with a means of resolving disputes with employers. The two provide a cornerstone for the basic rights of workers.²⁴⁹

The United Nations has recognized the concept of equal pay in two significant documents, to wit, the Universal Declaration²⁵⁰ and the ESC covenant²⁵¹. The Universal Declaration specifically addresses the issue of equal pay by stating that "everyone, without discrimination, has the right to equal pay for equal work."²⁵²

²⁴⁶ ILO Human Rights (Visited Mar. 30, 1999) <<http://www.ilo.org/public/english/50normes/human.html>> at 44.

²⁴⁷ Karen Vossler Champion, Who Pays For Free Trade? The Dilemma of Free Trade and International Labor Standards, 22 N.C.J. Int'l L. & Com. Reg. 181, 219 (1996).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ The Universal Declaration, *supra* note 87, G.A. Res. 217A (III), UN. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 at 20.

²⁵¹ Economic, Social and Cultural Covenant, *supra* note 208, art. 23, 993 U.N.T.S. 3, UN Doc A/6316.

²⁵² The Universal Declaration, *supra* at note 87, arts, 23.

Although the terms of the Universal Declaration were not legally binding, many of the rights promulgated became legally enforceable by incorporation into subsequent treaties and U.N. resolutions.²⁵³ Because the provision of the Universal Declaration on equal pay has become legally enforceable, the doctrine of equal pay has achieved the status of *jus cogens*, and as such is legally binding on all nations.²⁵⁴

Article 7 of the ESC Covenant specifically defines the right to equal pay by guaranteeing the right to "fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work."²⁵⁵ This language is significant in that it seems to go beyond the text of the Universal Declaration, which makes no reference to work "of equal value."²⁵⁶

One of the main purposes of the right to equal pay as expressed in the Social Charter²⁵⁷ is to standardize health and safety requirements in the workplace, thereby alleviating the technical barriers which exist between the various member states.

As the case studies show, violations of these norms are common. Still, deciding which of the three approaches to human rights norms would be most suitable is complex question. It may be best to divide the norms into different groups. All three approaches would clearly be appropriate in the extreme case of forced or slave labor. That is, states have a duty to protect individuals against it; MNEs ought to be held liable if they act in concert with states or on the basis of delegated authority; and

²⁵³ Brian S. Johnson, Ensuring Equality: Pursuing Implementation of the Equal Pay Principle Via the Institutions of the European Union, The North American Agreement on Labor Cooperation, and Corporate Codes of Conduct, 38 Va. J. Int'l L. 849, 852 (1998). [citing David Weissbrodt, *An Introduction to the Sources of International Human Rights Law* 1, 9 (1989).].

²⁵⁴ *Id.*

²⁵⁶ *Id.* at 853.

²⁵⁷ Social Charter, *supra* note 248, at para. 22.

direct imposition of liability would be appropriate, given the universal condemnation and concrete nature of the violation.

It would appear that norms of gender equality in work are frequently violated, as the case studies concerning the Gap, Nike, and Disney suggest. These violations are nearly universally condemned, and states have a duty under the major human rights instruments to protect against discrimination. Thus the first approach is appropriate. The second approach would be justified, but seems less likely to have practical significance; it may well be infrequent that operating a factory amounts to state action. The near-universality of norms against gender discrimination, at least in the major instruments, might counsel in favor of the third approach, which would make MNEs directly liable. At the same time, whether the norms have been worked out sufficiently concretely in all respects remains open to question. Equal pay for equal work is likely to be much more widely accepted than are norms against sexual harassment. This third approach thus might take international human rights law beyond its current parameters.

Other violations pose more difficult questions. As to basic labor rights such as the right to unionize, and as to the right of children not to be exploited, there is widespread agreement in principle. Once again, the first approach would appear to be justified, as would the second. Yet the contrast between principles and state practice is perhaps even greater here than it is in the area of gender equality. This might well call into question any current attempt to impose formal direct responsibility under international human rights law on MNEs that violate these kinds of labor rights. It may well be that for the foreseeable future, less formal mechanisms of implementation, rather than enforcement (as discussed in Part V) will have to be the prime route for making human rights norms applicable to MNEs.

C. The Rights of MNEs

Subjects under international law also enjoy legal rights. For example, states acquire rights under treaties. However, states do not have human rights. The aim of human rights law is to restrain states and to place affirmative duties on them, not to protect

them.²⁵⁸ Treating MNEs as full or partial equivalent of states (for example, by affording them limited subject status) raises the question whether MNEs should have any rights under international human rights law.

One might oppose recognizing human rights of MNEs on either philosophical or practical grounds. As regards the former, human rights might be said to inhere in one's humanity, given the fact that all human beings are entitled to certain basic protections. One might also argue that because human rights are individual and not collective, they are inappropriate for entities such as MNEs. Based on the notion of human rights law that prohibits human rights protections for states, one could conclude that MNEs should be treated similar to states and should not enjoy human rights protections.

On a practical level, certain human rights protections are simply inapplicable to MNEs by their very nature. For example, it would not make sense for a MNE to enjoy the right to an education, a right to health, or a right to life, just to name a few. Even assuming *arguendo* that MNEs should enjoy human rights protections, MNEs' economic and political power already serves as a vehicle for protection. The very concern that argues for imposing human rights norms on MNEs (that is, MNEs' growing power vis-a-vis the host governments in which the MNEs operate) might suggest that they have sufficient power to protect themselves.

On the other hand, there are arguments for extending some forms of human rights protections to MNEs. On a philosophical level, there is a growing recognition that associations of people, and not just individual human beings, have rights under international law. One example is the increasing recognition of rights of indigenous peoples.²⁵⁹

²⁵⁸ States traditionally have been protected by international law in other aspects, most notably in the prohibition of aggression. Under international human rights law, the interests of the state in various aspects (e.g., with states of emergency) are accommodated. However, human rights law has not recognized any rights on the state's part.

²⁵⁹ For a brief discussion on the nexus between environmental human rights and indigenous rights, see Hari M. Osofsky, Environmental Human Rights Under The Alien Tort Statute: Indigenous Victims of Multinational Corporations, 20 Suffolk Transnat'l L. Rev. 335, 381-393 (1997).

The recognition of human rights in something other than individual natural persons does not, of course, mean that MNEs should necessarily have rights. Rather, it simply means that this notion should not be rejected out of hand or on philosophical grounds. In addition, there are three practical reasons for extending at least some limited forms of rights to MNEs.

First, not all MNEs are, in fact, sufficiently powerful vis-à-vis all states so as to be able to protect themselves. Second, the protection of some rights, particularly property rights, may benefit the entire world community. Expressed differently, if MNEs had no protection against expropriation whatsoever, it is possible that all countries would suffer economically.²⁶⁰ Third, permitting states to deal with MNEs in an arbitrary and capricious fashion might prove dangerous. Such power would seem inconsistent with the rule of law, and might even undermine states' general commitment to human rights. Accordingly, it can be argued that the recognition of some human rights on the part of MNEs may make sense.²⁶¹

As a practical matter, the contours of those rights remain to be worked out. Foremost among them would be a right to property, recognized already in most international human rights instruments. Such a right does not give absolute protection to property, but does provide assurances against arbitrary expropriation. The other major group of rights would be those relating to access to courts and guarantees of proper procedure. The major justification for these rights would be the corrupting effect on governments if they were able to ignore the rule of law even for the limited category of MNEs.

More problematic would be notions of freedom of speech. It might well be possible for a free and open debate among individuals and parties to coexist without recognizing speech rights among corporations, and the considerable power that MNEs have might counsel against allowing them to tilt the debate. Even here, though, some limited form of rights might be appropriate. At the

²⁶⁰ Of course, one could argue that individual states that wished to protect corporate property rights could still do so. However, in today's globalized economy, if there is validity to the argument that protecting property rights helps spur economic growth, then such protection must come most likely at an international level.

²⁶¹ See Francisco Forrest Martin, *supra* note 201.

very least it would suspect for a state to ban or limit speech rights for MNEs, while recognizing such rights in the case of domestic corporations.

D. Conclusion

Simply equating MNEs to states may be an attractive option at first glance, but it is unlikely to provide an adequate approach to the difficult questions raised by MNEs' impact on human rights. Perhaps the best option is to recognize the legal capacity of the MNE to a limited extent, rather than artificially place it on par with the state. Similarly, although MNEs should have certain limited rights, they should not have the same range of rights that individuals enjoy.

So far, however, the discussion has proceeded in the abstract. There is little point in articulating human rights norms if there is no way to enforce or at least to implement them.

V. Implementation and Enforcement

This part addresses the ways in which human rights are declared internationally, regionally, and domestically. It explores the documents, treaties, and conventions that declare human rights, such as those established by the United Nations. Once these rights are named and set forth in documents such as the Universal Declaration of Human Rights, they are then promoted, protected, and enforced to different degrees by nations, communities, and even corporations. This part specifically explores the many different approaches to human rights implementation and enforcement, and evaluates the mechanisms that currently exist for the protection of human rights. Where appropriate, this part proposes ways in which new mechanisms might be used to help achieve global respect for human rights.

Before undertaking this survey, however, it may be appropriate to reflect briefly on a fundamental distinction between enforcement and implementation. The term "enforcement" typically connotes coercive force and immediacy, as is the case with a binding court judgment or a Security Council resolution under Chapter VII of the U.N. Charter. Ideally it brings about

immediate changes (including benefits for the victims) and moral condemnation of the wrongdoer, and has a deterrent effect.

“Implementation,” on the other hand, typically connotes actions that are more gradual, involving pressure but not outright coercion. Examples would include resolutions of the U.N. Commission on Human Rights condemning states that violate human rights; study reports by rapporteurs that highlight major human rights violations; and campaigns by NGOs against human rights violators. Ideally, implementation helps make norms more concrete and provides a basis for future enforcement efforts. It also provides publicity and possible moral condemnation of the wrongdoers, though with less of a sting than that provided by the international community’s formal judgment. It may also have a deterrent effect, though that can be difficult to gauge.

Both enforcement and implementation need to be pursued in any comprehensive strategy for giving life to abstract human rights norms. Certainly, there are real benefits to enforcement, particularly to individual victims, and it has some deterrent effect. On the other hand, enforcement has its own limits. It tends to be after the fact. It is also highly limited in availability: there are not many international forums to which individuals have access, particularly as a practical matter, and their binding powers (both in practice and in law) tend to be limited. Implementation is less satisfying than enforcement in an immediate sense, but in many cases it may be the only practical alternative. And it has its own benefits. In particular, enforcement efforts are likely to be dominated by lawyers and state actors; implementation offers a greater scope for activity by NGOs, unions, and other actors. One benefit of a strategy that focuses heavily on implementation is that the very fact of seeking to protect human rights may help build an active and vibrant international civil society.

A. International Mechanisms

1. The United Nations

From its inception in 1945, the UN has been known as the primary international body dedicated to the promotion and protection of human rights. The preamble of the UN Charter declares in pertinent part that the people of the United Nations are

determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women of nations large and small . . ."²⁶²

Shortly after the Charter was signed, the Preparatory Commission focused its attention on establishing a Commission on Human Rights and directing it to prepare an International Bill of Rights.²⁶³ In January of 1947, with Eleanor Roosevelt as chairperson, the Commission drafted the Universal Declaration of Human Rights, which was adopted by a unanimous vote of the UN General Assembly on December 10, 1948.²⁶⁴ The Declaration recognized the inherent human rights with which each person is born, and described these rights in thirty articles as ideals towards which the State must work.

Some of the rights listed in the Declaration include the right to: life (Article 3); freedom from slavery (Article 4); freedom from torture (Article 5) freedom from arbitrary detention (Article 9); ownership of property (Article 17); work (Article 23) and take part in the government of one's country (Article 21).²⁶⁵ The Declaration has influenced over forty states' constitutions, as well as the regional human rights conventions of Africa, Europe, and the Americas. In light of such widespread international acceptance, the Declaration's principles have become customary law around the world.²⁶⁶

Once the Declaration was in place, a means of implementing these declared rights assumed a high priority for the international community. In December 1966, some eighteen years after the Declaration's signing, the U.N. General Assembly unanimously approved the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and

²⁶² A.H. Robertson and J.G. Merrills, Human Rights in the World (1996).

²⁶³ *Id.* at 27.

²⁶⁴ *Id.* at 28.

²⁶⁵ Ian Brownlie, Basic Documents on Human Rights 21-27 (1997).

²⁶⁶ Robertson and Merrills, *supra* note 262, at 29.

Cultural Rights. These covenants came into force after ratification in 1976.²⁶⁷

The Covenant on Civil and Political Rights provides for a Human Rights Committee (HRC) to oversee its implementation.²⁶⁸ It lists the rights set forth by the Declaration in greater detail, and adds five more, including the rights of the child (Article 24) and the rights of minorities (Article 27).²⁶⁹ The ICCPR proclaims that each signatory state shall “undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”(Article 2).²⁷⁰

Although no time limit was imposed, it seems that member states are expected to comply with the articles of the Covenant as soon as they are able to do so. The ICCPR requires that states “submit reports on the measures they have adopted which give effect to the rights recognized herein” (article 40). The states must report every five years or when the HRC requests them to do so, in which case the HRC reviews the reports and makes General Comments.²⁷¹

Because states, like people, seek to present themselves in the best possible light, the reporting procedure is often unreliable as a source of information. The process is even more difficult in light of many countries’ failure to engage in full disclosure, to report on time, or even to report at all. This lack of communication eliminates the dialogue that is essential to the implementation of rights, particularly in developing nations.

In addition to this reporting requirement, the ICCPR has two means of enforcement, to which states must separately consent: the inter-state procedure and the right of individual petition.²⁷² The inter-state procedure, by which one state may bring a complaint

²⁶⁷ *Id.* at 33-34.

²⁶⁸ *Id.* at 39.

²⁶⁹ Brownlie, *supra* note 265, at 125-143.

²⁷⁰ *Id.* at 126.

²⁷¹ Robertson and Merrills, *supra* note 262, at 42.

