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UNITED NATIONS NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS: THE INTERNATIONAL COMMUNITY ASSERTS BINDING LAW ON THE GLOBAL RULE MAKERS

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I. SUMMARY

Last August, the United Nations ("UN") issued legally binding draft Norms obligating transnational corporations and other business entities to respect, protect and fulfill human rights within their respective spheres.

The international business community objects to the Norms and claims that compliance with international human rights law should be by choice and only applicable to the extent it desires. Moreover, the community asserts that nation states, not the UN, should enforce human rights. It is wrong on all accounts.

Legally, human beings hold their rights not as citizens or subjects of nation states, but as members of society. Despite the legal duty to respect, protect and fulfill the intertwined and interdependent economic, social, cultural, civil and political rights of their citizens, many nations breach this duty. Moreover, many of these countries perpetrate human rights violations themselves. Other countries are so impoverished, or war-torn, or both, to claim supervening impossibility of performance. Sovereignty, the indispensable object for executing their duties, has vanished.

The international society of states delegated the task of international human rights supervision to the UN in the Charter.

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Participation and accountability are the bases of the principles put forth by the Norms.

The decisions and actions of transnational corporations affect individuals' human rights worldwide. Through their economic might, transnational corporations established ample participatory rights in international law. Under its legal authority, the UN set forth basic duties of accountability under international law.

II. INTRODUCTION

On August 13, 2003, the UN Commission on Human Rights adopted draft Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights ("Norms").¹ All fifty-three member nations of the Commission supported their adoption.² The Norms were not the UN's first attempt to address the human rights, labor rights and environmental rights of the world's peoples in a single effort. In June of 1998, the General Assembly adopted the United Nations Global Compact ("Compact").³ The Compact sets forth nine principles derived from the *Universal Declaration of Human Rights*, the *ILO Tripartite Declaration of Fundamental Principles and Rights at Work* and the *Rio Declaration on the Environment and Development*.⁴ UN Secretary General Kofi Annan introduced the Compact to world business leaders at the World Economic Forum on January 31, 1999.⁵ On July 26, 2000, the Compact commenced its operational phase at UN headquarters in New York.⁶ The UN describes the Compact as a network. "At its core are the Global Compact Office and four UN agencies: the Office of the High Commissioner for Human Rights; the United Nations Environment Programme; the International Labour Organization and the United Nations Industrial Development Organization."⁷ Unveiling the Global Compact at the World Economic Forum, Mr.

1. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, U.N. ESCOR, 55th Sess., 22d mtg., at Agenda Item 4, U.N. Doc. E/CN.4/Sub2/2003/12/Rev.2 (2003), available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html> (last visited June 25, 2004) [hereinafter *Norms*].

2. Jonathan Birchall, *UN Plans to Scrutinise Multinationals*, FIN. TIMES, Aug. 13, 2003, at A1.

3. U.N. Global Compact, *What is the Global Compact?*, at <http://www.unglobalcompact.org/Portal/Default.asp> (last visited June 24, 2004) [hereinafter *Global Compact*].

4. U.N. Global Compact, *The Nine Principles*, at http://www.unglobalcompact.org/Portal/?NavigationTarget=/roles/portal_user/aboutTheGC/nf/nf/theNinePrinciples (last visited July 19, 2004) [hereinafter *Nine Principles*].

5. *Global Compact*, *supra* note 3.

6. *Id.*

7. *Id.*

Annan described its purpose as allying companies with UN agencies, labor and civil society to support the nine principles.⁸ Compliance is voluntary; international business leaders are invited to join this international initiative.⁹

In addition to the Global Compact, the UN asked multinational enterprises to follow the OECD Guidelines for Multinational Enterprises ("OECD Guidelines"), included in the *OECD Declaration on International Investment and Multinational Enterprises*.¹⁰ Member states of the OECD, along with the Slovak Republic, Argentina, Brazil and Chile, set forth the OECD Guidelines as recommendations for "standards for responsible business conduct consistent with applicable laws."¹¹ The goal of the OECD Guidelines is to: "ensure that the operations of [multinational] enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and enhance the contribution to sustainable development made by multinational enterprises."¹²

Compliance with the OECD Guidelines is voluntary and not legally enforceable.¹³

Unlike the Compact and the OECD Guidelines, the Norms legally bind transnational corporations and other business enterprises. Under the Norms, these entities are subject to UN monitoring and verification procedures aside "other international and national mechanisms already in existence or yet to be created."¹⁴

The international business community virulently opposes the Norms because of their enforceability. The International Chamber of Commerce ("ICC") and the International Organisation of Employers ("IOE") issued a joint statement opposing the Norms and their "legalistic approach."¹⁵ The United States Council for

8. *Id.*

9. *Id.*

10. ORG. FOR ECON. CO-OPERATION AND DEV., *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 15 (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (last visited June 24, 2004).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights*, U.N. ESCOR, 55th Sess., ¶ 16, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003), available at <http://www1.umn.edu/humanrts/links/commentary-Aug2003.html> [hereinafter *Commentary*].

15. *Joint Views of the IOE and ICC on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. ESCOR, 55th. Sess., U.N. Doc. E/CN.4/Sub.2/2003/NGO/44 (2003), available at <http://www.uscib.org/docs/cr-7->

International Business, the United States arm of the ICC ("USCIB"), also opposes the Norms.¹⁶ It is not clear to the USCIB how the Norms are binding, nor "what the legal principle involved would be."¹⁷

III. THE INTERNATIONAL LEGAL PRINCIPLE OF HUMAN RIGHTS

Language found in the *Universal Declaration of Human Rights* ("Universal Declaration"),¹⁸ one of the three founding documents of the UN (along with the *UN Charter* and the *Statute of the International Court of Justice*),¹⁹ demonstrates that the Norms bind transnational corporations as "other organs of society."²⁰

The international legal principle involved is rooted in universal human rights and fundamental freedoms held by every human being. These rights and freedoms include economic, social and cultural rights,²¹ as well as the right to life, freedom from slavery in all its forms and freedom from servitude and forced or compulsory labor.²² The "interconnection and independence" of the right to civil and political freedoms of inviolable economic, social and cultural rights is fundamental to international human rights law since the UN General Assembly initially declared them so in 1950.²³ The Universal Declaration, the most translated document in the world,²⁴ has become the "yardstick by which to measure the degree of respect for, and compliance with international human rights standards."²⁵ "It has set the direction for all subsequent work in the field of human rights and has provided the basic philosophy for many legally binding international instruments

30-02.pdf (last visited July 8, 2004) [hereinafter *Joint Views*].

16. Birchall, *supra* note 2.

17. *Id.*

18. *Universal Declaration of Human Rights*, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter *Universal Declaration*]. Although strict positivists do not consider this binding international law, the Universal Declaration has been codified and confirmed by the twin covenants, the CESC, *infra* note 21, and the CCPR, *infra* note 22.

19. LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* 588-89 (4th ed. 2001).

20. *Universal Declaration*, *supra* note 18.

21. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter CESC].

22. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter CCPR].

23. G.A. Res. 421 (V), 5th Sess., 317th plen. mtg., sect. E, U.N. Doc A/RES/427(V), (1950).

24. See generally Office of the U.N. High Comm'r for Human Rights, *The International Bill of Human Rights, Fact Sheet No. 2 (Rev. 1)*, available at <http://www.unhchr.ch/html/menu6/2/fs2.htm> (last visited June 24, 2004) [hereinafter *Fact Sheet*].

25. *Id.*

designed to protect the rights and freedoms which it proclaims.”²⁶

Though strict positivists do not consider the Universal Declaration legally binding,²⁷ it is undisputed that the twin human rights covenants, the *International Covenant on Economic, Social and Cultural Rights*²⁸ (“CESC”) and the *International Covenant on Civil and Political Rights*²⁹ (“CCPR”), constitute binding international law upon and between those states that adopted them.³⁰ One hundred forty-eight nation states have ratified the

26. *Id.*

27. See, e.g., MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 50-52 (3d ed. 1999) (discussing the legal weight of UN Resolutions). UN Resolutions are often considered to be “evidence” of the development of international law. *Id.* at 51. They are sometimes regarded as a form of “soft” international law, neither legally binding nor legally insignificant. *Id.* at 51-52. “In time (they) may harden into customary international law.” *Id.* at 52. But see *Filartiga v. Peña-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (noting that “the Universal Declaration of Human Rights ‘no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community” (citing E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 70 (1964)). The court went on to observe that not only the Universal Declaration, but all United Nations declarations “create an expectation of adherence, and ‘insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States.’” *Id.* (citing U.N. ESCOR, 34th Sess., Supp. No. 8, at 15, U.N. Doc. E/CN.4/1/610 (1962)). See, e.g., DAMROSCH ET AL., *supra* note 19 (discussing the legal effect of General Assembly resolutions and decisions and distinguishing between those resolutions that deal with specific factual situations and then express or imply general legal prescription for states or which are addressed to particular states and imply that the recommended or required conduct is conduct required of all states, and those resolutions that express general rules of conduct for states). Approximately 8,000 resolutions were adopted between 1946 and 2000. *Id.* at 145-46. Fewer than 100 of them, however, express general rules of conduct for states. *Id.* It is this small subset that “may be considered by governments and by courts or arbitral tribunals as evidence of international custom or as expressing (and evidencing) a general principle of law.” *Id.* at 146. They “may also serve to set forth principles for a future treaty.” *Id.* See, e.g., *Fact Sheet*, *supra* note 24 (discussing the role of the Universal Declaration as a basis for action as well as a basis for “nearly all the international human rights adopted by United Nations bodies since 1948”). Moreover, the Universal Declaration has also served as a basis for international human rights instruments “adopted outside the United Nations system.” *Id.* The Convention for the Protection of Human Rights and Fundamental Freedoms (adopted by the Council of Europe in 1950), the Charter of the Organization of African Unity (adopted at Addis Ababa in 1963), and the American Convention on Human Rights (signed at San José, Costa Rica in 1969), for example, either refer to the Universal Declaration and include its purposes in the purposes of the regional treaty, or adopt specific language from the Preamble to the Universal Declaration, or both. *Id.*

28. CESC, *supra* note 21.

29. CCPR, *supra* note 22.

30. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(a), 59 Stat. 1055, 1060 [hereinafter *ICJ Statute*].

CESC, and one hundred fifty-one states have ratified the CCPR.³¹ Moreover, states that signed, but did not ratify one or both of the covenants, are obligated, under international law, "to refrain from acts which would defeat the object and purpose of [the] treaty."³² The CESC and the CCPR, annexed to the Universal Declaration and both signed on the same day,³³ codify the principles the Universal Declaration sets forth.³⁴ The Universal Declaration, with the CESC, the CCPR and the two optional protocols to the CCPR, form the International Bill of Rights. Because it marks the "conscious acquisition of human dignity and worth," the Universal Declaration is also called the Magna Carta of international human rights law.³⁵

Article 28 of the CCPR establishes the Human Rights Committee.³⁶ The contracting states bound themselves and each other to "submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights."³⁷ The plain language of the CCPR demonstrates that the international community of states recognized and looked to the supervisory function of the United Nations as a guardian of international human rights from

31. Office of the U.N. High Comm'r for Human Rights, *Development of the Human Rights Treaty System*, available at <http://www.unhchr.ch/html/intlist.htm> (last visited June 24, 2004).

32. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, art. 18 [hereinafter Vienna Convention]. See, e.g., JANIS, *supra* note 27, at 17 (explaining that the Vienna Convention is "largely, though not entirely, a codification of the existing customary international law of treaties"). The International Law Commission sees the Vienna Convention as "both a codification and a progressive development of international law." *Id.* (citing 2 Y.B. INT'L L. COMM'N 177.) The repeated position of the International Court of Justice is that the Vienna Convention "may in many respects be considered as a codification of existing customary law" on the interpretation of treaties. *Id.* at 17 (citing Thirlway, *The Law and Procedure of the International Court of Justice, 1960-1989 (Part Three)*, 62 BRITISH Y.B. INT'L L. 1, 3 (1991)). The United States is not a party to the Vienna Convention, but the U.S. State Department does recognize it as "the authoritative guide to current treaty law and practice." *Id.* (citing S. EXEC. DOC., 92-L, at 1 (1991)). The Restatement (Third) of Foreign Relations Law of the United States "accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements." *Id.* (citing 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 145 (1987)).

33. The CESR is annexed to U.N. General Assembly Resolution 2200. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 490, U.N. Doc. A/6316 (1966). The CCPR is also annexed to U.N. General Assembly Resolution 2200. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52 U.N. Doc. A/6316 (1966).

34. *Fact Sheet*, *supra* note 25.

35. *Id.*

36. CCPR, *supra* note 22, at art. 40(1).

37. *Id.*

the start. Moreover, the first Optional Protocol to the CCPR³⁸ enables the Human Rights Committee “to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.”³⁹

Despite the uncertainty expressed by the international business community,⁴⁰ it is patently clear that human beings have recourse to the United Nations, and not only to their nation states, since the formal, treaty-bound inception of international human rights law. At the same time, there is an undeniable tension, or “disconnect,” between human rights theory and international human rights law. “While human rights theory supports the claims of rights holders against all others, international human rights law treats the state as the principal threat to individual freedom and well-being.”⁴¹

As is frequently the case, history helps explain the current situation. Civil and political human rights rest on a post-World War II paradigm under which the state and its agents have the duty to respect and ensure rights.⁴² “Real, full-blown internationalization of human rights came in the wake of Hitler and World War II.”⁴³ On the other hand, economic and social rights actually precede the civil and political as a world issue.⁴⁴ “Efforts to establish international protection for human rights can be traced to the surge of globalization and international markets that occurred at the end of the 19th century.”⁴⁵

International labor standards were needed “to avoid competitive distortions and enhance the protection of the fundamental rights of workers” because of the industrial revolution.⁴⁶ The International Labour Organization (“ILO”) was created to address these rights and requirements and to develop international labor standards.⁴⁷ “Unlike all the subsequent international organizations, the ILO has engaged all the relevant actors,” that is, government, employers and employees, “in its operations from the beginning.”⁴⁸

38. *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200A(XXI), U.N. GAOR 21st Sess., Supp. No. 16, at 59 U.N. Doc. A/6316 (1966), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter *First Optional Protocol*].

39. *First Optional Protocol*, *supra* note 38, at art. 1. See also *Fact Sheet*, *supra* note 25.

40. See Birchall, *supra* note 2. See also *Joint Views*, *supra* note 15.

41. Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT’L & COMP. L. REV. 273, 281-82 (2002).

42. *Id.* at 282.

43. DAMROSCH ET AL., *supra* note 19, at 588.

44. Shelton, *supra* note 41, at 280.

45. *Id.*

46. *Id.*

47. *Id.* at 281.

48. *Id.*

The IOE and ICC, however, "strongly believe that the establishment of the legal framework for protecting human rights and its enforcement is a task for national governments,"⁴⁹ and in that assertion, they are correct. Human rights protection and enforcement are tasks that bind all states who are parties to human rights covenants. Both the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ("Limburg Principles")⁵⁰ and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* ("Maastricht Guidelines")⁵¹ provide that a state's failure to comply

49. *Joint Views*, *supra* note 15.

50. *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, 24th Sess., Agenda item 3, U.N. Doc E/CN.4/1987/17 (1987) [hereinafter *Limburg Principles*].

A group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America), met in Maastricht on 2-6 June 1986 to consider the nature and scope of the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights, the consideration of States parties Reports by the newly constituted ECOSOC Committee on Economic, Social and Cultural Rights, and international co-operation under Part IV of the Covenant.

The 29 Participants came from Australia, the Federal Republic of Germany, Hungary, Ireland, Mexico, Netherlands, Norway, Senegal, Spain, United Kingdom, United States of America, Yugoslavia, the United Nations Centre for Human Rights, the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the Commonwealth Secretariat, and the sponsoring organizations. Four of the participants were members of the ECOSOC Committee on Economic, Social and Cultural Rights.

Id. at Introduction.

51. *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, U.N. ESCOR, 24th Sess., Agenda Item 3, U.N. Doc E/C.12/2000/13 (2000) [hereinafter *Maastricht Guidelines*].

On the occasion of the 10th anniversary of the Limburg Principles . . . a group of more than thirty experts met in Maastricht from 22-26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The objective of this meeting was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.

The participants unanimously agreed on the Maastricht guidelines which they understand to reflect the evolution of international law since 1986.

Id. at Introduction.

with its legal obligation under the CESC violates the CESC under international law.⁵² The *Limburg Principles* and the *Maastricht Guidelines* are international legal instruments and are “subsidiary means” to determine the rule of international law.⁵³

Most nation states are parties to binding international treaties on human rights.⁵⁴ These treaties are all sources of binding international law⁵⁵ as well as sources, or certainly

52. *Limburg Principles*, *supra* note 50, at art. 70; *Maastricht Guidelines*, *supra* note 51, at arts. 4-5.

53. “[J]udicial decisions and the teaching of the most highly qualified publicists of the various nations [are] a subsidiary means for the determination of rules of law.” CJS Statute, art. 38(d), 59 Stat. 1055, 1060.

54. With the additions of Switzerland and East Timor, there are now 191 member states in the UN. *United Nations, List of Member States*, available at <http://www.un.org/Overview/unmember.html> (updated Apr. 24, 2003). One hundred forty-eight countries have ratified the CESC and 151 countries have ratified the CESC’s “twin” human rights covenant, the CCPR. OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11 (2004), available at <http://www.unhchr-ch/pdf/report.pdf>. (updated June 9, 2004) [hereinafter STATUS OF RATIFICATIONS]. There are 133 state parties to the Convention on the Prevention and Punishment of the Crime of Genocide. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951); STATUS OF RATIFICATIONS, *supra*, at 11. One hundred fifty-six countries have ratified the Convention on the Elimination of All Forms of Racial Discrimination. Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter Racial Discrimination Convention]; STATUS OF RATIFICATIONS, *supra*, at 11. One hundred sixty-seven countries have ratified the Convention on the Elimination of All Forms of Discriminations Against Women. Convention on the Elimination of All Forms of Discriminations Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; STATUS OF RATIFICATIONS, *supra*, at 11. There are 127 state parties to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85; STATUS OF RATIFICATIONS, *supra*, at 11. One hundred ninety-two states are parties to the Convention on the Rights of the Child. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3, [hereinafter CRC]; STATUS OF RATIFICATIONS, *supra*, at 11. Even the United States, which has not ratified the CRC has ratified the CRC’s two optional protocols: the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; STATUS OF RATIFICATIONS, *supra*, at 11; Mark E. Wojcik et al., *International Human Rights*, 37 INTL. LAW. 597, 600 (2003). Finally, on December 10, 2002, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families received the required twentieth ratification, entering into force on July 1, 2003. G.A. Res. 45/158, U.N. GAOR, 45th Sess, 69th mtg., U.N. Doc. A/RES/45/158 (1990); Wojcik et al., *supra*, at 600.

55. ICJ Statute, art. 38(1)(a), 59 Stat. 1055-1060.

evidence, of customary international law.⁵⁶ When condemned by the international community, states violating treaty-recognized international human rights deny the violation, thereby recognizing their own actions as either contravening general state practice,⁵⁷ or customary international law,⁵⁸ or being inconsistent with the general principles of law recognized by civilized nations.⁵⁹

The sheer number of human rights conventions and the contracting state parties thereto demonstrate the international community's overwhelming endorsement of human rights. Most of these international agreements address nation states and require national governments to establish and enforce legal frameworks for the protection of human rights.⁶⁰ Despite the emphasis on state responsibility, however, "international human rights instruments continue to recognize human rights that are violated predominantly by non-state actors, for example, freedom from slavery and forced labor."⁶¹ The fundamental question in international human rights law today is "whether a human rights system premised on state responsibility to respect human rights can be effective in a globalized world."⁶²

Transnational corporations are wrong to presume that nation states are the only legal bodies capable of enforcing human rights.⁶³ It is true that the U.N. Charter "did not create institutions to enforce international law,"⁶⁴ and that "the Charter itself was not conceived to include a code of international law."⁶⁵ The one exception to this "design to establish a new world order after the Second World War"⁶⁶ also happens to be "the most important norm of 20th century law."⁶⁷ The Charter created specific institutions to enforce international law "in respect of the prohibition of the use of force related to threats to international peace and security."⁶⁸

In an international legal order where "the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent,"⁶⁹ there can be no peace or

56. JANIS, *supra* note 27, at 51.

57. Marco Simons, *The Emergence of a Norm Against Arbitrary Forced Relocation*, 34 COLUM. HUM. RTS. L. REV. 95, 97 (2002).

58. ICJ Statute, art. 38(1)(g), 59 Stat. 1055, 1060..

59. *Id.* at art. 38(1)(c).

60. Beth Stephens, *The Amoral of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 71 (2002).

61. Shelton, *supra* note 41, at 282.

62. *Id.* at 274.

63. *Joint Views*, *supra* note 15.