²⁷² Brownlie, *supra* note 265, at 144-47.

against another, is rarely invoked because of political reasons. The optional protocol for individual petition, however, is an essential element of the ICCPR, and emphasizes the importance afforded to the rights of the individual. The optional protocol requires that the individual exhaust his or her available domestic remedies before proceeding with a complaint (Article 5).²⁷³ The Human Rights Committee reviews the petitions and brings them to the attention of the state that is allegedly violating the Covenant. Within six months of receiving such a petition, the state must respond and indicate whether any remedial action has been taken (Article 4).²⁷⁴ The HRC is supposed to include these activities in its annual report to the General Assembly (Article 6).²⁷⁵

The Covenant on Economic, Social and Cultural Rights is more of a promotional convention in that it lists rights which states should endeavor to establish gradually, as their resources permit.²⁷⁶ Some of the rights it includes are the right to fair wages and working conditions (Article 7), the right to form unions and strike (Article 8), the right to social security (Article 9), and the right to health (Article 12).²⁷⁷ The Covenant is implemented by the Economic and Social Council, which functions like the HRC. States submit periodic reports of their progress, and the Council reviews them and makes General Comments.²⁷⁸ There is no individual right of petition.

"The real question must be, however, what difference do the international human rights standards, and the meetings and accompanying paper flow, make for the victims of human rights abuse?"²⁷⁹ An individual who feels that one or more of her rights

²⁷³ *Id.* at 145.

²⁷⁴ *Id.* at 144-45.

²⁷⁵ *Id.* at 145.

²⁷⁶ Robertson and Merrills, *supra* note 262, at 276.

²⁷⁷ Brownlie, *supra* note 265, at 114-124.

²⁷⁸ *Id.* at 120.

²⁷⁹ Janet E. Lord, Human Rights: Implementation Through the UN System, 89 AM. SOC'Y INT'L L. PROC. 225 (1995).

set forth in the International Covenant on Civil and Political Rights has been violated by an MNE operating in her country may find some redress, but only under very limited circumstances. First of all, the petition must be made either against her home country, for example, on the grounds that it permitted the corporation to violate the rights of its citizens through abusive working conditions, or against the country where that corporation has its headquarters. In either scenario, the country filing the complaint must be party to the Covenant in order for any action to proceed. Second, all of the domestic remedies must have been exhausted and the action may not be pursued elsewhere at the same time. Third, if a violation is found, one of two things may happen: either the state responds and acts to remedy the situation, perhaps by requiring some remedial action by the corporation, or the state does nothing and is mentioned in the HRC's report to the General Assembly. For many states, especially developing nations, the risk of a dishonorable mention is outweighed by the benefit they receive from having the corporation operating and generating revenue, despite the abuses its people might endure as a result.

Alternatively, as described above, the individual's home country may file a complaint against another country if it feels the second country is violating rights guaranteed by the ICCPR. This option is severely limited primarily because countries are unlikely, for political reasons, to invoke this procedure against one another, but also because both countries must be party to this optional procedure, and few countries (approximately thirty) are.²⁸⁰

The United Nations fulfills a necessary role in declaring universal human rights and establishing implementation procedures for states to follow. Many states party to the Covenants take their commitments seriously and endeavor to secure human rights for their people. When complaints are lodged against them, these states investigate and take action. Occasionally, there are positive results, in that victims are compensated, legislation is created or changed, or local remedies are established.²⁸¹ However,

²⁸⁰ Robertson and Merrills, *supra* note 262, at 53.

²⁸¹ Elizabeth Evatt, The Right to Individual Petition: Assessing its Operation Before the Human Rights Committee and Its Future Application to the Women's Convention on Discrimination, 89 AM. SOC'Y INT'L L. PROC. 225, 229 (1995).

the reality is that only about sixty percent of the member states have accepted the protocol of individual petition (with notable omissions from the United States, the United Kingdom, India, Mexico, Brazil and Japan).²⁸² There is therefore little that an average individual is likely to accomplish under the UN system if he or she feels, for example, that his government watches silently while the MNE-owned factory where he works is systematically subjecting him and his coworkers to torture, unsafe working conditions, or forced labor.

a. The UN High Commissioner for Human Rights

In 1993, the General Assembly of the UN created the post of the UN High Commissioner for Human Rights.²⁸³ The High Commissioner is charged with the role of providing leadership in human rights, advising governments, providing them with technical assistance in the implementation of human rights, and coordinating the UN's activities with respect to human rights.²⁸⁴ Much of this work is accomplished through visits to individual countries, where the Commissioner collects information, offers advice, and may set up field operations.

The High Commissioner cannot force a state that is causing or permitting human rights violations to do anything the state does not want to do. However, the High Commissioner can direct the attention of the UN and the world to the violations, bring resources to that state in an attempt to facilitate change there, and put in motion the small but necessary steps required to mobilize the international public against the violating entities.

Another duty of the High Commissioner is to coordinate the endeavors of the theme rapporteurs and working groups that investigate and respond to information about human rights violations around the world.²⁸⁵ Dedicated to one particular theme,

²⁸² *Id.*

²⁸³ Robertson and Merrills, *supra* note 262, at 112.

²⁸⁴ *Id.* at 113.

²⁸⁵ *Id.* at 239, citing the UN Charter, paragraph 1 (1).

these theme rapporteurs can respond more quickly to reports of violations than the Human Rights Commission can, and are authorized by the HRC to "receive complaints from individuals; make direct, urgent appeals to governments; visit countries; make detailed recommendations to governments; and ultimately seek an end to specific violations." The rapporteurs then make their findings known in reports to the HRC.²⁸⁶

As of 1995, the HRC had created fourteen thematic procedures. These include the Special Rapporteur on summary or arbitrary executions (1982); the Special Rapporteur on torture (1985); the Special Rapporteur on racism and xenophobia (1993); the Working Group on the Right to Development (1993); the Special Rapporteur on violence against women (1994); and the Special Rapporteur on toxic waste (1995).²⁸⁷ The question arises whether a Special Rapporteur or Working Group should be established to monitor multinational corporations. It has been suggested that one individual is "less expensive and less visible, as well as more efficient" than a working group of five persons.²⁸⁸ Assuming the validity of this concept, we will proceed to discuss the feasibility and desirability of a Special Rapporteur on human rights violations by MNEs.

b. A UN Special Rapporteur for Multinational Enterprises

A Special Rapporteur on MNEs would likely function in much the same way as the other rapporteurs by responding to complaints or reports of abuses at the hands of MNEs, visiting the places where the violations are alleged to be occurring, and investigating the allegations. The Special Rapporteur would explore human rights violations in light of the special concerns raised by the corporations perpetrating the violations and the

²⁸⁶ Frank Newman and David Weissbrodt, International Human Rights: Law, Policy, Process 192 (1996).

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 192-193, citing David Weissbrodt, The Three 'Theme' Special Rapporteurs of the UN Commission on Human Rights, 80 AM. J. INT'L L. 685, 685-695 (1986).

countries permitting them, and would then communicate the findings to both the corporation and the country hosting the corporation.

Even though an MNE is not a state, if the United Nations communicates to it that the world is aware of and will not tolerate its actions, some good is likely to come of it. As is often the case, upon receiving this information, the media, non-governmental organizations and private citizens may react with news stories, petitions, and boycotts. The host country would then have to choose whether to force the corporation to respect the rights of its citizens and risk its leaving the country, or face the negative attention of the UN and the world.

A UN Special Rapporteur on MNEs would be a positive and necessary addition to the UN's theme procedures. The early 1990s saw the addition of working groups and rapporteurs to address contemporary concerns such as the sale of children (1990), racism (1993), freedom of expression (1993), violence against women (1994), and toxic waste (1995).²⁸⁹ It is fitting that the newest addition address multinational corporations, the emerging superpowers of the next century that exist everywhere and nowhere at the same time and remain seemingly untouchable by any country's laws even though many are known to be consistent violators of human rights.

c. The UN Code of Conduct for Transnational Corporations

In 1974, the UN Economic and Social Council established the United Nations Commission on Transnational Corporations, the primary purpose of which was to draft a code of conduct for TNCs.²⁹⁰ The push for the Code came mainly from the socialist Eastern Bloc states that were concerned that foreign TNCs would threaten their sovereignty.²⁹¹ The Code's drafters sought to

²⁸⁹ *Id.* at 191-202.

²⁹⁰ Barbara A. Frey, The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights, 6 MINN. J. GLOBAL TRADE 153, 166 (1997).

²⁹¹ *Id.*

balance the regulation of corporations with assurances that host countries would treat these corporations fairly. However, few countries were satisfied with the result, and the draft of the Code completed in 1990 has not yet been adopted by the UN.²⁹²

This draft spoke explicitly about corporations and human rights. Indeed, paragraph 14 of the draft states that “transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate...[and] shall not discriminate on the basis of race, color, sex, religion, language, social, national and ethnic origin or political or other opinion.”²⁹³ The draft made it clear that human rights took precedence over cultural norms.²⁹⁴

Two years after the draft was introduced, negotiations on its adoption were suspended. As noted earlier, the draft had satisfied few parties, with the Western countries and corporations finding the Code too harsh on them, while non-Western host countries were not held to similar standards.²⁹⁵ Additionally, the developing nations that had pressed for the Code in the 1970s seemed simply to have lost interest. Many developing nations had come to the conclusion that TNCs were no longer “suspicious intruders,” but rather “welcome and wealthy guests.”²⁹⁶

One author has suggested that even if the draft Code were ratified, it still lacks clear standards for enforcing its provisions, and would therefore be “impotent” against corporations. The same author advocates instead for private corporate codes of conduct, which are addressed below.²⁹⁷ As we will see throughout this section, corporations and developing nations must be enticed into respecting human rights with the language they want to hear; most often, this is the language of profits. If the UN TNC Code

²⁹² Baker, *supra* note 103 at 399, 410.

²⁹³ Frey, *supra* note 290, at 166-167.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ Baker, *supra* note 103, at 413.

increases the costs of TNC investment in developing nations, the corporation, its home country, and its host country will never approve of it.

d. The UN Security Council

As established by Article 24 of the UN Charter, the United Nations National Security Council has the primary responsibility of maintaining international peace and security.²⁹⁸ Occasionally, however, the Council deals with humanitarian issues as well. The Security Council established operations in Somalia to help its starving population in 1992, and also provided humanitarian assistance in Bosnia in 1992 and 1993.²⁹⁹ In 1993, the Council created tribunals to deal specifically with violations of international humanitarian law in the former Yugoslavia, and again the following year in Rwanda.³⁰⁰ In implementing both of these tribunals, the Council had determined that the situations in each country posed threats to international peace and security, and that it was necessary to make the perpetrators accountable for their actions.³⁰¹

More importantly for the purposes of this discussion is the notion that the Security Council's humanitarian intervention in Somalia highlights "new consensus on what circumstances qualify as 'threats to international peace,' justifying military intervention under article 42 [of the UN Charter]."³⁰² A liberal reading of Chapter 7 of the Charter could lead to the conclusion that the Security Council may act with force anywhere in the world where human rights violations constitute a threat to peace.³⁰³ If mass

²⁹⁸ Robertson and Merrills, *supra* note 262, at 317.

²⁹⁹ *Id.* at 319.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² Mark R. Hutchinson, Restoring Hope: UN Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention, 34 HARV. INT'L L. J. 624.

³⁰³ *Id.*

starvation is a justifiable threat, then by extension systematic torture, slave labor, environmental destruction, and cultural genocide might eventually be considered threats as well.

One commentator even foresees that the UN Security Council may one day be confronted with a situation in which “massive humanitarian abuses are completely insulated within the domestic jurisdiction of a given state.”³⁰⁴ At that point, “it remains to be seen how far the Security Council will extend its liberal humanitarian intervention doctrine.”³⁰⁵

In terms of human rights abuses by multinational corporations, the violations would unfortunately have to be atrocities comparable to those in Rwanda and the former Yugoslavia to win the attention of the Security Council; that is, they would have to amount to threats to international peace and security. This seems unlikely in most cases, because although the abuses are very real, they tend to affect only a small percentage of a country's population. The global nature of MNEs, however, often puts them in the position to affect several thousands of people. Some particularly egregious examples of abuses, such as those of Unocal in Burma and Royal Dutch Petroleum in Nigeria, could indeed amount to threats to international peace and security, provided that the host governments in which these MNEs operate refused to tolerate violations of the rights of their people.

2. International Organizations

a. The Organization for Economic Cooperation and Development

Functioning like the United Nations in its voluntary approach to human rights, the Organization for Economic Cooperation and Development (OECD) is a “club of like-minded countries,” consisting of twenty-nine nations whose membership is based solely on each member's commitment to the concepts of market

³⁰⁴ *Id.* at 640.

³⁰⁵ *Id.*

economies, pluralist democracy, and human rights.³⁰⁶ The OECD includes many European countries, as well as Australia, Japan, Korea, Mexico and the United States,³⁰⁷ and serves primarily a promotional role with regard to human rights. In order to join, states must prove their capacity to assume the responsibilities of membership which, in addition to the principles described above, also include sustainable economic growth and contributions to the non-discriminatory expansion of world trade.³⁰⁸

Because the benefits of membership are commensurate with the duties imposed on the states, the states that seek membership are already working toward the recognition of human rights. For other states, attaining OECD membership may serve as an incentive to respect human rights domestically and ensure that visiting corporations do the same.

b. International Courts

On August 22, 1999, Kofi Annan, the UN Secretary General, expressed the hope that "in the prospect of an international criminal court lies the promise of universal justice."³⁰⁹ While the promotional efforts of international organizations such as the UN and the OECD are essential to the global recognition of human rights, it has become clear that such promotion alone has not been sufficient. Violations by MNEs, countries, and individuals continue, and unless all of the conditions of membership in assorted organizations and covenants are met, the victims often have no recourse. For many years, human rights activists have claimed that an international tribunal to address violations is the

³⁰⁶ The Organization for Economic Cooperation and Development, What is OECD? (visited Sept. 5, 1999) <<http://www.oecd.fr/about/general/index.htm>>.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Background Information (visited Aug. 22, 1999). <<http://www.un.org/icc/main.htm>>.

only way to ensure the respect and enforcement of human rights.³¹⁰ According to one advocate of an international tribunal, "The full implementation of human rights within the UN system is contingent not merely upon reports, complaints, discussion, and recommendations. The adoption of legally binding decisions by an impartial international tribunal is a condition *sine qua non* to the success of the entire system."³¹¹

The International Court of Justice (ICJ) at the Hague is the current international court within the UN system. The Court is authorized to resolve disputes only between states, and rarely addresses human rights issues.³¹² Additionally, the ICJ does not handle cases between individuals, or between individuals and states.³¹³ As the last century has witnessed, individuals have been responsible for great atrocities; without an international tribunal where they can be held accountable, many of their deeds will remain unpunished, and future criminals will be undeterred.