64. DAMROSCH, *supra* note 19, at 29.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Universal Declaration*, *supra* note 18.

security when “the poorest fifth of the world’s population is receiving 1.4% of the global income and the richest fifth 85%.”⁷⁰ The aims of the U.N. Charter are to “promote social progress and better standards of life in larger freedom.”⁷¹ Yet, the gap between the world’s rich and poor doubled in the last three decades of the 20th century.⁷² The impact of this income disparity is so dramatic as to render “the enjoyment of economic, social, and cultural rights *illusory* for a significant portion of the planet.”⁷³ With peace and security under an increasing, decade-by-decade threat, the question is not whether the United Nations *can* act. It *must* act under its full legal powers “to employ international machinery for the promotion of the economic and social advancement of all peoples”⁷⁴ under the mandate put forth by “the representatives assembled in the city of San Francisco, who . . . exhibited their full powers”⁷⁵ when agreeing to the U.N. Charter, thereby “establish[ing] an international organization to be known as the United Nations.”⁷⁶

The Washington consensus, under the legal authority of the IMF and the World Bank, managed to successfully propose global income redistribution.⁷⁷ The Economic and Social Council has not done so.⁷⁸ Instead, it exercises its charter-based authority to promote “progressive measures”⁷⁹ in order “to secure universal”⁸⁰ and particularly *effective*⁸¹ “recognition and *observance*”⁸² of the universal right of self-determination⁸³ under international law

70. *Maastricht Guidelines*, *supra* note 51, art. 1.

71. U.N. CHARTER pmbl.

72. *Maastricht Guidelines*, *supra* note 51, art. 1.

73. *Id.* (emphasis added).

74. U.N. CHARTER pmbl.

75. U.N. CHARTER pmbl.

76. U.N. CHARTER pmbl.

77. See, e.g., Shelton, *supra* note 41, at 288-94 (discussing the Washington Consensus methods of structural adjustment and economic liberalization in the 1980s and 1990s resulting in the relinquishing, by sovereign states, of their legal duty to promote, fulfill, and ensure the fulfillment of their citizens’ right to health, education, housing and other international human rights guaranteed by the International Bill of Rights).

78. See *id.*

79. *Norms*, *supra* note 1, at pmbl. ¶2. See *Universal Declaration*, *supra* note 18, at Proclamation.

80. *Id.*

81. *Norms*, *supra* note 1, at pmbl. ¶2. The addition of the adjective “effective” is one of the few distinctions between the language of the Preamble to the Norms and the Proclamation of the Universal Declaration, which otherwise mirror each other nearly verbatim. The United Nations is not changing the law or creating the law by adopting these Norms; it is trying to get something done.

82. *Norms*, *supra* note 1, at pmbl. ¶2 (emphasis added). See *Universal Declaration*, *supra* note 18, at Proclamation.

83. CESC, *supra* note 21, at art. 1(1); CCPR, *supra* note 22 at art. 1(1).

(italics added). Not only is everyone entitled to a social and international order to realize these rights,⁸⁴ but members of society have duties to the community,⁸⁵ which is the only place available to freely and fully develop one's personality,⁸⁶ or one's legal power to act. The only limitations the United Nations imposes on transnational corporations' rights to act are those already imposed by international law, which are limited "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."⁸⁷

The Economic and Social Council of the United Nations has not acted *ultra vires* because it has neither promulgated nor sought enforcement of, new international law on human rights, employment procedures or environmental practices,⁸⁸ i.e. the law governing "the core business practices and operations" of transnational corporations.⁸⁹ Instead, the Council acknowledges and recognizes the law set forth by the international community of states⁹⁰ as well as the non-binding evidentiary instruments, the OECD Guidelines⁹¹ and the Global Compact,⁹² and announced an implementation and verification plan, a tool or standard to measure the legal compliance of transnational corporations.⁹³

As explained above, states recognize the supervisory function of the United Nations as a guardian of individual rights in the fundamental human rights covenants. Moreover, and more critically, human beings do not hold their human rights and fundamental freedoms as citizens of nation states.⁹⁴ They hold these rights as "members of society" and are entitled to have these rights realized through *both* national effort and international cooperation.⁹⁵ "Achiev[ing] international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and [] promoting and encouraging respect for human rights and for fundamental freedoms for all" is, of course, one of the purposes and principles of the United Nations.⁹⁶

84. *Universal Declaration*, *supra* note 18, at art. 28.

85. *Id.* at art. 29(1).

86. *Id.*

87. *Id.* at art. 29(2).

88. DAMROSCH, *supra* note 19, at 27.

89. *Norms*, *supra* note 1, at pmbl. ¶11.

90. *Id.* at pmbl. ¶¶3-5.

91. *Id.* at pmbl. ¶6.

92. *Id.* at pmbl. ¶7.

93. *Id.* at pmbl. ¶12.

94. *Universal Declaration*, *supra* note 18, at art. 22.

95. *Id.*

96. U.N. CHARTER art. 1.

IV. UNITED NATIONS SUPERVISION OF HUMAN RIGHTS

Both the Charter of the United Nations and the Universal Declaration of Human Rights recognize human rights. "Initial recognition [of the existence of human rights] was sufficient to initiate development of human rights law and the process of international organizational supervision of those rights."⁹⁷ Since that initial recognition, the United Nations has structured its supervision of human rights law recognition pursuant to and in furtherance of the world community's authorization to do so under Article 55 of the Charter.⁹⁸ Located in Chapter IX, International Economic and Social Co-operation [sic], Article 55 reiterates the relationship of equal rights and self-determination of peoples to economic stability and well being and world peace.⁹⁹ To that end, the world agreed to delegate to the U.N. the tasks of promoting higher standards of living;¹⁰⁰ of solving international economic, social, health and related problems;¹⁰¹ and of upholding "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."¹⁰² In so doing, the United Nations is fulfilling the determination of the international community to "promote social progress and better standards of life in larger freedom."¹⁰³ One of the ways the peoples of the United Nations decided to implement this progress and these standards is to "employ international machinery for the promotion of the economic and social advancement of all peoples."¹⁰⁴ By supervising transnational corporations and their adherence to international human rights law through the employment of its organizational machinery, the UN carries out the stated principles agreed to by the international community.¹⁰⁵

The Economic and Social Council ("ECOSOC"), under whose authority the Norms were issued,¹⁰⁶ is one of the six principal

97. Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U.J. INT'L L & POL'Y 1, 3 (1993).

98. U.N. CHARTER art. 55.

99. U.N. CHARTER art. 55.

100. U.N. CHARTER art. 55, para a.

101. U.N. CHARTER art. 55, para b.

102. U.N. CHARTER art. 55, para c.

103. U.N. CHARTER pmbl.

104. U.N. CHARTER art. 55, para c.

105. The third of the four purposes of the United Nations is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. CHARTER art. 1, para. 3.

106. U.N. CHARTER art. 62.

organs of the United Nations, along with the Security Council, the General Assembly and the International Court of Justice.¹⁰⁷ ECOSOC, whose Charter-determined membership grew from eighteen original members to its current fifty-four member composition,¹⁰⁸ “coordinates the work of the 14 UN specialized agencies, 10 functional commissions and five regional commissions.”¹⁰⁹ The Charter also allows for the existence of specialized agencies.¹¹⁰ Intergovernmental agreements establish each of these specialized agencies, which have “wide international responsibilities . . . in economic, social, cultural, educational, health and related fields.”¹¹¹ One of the functional commissions coordinated by ECOSOC, in turn, is the Commission on Human Rights.¹¹² Each year, the Commission meets for six weeks, with over 3,000 delegates, including member states, observer states, and non-governmental organizations, in attendance.¹¹³ These international actions by international parties arising out of international conventions and agreements acknowledge and develop international law, under whose authority each human being holds human rights.

The international business community believes they should not be subject to the same UN enforcement procedures that until now, applied only to nation states.¹¹⁴ Again, they are mistaken.

[T]he norms embedded in [international human rights] agreements bind the behavior of private individuals and corporations alike. International law has never been limited to regulating state behavior. Over the past fifty years, the international community has moved decisively to expand not only the rights of non-state actors, but their responsibilities as well.¹¹⁵

As recognized by the Norms and all the international conventions on human rights, “states have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights.”¹¹⁶ Nonetheless, every individual and “every organ of society” also is bound, as

107. U.N. CHARTER art. 7, para. 1.

108. U.N. CHARTER art. 61, para. 1.

109. UN Econ. & Soc. Council, *What ECOSOC Does*, at <http://www.un.org/esa/coordination/ecosoc/about.htm> (last visited June 22, 2004) [hereinafter ECOSOC].

110. U.N. CHARTER art. 57, para 1.

111. U.N. CHARTER art. 57, para 1.

112. ECOSOC, *supra* note 109.

113. UN Sub-Commission on the Promotion and Protection of Human Rights, *About the Sub-Commission on the Promotion and Protection of Human Rights*, at <http://www.unhcr.ch/html/menu2/2/sc.htm> (last visited July 5, 2004).

114. Birchall, *supra* note 2.

115. Stephens, *supra* note 60, at 71.

116. Norms, *supra* note 1, at pmb1. ¶3.

proclaimed by the Universal Declaration, to promote respect for human rights and fundamental freedoms and to “secure their universal and effective recognition and observance.”¹¹⁷ This language proclaims that human rights and fundamental freedoms are “a common standard of achievement” applicable to all in the international order.¹¹⁸

Under international law, treaty terms are interpreted in good faith, using the ordinary meaning of the terms in their context, in light of the treaty’s object and purpose.¹¹⁹ The Charter and Universal Declaration were drafted in the context of a world in the ruins of World War II. The “Peoples of the United Nations” concerned themselves primarily with states.¹²⁰ The object and purpose of the instruments sought to confirm the worth and dignity of the human person, as well as that person’s fundamental human rights, whether male or female.¹²¹ Promoting social progress and better standards of life; employing international machinery for the promotion of the economic and social advancement of all peoples;¹²² achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character; and promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion were equally important aims.¹²³ Human rights were proclaimed “a common standard of achievement for all peoples and all nations.”¹²⁴ It was, and remains, the duty of every individual and organ of society to secure the universal recognition and observance of these rights.¹²⁵

The object and purpose of the founding documents of the United Nations, the UN Charter and the Universal Declaration have not changed. “Since 1948 [the Universal Declaration] has been and rightly continues to be the most important far-reaching of all United Nations declarations, and a fundamental source of inspiration for national and international efforts to promote and protect human rights and fundamental freedoms.”¹²⁶ Instead, the context for the term “every organ of society” is what evolved. International law equally well establishes that treaty terms and provisions are not static; they must evolve and adapt to the

117. *Universal Declaration*, *supra* note 18, at proclamation.

118. *Id.* See Norms, *supra* note 1, at pmbl. ¶2 (recalling and restating this common international standard).