After decades of discussion about an international human rights tribunal, delegates to the Rome Diplomatic Conference adopted a Statute on July 17, 1998, that seeks to create a permanent International Criminal Court (ICC), to be located at the Hague, Netherlands.³¹⁴ The Court, which will not begin hearing cases until its enabling statute is ratified by at least 60 nations, is closely tied to the UN, and may hear cases referred to it by the UN Security Council.³¹⁵

³¹⁰ Non-governmental organizations have been instrumental in leading the international campaign for the establishment of the ICC, particularly via information and advocacy on the Internet.

³¹¹ Prof. Yoram Dinstein, Human Rights: Implementation Through the UN System, 89 AM. SOC'Y INT'L L. PROC. 241, 246-247 (1995).

³¹² Nanette Dumas, Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals, 13 HASTINGS INT'L & COMP. L. REV. 585 (1990), citing the Statute of the ICJ, which is annexed to the UN Charter, ch. 14.

³¹³ *Id.*

³¹⁴ See United Nations ICC website, *supra* note 309.

³¹⁵ *Id.*

Unlike the International Court of Justice, the ICC will have jurisdiction over international crimes committed by individuals. Such crimes include genocide, war crimes, and crimes against humanity, including those committed during peacetime.³¹⁶ The Rome Statute applies to all persons, including heads of state, government officials, and members of the military, who may be held accountable for the actions of their subordinates.³¹⁷ Charges may be brought by a member state, by the Court's prosecutor acting upon his or her own motion, or by the UN Security Council.³¹⁸ The Court's jurisdiction will be complementary to that of its member states, and the court may only take action when the victims' home government is unable or unwilling to prosecute.³¹⁹ The penalties that the Court may apply include a maximum of life imprisonment, as well as the imposition of fines and forfeiture of any and all proceeds derived from the criminal activity at issue.³²⁰

The ICC is potentially the ideal international institution to deal with multinational corporations that violate human rights. Because the Court has jurisdiction over individuals, the officials of these corporations (and perhaps even the corporations themselves, considered to be legal "persons" under U.S. rules of civil procedure) may finally be brought to justice for their offenses. Additionally, leaders or officials of a country hosting and tolerating a violating corporation could also face punishment under the ICC. There are, of course, limitations. The state in which the MNE is located would need to be a member of the ICC, and the rights violations would need to amount to "crimes against humanity."

Crimes against humanity are defined in Article 7 of the Statute to include murder, extermination, enslavement, deportation,

³¹⁶ Rome Statute of the International Criminal Court, Articles 1 and 5, *supra* note 309.

³¹⁷ *Id.* at Articles 25, 27-28.

³¹⁸ *Id.* at Articles 13-15.

³¹⁹ *Id.* at Article 17.

³²⁰ *Id.* at Article 77.

imprisonment, torture, sexual violence, persecution, disappearance of persons, apartheid, and "other inhumane acts of similar character intentionally causing great suffering."³²¹ Subsection (2) of Article 7 explains that the jurisdiction of the Court over these crimes is limited to their "multiple commission," which suggests that isolated incidents will not trigger the jurisdiction of the Court.³²² It does not seem that this requirement will prevent multinational corporations or their officials from being prosecuted.

Generally, rogue corporations violate human rights in a systematic way, often as part of a rather egregious *modus operandi*. If these violations are brought to the attention of the Court's prosecutor, an investigation will ensue and violating corporations and/or their officials can be brought to justice. The officials may be ordered to serve time in prison or pay fines, and the corporation may be ordered to forfeit funds or property as restitution. In either scenario, the punishments are more promising than anything that has been done in the past to force MNEs to respect human rights. Jail time and million-dollar fines are precisely what is needed to eliminate the impunity that many corporations have enjoyed thus far.

One commentator has addressed the possibility of enforcing environmental rights under the ICC.³²³ He suggests that actions such as dumping hazardous waste and developing rainforests and other protected areas destroy people's habitats and should be considered violations of their human rights.³²⁴ Intentional large-scale destruction of the environment might be considered a "war crime" (Article 8), but there is no other mention of ecocide in the Statute, nor is it clear whether isolated incidents fall within the Court's jurisdiction.³²⁵ Ultimately, the commentator concludes

³²¹ *Id.* at Article 7.

³²² *Id.*

³²³ Mark. A. Drumbi, Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes, 22 *FORDHAM INT'L L. J.* 122 (1998).

³²⁴ *Id.* at 152.

³²⁵ *Id.*

that rather than the ICC, a convention on environmental rights and an environmental court for the enforcement of those rights would be the best means of ensuring their protection.³²⁶

The formation of separate conventions and courts for each of several human rights norms is inefficient and unnecessary. The long-awaited ICC is the ideal institution for the enforcement - and not just the promotion - of human rights. Although the ICC is new and speculative, once it is ratified and begins its work, it will present a unique opportunity for individuals around the world without the benefit of a regional human rights court to have their cases heard before an international tribunal.

Of course, the ICC is not yet a perfect institution. Waiting for 60 states to ratify the Rome Statute before the Court becomes effective may take several years. And, more importantly, China, India, Russia and the United States have not ratified the Statute, which means that they cannot be subject to the Court's jurisdiction.³²⁷ Despite these initial hurdles, the International Criminal Court promises to become what human rights advocates have long been waiting for: an international venue to secure remedies for the victims of international crime.

3. International Trade and Sanctions

As the economies of the world speed towards globalization, human rights advocates are increasingly exploring the possibility of using international trade as a means of promoting and enforcing human rights. By conditioning favorable trading terms on a country's human rights record, one country may help coax its trading partner into greater recognition and protection of human rights. This "coaxing" may be accomplished on international, regional and domestic levels. Many scholars agree that since labor is an essential part of the production of the goods that are traded internationally, the human rights which can best be enforced

³²⁶ *Id.* at 153.

³²⁷ *Id.* at 146. For additional information on the U.S. and the ICC, see David Scheffer, Developments in International Criminal Law: The United States and the International Criminal Court, 93 A.J.I.L. 12 (1999).

through international trade are labor rights.³²⁸ This section will primarily focus on the ways in which international trade can be used to enforce labor rights.

a. The International Labor Organization

The International Labor Organization (ILO), established by the Treaty of Versailles in 1919, is the primary organization concerned with setting international standards for economic and social rights, and especially worker rights.³²⁹ The ILO has established a comprehensive international labor code, and uses its tripartite structure to implement and enforce the rights set forth in the code.³³⁰ The ILO consists of the Governing Body, the International Labor Office, and the International Labor Conference.³³¹ The Labor Office is the legislative body of the ILO.³³² The Conference consists of about 200 representatives of governments, workers, and employers, and reviews reports and demands responses from governments with consistently bad human rights records.³³³

Rather than employing material sanctions, the ILO uses “moral persuasion, publicity, shame, diplomacy, and dialogue to ensure compliance by member states.”³³⁴ The ILO has been criticized for not sanctioning states that consistently fail to meet its standards. Rather than withdrawing aid from those states, the ILO provides them with information and technical assistance to help them comply, a tactic that has been described as a “carrot”

³²⁸ Daniel S. Ehrenberg, The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor, 20 YALE J. INT'L L. 361, 363 (1995).

³²⁹ Robertson and Merrills, *supra* note 262, at 282.

³³⁰ Ehrenberg, *supra* note 328, at 382.

³³¹ *Id.* at 382-383.

³³² *Id.* at 383.

³³³ Robertson and Merrills, *supra* note 262, at 285.

³³⁴ Ehrenberg, *supra* note 328, at 388-389.

approach of encouraging states rather than threatening them with sanctions.³³⁵ This somewhat gentler approach to human rights enforcement has in fact been rather successful. Over a fourteen year period, researchers documented over 1,000 improvements in member states that resulted from ILO procedures.³³⁶

However, in light of the profit-centered nature of corporations, the question remains whether the carrot will not simply be swallowed whole and rendered useless. For example, if a country that has ratified ILO conventions learns that one of its MNEs is violating labor standards, it may attempt to urge the corporation into compliance. If the MNE refuses and threatens to take its business elsewhere, unless the ILO offers assistance sufficient to compensate for the loss of that corporation, there will be more incentive to keep the violating MNE than to risk the loss of a substantial contributor to the economy.

Proponents of a trade-based system of human rights enforcement seem to agree that existing enforcement regimes fail because there are no real consequences for the violators. Moral incentives such as the disapproval of other countries or an unfavorable country report to the UN are simply not sufficient to force a violating state into compliance. As one writer suggests, "A new economically based system to achieve effective enforcement is needed... [because] [s]tates are much more apt to take punitive actions against each other, beyond verbal condemnation, where their material interests are affected."³³⁷

When countries are dependent upon each other for survival and development, trade is essential. If trade is conditioned on the protection of human rights, then countries will have little choice but to comply. Ultimately, it will be "the self-interest of each state" which will "stimulate the promotion and enforcement of human rights."³³⁸

³³⁵ *Id.* at 390.

³³⁶ Robertson and Merrills, *supra* note 262, at 285.

³³⁷ *Id.* at 377.

³³⁸ *Id.* at 381.

b. The World Trade Organization

An international organization such as the World Trade Organization (WTO) appears to be an ideal instrument for the global enforcement of human rights through trade. The new WTO was established in 1995 by the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).³³⁹ The WTO, which has been adopted by the United States and a large number of states, suggests that many nations are willing to allow an international body not only to increase their trade opportunities, but also to regulate them as well.³⁴⁰

Patricia Stirling suggests that this willingness to be subject to regulation should be seen as a natural stepping-stone toward human rights enforcement through the WTO. She proposes the creation of a "human rights arm" within the WTO.³⁴¹ Such a mechanism, Ms. Stirling explains, is a logical extension of GATT/WTO,³⁴² and would be similar in form to the Dispute Resolution Body already in place within the WTO, with automatic membership for all member states.³⁴³ Within the body, there would be a committee responsible for receiving reports of abuses by member states, and these reports would be evaluated, with recommendations made to either dismiss the complaint or impose sanctions.³⁴⁴

Once all of the WTO members are notified, they would then need to agree on the multilateral sanctions to be imposed on the violating state.³⁴⁵ Ms. Stirling suggests that restricting the import

³³⁹ Patricia Stirling, The Use of Trade Sanctions as an Enforcement Mechanism for Basic Rights: A Proposal for Addition to the World Trade Organization, 11 AM. U. J. INT'L L. & POL'Y 1, 33-34 (1996).

³⁴⁰ *Id.*

³⁴¹ *Id.* at 34.

³⁴² *Id.* at 38.

³⁴³ *Id.* at 40.

³⁴⁴ *Id.* at 40-41.

³⁴⁵ *Id.* at 42.

of the main product of the sanctioned state would be the most effective form of a multilateral sanction, and the one that would do the least harm to the other states.³⁴⁶ She concludes that "[w]hen a member state faces the possibility of loss of access to international markets if it violates the human rights of its residents and citizens, it may think twice about committing such violations."³⁴⁷

Another reason why human rights fit comfortably within the GATT/WTO scheme is that the GATT already contains an exception within Article XX(a) that allows for trade restrictions when they are "necessary to protect public morals."³⁴⁸ This provision is vague, and there is little legislative history to aid in its interpretation.³⁴⁹ The WTO could easily turn to internationally-recognized human rights norms for a definition of what falls within the exception. This step would provide a smooth segue into the creation of the aforementioned human rights committee to determine which trade restrictions are valid under Article XX(a).

Under this scheme, the countries that knowingly host rights-violating multinationals would be subject to sanctions. If the countries were unaware of the violations by the visiting MNE, the committee could inform them of any complaints that were filed against them, and the countries would be given a certain number of months within which to comply. The country might confront the corporation and threaten it with expulsion if the latter did not reform its practices. Even without confrontation, the MNE would suffer if its products were no longer being bought or sold on the global market.

Another means of using the WTO to enforce human rights is to condition the admission of a new state into the Organization on the state's maintaining a positive human rights record. At this writing, China is seeking admission into the World Trade Organization, but has been unable to reach agreement with the United States, which is a prerequisite to admission. Although economic concerns have contributed to the lack of agreement, it is

³⁴⁶ *Id.* at 42-43.

³⁴⁷ *Id.* at 45-46.

³⁴⁸ Steve Charnovitz, The Moral Exception in Trade Policy, 38 VA. J. INT'L L. 689, 690 (1998).

³⁴⁹ *Id.* at 704.

important to note that U.S. negotiators have been under great pressure by labor unions to block the agreement unless Beijing agrees to improve labor standards and frees jailed labor and human rights activists. If China is ultimately denied membership due to its human rights record, two important precedents will have been set. First and foremost, China may finally be forced to bow to global pressure to change its human rights policies. Secondly, other countries seeking admission to the WTO will work to improve their human rights records after seeing how China failed in its bid to join the WTO.

i. Proposal to Combine the ILO and the WTO

At a commemoration of the fiftieth anniversary of the World Trade Organization in Geneva, President Clinton stated that “the WTO and the International Labor Organization should commit to work together in order to make certain that open trade... lift[s] living standards and respects the core labor standards that are essential not only to worker rights, but to human rights.”

Three years earlier, Daniel S. Ehrenberg had suggested the very same thing: the creation of a joint ILO/WTO enforcement regime for the protection of human rights.³⁵⁰ Noting the ineffectiveness of existing regimes that limit themselves to non-punitive, morality-based measures to obtain compliance, Mr. Ehrenberg suggests a different scheme based on material sanctions.³⁵¹ This regime would benefit from a marriage of the ILO’s 70 years of experience in reporting with the WTO’s ability to regulate unfair trading practices and eliminate them through sanctions.³⁵² Mr. Ehrenberg’s proposed scheme would work much like Ms. Stirling’s, with reports, investigations, and import-ban sanctions imposed upon the finding of a violation.³⁵³ The

³⁵⁰ Ehrenberg, *supra* note 328, at 405.

³⁵¹ *Id.* at 376-377.

³⁵² *Id.* at 405.

³⁵³ *Id.* at 406-414. For more information on the WTO, see <<http://www.wto.org>>.

presence of the ILO would fortify a trade-based system of enforcement of human rights.