119. Vienna Convention, *supra* note 32, at art. 31(1).

120. U.N. CHARTER pmbl.

121. U.N. CHARTER pmbl.

122. U.N. CHARTER pmbl.

123. U.N. CHARTER art. 1.

124. *Universal Declaration*, *supra* note 18, at proclamation.

125. *Id.*

126. *Fact Sheet*, *supra* note 24.

emerging norms of international law.¹²⁷ "The law of nations is dynamic, rather than static."¹²⁸

By the early 1970s, "the total revenue of the eight largest multinational and multi-corporate networks . . . was already some \$118 billion, a monetary mass identical to the global budget expenses of six European member states together."¹²⁹ Today 65,000 transnational corporations worldwide operate in two or more jurisdictions.¹³⁰ These 65,000 transnational corporations have 690,000 foreign affiliates. Currently, 51 of the 100 largest economies are corporations; 49 are countries.¹³¹ "The largest fifteen corporations have revenues greater than all but thirteen nations."¹³² Only seven national economies are larger than General Motors.¹³³ "Corporations have grown to a level of economic power that dwarfs most nation states."¹³⁴

While transnational corporations expanded their economic strength and presence, the role of the nation state in providing for the general welfare of its citizens and people within its borders diminished.¹³⁵

A trend developed post-Cold War where all regions of the world reduced the role of the state and began relying on the market to resolve the problems of human welfare. This typifies the response to conditions generated by international and national financial markets and institutions seeking investments from multinational enterprises with wealth and power that exceeds that of many states.¹³⁶

The "Washington Consensus methods of structural adjustment and economic liberalization, . . . applied in the 1980s and early 1990s to the macroeconomic policies of developing countries,"¹³⁷ accelerated this reduced participation by nation states in fulfilling the essential economic and social human rights of their citizens. "The Washington Consensus privileged market

127. Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Czech Rep.), 1997 I.C.J. 7 (Sept. 25).

128. *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 370 (E.D. La. 1997) (citing *Filartiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)).

129. Jose Engracia Antunes, *The Liability of Polycorporate Enterprises*, 13 CONN. J. INT'L L. 197, 203 (1999).

130. Peter Utting, *The Global Compact: Why All the Fuss?*, UN CHRON. Jan. 2003, at 65, available at <http://www.un.org/Pubs/chronicle/2003/issue1/0103p65.html>.

131. Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power*, CORPORATE WATCH, at <http://www.globalpolicy.org/socecon/tncs/top200.htm> (last visited June 24, 2004).

132. Stephens, *supra* note 60, at 57.

133. *Id.*

134. *Id.*

135. *Maastricht Guidelines*, *supra* note 51, at art. 2.

136. *Id.*

137. Shelton, *supra* note 41, at 290.

forces, and the [World] Bank followed by promoting privatization programs that took the state out of health, education and housing.¹³⁸ According to the UN-appointed independent expert, structural adjustments imposed by the IMF and the World Bank in an effort to improve conditions for international investors impacted states to the point that “countries have ceded their right to independently determine their country’s development priorities.”¹³⁹ This is, of course, a violation of the “Charter of the United Nations and the principles of international law” as proclaimed in the *Rio Declaration on Environment and Development*, under which nation states “have the sovereign right to exploit their own resources pursuant to their own environmental and development policies.”¹⁴⁰ When their nation states bargained away their legal duty to respect, promote and fulfill them, citizens of these countries did not lose their fundamental rights to adequate housing,¹⁴¹ the highest attainable standard of physical and mental health¹⁴² or their universal right to at least a primary education¹⁴³ as guaranteed by the CESC. When governments trade away the sovereign power to protect and fulfill the human rights of their citizens and subjects, whether under duress or not, an insistence that these very governments remain the sole enforcer of human rights is spurious and disdainful.

Under the principle of participation, transnational corporations must be obligated to promote and respect these citizens’ rights.¹⁴⁴ This is because they intervened, or legal entities such as the IMF and the World Bank intervened on their behalf, in the affairs of other states.¹⁴⁵ The principle of participation “establishes a duty of every state or group that seeks to intervene in the affairs of any other state or group, to obtain authorization for its actions through a decision-making mechanism in which *all* interested parties have the right to participate.”¹⁴⁶

Because of this worldwide evolution, or erosion, of state sovereignty in both the developing and the least-developed

138. *Id.*

139. *Id.* at 298.

140. UNITED NATIONS ENVIRONMENT PROGRAMME, *RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT* at Principle 2, U.N. Doc. A/CONF.151/5/Rev.1, U.N. Sales No. E.73.II.A.14 and corrigendum (1992) [hereinafter *RIO DECLARATION*]. The Rio Declaration is one of the three fundamental human rights doctrines framing the UN Global Compact. *Global Compact*, *supra* note 3.

141. CESC, *supra* note 21, at art. 12.

142. *Id.* at art. 13.

143. *Id.* at art. 14.

144. Grossman & Bradlow, *supra* note 97, at 24.

145. Shelton, *supra* note 41, at 297-98.

146. *Id.* (*emphasis added*).

countries, "it is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the state."¹⁴⁷ Moreover, the Maastricht Guidelines recognize that not only states, but "entities insufficiently regulated by States" are capable of violating economic, social and cultural rights.¹⁴⁸ By the same token,

there have also been significant legal developments enhancing economic, social and cultural rights since 1986 [i.e. since the *Limburg Principles*], including emerging jurisprudence of the Committee on Economic, Social and Cultural Rights and the adoption of instruments, such as the revised European Social Charter of 1996 and the Additional protocol to the European Charter Providing for a System of Collective Complaints, and the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights of 1988.¹⁴⁹

Between 1992 and 1996, seven UN conferences took place where world governments firmly committed to human rights development.¹⁵⁰ By determining that transnational corporations are legally bound to respect, protect and ensure the human rights of people whose lives they affect worldwide, the United Nations has done no more than set forth international law as it has evolved, since the end of the Second World War, and particularly, since the end of the Cold War.

Transnational corporations benefited greatly from the assertion of their economic and legal rights and freedoms in the international community. Indeed, the sales pitch given to businesses to join the ICC, the IOE or the USCIB is the proven ability to influence international business policy and regulation.¹⁵¹ In return for membership dues, businesses have their interests represented "directly to U.S. policy makers and officials in the United Nations, European Union, and a host of other governments and groups."¹⁵²

Transnational corporations need to keep in mind that

human rights law not only potentially imposes duties on non-state economic actors, it guarantees rights essential for the furtherance of globalization. It protects the right to property, including intellectual property, freedom of expression and communications across

147. *Maastricht Guidelines*, *supra* note 51, at art 2.

148. *Id.* at art. 14.

149. *Id.* at art. 3.

150. *Id.*

151. *See Joint Views*, *supra* note 15. *See also* U.S. COUNCIL FOR INT'L BUS., ADVANCING CORPORATE RESPONSIBILITY (Dec. 2002), *available at* <http://www.uscib.org/index.asp?documentID=2573> (last visited Aug. 10, 2004) [hereinafter CORPORATE RESPONSIBILITY].

152. *See* U.S. COUNCIL FOR INT'L BUS., *Giving Business a Seat at the Table* (2001), *available at* <http://www.uscib.org/index.asp?documentID=706> (last visited Aug. 10, 2004) [hereinafter A SEAT AT THE TABLE].

boundaries, due process for contractual or other business disputes and a remedy before an independent tribunal when rights are violated. Furthermore, rule of law is an essential pre-requisite to the long-term conduct of trade and investment.¹⁵³

Rather than restricting businesses, the Norms actually benefit businesses by addressing the classic “free-rider” problem. As Robert Lake, head of socially responsible investment at Henderson Global Investors in London told the *Financial Times*: “Seen in a competitive context, a monitoring mechanism can help overcome the ‘free-rider’ problem, where many companies are reluctant to take action for fear that their competitors may not.”¹⁵⁴

Transnational corporations participate in the international economic arena and are “directly affected by the decisions taken” by international legal bodies.¹⁵⁵ As actors and participators, these private global economies believe they “should be able to participate in the formulation of these decisions.”¹⁵⁶ These “private actors . . . have at least as much power as the sovereign state. They are able to use their power to influence the decisions and policies of the individual nation-state in the domestic realm and of the community of states in the international arena.”¹⁵⁷ Because their actions affect the lives of human beings worldwide, they must be accountable to these affected individuals. “The identity of those to be held accountable depends only upon who actually has the power to make and implement decisions.”¹⁵⁸ Law and equity require that “all affected parties should be assured of meaningful participation in the fora in which decisions are made.”¹⁵⁹

The actions of transnational corporations and governments today are patently intertwined and interdependent. A good faith reading leaves no doubt that transnational corporations have evolved into duty-bearing “other organs of society.” “Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.”¹⁶⁰ Thus, transnational corporations cannot “choose” whether to honor or breach the universal, indivisible, interdependent and interrelated human rights held by all people wherever they invest their funds and resources.¹⁶¹ These rights

153. Shelton, *supra* note 41, at 286-87.

154. Birchall, *supra* note 2.

155. Grossman & Bradlow, *supra* note 97, at 22.

156. *Id.*

157. *Id.*

158. *Id.* at 24.

159. *Id.*

160. Stephens, *supra* note 60, at 77.

161. This language, reiterated in the Norms, was first adopted by the General Assembly in 1950, when it declared that “the enjoyment of civic and political freedoms of economic, social, and cultural rights are *interconnected and interdependent*.” *Fact Sheet*, *supra* note 24 (emphasis added). The

include, as established by international law, "the right to development, which entitles every human person and all peoples to participate in, contribute to and enjoy economic, social, cultural and political development."¹⁶² Therefore, the right to development is not merely an investor's or a government's right, because they are not the sole parties participating in and contributing to the development. The right to development entails a straightforward right to the fruits of one's labors.

V. FUNDAMENTAL FLAWS OF THE BUSINESS EXEMPTION

In their Joint Statement, the ICC and the IOE claim that one of the fundamental flaws of the Norms is that they include assertions of company obligations in dubious contexts.¹⁶³ As shown above, however, the human rights "context" is not at all dubious. That human rights belong to each and every individual, and not to the State, is well established.¹⁶⁴ It is further established that "[a]ll

interconnection and interdependence of these human rights were the reason why the General Assembly requested that the Human Rights Commission draft *two* covenants on human rights: one setting forth economic, social and cultural rights, and the other civil and political rights which would contain as many similar provisions as possible, and both of which would provide that "all peoples have the right of self-determination." *Id.* The interconnectedness of these rights has been re-asserted and re-affirmed in other legally binding human rights conventions as well as proclamations, such as the Proclamation of Teheran of 1966. *Id.* See *Limburg Principles*, *supra* note 50, at art. 3 (listing other important international legal instruments reiterating this interconnectedness). See also *Maastricht Guidelines*, *supra* note 51, at art. 4 (restating the interconnection and interdependence of human rights).