4. The World Bank

"Many states, as well as non-governmental organizations, are slowly realizing that the use of economic aid as a weapon against human rights abuses may be the most effective enforcement mechanism to date," writes Halim Morris.³⁵⁴ Morris argues in favor of using the World Bank - more so than the International Monetary Fund - as an ideal means of both monitoring and enforcing human rights.³⁵⁵

The World Bank was created in 1944 by the United Nations to help rebuild Europe after World War II.³⁵⁶ Nation-states that are members of the Bank buy its shares, and the revenue from those sales provides the capital the Bank uses to make loans.³⁵⁷ Loan decisions are made by the Bank's Board of Executive Directors, whose votes are weighted by the number of shares owned by each of the countries the board members represent.³⁵⁸

Morris suggests that because the Bank is owned by 177 countries, any decision made or action taken would be viewed as multilateral in nature, and would therefore "carry greater weight" than that of any one country alone.³⁵⁹ Additionally, because the World Bank's loans are often the main source of funding to developing nations, it is able to leverage that lending power to force those countries - which often suffer the worst human rights

³⁵⁴ Halim Morris, The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?, 4 ILSA J. INT'L & COMP. L. 173, 174-175 (1997).

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 178.

³⁵⁷ *Id.* at 179.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 176.

violations by multinational corporations - to comply with internationally-recognized human rights norms.³⁶⁰

Establishing a system of conditioning its loans on human rights compliance would not be a new venture for the World Bank. Because of problems it had encountered with some borrower nations, the Bank implemented in 1979 "structural adjustment loans" which had conditions attached to them. These conditions forced the borrowing countries to adhere to the Bank's "policies and practices in their internal and/or external affairs."³⁶¹ Additionally, the Bank's Articles of Agreement allow consideration of "non-economic" factors when "special circumstances arise."³⁶² Gross human rights violations are a perfect example of the circumstances that should trigger this consideration.

The World Bank is an ideal mechanism not only to monitor human rights, but also to implement and enforce such rights as well. By establishing a human rights commission, or a liaison to the HRC of the United Nations (to which the World Bank is already connected), the Bank's Board of Executive Directors would have direct access to information about the human rights record of each loan requesting nation state. The Board could add this review process to its loan-granting procedure, making it clear to the world that countries not respecting basic human rights will not receive loans. Since their survival and development are contingent upon such compliance, these nations will have no choice but to begin to respect human rights.

This conditioning of loans would directly affect multinational corporations engaged in human rights violations. Governments that look the other way when these corporations abuse their citizens will realize that they can no longer afford to do so. Any revenue they may lose from having the companies pull out of their countries can be counterbalanced by the aforementioned special assistance loans, or even the standard development loans, once the offending corporations either stop their abuses or show

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.* at 196.

improvements. Ideally, the setting of these standards by the World Bank will serve as incentives for both corporations and countries that would realize that when human rights and human dignity are respected, a country's citizens are happier and, to use a term the MNEs will appreciate, more productive.

Another option might be for the Bank to create a special assistance program for countries that have pledged their desire to implement human rights, but lack the resources or means to do so. The Bank could provide smaller, short-term loans to help these countries reach compliance. Non-governmental organizations such as Human Rights Watch might work in conjunction with the Bank in order to provide education and guidance to these countries, and the United Nations Human Rights Committee or rapporteurs might also be called upon for assistance and monitoring. The Bank has already acted in a similar fashion by providing loans specifically meant to create jobs for refugees in Pakistan and Somalia, and to promote equality for women in some developing countries.³⁶³

Of course, this policy would require some extra work and perhaps the creation of a new fund within the Bank, but if the member nations decided that human rights were a real priority, these changes could be implemented without much foreseeable cost or trouble. On the contrary, the changes might result in more capital for the Bank. Once these developing nations comply with human rights norms and become eligible for loans, they will begin earning money, an in turn may eventually buy shares in the World Bank, which would in turn allow it to continue making such loans. Thus, in today's money-centered "global village," the World Bank is another ideal instrument for the multilateral protection of human rights.

B. Regional Mechanisms

Regional enforcement of human rights was originally disfavored by the United Nations, which believed that "it might detract from the perceived universality of human rights."³⁶⁴

³⁶³ *Id.* at 199, citing Ibrahim Shitata, *The World Bank and Human Rights: An Analysis in Legal Issues and the Record of Achievements*, 17 DEN. J. INT'L L. & POL'Y 39, 48-66.

³⁶⁴ Stirling, *supra* note 339, at 21.

Eventually, as regional systems developed in Europe and the Americas, the UN began to embrace the concept. In 1977, the General Assembly requested that States that were without regional regimes begin discussing the creation of regional agreements in their area.³⁶⁵ Regional conventions and courts have many benefits over international systems of enforcement. Cultural and linguistic similarity, for example, might promote cooperation between member states. Geographic proximity, and a smaller group of nations with which to work might allow complaints to be investigated and remedied more quickly. This section considers the regional mechanisms in force, and how they might be used to enforce the respect of human rights by multinational enterprises.

1. Regional Human Rights Agreements and Courts

a. The European System

The European Convention for the Protection of Fundamental Rights and Freedoms became effective in 1953. It contains a series of twenty-five civil and political rights, many of which originate from the Universal Declaration of Human Rights.³⁶⁶ It has been ratified by more than thirty countries across continental Europe, as well as Iceland, Cyprus, and Malta.³⁶⁷ The member nations agree to ensure those enumerated rights to the persons within their respective jurisdictions.³⁶⁸ However, the drafters of the European Convention felt that the nations' mere agreement to ensure rights was not sufficient.³⁶⁹ To this end, they established the European Commission on Human Rights and the European Court of Human Rights.³⁷⁰ The Commission serves as the investigative and

³⁶⁵ *Id.*

³⁶⁶ Robertson and Merrills, *supra* note 262, at 124-26.

³⁶⁷ *Id.* at 122.

³⁶⁸ *Id.* at 127.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

reporting branch, and thus determines the admissibility of cases before the Court.³⁷¹

The European Court of Human Rights has one judge from each of its member states.³⁷² Its jurisdiction is not automatic, and must be accepted by each member state.³⁷³ Although the right of individual petition is optional, if a member state has accepted it, then its citizens may bring complaints against their government after they have exhausted all domestic remedies.³⁷⁴ States may also bring cases against one another, but as in the international arena, this rarely happens.³⁷⁵

The Court interprets and applies the rights in the Convention, but it does not have explicit authority to grant remedies for violations of those rights. Instead, the Court has held that the respondent state should decide which measures are necessary to implement its obligations under the Convention.³⁷⁶ In addition to this lack of authority, the European system has been criticized for its years-long delays in processing cases, and for the rejection of ninety percent of the complaints that are brought to its attention.³⁷⁷

For more than forty-five years, the European Court of Human Rights has been a "significant example of diverse cultures working together to create a transnational human rights tribunal."³⁷⁸ However, if individuals cannot win speedy and effective remedies against the countries that are causing or permitting the individuals' rights to be violated, then the system cannot be considered a success in defending human rights.

³⁷¹ *Id.*

³⁷² *Id.* at 132.

³⁷³ *Id.*

³⁷⁴ *Id.* at 127.

³⁷⁵ *Id.* at 128.

³⁷⁶ *Id.* at 134.

³⁷⁷ Dumas, *supra* note 312, at 604.

³⁷⁸ *Id.* at 603.

b. The Inter-American System

After World War II, Latin American nations began meeting regularly as the Inter-American Conference on Problems of War and Peace.³⁷⁹ In 1948, the Inter-American Conference in Bogota formed the Organization of American States (OAS), and also adopted the American Declaration on the Rights and Duties of Man.³⁸⁰ The American Declaration enumerated 28 rights and 10 duties of citizens, and was generally like the Universal Declaration, except that the American Declaration followed the Universal Declaration by seven months.³⁸¹ In 1959, the Inter-American Commission on Human Rights (IACHR) was formed as an organ of the OAS. Years later, the Commission established the Inter-American Court of Human Rights.³⁸²

After ratifying the UN Covenants in 1966, the OAS requested that the IACHR draft a separate Inter-American convention.³⁸³ The American Convention on Human Rights was drafted in 1969, and became effective in 1978.³⁸⁴ It includes 21 of the rights protected by the International Covenant on Civil and Political Rights, and also adds human rights to include the freedom from exile, the prohibition of the collective expulsion of aliens, the right of property, the right of reply, and the right of asylum.³⁸⁵ The Convention has been ratified by 25 Central and South American countries. Both Canada and the United States refused to ratify the Convention.³⁸⁶

³⁷⁹ Robertson and Merrills, *supra* note 262, at 198-199.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 199.

³⁸² *Id.* at 198-99.

³⁸³ *Id.* at 201.

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 202-03.

³⁸⁶ Organization of American States, Inter-American Commission on Human Rights (visited Aug. 12, 1999) <<http://www.cidh.oas.org>>.

Like the European system, the Commission conducts investigations and determines which cases may come before the Court. While individuals and groups may bring complaints to the Commission, they may not appear before the Court themselves.³⁸⁷ The Inter-American Court is also one of optional jurisdiction, but it has more powers than the European Court in that it may order damages and reinstate violated rights.³⁸⁸ Despite these additional powers and its ability to take contentious cases, the Court has in the past focused primarily on issuing advisory opinions.³⁸⁹ In light of Latin America's generally dreadful human rights record, this seems like a waste of what could be a potentially great instrument for the enforcement of human rights, especially since the IACHR has the power to compel violating states to restore their victims.

One recent development does signal positive change within the IACHR. In 1997, the Commission adopted the American Declaration on the Rights of Indigenous Peoples.³⁹⁰ In addition to respecting the languages, cultures, and religions of the indigenous peoples of the Americas, the Declaration also guarantees the right to environmental protection.³⁹¹ This declaration may prove to be a useful tool not only against ecocide and the displacement of peoples by MNEs in Central and South America, but may also assist the individuals who face numerous procedural hurdles that often prevent them from winning justice in their regional Court.

c. The African System

The Organization of African Unity, which was formed in 1962, adopted the African Charter on Human and Peoples' Rights in 1981.³⁹² Although the Charter establishes a Commission for the

³⁸⁷ Robertson and Merrills, *supra* note 262, at 212-16.

³⁸⁸ *Id.* at 215-17.

³⁸⁹ *Id.* at 218-26.

³⁹⁰ IACHR Internet site, *supra* note 397, at <<http://www.cidh.org/Indigenous.htm>> .

³⁹¹ *Id.*

³⁹² Robertson and Merrills, *supra* note 262, at 242-43.

promotion and protection of human rights, it does not provide for a court, which renders the Commission powerless to do much more than issue advisory opinions.³⁹³ The Commission accepts complaints from anyone, which is a positive step. Unfortunately, it acts only in "special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights."³⁹⁴ Waiting for such serious violations is a major shortcoming of this regional system, especially in light of atrocities committed within the region by US and European corporations acting in concert with the military and the government of host nations.

d. The Arab System

Although there is not yet a functioning human rights regime for the Arab and Asian nations, the League of Arab States began the process by establishing the Permanent Arab Commission on Human Rights in 1968.³⁹⁵ The Commission is dedicated to promoting (rather than protecting) human rights within the Islamic context.³⁹⁶ Although the Arab League has drafted a declaration for an Arab Charter of Human Rights, it has not yet been ratified.³⁹⁷

There is much work to be done within the different realms of regional human rights enforcement. As one commentator notes, "The courts now in existence need to resolve procedural difficulties and overcome the fear of political repercussions that limit their effectiveness so that every major area of the world will be encouraged to establish its own regional human rights court."³⁹⁸

Even if the existing regimes became fully functional and effective, China, India and Russia would be among the many countries that still would not have access to regional courts for

³⁹³ *Id.* at 260-63.

³⁹⁴ Dumas, *supra* note 312, at 606, citing the African Charter, Article 58(1).

³⁹⁵ Robertson and Merrills, *supra* note 262, at 238-41.

³⁹⁶ *Id.* at 241.

³⁹⁷ Stirling, *supra* note 339, at 24.

³⁹⁸ Dumas, *supra* note 312, at 607.

human rights violations. It is in light of the areas in which regional courts are lacking (or are altogether nonexistent) that the International Criminal Court becomes an essential component of human rights enforcement around the world.

3. Using Regional Trade Systems to Enforce Human Rights

Regional enforcement of human rights through trade complements the promotional efforts of regional organizations and courts by dealing with the countries and corporations that violate rights in ways that are both culturally and economically relevant.

a. The European Union

The 1992 "Social Charter" of the Maastricht Treaty, which was the founding document of the European Union (EU), established a unique regional system respecting the rights of workers.³⁹⁹ Members of the EU are obligated to respect twelve fundamental workers' rights, which include the right to fair remuneration, freedom of association and collective bargaining, workplace safety, equal pay for men and women, and the protection of the elderly and disabled.⁴⁰⁰ These rights are enforceable both in the national courts of member states and in the European Court of Justice, a regional court for the members of the EU.⁴⁰¹

In addition to judicial enforcement of these rights, the EU recently passed a provision granting trade preferences and incentives to countries that have implemented ILO standards.⁴⁰² Conversely, that same provision could be used to terminate benefits to countries that violate workers' rights.⁴⁰³ The EU has

³⁹⁹ Sarah H. Cleveland, Global Labor Rights and the Alien Tort Claims Act, 76 TEX. L. REV. 1533, 1542-43 (1998).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 1543.

⁴⁰² *Id.* at 1543-44.

⁴⁰³ *Id.* at 1544.

also linked trade and labor rights, beginning in 1996 when it terminated GSP trade benefits to Burma because of that country's use of forced labor.⁴⁰⁴ This system of enforcement is one of the most promising, since it has in place all of the necessary elements for the protection of human rights, to wit: established rights through the ILO, as well as the promotion, implementation and enforcement of those rights.

b. The Americas

i. The Southern Common Market: MERCOSUR

In 1994, Argentina, Brazil, Paraguay, and Uruguay established MERCOSUR, a common market that provides for the free movement of goods, services, and capital between member states.⁴⁰⁵ The agreement provides for a common external tariff, common trade policies, and the harmonization of local laws.⁴⁰⁶ The Market represents approximately 200 million people with almost \$800 billion in combined Gross Domestic Products. For these reasons, Mercosur has attracted several other Latin American countries (such as Chile and Bolivia) to join as associate nations.⁴⁰⁷

Although it is only a few years old, MERCOSUR seems to have established that its primary concern is trade. While the executive body has established a Work Subgroup on labor, employment, and social security matters, there is no hint of serious concern for human rights violations as of yet. Additionally, although the Market provides for a tribunal to resolve disputes between member states, the states have been reluctant to use it, and have consistently relied instead upon their own negotiations.⁴⁰⁸

⁴⁰⁴ *Id.*

⁴⁰⁵ MERCOSUR: South America's Common Market (visited September 10, 1999) <<http://www.americasnet.com/mauritz/mercotur/english>>.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

Until the states are willing to subject themselves to the decisions of a court, or the decisions of the rest of the member states (for example, a majority decision to impose sanctions), the MERCOSUR will not be a useful means to enforce or implement human rights in the Americas.

ii. The North American Free Trade Agreement (NAFTA)

The North American Free Trade Agreement was signed in 1992. In addition to establishing free trade between Canada, Mexico, and the United States, it also provided for side agreements on labor and the environment. Due to pressure from labor advocacy groups in the United States, both Congress and President Clinton conditioned their respective approval of NAFTA on the inclusion of the North American Agreement on Labor Cooperation (NAALC), the labor side agreement.⁴⁰⁹ The NAALC recognizes eleven fundamental labor rights, and requires its member countries to promote them domestically to the furthest extent possible. Nonetheless, no minimum standards are set.⁴¹⁰ Violations of these rights have been alleged, but have only triggered administrative processes, and to date, no sanctions have been imposed.⁴¹¹

Although the NAALC is notable as the first regional trade agreement approved by the United States which is conditioned on labor rights,⁴¹² it has been criticized for its weaknesses in enforcement and lack of independence.⁴¹³ Also, it does not provide for any sort of equalizing or "harmonization" of labor rights in the three member nations.⁴¹⁴ Nonetheless, the Agreement

⁴⁰⁹ Cleveland, *supra* note 399, at 1544.

⁴¹⁰ *Id.* at 1544-45.

⁴¹¹ *Id.* at 1545.

⁴¹² Cleveland, *supra* note 399, at 1544.

⁴¹³ *Id.* at 1546.

⁴¹⁴ *Id.*

has been commended for bringing labor rights to the attention of its member countries, and for creating public awareness about the importance of these rights. Because of the Agreement, companies and governments are more conscious of the effects of their policies and decisions.⁴¹⁵

The Supplemental Environmental Agreement (SEA) is another side agreement within NAFTA. Under the SEA, individuals and groups concerned with a member country's violation of its own domestic environmental laws may bring complaints to NAFTA's Environmental Commission.⁴¹⁶ After the alleged violation is brought to the country's attention and the country responds, the worst that could happen to the violating party is that the Commission is not satisfied with its response and prepares its own report.⁴¹⁷ Under this system, a country's imperfect environmental practices are brought to light, but not much else is likely to change.

While the labor and environmental side agreements are important steps in North America's recognition of these rights, they are unnecessarily weak and inefficient mechanisms when compared to the "access to transnational justice provided to economic interests under the NAFTA."⁴¹⁸ The existing side agreements could easily be fortified into rights-enforcement mechanisms that allow for individual complaints and provide for enforcement in the form of sanctions or loss of trade privileges. Such a mechanism is essential for this region because while Canada, Mexico, and the United States are all members of the OAS, none of them has ceded jurisdiction to the Inter-American Court of Human Rights, and only Mexico has ratified the American Convention.⁴¹⁹ Thus, individual victims of states or

⁴¹⁵ *Id.*

⁴¹⁶ Ruth Buchanan, Access to Transnational Justice: Responding to the NAFTA, 88 AM. SOC'Y INT'L L. PROC. 531, 533 (1994).

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ James F. Smith, NAFTA and Human Rights: A Necessary Linkage, 27 U.C. DAVIS L. REV. 793, 838 (1994).

corporations in this region have little other hope of finding redress for violations of their rights. If Canada, Mexico, and the United States set a precedent of respect for at least environmental and labor rights under NAFTA, a great deal of good is likely to come of it. The greatest good would be the implementation of those rights in the member states, as well as in countries that may seek membership in the Agreement.

C. Domestic Mechanism

1. The United States

Although the United States "has successfully exported democratic values and human rights along with market economics,"⁴²⁰ it has been reluctant to receive the same. The very origin of the United States is grounded in a resistance to be subject to the laws or jurisdiction of another entity. When it comes to human rights, however, this maverick attitude has received strong criticism from abroad. Many advocates argue that a multilateral approach to sanctions, for example, is more effective than the unilateral approach that the United States tends to favor. Several authors also question the legitimacy of U.S. attempts to pressure countries such as Burma and China into respect for human rights when the United States is not a party of the American Convention on Human Rights nor several other international covenants. Some observers have suggested that this one-sided approach creates resentment in the States' regional neighbors, and often backfires by generating sympathy and support for the object of the sanctions imposed by the United States.⁴²¹

Despite these criticisms, the United States is recognized for its efforts on behalf of human rights both domestically and abroad. This section explores what the U.S. has done - and could do better - to improve human rights worldwide.

⁴²⁰ *Id.* at 840.

⁴²¹ Stirling, *supra* note 339, at 31.

a. U.S. Government Action

i. Model Business Principles

In 1994, despite a series of promises to the contrary, President Clinton de-linked China's human rights record from its trade status with the United States. After enduring much criticism for not being as "tough" on trade with China as he had promised to be, President Clinton in May 1995 developed a set of Model Business Principles to encourage respect for human rights by U.S. corporations that operate abroad in all countries. The Principles represent the "first significant effort by the Executive to create a minimum standard of conduct for corporations with regard to human rights."⁴²²

However, the Principles are simply that: an effort. They are essentially a voluntary code of ethics, designed to promote corporate respect for human rights, but not much more. There is no means to enforce the Principles, no system to monitor their effectiveness, and really no way of knowing how many companies have adopted them.⁴²³

Additionally, most U.S. corporations are likely to see little incentive in using them. Because they are unilateral, companies may find themselves at a disadvantage for adopting them when their competitors have not. However, a handful of major U.S. corporations has expressed their support for the Principles as a point of reference for framing their own corporate codes of conduct.⁴²⁴

ii. Legislation to Regulate Trade

For over one hundred years, the United States has had trade policies that address the labor-related human rights conditions of

⁴²² Frey, *supra* note 290, at 172.

⁴²³ *Id.* at 173.

⁴²⁴ Douglas Cassel, Corporate Initiatives: A Second Human Rights Revolution?, 19 Fordham Int'l L. J. 663, 1975 (1996). Corporate codes of conduct are discussed further below.

its trading partners.⁴²⁵ As early as 1890, the Tariff Act was enacted to prohibit the import of goods manufactured by prison laborers.⁴²⁶ Since then, Congress has periodically enacted legislation intended to better the working conditions in the nations with which the United States does business.

In 1983, Congress passed the Caribbean Basin Initiative, a program that grants trade preferences to Caribbean countries that meet a series of criteria. Some of the criteria considered include workplace conditions, collective bargaining, and the right of laborers to organize.⁴²⁷ The Initiative has been successful in motivating some of the countries that initially fell short of the criteria to pass laws and commit to improvements in worker rights.⁴²⁸ In 1984, Congress amended the General System of Preferences Act (GSP) of 1974, which had granted duty-free trade treatment to certain developing nations over a number of years. The 1984 amendment to the GSP statute required the President to withhold those trading privileges from countries that were not granting their citizens internationally recognized workers' rights.⁴²⁹

Similar provisions have been included in several statutes throughout the 1980s and 1990s. For example, since 1994, federal laws require that U.S. delegates to the IMF and the World Bank use their votes to pressure borrower nations into compliance with international labor standards.⁴³⁰ That same year, the U.S. Agency for International Development statute was amended to prohibit aid to countries that violate workers' rights.⁴³¹

⁴²⁵ Jorge F. Perez-Lopez, Conditioning Trade on Foreign Labor Law: The U.S. Approach, 9 COMP. LAB. L.J. 253, 254 (1988).

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 260-61.

⁴²⁸ *Id.* at 264.

⁴²⁹ Cleveland, *supra* note 399, at 1547.

⁴³⁰ *Id.* at 1548.

⁴³¹ *Id.*

The Foreign Corrupt Practices Act (FCPA) of 1977 prohibits, among other things, payment of bribes to foreign officials by U.S. companies.⁴³² However, in 1988, the Act was amended to include a series of exceptions for payments that do not constitute bribes.⁴³³ These include payments to facilitate the granting of licenses and visas, utilities, and police protection.⁴³⁴ For the blatantly corrupt payments that do violate the statute, corporate officials face both civil and criminal penalties.⁴³⁵ Violations of the FCPA may also give rise to private actions under the Racketeer Influenced Corrupt Organizations Act (RICO), as well as state and local laws.⁴³⁶ A case might be brought under RICO, for example, by a competitor alleging that the violating corporation gained unfair advantage from its payment of bribes to government officials.⁴³⁷ Multinational corporations that violate the rights of workers or villagers and then pay governments for their silence or cooperation are ideal candidates for prosecution under this Act, if one can overcome the broad exceptions written into it.

Some of the most recent human rights-based trade legislation has been directed against Burma, which has been under the martial law rule of the State Law and Order Restoration Council (SLORC) since 1988. In 1997, President Clinton imposed a ban on financial investment and assistance to Burma. In doing so, Clinton acted pursuant to the Congress' 1996 act that mandates sanctions if the SLORC became especially egregious in its rights violations.⁴³⁸

China has also been another recent target of attempted U.S. sanctions. As China's dreadful human rights violations made headlines throughout the 1990s, human rights activists and

⁴³² BISNIS, Foreign Corrupt Practices Act Antibribery Provisions (Visited Sept.5, 1999) <<http://www.itaiep.doc.gov/bisnis/fcp1.htm>>.

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ Cleveland, *supra* note 399, at 1549.

politicians alike debated the correctness of continually granting China Most Favored Nation (MFN) trading status. In 1994, the U.S. took a stand and demanded that China improve its human rights policies in order to maintain MFN status.⁴³⁹ China refused, claiming U.S. interference with its domestic policies and declaring that it simply did not adhere to the same notion of human rights.⁴⁴⁰ The U.S. response was to back down; China never lost MFN status.

The futility of the showdown between the United States and China illustrates how difficult it can be for one nation acting alone to force another nation to respect human rights, particularly when so many countries rely on the violating nation for labor and manufactured goods. Unless all of the countries that do business with China act in concert with the U.S., China will continue to do as it pleases because it can afford to do so.

iii. Other Government Action

In addition to trade-based legislation, the U.S. government has many other economic measures available to help it promote and enforce human rights in the nations with which it does business. One author's list of options included freezing foreign bank accounts, opposing World Bank loans, forbidding foreign investment, restricting air landing rights, and reducing foreign aid.⁴⁴¹ In 1996, the U.S. National Security Council recommended that the U.S. Import-Export Bank decline government-backed financing for Caterpillar and two other U.S. firms to build the Three Gorges Dam in China, which was expected to force the relocation of over one million people, flood farmlands, and produce toxic waste.⁴⁴² The Bank, which is funded by U.S. taxpayers, denied loans to the three firms.⁴⁴³

⁴³⁹ Stirling, *supra* note 339, at 1.

⁴⁴⁰ *Id.*

⁴⁴¹ Charnovitz, *supra* note 348, at 693.

⁴⁴² Human Rights Watch, *Corporations and Human Rights* (visited Jan. 2, 1999) <<http://www.hrw.org/about/initiatives/corp.html>>; See also International Rivers Network, *Funding Fracas Develops Over US Support for Three Gorges* (Visited Jan. 7, 1999) <http://www.comlink.apc.org/fic/newslett/eng/n127/3_gorges.htm>.

The U.S. State Department issues an annual report on human rights in most countries. The report serves to educate activists as well as consumers. This measure serves as a means of encouraging respect for human rights, and relies primarily on shame in order to motivate countries into compliance.

b. Litigating Compliance: Using Domestic Courts to Enforce International Human Rights

Despite the United States' general reluctance to submit to the jurisdiction of human rights courts and conventions, it has made significant progress in establishing a domestic forum for foreign human rights victims who have nowhere else to find justice. This section addresses legislation passed to facilitate this process, as well as the procedural difficulties encountered by human rights plaintiffs in this country. Many cases are dismissed on grounds of forum non conveniens, failure to join indispensable parties, or lack of subject matter jurisdiction. The process is not yet a perfect one, but there is hope that through legislation and precedent, the United States will succeed in developing an efficient model of domestic enforcement of human rights for foreign victims with no other recourse.

i. The Alien Tort Claims Act

In 1789, the First Congress enacted the Alien Tort Claims Act (ATCA), which granted the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁴⁴³ The statute lay dormant for almost two hundred years, until the landmark case of *Filartiga v. Pena-Irala* resurrected it and set a new precedent for human rights litigation in the United States.

⁴⁴³ Worker News, Rejection of Chinese Dam Financing is Victory for Environment, Labor, Human Rights (Visited Jan.7, 1999) <<http://www.uaw.org/workernews/dam.html>>.

⁴⁴⁴ Alien Tort Claims Act, 28 U.S.C. § 1350.

In *Filartiga v. Pena-Irala*, Dr. Filartiga, a citizen of Paraguay, brought suit in the Eastern District of New York against another Paraguayan citizen for the wrongful death of his son.⁴⁴⁵ The action was brought in the Eastern District of New York, and claimed jurisdiction under the ATCA.⁴⁴⁶ Dr. Filartiga alleged that his son was tortured and killed because of his father's opposition to the Paraguayan government.⁴⁴⁷ The case was dismissed for lack of subject matter jurisdiction.⁴⁴⁸ Dr. Filartiga appealed to the Second Circuit, which reversed the dismissal, finding that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."⁴⁴⁹ The Second Circuit stated that it was construing the ATCA so as to open "the federal courts for adjudication of the rights already recognized by international law."⁴⁵⁰

The importance of the *Filartiga* decision rests in three main points: (1) It grants individuals the right to bring human rights claims under the ATCA; (2) It recognizes torture as a violation of the law of nations; and (3) It construes the ATCA broadly to include "contemporary universally recognized rights and those which will ripen into custom at some point in the future."⁴⁵¹

The ATCA is a potential vehicle for addressing human rights violations by MNEs. It may provide a basis for direct imposition of individual liability, as *Kadic v. Karadzic* shows. In that case, Croat and Muslim citizens of Bosnia-Herzegovina brought actions against Radovan Karadzic under the ATCA for genocide, war

⁴⁴⁵ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir.1980).