The Maastricht Guidelines specifically recalled the 10th anniversary of the Limburg Principles and declared that the disparities between the increased gap of the world's rich and poor had rendered enjoyment of economic, social and cultural rights "illusory for a significant portion of humanity." *Id.* at Introduction, art. 2. Whereas the Limburg Principles made it clear that states were in violation of both domestic and international law when their people were denied these fundamental human rights (*Limburg Principles*, *supra* note 50, at art. 10), the Maastricht Guidelines further establish that these rights may also be violated by "other entities insufficiently regulated by States." *Maastricht Guidelines*, *supra* note 51, at art. 18. The Maastricht Guidelines also provide remedies and reparations for any person or group victimized by a violation of these rights. *Id.* at arts. 22-23. Appropriate remedies should be available at both national and international levels. *Id.* at art. 22. Under the Maastricht Guidelines, adequate reparation can be in the form of "restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition." *Id.* at art. 23.

162. *Norms*, *supra* note 1, at pmbl. ¶13.

163. *Joint Views*, *supra* note 15.

164. One of the aims resolved in the Preamble of the United Nations Charter is to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . ." U.N. CHARTER pmbl.

See *Universal Declaration*, *supra* note 18, art. 2 in particular, under which "[e]veryone is entitled to all the rights and freedoms set forth in this

are equal before the law and are entitled without any discrimination to equal protection of the law.”¹⁶⁵ Every person possesses the right to a remedy; this is universally recognized.¹⁶⁶ “Nothing is relevant to or required for the enjoyment of one’s interdependent and intertwined human rights but one’s humanity. Transnational corporations often find themselves directly and indirectly faced with issues involving the human rights defined in the Universal Declaration.”¹⁶⁷

There are twenty-three Norms divided into eight categories including general obligations of transnational corporations “to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international law as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”¹⁶⁸ Other categories provide for the right to equal opportunity and non-discriminatory treatment;¹⁶⁹ the right to security of persons;¹⁷⁰ the rights of workers;¹⁷¹ respect for sovereignty and human rights;¹⁷² obligations with regard to consumer protection;¹⁷³ obligations with regard to environmental protection;¹⁷⁴ general provisions of implementation;¹⁷⁵ and a definition section.¹⁷⁶

The Commentary to the Norms explicates each section in great detail, and references instruments and norms of international law that govern specific categorical rights or

declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Furthermore, no distinction shall be made on the basis of “the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation or sovereignty.” *Id.* These rights are endorsed and confirmed throughout international human rights instruments, including the twin covenants, the *CESC* and the *CCPR*. *CESC*, *supra* note 21, at art. 2(2); *CCPR*, *supra* note 22, at art. 2(1).

165. *Universal Declaration*, *supra* note 18, at art. 7; *CCPR*, *supra* note 22, at art. 26; *Racial Discrimination Convention*, *supra* note 54, at art. 5(a); and *CEDAW*, *supra* note 54, at art. 15.

166. *Universal Declaration*, *supra* note 18, at art. 8. See *CCPR*, *supra* note 22, at art. 3(a) (requiring that each contracting state ensure “any person” whose rights or freedoms recognized by the covenant have an effective remedy). Those rights and freedoms belong to each individual.

167. Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 162 (1997).

168. *Norms*, *supra* note 1, at art. 1.

169. *Id.* at art. 2.

170. *Id.* at arts. 3-4.

171. *Id.* at arts. 5-9.

172. *Id.* at arts. 10-12.

173. *Id.* at art. 13.

174. *Id.* at art. 14.

175. *Norms*, *supra* note 1, at arts. 15-19.

176. *Id.* at arts. 20-23.

duties.¹⁷⁷ The context is unreservedly one of rights-holders and duty-providers. There is no doubt or hesitation in these assertions.

Article 7 of the Norms, for example, requires transnational corporations to provide a safe and healthy working environment.¹⁷⁸ The corresponding Commentary article clarifies this duty, stating that transnational corporations and other business entities must “consult and cooperate fully with health, safety and labour authorities, workers’ representatives and their organizations and establish safety and health organizations on matters of occupational health and safety.”¹⁷⁹ Within this context, companies must provide complaint mechanisms and corresponding procedures where the employee will not fear reprisal.¹⁸⁰

“Safe and healthy working conditions” are a “fundamental right of everyone to the enjoyment of just and favourable conditions of work” under the CESC.¹⁸¹ Nonetheless, the Australian mining industry, for instance, “does not have a grievance mechanism despite its large size and the significant environmental and social impacts it can have.”¹⁸² Communities in Peru, the Philippines, Papua New Guinea and Indonesia complained about human rights abuses and environmental degradation perpetrated by the Australian mining industry to Oxfam Community Aid Abroad.¹⁸³ There is often no institution available to complainants seeking redress, “which has allowed some mining companies simply to disregard their concerns.”¹⁸⁴

There has been a worldwide shift to contingent or temporary workers who do not receive benefits.¹⁸⁵ “Only some 20% of the world’s workers have adequate social protection.”¹⁸⁶ Eighty percent of the world’s workers, therefore, have their inviolable human right to social security and social insurance violated.¹⁸⁷ “Some 3,000 people a day die from work-related accidents or diseases,”¹⁸⁸ despite their universal right to safe and healthy working conditions.¹⁸⁹

177. *Commentary*, *supra* note 14.

178. *Norms*, *supra* note 1, at art. 7.

179. *Commentary*, *supra* note 14, at art. 7(b).

180. *Id.*

181. CESC, *supra* note 21, at art. 7(b).

182. OXFAM CMTY. AID ABROAD, 2001 - 2002 MINING OMBUDSMAN ANNUAL REPORT 4 (2002), available at <http://www.oxfam.org/au/campaigns/mining/ombudsman/index.htm> (last visited June 24, 2004).

183. *Id.*

184. *Id.*

185. Shelton, *supra* note 41, at 296.

186. *Id.*

187. CESC, *supra* note 21, at art. 9. See *Universal Declaration*, *supra* note 18, at art. 22.

188. Shelton, *supra* note 41, at 296.

189. CESC, *supra* note 21, at art. 7(b). Also see the following ILO

Here, the Norms seek merely to secure the recognition, respect, protection, and fulfillment of the rights set forth in the Universal Declaration, under which “everyone is entitled to a social and international order in which the rights and freedoms set forth in [the] Declaration can be fully realized.”¹⁹⁰

The context for Article 6 concerns the rights of children and transnational corporations’ duty to protect them from economic exploitation.¹⁹¹ The Commentary specifically defines “economic exploitation of children” as employment or work, other than light work, before a child completes compulsory schooling, reaches the age of either fifteen or the age when compulsory schooling is no longer required.¹⁹² The Commentary cites specific examples of what does and does not constitute “economic exploitation of children,” leaving little or no room for doubt. Exploitation includes employing them in a manner that harms their health or development; prevents them from going to school; or is inconsistent with well-established conventions against child labor.¹⁹³ “Work done by children in schools for general, vocational, or technical education or in other training institutions,” on the other hand, does not constitute economic exploitation.¹⁹⁴

The Country Report of the United States Department of State, which estimates that 15,000 child slaves worked on cocoa, cotton and coffee farms in the Ivory Coast in the year 2000, depicts a well-known context for this Norm.¹⁹⁵ Cocoa, most of it exported, fuels one-third of the Ivory Coast’s economy.¹⁹⁶ In this instance, the chocolate industry actually “announced that it accepted responsibility for labor practices on cocoa farms and will work with other stakeholders to eliminate child slavery.”¹⁹⁷ Who has room for doubt in this context?

Conventions: C 115 Radiation Protection Convention, 1960; C 119 Guarding of Machinery Convention, 1963; C 148 Working Environment (Air Pollution, Noise and Vibration) Convention, 1977; C 155 Occupational Safety and Health Convention, 1981; C 161 Occupational Health Services Convention, 1985; C 174 Prevention of Major Industrial Accidents Convention, 1993; as well as the (non-binding) Recommendations thereto.

190. *Universal Declaration*, *supra* note 18, at art. 28.

191. *Norms*, *supra* note 1, at art. 6.

192. *Commentary*, *supra* note 14, at art. 6(a).

193. *Id.*

194. *Id.*

195. U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, AFRICAN COUNTRIES (2000), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/af/8355.htm> (last visited June 23, 2004).

196. Child Labor Coalition, *Nothing Sweet: Child Slave Labor in Ivory Coast Cocoa Fields*, at <http://www.stopchildlabor.org/internationalchildlabor/facts.htm> (last visited July 8, 2004).

197. Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT’L L. 91, 94 n. 11 (2002).

Article 11 of the Norms provides, in part, that transnational corporations

shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage, nor shall they be solicited or expected to give a bribe or other improper advantage to any Government, public official, candidate for elective post, any member of the armed forces or security forces, or any other individual or organization.¹⁹⁸

This language essentially summarizes the anti-bribery provisions of the Foreign Corrupt Practices Act¹⁹⁹ and the OECD Anti-Bribery Convention.²⁰⁰ Though these instruments vary and each contain gray areas, the language of the Norms does not “muddy up the waters” confusing generally accepted international norms against corruption and bribery. The context remains unchanged.

Although specific or limited purpose and powers requirements no longer exist in the corporation statutes of most American states, no state “removed the requirement that the corporation’s purposes and activities be ‘lawful’ or ‘legal.’”²⁰¹ Unocal’s articles of incorporation state that its purpose is “to engage in any *lawful* act or activity for which a corporation may be organized under California law.”²⁰² Nike’s corporate charter states that its purpose is “to engage in any *lawful* activity for which corporations may be organized under Oregon law” (italics added).²⁰³ The Revised Model Business Corporation Act, adopted by Delaware, New York, Illinois, and many other business-oriented states, provides that “every corporation incorporated under this Act has the purpose of engaging in any lawful business.”²⁰⁴

Corporations are not strangers to law; they are creatures of law. Their goals are primarily economic growth and profit maximization. The context of the corporate pursuit of these goals is not doubted. Human beings, their work and some level of interaction with the environment are the perennial context of any business enterprise. The fact that corporate illegality is difficult to control and that their conduct is “imperfectly regulated by social

198. *Norms*, *supra* note 1, at art. 11.

199. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 94 Stat. 1494-98 (codified as 15 U.S.C. § 78m).

200. ORG. FOR ECON. CO-OPERATION AND DEV., CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, at <http://www.oecd.org> (last visited June 22, 2004).

201. Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on how Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1316 (2001).

202. *Id.* at 1318 (emphasis added).

203. *Id.* (emphasis added).

204. *Id.*

controls²⁰⁵ does not cast the slightest doubt on their legal or moral obligations. Rather, it demonstrates the factual truth that money and might often allow corporations to elude consequences of derogating norms assumed by domestic and international law.

The Norms are not flawed. Instead, the context in which transnational corporations frame their human rights duties is what is fundamentally flawed. The UN consulted both the IOE and the ICC when constructing the Norms.²⁰⁶ As they see it, "business principles and responsibilities should be developed and implemented by the companies themselves" in order for them to be "effective and relevant to a company's specific circumstances."²⁰⁷ The language clearly reflects their viewpoint that international human rights are management issues. It is their framework that is fundamentally flawed. Development of efficient internal systems to ensure effective compliance with these legal norms is a management issue specific to each company's circumstances. *How* to comply is a management question; *whether* to comply is a legal one.

The IOE and the ICC further object to the Norms because they are "bound to conflict with company policies and practices based on history, culture, philosophy and laws and regulations of the countries in which they operate."²⁰⁸ States cannot derogate or limit the rights recognized in the CESC based on arguments of different social, religious, or cultural background.²⁰⁹ Why should a business be able to do so?

International business groups further allege the Norms are flawed because they are counterproductive to the UN's ongoing efforts encouraging companies to support and observe human rights norms by participating in the Global Compact.²¹⁰ The glaring error in this assertion is that the Global Compact is not legally enforceable²¹¹ while the Norms are.²¹² Promulgation of the Norms does not preclude, in any way, companies from participating in the Compact. Their provisions are based on the same human rights standards and culled from essentially the same international instruments. Therefore, a good faith reading demonstrates that participation in the Compact, and the exchange of information and best practices with other transnational corporations at annual international meetings (such as the

205. *Id.* at 1290.

206. *Joint Views*, *supra* note 15. See also CORPORATE RESPONSIBILITY, *supra* note 151.

207. *Joint Views*, *supra* note 15.

208. *Id.*

209. *Maastricht Guidelines*, *supra* note 51, at art. 8.

210. *Joint Views*, *supra* note 15.

211. *Global Compact*, *supra* note 3. See *Nine Principles*, *supra* note 4.

212. *Norms*, *supra* note 1, at pmb. ¶15.

meeting held last year in Belo Horizonte, Brazil), would constitute a useful management approach to identify and implement initiatives most relevant to the company's circumstances.²¹³ The purpose of the Compact is to unite transnational corporations with the four "core" UN agencies: the Office of the High Commissioner for Human Rights, the United Nations Environment Programme [sic], the International Labour Organization and the United Nations Industrial Development Organization.²¹⁴ Simply reviewing the websites of these agencies offers an unsurpassed wealth of information.²¹⁵ It is difficult to imagine that these organizations would not offer tremendous assistance to transnational corporations in complying with the Norms.

What the transnational corporations lack is good faith. Not only do transnational corporations oppose both the Norms and their legally binding status, but some declared they will not stay in the *Compact* if the labor rules enshrined in the Declaration of the Tripartite Principles and the Social Policy of the ILO are imposed on them.²¹⁶ However, these labor rules are not, nor can they be, "imposed" on companies as they imply. As with all ILO Conventions, business was involved in the tri-partite development and decision making process throughout the drafting and adopting process.²¹⁷ The origin of the Tripartite Declaration lies in a Tripartite Meeting of Experts between Multinational Enterprises and Social Policy held in 1972.²¹⁸ Through the five years it took to complete the Tripartite Declaration, transnational corporations participated in, and were consulted, regarding research, studies, recommendations and drafts that covered "all of the areas of ILO concern which relate to the social aspects of the activities of multinational enterprises."²¹⁹ Either transnational corporations can fulfill their legal duty to obey these international legal instruments, or they can breach. The legal question focuses on the obligation to adhere, not some far-fetched exemption from this duty.

213. *Global Compact*, *supra* note 3.

214. *Nine Principles*, *supra* note 4.

215. See the following web addresses: <http://www.unhchr.ch>; <http://www.unep.org>; <http://www.ilo.org>; <http://www.unido.org>.

216. AM. ASS'N OF JURISTS AND CENTRE EUROPE TIERS MONDE, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS, ACTS AND CONCLUSIONS OF THE CÉLIGNY SEMINAR, *available at*: <http://www.cetim.ch/activeng.htm> (last visited June 22, 2004) [hereinafter CELIGNY SEMINAR].

217. Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, *adopted* Nov. 1977, 38 I.L.O. A(3), pmb. ¶3, *available at* <http://www.ilo.org/ilolex/html> (last visited June 20, 2004) [hereinafter Tripartite Declaration]. The Governing Body of the International Labour Office adopted this Declaration at its 204th Session.

218. *Id.* at pmb. ¶5.

219. *Id.* at pmb. ¶¶4-8.

By insisting that the Tripartite Declaration not apply to them, these transnational corporations essentially seek a reservation to the Compact that is incompatible with its object or purpose, a violation of international law.²²⁰ The Tripartite Declaration, one of the three foundation documents of the Compact,²²¹ provides the framework for the labor standards of the Compact²²² and restates fundamental international human rights law of freedom of association,²²³ collective bargaining²²⁴ and examination of worker grievances “without suffering any prejudice whatsoever as a result.”²²⁵ The Tripartite Declaration notes that transnational corporations have a burden, or duty, to provide a non-retaliatory grievance procedure.²²⁶ This obligation is *all the more important* when they are operating “in countries which do not abide by the principles of ILO Conventions pertaining to freedom of association, to the right to organize and bargain collectively, and to forced labor.”²²⁷

Transnational corporations feel very put upon by what they see as the “bureaucratization” and “restrictions” imposed on them by the Norms.²²⁸ This so-called bureaucratization cramps their creative compliance style, they assert.²²⁹ Their claim is that they prefer to “*exceed* legal requirements to voluntarily advance their own corporate responsibility programs and practices, particularly where local law is absent or insufficient.”²³⁰ Yet, they seek exemption from a century’s worth of established international law concerning the rights of employees and duties of employers.²³¹ The Tripartite Declaration specifically references fifteen ILO Conventions and nineteen Recommendations, including Convention (No. 29) concerning Forced or Compulsory Labor, 1930, an ILO fundamental human rights document to which 163 states are parties,²³² as well as more recent international conventions such as Convention (No. 122) concerning Employment Policy, 1964, ratified by ninety-four states.²³³

220. Vienna Convention, *supra* note 32, at art. 19(c).

221. *Nine Principles*, *supra* note 4

222. See *id.* where the relevant standards are to (3) uphold freedom of association; (4) eliminate all forms of forced and compulsory labor; (5) abolish child labor; and (6) eliminate employment and occupation discrimination.

223. Tripartite Declaration, *supra* note 217, at arts. 41–47.

224. *Id.* at arts. 48–55.

225. *Id.* at art. 57.

226. *Id.*

227. *Id.*

228. *Corporate Responsibility*, *supra* note 151.

229. *Id.*

230. *Id.* (emphasis added).

231. CELIGNY SEMINAR, *supra* note 216.

232. Convention Concerning Forced or Compulsory Labor, 39 U.N.T.S. 55 (entered into force May 1, 1932).

233. Convention Concerning Employment Policy, 569 U.N.T.S. 65 (entered

When seeking to make a reservation to the Compact in contravention of its purpose and object, human rights, transnational corporations should consider the reasoning of the International Court of Justice when it determined that the appropriate criterion for making a reservation would be the compatibility of the reservation with the purpose of the Convention.²³⁴ Because the object and purpose of the Genocide Convention is one of fundamental human rights, the Court reasoned that contracting parties “[did] not have any interests of their own; they merely had, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention.”²³⁵ By seeking exemption from the Tripartite Declaration, transnational corporations misunderstand the fundamental distinction between human rights conventions and contracts for the sale of Nike sneakers. In a human rights convention, parties recognize rights, rather than negotiate or bargain for them.²³⁶ As memorialized in the Tripartite Declaration, and confirmed by the Genocide Convention advisory opinion, this results in a heightened, not diminished, common duty to perform.

The international community has actually been declaring human rights law, particularly workplace human rights law, since before World War II.²³⁷ Many transnational corporations have simply been violating the legal rights of their employees and other affected persons for decades.²³⁸ Nonetheless, the world community has never accepted or acquiesced to the lawlessness of these entities’ conduct. Indeed, one of the stated reasons for issuing the Norms is that:

the Governing Body Subcommittee on Multinational Enterprises and Social Policy, the Committee of Experts on the Application of Standards, as well as the Committee on Freedom of Association of the International Labour Organization, which have named business enterprises implicated in States’ failure to comply with Conventions No. 87 concerning the Freedom of Association and Protection of the Right to Organize and No. 98 concerning the Application of the Principles of the Right to Organize and Bargain Collectively.²³⁹

“New international human rights issues and concerns are continually arising” and often involve transnational

into force July 9, 1965).

234. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, (*Advisory Opinion*), 1951 I.C.J. 15 (May 28).

235. *Id.*

236. *Id.*

237. For example, see the International Labour Organization website at <http://www.ilo.org> (last visited June 21, 2004).

238. *Norms*, *supra* note 1, at pmbl. ¶¶ 8, 12.

239. *Id.* at pmbl. ¶8.

corporations.²⁴⁰ For this reason, at the start of this century, the United Nations decided to set forth and implement standards²⁴¹ similar to how the International Labour Organization did at the beginning of last century.²⁴² The rules are not new, nor are the violations.

One hundred forty-two countries have ratified Convention No. 87, concerning Freedom of Association and Protection of the Right to Organize, 1948.²⁴³ One hundred fifty-three countries have ratified Convention No. 98, concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, 1949.²⁴⁴ Of the 180 Conventions and 185 Recommendations put in place by the ILO, Conventions, Nos. 87 and 98 are amongst the eight core conventions the ILO itself considers “fundamental to the rights of human beings at work.”²⁴⁵

The ILO is “a tripartite organization, the only one of its kind bringing together representatives of governments, employers and workers in its executive bodies.”²⁴⁶ It enjoys international legal personality.²⁴⁷ The ILO’s governing board, the Executive Council, has fifty-six members today.²⁴⁸ Half of the Council represents governments.²⁴⁹ Fourteen members represent trade unions and other workers’ groups; the remaining fourteen represent employers, largely from transnational corporations.²⁵⁰

The ILO was created in 1919, at the time of the Paris Peace Conference, and its Constitution became Part XIII of the Treaty of Versailles.²⁵¹ The ILO’s Constitution links civil and political rights to economic, social, and cultural rights, and provides that all these rights are necessary for world peace.²⁵² The ILO is the only

240. *Id.* at pmb. ¶12.

241. *Id.*

242. Int’l Labour Org., *What are International Labour Standards?*, at <http://www.ilo.org/public/english/standards/norm/whatare/index.htm> (last updated Oct. 20, 2000) [hereinafter *ILO Standards*].