⁴⁴⁶ *Id.* at 878-79.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 887.

⁴⁵¹ Jennifer Correale, The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture? 6 PACE INT'L L. REV. 197, 205 (Winter 1994).

crimes and various other crimes against humanity (including torture, rape and forced impregnation) ordered by Karadzic during the conflict in the former Yugoslavia.⁴⁵² The U.S. Court of Appeals for the Second Circuit held that the court did have subject matter jurisdiction, and that Karadzic could be found liable “in his private capacity” for those violations, and therefore reversed and remanded the case back to the District Court, which had dismissed for lack of jurisdiction.⁴⁵³

Kadic was the first case to find an individual in his private capacity liable for human rights violations under the ATCA.⁴⁵⁴ This finding has important implications for victims of human rights at the hands of corporations, particularly if the violations are traced to individual employees, supervisors, or officers of a corporation. Provided that the jurisdictional requirements are met, *Kadic* establishes important precedent in enforcing corporate responsibility for human rights.

This potential has been realized in subsequent cases. In *Doe v. Unocal*,⁴⁵⁵ various Burmese citizens sued the Burmese government and Unocal, a US oil company involved in a joint venture with the Burmese government in a gas pipeline project, for a series of human rights violations against the residents of the area where the pipeline was built.⁴⁵⁶ The court held that although the Burmese government was entitled to immunity under the FSIA, Unocal did fall within the subject matter jurisdiction of the ATCA, and could be held liable for the torts claimed by the plaintiffs.⁴⁵⁷

The court took the “joint action approach,” thereby employing a test to determine state action that looks for a “substantial degree of cooperative action” between private actors

⁴⁵² *Kadic*, *supra* note 102, at 236.

⁴⁵³ *Id.*

⁴⁵⁴ Anastasia Khokhryakova, *Beanal v. Freeport-McMoRan, Inc.: Liability of a Private Actor for an International Environmental Tort Under the Alien Tort Claims Act*, 9 COLO. J. INT’L ENVTL. L. & POL’Y 487 (1998).

⁴⁵⁵ See *Doe v. Unocal*, *supra* note 101, at 880.

⁴⁵⁶ *Id.* at 883.

⁴⁵⁷ *Id.* at 884.

and states in causing rights violations.⁴⁵⁸ Because the Doe plaintiffs had alleged that the Unocal defendants “were and are jointly engaged with state officials in the challenged activity,” the court held that this was sufficient to satisfy the requirements of the ATCA for subject matter jurisdiction.⁴⁵⁹ Additionally, the court stated that “private actors may be liable for violations of international law even absent state action,”⁴⁶⁰ if the violations amount to genocide or slave labor.

Beanal v. Freeport McMoRan provides another example of how even imperfect litigation can help concretize still-developing human rights norms, specifically, the right to a healthy environment and the rights of indigenous peoples to be free from cultural genocide. In *Beanal*, Indonesian citizens brought suit against US corporations under both the ATCA and TVPA, alleging that the corporations’ mining operations had caused environmental damage, human rights abuses, and cultural genocide.⁴⁶¹

Although the US District Court for the Eastern District of Louisiana granted the corporations’ motion to dismiss without prejudice with leave for the plaintiffs to amend their complaint, the case is essential to the discussion of human rights litigation for several reasons.⁴⁶² First, it is the only case claiming an environmental tort under the ATCA in which the court considered an MNE’s liability based on customary international law (CIL).⁴⁶³ Therefore, the court agreed that a private, non-state actor could be held liable under CIL for genocide.⁴⁶⁴ Secondly, the court “seriously considered” Freeport’s potential liability for human rights violations if the corporation had acted “under the color of

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* at 891.

⁴⁶¹ *Beanal v. Freeport McMoRan*, 969 F.Supp. 362, 366 (1997).

⁴⁶² *Id.* at 384.

⁴⁶³ Khokhryakova, *supra* note 454, at 463, 470.

⁴⁶⁴ *Id.* at 470.

Indonesian law.”⁴⁶⁵ Finally, the court held that, although private actors were not bound to the norms of customary international environmental law, such actors could be bound to those norms by treaty.⁴⁶⁶

Beanal amended his complaint three times; each was dismissed.⁴⁶⁷ His difficulties highlight the importance of a well-pleaded complaint. In order to state a successful claim of an ATCA violation, he will need to allege that the conduct is “attributable to the state”;⁴⁶⁸ that is, that the Indonesian government committed the violations, condoned them, or facilitated their commission by the Freeport corporation.

How does one determine what is state action? The Beanal court cites both the Restatement (Third) of Foreign Relations, section 207, and the “under color of law” jurisprudence of 42 U.S.C. section 1983.⁴⁶⁹ Section 207 attributes responsibility to a state for the violation of its obligations under international law when the violation is committed by the state’s government, its subdivisions, or any agent “acting within the scope of authority or under color of such authority.”

Section 1983 jurisprudence, most commonly relied upon in U.S. civil rights litigation, provides the “under color of law” test. Relying on *Kadic*, the Beanal court stated that a plaintiff “could meet the state action requirement by alleging that defendant ‘acted in concert with a foreign state.’”⁴⁷⁰ Section 1983 provides a cause of action for violations of constitutional and statutory rights committed by private persons acting under the color of state law. Corporations often act in concert with states and may represent them.⁴⁷¹ Subsequently, “both private individuals and private

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* See also *Beanal*, *supra* note 461, at 384.

⁴⁶⁷ Because the class has not been certified, Beanal is presently the only named plaintiff. *Khokhryakova*, *supra* note 454, at 477.

⁴⁶⁸ *Beanal*, *supra* note 461, at 374.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 375. See also *Kadic v. Karadzic*, *supra* note 102.

⁴⁷¹ *Beanal*, *supra* note 461, at 375-76.

entities can be state actors and can be held liable under section 1983.⁴⁷² The Supreme Court has also addressed this, and has "recognized several circumstances in which a private actor can be held to have acted under color of law within the meaning of section 1983."⁴⁷³

ii. The Torture Victim Protection Act

In 1991, Congress adopted the Torture Victim Protection Act (TVPA) to provide victims of official torture and extra-judicial killing with a right of action in U.S. courts.⁴⁷⁴ The Act was intended to supplement, not displace, remedies available under the ATCA.

Pursuant to this Act, in order to bring suit, both the victim and the alleged torturer must be present in the United States.⁴⁷⁵ The result is that the TVPA "gives congressional endorsement to the Filartiga approach of exercising jurisdiction to provide a remedy to foreign victims of torture."⁴⁷⁶ Victims of the most egregious violations at the hands of corporations, such as the many associated with petroleum companies operating in Africa, are most likely to benefit most from the statute, provided that both the victims and the perpetrators make their way to the United States.

iii. The Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.A. sections 1602 et seq. (1976), is a significant hurdle for human rights plaintiffs who wish to litigate in the U.S.A. The statute grants foreign states immunity from the jurisdiction of U.S. courts. There are, however, some exceptions, listed in sections 1605 to 1607 of the statute. For human rights plaintiffs alleging violations

⁴⁷² *Id.* at 376.

⁴⁷³ *Id.*

⁴⁷⁴ Correale, *supra* note 451, at 198-99.

⁴⁷⁵ *Id.* at 208-09.

⁴⁷⁶ *Id.* at 209.

against MNEs, the most useful of these is the “commercial activity” exception found in section 1605, subsection (a)(2). This section provides that no immunity shall be granted in an action against a foreign state “in which the action is based upon a commercial activity carried on in the United States by the foreign state . . .” The exception also applies to acts that cause a “direct effect” on the United States, and which are connected with a foreign state’s commercial activities in other countries.

The case of *Saudi Arabia v. Nelson* presents an example of one human rights plaintiff’s struggle with the FSIA.⁴⁷⁷ The plaintiff, a US citizen employed by a Saudi hospital, had been recruited in the United States.⁴⁷⁸ His job was to monitor the hospital’s equipment and facilities for safety.⁴⁷⁹ After reporting a series of safety hazards and repeatedly being told to keep quiet, he was arrested by the government, beaten, shackled and incarcerated.⁴⁸⁰ After his release he brought suit in the U.S. District Court for the Southern District of Florida, which dismissed the case for lack of jurisdiction under the FSIA. The court stated in its opinion that it could not find a sufficient “nexus” between the hospital’s recruitment efforts in the United States and Nelson’s injuries.⁴⁸¹

Upon further review, the Court of Appeals reversed, holding that there was indeed a sufficient nexus, and Nelson was momentarily victorious. When the Supreme Court granted certiorari, it reversed again,⁴⁸² holding that Nelson’s suit did not fall within the commercial activity exception of the FSIA because the tortious acts resulted from an abuse of the police and penal

⁴⁷⁷ *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

⁴⁷⁸ *Id.* at 352.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* at 353.

⁴⁸¹ *Id.* at 354.

⁴⁸² *Id.* at 355.

powers of the Saudi government, which "however monstrous," were sovereign in nature.⁴⁸³

In short, lawsuits directly against states for failing to enforce duties of MNEs are unlikely to succeed in U.S. courts.

iv. Overcoming Forum Non Conveniens

The federal doctrine of forum non conveniens is often invoked successfully by foreign defendants of human rights violations. It allows for the dismissal of a case, despite personal and subject matter jurisdiction, if a defendant can show that another forum exists for the plaintiffs that would be more convenient.⁴⁸⁴

Commentators have noted that this doctrine is inappropriate in human rights cases because it undermines the congressional intent in passing legislation such as the ATCA and TVPA to provide remedies for human rights victims.⁴⁸⁵ Although the private interests of a corporate defendant are significant, a large multinational corporation is likely to have the means to cover travel expenses and the costs of litigation. Additionally, as one author notes, it is little compared to the "inconvenience of being a victim of human rights abuses."⁴⁸⁶ Other interests to consider are those of the United States in protecting fundamental human rights, and the rights themselves, which have intrinsic value and are internationally recognized as non-derogable.⁴⁸⁷

Proponents of the abolition of forum non conveniens for human rights litigation agree that congressional action to amend either the ATCA or the TVPA is unlikely.⁴⁸⁸ However, states may

⁴⁸³ *Id.* at 361.

⁴⁸⁴ Kathryn Lee Boyd, The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation, 39 VA. J. INT'L L. 41, 44-46 (1998).

⁴⁸⁵ *Id.* at 48.

⁴⁸⁶ *Id.* at 81.

⁴⁸⁷ *Id.* at 79.

⁴⁸⁸ *Id.* at 87.

act individually to abolish the doctrine. In *Dow Chemical v. Castro Alfaro*, the Texas Supreme Court reversed the dismissal of a claim on the grounds of forum non conveniens by Costa Rican employees of the Standard Fruit Company that alleged injuries resulting from exposure to pesticides.⁴⁸⁹ The Court was split 5-4, but held that the state legislature statutorily abolished the doctrine in 1913.⁴⁹⁰ Concurring, Justice Doggett noted that a Texas corporation's refusal to submit to the jurisdiction of a Texas judge and jury should not be labeled "'inconvenient' when what is really involved is not convenience but connivance to avoid corporate responsibility."⁴⁹¹

As more states and judges come to similar conclusions, the hope is that they will begin to recognize the significance of human rights litigation in the U.S., and realize that universally recognized core human rights should take clear precedence over convenience.

v. Enforceability of Judgments

Litigation in the United States is a promising development for human rights plaintiffs. Even more important, however, is the enforceability of the judgments rendered in these cases. For example, the plaintiffs in *Filartiga* were each awarded five million dollars, but they were never paid, nor were the awards enforced in the domestic courts of their home country.⁴⁹² With regard to MNE defendants, however, there is more room to ensure that judgments are enforced. One author suggests that while a judgment ordering a corporation to repair environmental damage abroad would be nearly impossible to enforce, an order to establish a fund in the U.S.A. from which victims' compensation will be paid would be easy to enforce.⁴⁹³ Similarly, since so many of the world's

⁴⁸⁹ *Dow Chemical Company v. Castro Alfaro*, 786 S.W.2d 674, 675 (Tex. 1990).

⁴⁹⁰ *Id.* at 677-79.

⁴⁹¹ *Id.* at 680.

⁴⁹² Correale, *supra* note 451, at 219.

⁴⁹³ Khokhryakova, *supra* note 454, at 492.

multinational enterprises are based in the U.S.A., corporations found liable for human rights violations could have their assets used to satisfy judgments entered against them.

Time is the only thing that will truly help the litigation of human rights violations. In time, norms will solidify and standards of liability will be put in place that will apply across nations to both state and private actors. "Judicial crystallization" of human rights norms, as another commentator writes, is best achieved by specific cases.⁴⁹⁴ Eventually these small victories will lead to the national, and perhaps even global, recognition of human rights.

c. States & Municipalities as Actors

Frustrated by lack of action on the national level, states and cities are beginning to take local action to indicate their unwillingness to deal with countries and companies that violate human rights. In Bangor, Maine, a group of activists, elected officials and shop owners established the Clean Clothes Campaign, in which 19 local retailers agreed to trace the origins of the goods they sell in their stores to ensure that they are made under humane working conditions.⁴⁹⁵ Inspired by its citizens, the Bangor City Council passed a non-binding resolution in support of the campaign.⁴⁹⁶ On a larger scale, the city of San Francisco disqualified Ericsson GE from competing for a \$40 million contract with the city to rebuild its emergency radio system due to its parent company's activities in Burma.⁴⁹⁷ The city also disqualified Mitsubishi from a \$123 million transportation contract at its airport due to its ties to Burma.⁴⁹⁸

⁴⁹⁴ See Osofsky, *supra* note 259 at 335, 395-96.

⁴⁹⁵ Andy Steiner, Cleaning Up in Bangor: How One Town is Saying No to Overseas Sweatshops, UTNE READER 18, March-April (1999).

⁴⁹⁶ *Id.*

⁴⁹⁷ Harvetta Asamoah, et al., International Human Rights, 32 INT'L LAW. 559, 562 (1998).

⁴⁹⁸ *Id.*

Similarly, the Commonwealth of Massachusetts passed a law forbidding the state government to contract with companies doing business in Burma.⁴⁹⁹ The law was immediately successful, and prominent companies such as Apple, Kodak and Hewlett-Packard began to divest their holdings in Burma.⁵⁰⁰ More than twenty-four U.S. cities and counties have passed similar measures directed specifically at corporations dealing with Burma.⁵⁰¹ These laws, however, have met with a great deal of criticism, and in June 1999, the United States Court of Appeals for the First Circuit decided *National Foreign Trade Council ("NFTC") v. Baker*, which upheld a District Court decision declaring Massachusetts' Burma Law unconstitutional.⁵⁰² The Court found that the law constituted an unconstitutional interference with the foreign affairs power of the federal government, and that it was pre-empted by federal sanctions against Burma.⁵⁰³

The U.S. Supreme Court has agreed to hear the case.⁵⁰⁴ If the decision is affirmed, it could affect a series of laws, including environmental purchasing laws in 48 states, laws directed against regimes in Tibet and Nigeria, MacBride principles in 26 cities, 43 "Buy American" laws, and actions by states which forced Swiss banks to make reparations to survivors of the Holocaust.⁵⁰⁵ Supporters of the Free Burma laws point out that a boycott of companies should not be considered unconstitutional, particularly since they have been used successfully in the past, most notably

⁴⁹⁹ Tiffany Danitz, *Burmese Government-In-Exile Takes U.S. Company to Court*, INSIGHT ON THE NEWS, Mar. 17, 1997, at 44.

⁵⁰⁰ *Id.*

⁵⁰¹ Dan Orzech, *Free Burma, Maybe: Can cities and states boycott rogue regimes?* UTNE READER, November-December 1999, at 28.

⁵⁰² *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999); *aff'g National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998).

⁵⁰³ *Id.*

⁵⁰⁴ See *Natsios v. National Foreign Trade Council*, 120 S. Ct. 525 (1999).

⁵⁰⁵ *Id.* at 29.

against South Africa when apartheid was still in place. As the Coordinator of the New England Burma roundtable, Simon Billenness noted, "If it wasn't for a boycott of tea, we wouldn't have a constitution in the first place."⁵⁰⁶

The legal battle that the law faces is not quite that simple. The NFTC case set forth several grounds on which the Massachusetts Burma Law is unconstitutional, all of which were upheld on appeal. Among these grounds were the District Court's holding that the law violates the Foreign Commerce Clause, as well as the Supremacy Clause, due to the existence of a federal law that imposes sanctions against Burma.⁵⁰⁷ Additionally, the District Court relied on *Zschernig v. Miller*,⁵⁰⁸ a Supreme Court case that invalidated a state law due to its infringement on the federal government's exclusive power over foreign affairs.⁵⁰⁹

This precedent, however, does not guarantee success for NFTC. One author who approved of the NFTC decision criticized its vagueness and noted that it might eventually be interpreted to find that similar laws are, in fact, constitutional.⁵¹⁰ Another commentator has suggested that there are several theories that might help Massachusetts prevail, most importantly a defense of the law under the theory that the state is a market participant and can spend its funds as it chooses.⁵¹¹ It is also important to note that the *Zschernig* case is from 1968. Since then, many individual states and cities have participated in boycotts against companies

⁵⁰⁶ *Id.*

⁵⁰⁷ See *National Foreign Trade Council v. Baker*, *supra* note 506 at 38, 45.

⁵⁰⁸ *Zschernig v. Miller*, 389 U.S. 429 (1968).

⁵⁰⁹ Case Comment, *Foreign Affairs Power: The Massachusetts Burma Law is Found to Encroach of the Federal Government's Exclusive Constitutional Authority to Regulate Foreign Affairs*. *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998). 112 HARV. L. REV. 2013, 2015 (1999).

⁵¹⁰ *Id.*

⁵¹¹ Shawna Fullerton, *State Foreign Policy: The Legitimacy of the Burma Massachusetts Law*, 8 MINN. J. GLOBAL TRADE 249, 252-53 (1999).

doing business with apartheid South Africa, East Timor, Tibet and Nigeria without interference from the federal government.⁵¹²

In deciding the case, the Supreme Court will be in a crucial position to determine the fate of several states and municipalities, and perhaps even the fates of victims of human rights abuses around the world. By establishing clear guidelines that prevent actual state infringement of federal power while permitting states to take a few positive steps in defense of international human rights, the Supreme Court could set a valuable precedent.

On a related note, one author has suggested that the next step in the state-initiated protection of human rights is to allow states to be parties to international human rights conventions.⁵¹³ In light of the United States' general reluctance to ratify regional and international conventions (and to do so without reservations), the ratification of a treaty or protocol by a state or group of states would be better than no ratification at all on the national level.⁵¹⁴ This proposal, of course, presumes legislative action to amend the U.S. Constitution, which prohibits the states from making treaties, entering into agreements with other countries, or imposing duties on imports and exports.⁵¹⁵ Having theoretically overcome this rather large procedural hurdle, the discussion of allowing the states to be parties to international human rights treaties sounds promising. Armed with investments and purchasing power, many states are poised to participate in the international arena independently of the national government.⁵¹⁶ Once states begin reaping the social and economic benefits of policies that are protective of human rights, they are likely to influence other states and, ultimately, the national government to follow suit.⁵¹⁷

⁵¹² See Orzech, *supra* note 505, at 28.

⁵¹³ Peter J. Spiro, The States and International Human Rights, 66 FORDHAM L. REV. 567 (1997).

⁵¹⁴ *Id.* at 569.

⁵¹⁵ The Constitution of the United States, Article I § 10.

⁵¹⁶ Spiro, *supra* note 517, at 584.

⁵¹⁷ *Id.* at 591.

d. Private Entities

i. Corporate Codes of Conduct

Corporate codes of conduct and ethics have become commonplace among multinational corporations. Such codes are generally implemented by corporations as a means of protecting themselves from civil and criminal liability. In light of the bad press that many U.S. multinationals have received due to their misconduct both at home and abroad, as well as the increased frequency with which they are becoming the subjects of litigation, these codes are "a response to, and a hedge against, such misconduct."⁵¹⁸

Little has been written on the subject of corporate codes of conduct as they apply to human rights. Yet these codes seem to provide an ideal mechanism for creating awareness and respect for human rights within the structure of a corporation. By simply adding human rights to a company's code and putting in place an effective means of enforcing the code, a corporation can take large steps toward respecting human rights wherever it operates. Additionally, it may also protect itself from litigation against violations by its officers and employees working abroad.

The origins of corporate codes are in two longstanding and conflicting traditions: distrust of corporations and faith in self-regulation.⁵¹⁹ Business-oriented advocates of these codes suggest they are the best means of getting corporations to behave. Most corporations, arguing that government regulation is too disruptive, would prefer self-regulation in the arena of human rights.⁵²⁰ The problem is with enforcement. Without effective procedures to enforce a code, a corporation will fall prey to the most common criticism of codes of conduct: that they are meaningless public relations ploys.⁵²¹

⁵¹⁸ Harvey L. Pitt and Karl A. Groskaufmanis, Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, 78 GEO. L. J. 1559 (1990).

⁵¹⁹ *Id.* at 1562.

⁵²⁰ *Id.*

⁵²¹ *Id.* at 1630.

A good code, however, can be useful in several ways. First, it will communicate to management, employees, and the public that the corporation intends to obey both national and international law.⁵²² Second, it will encourage those employees inclined to “do the right thing” to intervene or report violations. Such a policy would also require putting in place a hotline, ombudsperson, or other procedure, whereby employees could safely and anonymously report code violations.⁵²³ Finally, a code can help create goodwill and discourage some litigation.⁵²⁴

The general sentiment of human rights advocates toward corporate codes of conduct is embodied in the title of an article assessing such codes: *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?*⁵²⁵ While many advocates would expect the answer to be a resounding ‘no’, Mark B. Baker, the author of the article, ultimately answers ‘yes’ to this question.⁵²⁶

Baker argues that a private voluntary code narrowly tailored to both the characteristics of the corporation and the needs of the host country is the best way to regulate MNEs.⁵²⁷ The codes are evidence of a company’s desire to follow a cohesive set of ethics, observe standards established by the home and host countries, and better its relations with the home and host countries.⁵²⁸ They may also be financially beneficial for the companies, because “[as] the free market takes its course, MNE’s with the most balanced codes will gain the trust and confidence of host countries and will accordingly receive competitive advantages.”⁵²⁹ This, in turn,

⁵²² *Id.* at 1634.

⁵²³ *Id.* at 1634-35, 1644-45.

⁵²⁴ *Id.* at 1635.

⁵²⁵ Baker, *supra* note 103, at 399.

⁵²⁶ *Id.* at 414-15.

⁵²⁷ *Id.*

⁵²⁸ *Id.* at 420.

⁵²⁹ *Id.* at 432.

should influence other MNEs to adopt similar codes and put them into practice.⁵³⁰

ii. Social Auditing

With more activists and citizens' groups demanding accountability and transparency from corporations, many companies are beginning to look inward and determine whether their objectives and codes are really working. For these companies that are legitimately concerned about their impact on the communities and environments in which they operate, social auditing offers some insight. Pioneered by companies such as Ben & Jerry's and The Body Shop, auditing allows companies to undergo comprehensive evaluations by independent auditors, primarily with regard to social and environmental factors.⁵³¹ One method of evaluation is called the social balance sheet, which assigns a dollar value to the company's social impact; another is called benchmarking by objectives, which contrasts the company's objectives to its actual performance.⁵³²

Naturally, there are dollar signs lurking in the background. Auditing is pushed by the accounting firms that provide the services and who know that consumers are attracted by even a semblance of corporate social responsibility.⁵³³ Additionally, many activists feel that there is something inherently wrong with having accounting firms, who are primarily interested in the monetary outcomes for their clients, responsible for measuring a corporation's social and environmental behavior.⁵³⁴ Once again,

⁵³⁰ *Id.*

⁵³¹ Craig Cox, Taming the Corporate Beast: New Strategies for Making Business Work for All of Us, UTNE READER, March-April 1998, at 60. For more information on social auditing, see Institute for Social and Ethical Accounting, <<http://www.accountability.org.uk>>.

⁵³² *Id.*

⁵³³ *Id.* at 61.

⁵³⁴ See generally, Joshua Karliner, The Corporate Planet: Ecology and Politics in the Age of Globalization (1997).

whether one is dealing with countries or corporations, if ethics has not motivated them into responsible behavior so far, and profits will, then until they learn otherwise, profits will have to do.

e. Non-Governmental Organizations & Citizens' Groups

i. Private Initiatives to Regulate Corporate Conduct: The Sullivan & MacBride Principles

Similar to municipalities and states dissatisfied with the national government's lack of action in defense of human rights, private groups and organizations have successfully proposed their own standards of how corporations should act in countries with known human rights violations. The Sullivan and the MacBride principles are codes of conduct for corporations that were introduced and organized by individuals and organizations dedicated to human rights.

The Sullivan Principles "placed business in the position of direct advocates of non-discrimination in the workplace and community" in apartheid South Africa.⁵³⁵ Over 125 transnational corporations agreed not only to abide by the principles, but also to be graded on their adherence to them. This system created an additional incentive for compliance, which effectively worked.⁵³⁶ Hundreds of companies were desegregated as a result of the Sullivan Principles.⁵³⁷ As successful as the principles were, they were not enough to single-handedly tackle apartheid, and eventually the proponents of the Sullivan Principles turned to advocating a total prohibition on investment in South Africa.⁵³⁸

Inspired by the Sullivan Principles, the MacBride Principles were directed at promoting policies of non-discrimination for

⁵³⁵ Frey, *supra* note 290, at 174-75.

⁵³⁶ *Id.* at 175.

⁵³⁷ *Id.*

⁵³⁸ *Id.*

corporations operating in Northern Ireland.⁵³⁹ They were not as successful, however, because there was not the same kind of global pressure and attention in Northern Ireland that there was in South Africa.⁵⁴⁰

The question remains whether such principles would be successful today. Although global attention is mobilized even more quickly now than when the Sullivan and MacBride Principles were established, our attention spans are consequently shorter. We hear about crises and abuses of power on a daily basis, but generally our concern seems to last only until the next newscast when we learn of the next country's crisis. The world is getting smaller, but our capacity to reach out to our neighbors is decreasing as well. Consequently our ability to collectively bring about change with one loud voice is diminished.

ii. Corporate Charter Revocation

On September 10, 1998, attorneys from the National Lawyers Guild International Law Project for Human, Economic and Environmental Defense (HEED) filed a petition with California's Attorney General on behalf of thirty citizens' groups and individuals requesting the revocation of the charter of the Union Oil Company of California (Unocal).⁵⁴¹ Groups as diverse as the Free Burma Coalition, the National Organization for Women, the Rainforest Action Network and the Surfers' Environmental Alliance joined in the petition; since its filing, more than 65 additional groups, individuals and law professors have signed on.⁵⁴² The petition lists ten counts of illegal activity by Unocal including ecocide, forced relocation, the oppression of women and

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* at 176.

⁵⁴¹ Robert Benson, How Many Strikes do Big Corporations Get? The Petition to Revoke Unocal's Corporate Charter, NLG GUILD PRACTITIONER, Vol. 55, at 113 (Summer 1998). The full petition is on the Internet at <<http://www.heed.net>>.

⁵⁴² James Lafferty, L.A. Guild Files Historic Corporate Charter Revocation Petition, NLG GUILD NOTES, Vol. 22, at 9 (Winter 1998).

homosexuals, forced labor and cultural genocide, and the deception of the courts, shareholders, and the public.⁵⁴³

Statutes empowering citizens to revoke the corporate charters of rogue corporations exist in every state in the U.S.A., but are rarely used. A successful petition can dissolve a corporation and turn its assets over to persons who will "obey the law and protect the public interest."⁵⁴⁴ Just as a state has the power to grant a charter, the people of that state may revoke it. A person may simply give the state's attorney general "reason to believe" that the corporation is breaking the law, at which time the attorney general "must bring the action" to revoke the charter.⁵⁴⁵ The state's governor may also order the attorney general to revoke a charter.⁵⁴⁶ Charter revocation petitions have been filed in both New York and Alabama against tobacco corporations and tobacco industry non-profit organizations.⁵⁴⁷ At least one of the New York petitions has been successful, and resulted in a settlement in which the corporation agreed to go out of business and donate many of its assets to charities.⁵⁴⁸

The Unocal petition explains that charter revocation is specially suited to deal with corporate "repeat offenders," because if the threat of revocation is a real one, it will result in the company's losing everything.⁵⁴⁹ If it is backed by action, the threat of charter revocation can force MNEs to respect human rights both domestically and in their subsidiaries and factories abroad. This effort is feasible, but it requires publicity and education so that the people, attorneys, judges, governors and attorneys general of all fifty states would learn (or at least be

⁵⁴³ Benson, *supra* note 545, at 131-34.