243. Freedom of Association and Protection of the Right to Organize Convention No. 87, concerning Freedom of Association and Protection of the Right to Organize, July 9, 1948, 68 U.N.T.S. 17 (*entered into force* July 4, 1950) [hereinafter *ILO Association*].

244. Right to Organize and Collective Bargaining Convention No. 98, concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257 (*entered into force* July 18, 1951) [hereinafter *ILO Organization*].

245. *ILO Standards*, *supra* note 242.

246. Int’l Labour Org., *ILO History*, at: <http://www.ilo.org/public/english/about/history.htm> (last updated Oct. 26, 2000) [Hereinafter *ILO History*].

247. I.L.O. CONST. art. 39.

248. *ILO History*, *supra* note 246.

249. *Id.*

250. *Id.*

251. *Id.*

252. “Whereas universal and lasting peace can be established only if it is based upon social justice, and whereas conditions of labour exist involving

surviving organization from the League of Nations, and it was the first organization brought into the newly constituted United Nations.²⁵³ The United States became a member of the ILO in 1934 even though it did not belong to the League of Nations.²⁵⁴ The ILO adopted its first six standards in 1919, and its supervisory system on the application of its standards in 1926.²⁵⁵

The ILO standard-setting system still exists today.²⁵⁶ "The ILO's standards take the form of international labour Conventions and Recommendations."²⁵⁷ Whereas ILO Recommendations are non-binding, the ILO Conventions are "international treaties, subject to ratification by ILO member States."²⁵⁸ One hundred seventy-seven nation states belong to the ILO.²⁵⁹ Even nations that do not ratify a given Convention are bound not to act against it.²⁶⁰

Although the original purpose for creating the ILO was to adopt international standards dealing with labor problems and conditions involving "injustice, hardship, and privation," the ILO mandate expanded in 1944, with the incorporation of the Declaration of Philadelphia²⁶¹ into its Constitution and with the broadening of its standard-setting mandate to include "social policy, human and civil rights matters."²⁶² Before the end of the Second World War, the international legal community already averred that economic and political rights were the foundation of world peace and that their achievement depended upon the "continuous and concerted international efforts"²⁶³ of all parties responsible for it: workers, employers and governments.

such injustice, hardship and privation to large members of people as to produce unrest so great that peace and harmony of the world are imperiled. . . ." I.L.O. CONST. pmbl.

253. *ILO History*, *supra* note 246.

254. *Id.*

255. *Id.*

256. *Id.*

257. *ILO Standards*, *supra* note 242.

258. *Id.*

259. Int'l Labour Org., *Alphabetical List of ILO Member Countries*, at <http://www.ilo.org/public/english/standards/relm/country.htm> (last updated Oct. 7, 2003).

260. *ILO History*, *supra* note 246.

261. The four fundamental principles on which the ILO is based and which were reaffirmed in the "Declaration of Philadelphia" are: 1) Labor is not a commodity; 2) Freedom of expression and association are essential to progress; 3) Poverty anywhere constitutes a danger to prosperity everywhere; and 4) The war against want requires to be carried on with unrelenting vigor within each nation and by continuous and concerted international effort in which representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to promotion of the common welfare. I.L.O. CONST.

262. *ILO Standards*, *supra* note 242.

263. *Id.*

Transnational corporations repeatedly disregard and violate international human rights law of global employees.²⁶⁴ Therefore, it is not surprising that the Norms specifically mention that the “conventions and recommendations of the International Labour Organization” are amongst the United Nations treaties and other international instruments which “transnational corporations and other business enterprises, their officers and persons working for them are . . . obligated to respect.”²⁶⁵ The “standards set forth in the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the Declaration on Fundamental Principles and Rights at Work²⁶⁶ of the International Labour Organization” are separately stated as instruments taken into account when interpreting the Norms.²⁶⁷

In addition to the ILO instruments (the UN Charter and the Universal Declaration), the Preamble to the Norms recalls, recognizes and incorporates every human rights international covenant, declaration and protocol thereto issued by the United Nations itself.²⁶⁸ Additionally, it recognizes and incorporates regional human rights instruments and conventions related to human rights, workplace rights, development and environmental rights.²⁶⁹ The Rome Statute of the International Criminal Court, which established the International Criminal Court at the Hague; the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the Ethical Criteria for Medical Drug Promotion and the “Health for All in the Twenty-First Century” policy of the World Health Organization are just examples of this.²⁷⁰ The Slavery

264. *Norms*, *supra* note 1, at pmb. ¶8.

265. *Id.* at pmb. ¶4.

266. The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, restates the four fundamental ILO principles regarding (i) freedom of association and collective bargaining, (ii) forced or compulsory labor, (iii) child labor and (iv) workplace discrimination. INT'L LABOR ORG., DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998). The Declaration requests that all parties reaffirm these principles and promote their application in light of the “urgent” situation of growing economic interdependence. *Id.* It also refers to the need to give special attention to the unemployed and migrant workers. *Id.* See Shelton, *supra* note 41, at 296 (discussing how migrant workers are most severely impacted by the shift to a benefit-free workplace). In particular, “women comprise the largest segment of migrant labor flows, both internally and internationally. States often do not include migrant workers in their labor standards, leaving women particularly vulnerable.” *Id.*

267. *Norms*, *supra* note 1, at pmb. ¶5.

268. *Id.* at pmb. ¶¶1-5.

269. *Id.*

270. *Id.* at pmb. ¶4.

Convention,²⁷¹ an instrument of the League of Nations given full legal force and effect by a United Nations protocol,²⁷² is listed among all the other anti-slavery conventions of the UN.²⁷³ The full body of international human rights law, both those recently recognized and those set in stone, has been set forth,²⁷⁴ lest ignorance of the law rear its disdainful little head. If there is an omission from this exhaustive list, transnational corporations and their agents must still obey "other instruments."²⁷⁵

VI. COMMENTARY: RULES OF CONSTRUCTION AND INTERPRETATION

The Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights²⁷⁶ ("Commentary") is clear and detailed as to construction and interpretation of the Norms. The rules of construction and interpretation are set forth in Section A., General Obligations.²⁷⁷ States retain general obligations of promotion, fulfillment of, respecting and ensuring the respect and protection of human rights, including ensuring that transnational corporations also respect them.²⁷⁸ Transnational corporations, "within their respective spheres of activity and influence," have the same duties, including the duty to respect "the rights and interest of indigenous peoples and other vulnerable groups."²⁷⁹

This language, "*respect, protect, and fulfill*," establishes duties, the breach of which constitute violations of the CESC, as explained in the *Maastricht Guidelines*.²⁸⁰ The *Maastricht Guidelines* make it clear that States owe these duties to their citizens under international law, and that failure to comply with these rights constitutes a violation of them.²⁸¹ "The obligation to *respect*, for example, requires States to refrain from interfering with the enjoyment of their people's economic, social, and cultural rights. Thus, the right to housing is violated if the State engages

271. *Slavery Convention*, Sept. 25, 1926, 60 L.N.T.S. 253. The recitals of this convention reference the General Act of Brussels Conference, 1889-90, expressing their firm intention to "putting an end to traffic in African slaves" as well as the Convention of Saint-Germain-en-Laye of 1919, whose intention was to "secure the complete suppression of slavery in all its forms". *Id.* (emphasis added).

272. Transfer to the United Nations of the Functions exercised by the League of Nations under the Slavery Convention of 25 Sept. 1926, G.A. Res. 794 (VIII), U.N. GAOR, 8th Sess., 453d plen. mtg. (1953).

273. *Norms*, *supra* note 1, at pmbl ¶4.

274. *Id.*

275. *Id.*

276. *Commentary*, *supra* note 14.

277. *Id.* at art. 1 cmt. (a).

278. *Id.*

279. *Id.*

280. *Maastricht Guidelines*, *supra* note 51, at art. 6.

281. *Id.*

in arbitrary forced evictions.”²⁸²

The Norms now unequivocally provide that transnational corporations also have obligations “recognized in national as well as international law.”²⁸³ While the Norms reflect the development of international law, human rights norms do not bind merely states and their agents. Instead, as the Second Circuit held in *Kadic v. Radovan Karadzic*, 70 F.3d 232, 239 (1995), “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” The adoption of the *Convention for the Protection of Human Rights and Fundamental Freedoms*,²⁸⁴ entered into force on September 3, 1953, and ratified by all but one of the signatory countries of the Council of Europe,²⁸⁵ (“Rome Convention”) also attests to this development. Article 19 of the Rome Convention establishes the European Court of Human Rights, which functions on a *permanent* basis.²⁸⁶ Unlike the International Court of Justice (“ICJ”) established by Article 92 of the United Nations Charter and succeeded to the Permanent Court of International Justice²⁸⁷ — individuals, groups of individuals and non-governmental organizations can bring a suit claiming violation of their human rights before the permanent Court of Human Rights.²⁸⁸ This broadens development of international law; while the ICJ’s subject-matter jurisdiction includes human rights violations, only United Nations member states have standing to bring disputes before it.²⁸⁹ In important dictum in a 1999 human rights suit, the United States District Court of New Jersey stated that “no logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under the color of law.”²⁹⁰

“The obligation of transnational corporations and other business enterprises under these Norms applies equally to activities occurring in the home country or territory of the

282. *Id.* (emphasis added).

283. *Norms*, *supra* note 1, at art. 1.

284. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (as amended by Protocol No. 3 (entered into force Sept. 21, 1970), Protocol No. 5 (entered into force Dec. 20, 1971), Protocol No. 8 (entered into force Jan. 1, 1990) and Protocol No. 11 (entered into force Nov. 1, 1998)) [hereinafter the Rome Convention].

285. Council of Europe, *The Conventions*, at <http://conventions.coe.int> (last visited July 1, 2004).

286. Rome Convention, *supra* note 284, at art. 19.

287. ICJ Statute, art. 37, 59 Stat. 1055, 1060.

288. Rome Convention, *supra* note 284, at art. 34.

289. ICJ Statute, art. 38, 59 Stat. 1055, 1060 and art. 41(1) at 1061.

290. *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424, 445 (D. N.J. 1999).

transnational corporation or other business enterprise, and in any country in which the business is engaged in activities.”²⁹¹ Whether employees at NCR’s headquarters in the suburbs of Chicago, or indigenous people of Myanmar -- where Unocal and TotalFina built a gas pipeline, and where “there is little question that thousands of villagers were impressed to perform labor for the benefit of [the] pipeline project”²⁹² -- all people hold these rights as members of society.²⁹³ It is undisputed that transnational corporations must observe these rights under a universal obligation.