⁵⁴⁴ Lafferty, *supra* note 546, at 9.

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

⁵⁴⁷ Benson, *supra* note 545, at 114.

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.* at 117.

reminded) about their power to revoke the corporate charters of law-breaking companies.

The Unocal petition, however, ran into trouble soon after its filing: California Attorney General Dan Lungren refused the petition within three business days, giving no explanation for his refusal.⁵⁵⁰ This initial setback need not prove discouraging. The mere act of filing the petition has served to educate people as to their sovereignty over the corporations they create or allow to be created.⁵⁵¹

iii. Shareholders' Resolutions

Much like citizens' groups and municipalities, groups of shareholders have begun to realize that they in fact hold both the power and the responsibility to force corporations to respect human rights, both domestically and abroad. Shareholders, the true owners of corporations, may pass resolutions to require corporations to do (or cease doing) certain things. In February 1999, after learning that Chevron was implicated in the murders of villagers in Nigeria, Chevron's shareholders passed a resolution that required the company to revise its code of conduct and amend it so as to include commitments to the environment, human rights, and social justice.⁵⁵² The resolution was sponsored by a socially-conscious investment firm that represented several of the shareholders.⁵⁵³

Shareholders' resolutions, much like charter revocation, are important elements in the battle against human rights violations by multinational enterprises. Both give voice to the people who are truly in power (regular citizens), and allow them to compel corporations to act responsibly. The resolutions especially are a

⁵⁵⁰ As of this writing, the petitioners had submitted the petition to the recently elected Attorney General Bill Lockyer, who also rejected the Petition; Governor Gray Davis had not yet responded. For further updates, see <<http://www.heed.net>>.

⁵⁵¹ For more information on corporate charter revocation, contact the Program on Corporations, Law and Democracy, 211.5 Bradford St., Provincetown, MA 02657; (508) 487-3151.

⁵⁵² See *Democracy Now*, *supra* note 112.

⁵⁵³ *Id.*

means of reminding corporations that shareholders, the true owners, are in charge and must be heard. Having these resolutions in place in all publicly held corporations would be a positive step toward securing corporate respect for human rights.

iv. Activists & Publicity Campaigns

Human rights issues have permeated our national conscience. Every day, more of us are making decisions that reflect our beliefs or politics. We are making consumer decisions based on the human rights records of the growers or manufacturers of the products we are buying. Most recently, this is especially true of produce, athletic shoes, clothing, and gasoline. This raised consciousness is the result of media attention and publicity campaigns and is the work of domestic and transnational activists all over the world. Armed with faxes, telephones, and modems, human rights activists play essential roles in monitoring rights violations, raising awareness, and helping non-governmental organizations and governments take action to protect human rights.

Activists are essential to the protection of human rights. Through publicity campaigns, boycotts, and labeling programs, networks of activists inform the rest of the world about human rights violations committed against persons who otherwise would have no other voice. Often this is accomplished by focusing publicity campaigns on a particularly heinous event or on a "poster child" to reach large audiences.⁵⁵⁴ In this way, activists "mobiliz[e] moral outrage," and with modern communications technologies they are able to reach a maximum audience with minimal cost and effort.⁵⁵⁵

Activists influence the agendas of governmental and non-governmental organizations alike, often forcing them to consider human rights issues. Occasionally, networks of activists are successful in achieving changes in state policy. To reach such success, the targeted state should be at least somewhat vulnerable

⁵⁵⁴ Susan D. Burgerman, Mobilizing Principles: The Role of Transnational Activists in Promoting Human Rights Principles, 20 HUMAN RIGHTS QUARTERLY 905, 910 (1998).

⁵⁵⁵ *Id.*

to pressures or sanctions that may be exerted upon it, sensitive to a damaged international reputation, and challenged by a network of organized domestic activists.⁵⁵⁶ In this ideal scenario, the most important thing that the activists will achieve is to "raise the costs of repression." This result is achieved by mobilizing the country's citizens, allies, and trading partners to make it as undesirable as possible for the state to continue to violate human rights.⁵⁵⁷

Recently, boycotts have become an effective means of pressuring MNEs to comply with human rights standards. Boycotts ensure that corporations feel the consequences of their actions where it matters the most: in their profits. Like the activists described above, boycotts often organize around a particular issue, country, or corporation. For example, many consumers avoid buying goods made in China or Burma, or those made with child labor. Boycotts organized to include massive publicity campaigns and protests are often the most successful, and occasionally convince a corporation that it would be best to pull out of a particular country. In 1996, PepsiCo, Inc. joined Levi-Strauss, Eddie Bauer, Liz Claiborne, and other U.S. corporations that have pulled out of Burma due to actual and threatened consumer boycotts.⁵⁵⁸

2. Domestic Mechanisms in Other Countries

Little has been written about the ways that specific countries act domestically to promote or protect human rights. This section will consider briefly how a handful of both industrialized and developing nations are dealing with human rights and multinational corporations.

In contrast to the United States, Canada maintains a policy of purposely doing business with non-democratic regimes.⁵⁵⁹ This is

⁵⁵⁶ *Id.* at 914-16.

⁵⁵⁷ *Id.* at 917.

⁵⁵⁸ Pepsi Gives Into Protests, Leaves Burma, CNN Archive, (last modified Apr.24, 1996) <http://cnnfn.com/news/9604/24/Burma_pepsi/index.htm>.

⁵⁵⁹ Thomas D'Aquino, Globalization, Social Progress, Democratic Development and Human Rights: The Responsibility of a Multinational Corporation, VITAL SPEECHES, Dec. 1, 1996, at 107.

justified by the principle that both trade and investment are “powerful catalysts for economic liberalization, democratization and the improvement of domestic social conditions.”⁵⁶⁰ Advocates of this principle suggest that Canadian companies are positive influences abroad because of their high standards of business ethics, such as respect for workers’ rights, safety standards, and environmental protection policies.⁵⁶¹ By stepping lightly where they invest and setting good examples of respect for persons as well as the environments in which they operate, Canadian companies serve as quiet advocates for human rights, wherever they do business.

With respect to environmental rights, some countries’ courts have derived newly interpreted rights from constitutional provisions. In the Philippines, a successful claim was brought against the Department of Environment and Natural Resources to cancel a timber licensing agreements.⁵⁶² The Supreme Court held that they cause of action was grounded in the constitutional right to a healthy environment, as well as the rights of future generations.⁵⁶³ The Colombian Constitutional Court has similarly held that the right to a healthy environment is a basic right, and compelled a mayor to enforce that right against a polluting corporation.⁵⁶⁴ Another Colombian court decision enjoined a company from producing foul-smelling fumes for a period of 60 days. The court in that case held that the right to a healthy environment was also linked to property and privacy rights.⁵⁶⁵

India’s courts have linked the right to a healthy environment to the right to life, holding in various cases that this right may be enforced against private actors such as corporations.⁵⁶⁶ Pakistan’s

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² Osofsky, *supra* note 259, at 376.

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.* at 377.

⁵⁶⁶ *Id.*

constitution also connects these rights, and its courts have used the constitutional provisions to compel government enforcement of these rights.⁵⁶⁷ Both Argentina and Costa Rica have enforced similar rights at the Supreme Court level.⁵⁶⁸

Gradual steps taken around the world will eventually amount to the solidification of human rights norms. Countries influence one another, and can likewise encourage one another to ratify international and regional rights covenants. Achieving the international recognition of human rights is a slow process. This process involves a series of small revolutions, revolutions that take place within persons, then communities, then governments and so on. Often, such revolutions result in a realization that a human being's dignity exceeds an MNE's personal comfort, profit and convenience.

VI. Conclusion

Multinational enterprises are growing exponentially around the world, establishing themselves in rich and poor nations alike, and both contributing to and profiting from their host countries' economies. Human rights advocates are generally wary of the increased presence of MNEs, particularly in poorer and developing countries, and often fear that the countries' need for employment opportunities will allow the corporations to operate without respect for the rights of the workers. The corporations claim that their very presence in these countries will improve their economies - particularly in the long run - and raise the standards of living for all of the countries' citizens. Some MNE advocates even claim that foreign investment can serve as a model for Western-style democracy.

The ultimate question of the value of MNEs is not for this Article to answer. MNEs are here to stay, growing faster and wielding more power than was previously thought possible for a private entity. Instead, the concern of this Article has been with the impact of these corporations, particularly on human rights, on a global level as well as in the nations in which they operate.

⁵⁶⁷ *Id.* at 378.

⁵⁶⁸ *Id.*

Despite the affirmations of good intentions, the reality is that every year the world learns of dozens more atrocities committed by MNEs. Many of those MNEs are headquartered and have operations in the United States. Victims, concerned individuals, and rights advocacy groups often feel helpless against the corporate giants, and with reason. Many MNEs' annual revenues often exceed the gross national products of the host countries in which they operate.

We have seen how MNEs are increasingly approaching state-like status in both the size of their economies and the power and influence they wield around the world. International law, which recognizes the rights and increasingly the responsibilities of individuals, will eventually need to impose a similar set of duties on corporations, which have been enjoying great freedoms around the world. The duty to respect the most basic human rights norms (specifically, the right to life, the right to health and to a healthy environment, as well as basic labor rights) must be imposed on corporations. There are several ways of accomplishing this goal, each of which is already in progress in varying degrees all over the world. The first option consists of imposing duties on states to regulate MNEs. The second imposes duties directly on MNEs, but only when they act like states. The third and final option is to disregard the state-action requirement and rather impose duties on MNEs whenever they violate human rights.

In addition to making MNEs subject to international human rights law, other steps must be taken in order to recognize, promote, implement, and enforce these rights uniformly on an international level. First, and perhaps most importantly, human rights must become an integral part of the emerging law of the global economy. Second, the Rome Statute of the International Criminal Court should be brought into force. Third, regional mechanisms for the enforcement of human rights must be strengthened. Finally, domestic mechanisms in the United States and abroad should accommodate human rights plaintiffs. At the same time, the importance of activist-based efforts to implement human rights norms should not be overlooked.

The initial step of integrating human rights into the global economy must come from the international organizations that regulate nations and corporations such as the International Monetary Fund, the World Bank, or the World Trade Organization.

These organizations are unique in their ability to influence domestic and global economies alike, and are best suited to deal with corporations. By taking strong positions to protect human rights such as withholding loans or conditioning favorable trade status on a country's human rights record, these organizations will tie human rights to profits, and will create respect for human rights among private entities. Other institutions, such as the United Nations and the International Labor Organization, also contribute to the international advancement of human rights, but in a more promotional capacity. The UN and ILO set the international standards for human rights and worker rights, respectively, and have successfully influenced states into rights compliance.

The ratification of the Rome Statute and creation of the International Criminal Court would remedy many of the gaps that exist in the enforcement of international human rights, particularly as against corporations. The ICC, which would have jurisdiction over international crimes committed by individuals, could be the ideal mechanism to remedy human rights violations by MNEs. Crimes against humanity, such as the atrocities in Nigeria, would be addressed at the ICC. Everyone from heads of state to military officials and employees of the corporation could be held liable and could receive fines and sentences up to life imprisonment. Because of the weaknesses of regional and international human rights regimes, the International Criminal Court is essential for the protection of human rights.

Regional mechanisms technically exist in almost every area of the world, but they are far from perfect. These rights conventions and courts could do much more to implement and enforce human rights against corporations. Regional regimes in Europe and the Americas must be strengthened, made more efficient, and granted more authority for enforcement and the granting of remedies to victims. The African system should immediately set upon establishing a court, so that the countless human rights victims in the region could have redress for their injuries. Finally, Arab and Asian nations should direct their efforts toward the creation of regional conventions and courts of human rights.

Domestically, there is a great deal that countries can do to recognize, promote, implement, and enforce human rights. Countries can establish guidelines that their corporations must

follow in order to conduct business. They may pass legislation to condition trade on factors that include the human rights record of their trading partners, particularly with regard to the ways in which the traded goods are made. Perhaps most importantly, countries could establish fora for human rights plaintiffs who have no other recourse. The United States has made great progress in opening its courts to foreign plaintiffs, through legislation such as the Alien Tort Claims Act. Although it is not yet a perfect system, U.S. courts have made significant advancements in protecting these rights, such as finding private individuals liable for human rights violations.⁵⁶⁹ This is an important precedent for enforcing corporate responsibility for human rights.

On a more local level, individual states and municipalities can take action to protect human rights, boycotting and even passing local legislation to ban the import of goods from nations that violate the rights of their citizens (or permit corporations to do so). Individuals and groups of activists can benefit from the rapid development of international methods of communication to document and report human rights violations, igniting moral outrage, publicity campaigns, and massive demonstrations and boycotts. Consumer action has resulted in several U.S.-based multinationals' pulling out of Burma over the last three years, and both shareholders' resolutions and petitions for corporate charter revocation are gaining in popularity.

The frequency of these events is sending the message that individuals, nations, non-governmental organizations, and international human rights groups are learning to balance the scales of power against corporations. For example, thousands of individuals protested outside the Seattle Round of the World Trade Organization, a series of meetings that was aimed at setting the world's trade agenda for the next several years. Activists primarily sought, with great success, to generate media attention on the lack of emphasis on human rights and labor rights within the WTO.

Corporations cannot be expected to revolutionize their respective *modus operandi* overnight, and instantly become zealous advocates for human rights. At the very least, however, they are expected to respect the basic human rights of life, labor and the right to health and a healthy environment. To do this they

⁵⁶⁹ Kadic, *supra* note 102, at 236.

need not incur any additional costs; they simply must refrain from violating these rights. Over time, MNEs will learn that consumers are watching, and that many of them will shop elsewhere if a particular manufacturer is associated with rights violations. Codes of conduct and outside auditors could help corporations respect the rights of their workers and the communities in which they operate. If corporations are going to continue to reap the benefits of a global economy, they must learn the most basic tenet of good citizenship: duties are an essential component of rights.

The international protection of human rights consists of both rights and responsibilities that are imposed equally on individuals, organizations, nations and corporations. The mechanisms that exist on domestic, regional and international levels are prepared to enforce human rights against all who violate them. Such measures must simply be implemented, efficiently and forcefully. If we are truly concerned with human rights, then as a global people we must decide that persons are more important than profits, and act accordingly.

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