Also as part of the general interpretative construct, transnational corporations “shall have the duty to use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses,”²⁹⁴ and “that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware.”²⁹⁵ In other words, Nike cannot be excused from breaching human rights obligations to the workers at the Doson factory in Indonesia from which it purchased its shoes by merely claiming it had no knowledge that workers were not paid enough, despite full-time employment and overtime, to meet their families’ basic needs.²⁹⁶ This violates the workers’ rights under the CESC, which provides that everyone has the right to fair wages²⁹⁷ and an “adequate standard of living for himself and his family.”²⁹⁸ Nor can Nike disclaim liability for human rights abuses through assertions of ignorance of its extensive use of child labor, particularly children under the age of 10, in violation of the following international human rights laws: Article 10(3) of the CESC,²⁹⁹ Article 32 of the CRC,³⁰⁰ and the two ILO core human

291. *Commentary*, *supra* note 14, at art. 1 cmt. (a).

292. Terry Collingsworth, *Boundaries in the Field of Human Rights: The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 188 (2002).

293. *Universal Declaration*, *supra* note 18, at art. 22.

294. *Commentary*, *supra* note 14, at art. 1 cmt. (a).

295. *Id.* at art. 1 cmt. (b).

296. TIMOTHY CONNOR, WE ARE NOT MACHINES 6 (2002), *available at* <http://www.oxfam.org.au/campaigns/nike/reports/machines/notmachines.pdf> (last visited June 14, 2004).

297. CESC, *supra* note 21, at art. 7 ¶ 1(a).

298. *Id.* at art. 11 ¶ 1.

299. “Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development *should be punishable by law.*” *Id.* (emphasis added).

300. CRC, *supra* note 54.

(1) Children have the right to be protected from economic exploitation and from performing any work likely to be hazardous or to interfere with their education, or to be harmful to their health or their physical, mental, spiritual, moral or social development. (2) States are expected to provide (a) minimum age for employment; (b) regulation of work

rights conventions, the *Minimum Age Convention*, 1973 (No. 138) and the *Worst Forms of Child Labour Convention*, 1999.³⁰¹

A simple visit to the website of the United States Department of State's Country Reports on Human Rights Practices would tell Nike that although the Indonesian government passed legislation to protect children, implementation of the law was weak and child labor remained a major problem.³⁰² The Department of State website reports that Indonesian manufacturers hire women in low-paying, low-level jobs, and that "female workers tend to be hired as day laborers, instead of as full-time permanent employees, and companies are not required to provide benefits, such as maternity leave, to day laborers."³⁰³ This is a clear violation of two core ILO human rights conventions: the *Equal Remuneration Convention*, 1951 (No. 100) and the *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111) as well as three ILO basic human rights and employment conventions.³⁰⁴ Indonesian manufacturers also violate female employees' human rights under Article 11 of the *Convention on the Elimination of all Forms of Discrimination Against Women* ("CEDAW"), to which Indonesia is a contracting party.³⁰⁵

Under the UN Norms, there is no need to establish joint action of the transnational corporation and the government violating its human rights duties toward its own citizens or subjects. The Norms do not assert that Nike is in a position, legal or otherwise, to bring suit against Indonesia for violating the CEDAW. Nor do they assert that Nike can or must force Indonesia to implement its own child labor laws. Under the due diligence obligation Nike owes to the Doson factory employees,

hours and conditions; and (c) provide penalties and sanctions for these violations.

Just because the state hasn't fulfilled its end, or cannot or will not enforce the laws it has promulgated does not mean that companies do not violate the rights of children when employing them at too young an age, for too many hours, in dangerous conditions in their mines, on their plantations, in their factories.

Id.

301. See *ILO Standards*, *supra* note 243 (stating that "132 countries have ratified this convention in under three years, making it the fastest to be ratified in the ILO's 82-year history, and clearly demonstrating rapidly growing worldwide support against abusive child labor").

302. U.S. DEP'T OF STATE, 2002 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18245.htm> (last visited July 6, 2004).

303. *Id.*

304. The Maternity Protection Convention, 1919 (No.3); the Maternity Protection Convention (Revised), 1952 (No. 103); and the Workers with Family Responsibilities Convention, 1981 (No. 156).

305. CEDAW, *supra* note 54.

from whose work it certainly benefits, Nike simply cannot turn a blind eye, willfully or negligently, to the fact that workers, particularly women and small children, are forced to work 14 to 16 hour days to fill orders for sneakers, and that wages earned do not meet the minimum standard of living in their own country.³⁰⁶ Nike does not have strict liability under the Norms. Instead, they cannot benefit from or contribute to abuses of which they were either aware or ought to have been aware.³⁰⁷ The Commentary specifically explains that transnational corporations “shall assure . . . monitoring (of human rights compliance) by their contractors, subcontractors, suppliers, licensees, distributors, and any other natural or legal persons with whom they have entered into any agreements, *to the extent possible*.”³⁰⁸ Should a cause of action arise, the rest is a question of proof.

Whereas Nike breached its duty to respect workers’ human rights, Coca-Cola flagrantly violated its due diligence duty to protect the human rights of workers from whom it certainly benefited.³⁰⁹ Coca-Cola was fully aware that the manager of the Coca-Cola bottling plant, Ariosto Mosquera, planned and carried out execution of trade union leaders.³¹⁰ The union had asked them for protection the first time after the manager brought paramilitaries into the factory and stood beside them as he threatened to “sweep away the union.”³¹¹ The union contacted Coca-Cola for help, but received no response.³¹² Nor did Coke respond to their entreaties after the union office was burnt down and “the paramilitaries were welcomed back into the plant by the management, and were permitted to address the workers, who were warned to resign from the union or die.”³¹³ Coke had knowledge that the paramilitaries led the workers into the manager’s office, where the manager had union resignation forms ready for all of the workers to sign.³¹⁴

When sued by the Estate of Isidro Gil, a union leader killed by paramilitaries following the threats of which Coca-Cola had full knowledge, Coca-Cola defended by alleging it had no control over the bottling plant with which it had an “anchor bottler” agreement” (an agreement “exclusively on behalf of and for the

306. CONNOR, *supra* note 296, at 9.

307. *Commentary, supra* note 14, at art. 1 cmt. (b).

308. *Id.* at art. 16 cmt. (d) (emphasis added).

309. Plaintiff’s Memo in Response to Motion to Dismiss at 4, *United Steel Workers v. Panamerican Bottling Co.*, (S.D. Fla. 2001), *available at* <http://www.cokewatch.org/resdismFINAL.rtf> [hereinafter *USW Memo*] (last visited July 8, 2004).

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 19.

314. *Id.* at 18.

benefit of Coca-Cola,” one of seventeen such agreements in place throughout Colombia).³¹⁵ Coca-Cola certainly has not met the due diligence standard under Article 1(b) of the Commentary based on its flagrant violations of Article 8 of the CESC³¹⁶ and Article 22 of the CCPR,³¹⁷ as well as ILO Conventions No. 87³¹⁸ and 98,³¹⁹ Universal Declaration Articles 20³²⁰ and 23(4),³²¹ and several other instruments of international human rights law. Under the duty to monitor the human rights complaints of licensees,³²² Coke would not be able to assert, as it has, that it knew of the abuses,³²³ but disclaimed responsibility for the abuses because it does not own the Colombian bottling plants.³²⁴

In establishing this duty to monitor, the Norms simply implement the 1999 General Assembly *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society* (“RR of Individuals, Groups and Organs of Society”)³²⁵ whereby “no one shall participate, by act or failure to act where required, in violating human rights and fundamental freedoms.”³²⁶ The extent of Coca-Cola’s participation, or action, in the Colombian work environment plainly demands a level of accountability.

Another rule of construction in the Norms is that transnational corporations “shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights.”³²⁷ British Petroleum (“BP”) is the lead company in the BTC Consortium (“BTC”) pipeline project approved for funding on November 11, 2003.³²⁸ The 1,760 kilometer pipeline will transfer one million barrels of crude oil per day from Baku,

315. *Id.* at 3

316. Freedom to join trade unions. CESC, *supra* note 21, at art. 8 ¶ 1(a).

317. Freedom of association, including the right to unionize. CCPR, *supra* note 22, at art. 22 ¶ 1.

318. “Freedom of association and protection of the right to organize.” ILO Association, *supra* note 243.

319. “Right to organize and collective bargaining.” ILO Organization, *supra* note 244.

320. “Right to freedom of peaceful assembly and association.” *Universal Declaration*, *supra* note 18, at art. 20 ¶ 1.

321. “Right to form and join trade unions.” *Id.* at art 23 ¶(4).

322. *Commentary*, *supra* note 14, at art. 16 cmt. (d).

323. *USW Memo*, *supra* note 309, at 3.

324. *Id.*

325. *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, G.A. Res.53/144, U.N. GAOR, 53d Sess., 85th plen. mtg., at annex, U.N. Doc. A/RES/53/144 (1999).

326. *Id.* at art. 10.

327. *Commentary*, *supra* note 14, at art. 1 cmt. (b).

328. Joanna Chung, *Funding for Oil Pipeline Project Approved*, FIN. TIMES, Nov. 12, 2003, at A1.

via Azerbaijan and Georgia, to the Turkish port of Ceyhan.³²⁹ Under the host agreements BP negotiated with the Azerbaijani, Georgian and Turkish governments, BTC is exempt from any obligations under host country laws, violating both fundamental norms of national sovereignty and “the citizens’ right to redress for harm that may be done during the course of the project.”³³⁰ In addition to undermining the rule of law, BP is breaching its duty to respect the affected people’s right of self-determination, by virtue of which they “freely determine their political status and freely pursue their economic, social and cultural development.”³³¹ It is further breaching its duty to protect their fundamental right to an effective remedy,³³² as well as its obligation to fulfill their right to enjoy their economic, cultural, or social rights, free of unlawful limitations incompatible with the nature of these rights within the general welfare of a democratic society.³³³

The BTC pipeline construction “increases the likelihood of debilitating landslides and other environmental damage,” in Georgia.³³⁴ Local Georgian villages, however, are not even marked on BP’s regional maps.³³⁵ Landslides, moreover, will only hasten pipeline corrosion and leaks.³³⁶ These actions violate the most fundamental environmental rights of these Georgian individuals. The *Stockholm Declaration on the Human Environment* (“Stockholm Declaration”) provides that both natural and man-made aspects of man’s environment “are essential to his well-being and to the enjoyment of basic human rights the right to life itself.”³³⁷ Under Principle 18 of the Stockholm Declaration, the intended application of science and technology is the identification, avoidance and control of environmental risks and the solution of environmental problems.³³⁸ The *Rio Declaration on Environment and Development*, (the “Rio Declaration”), which reaffirms the Stockholm Declaration and seeks to build upon it,³³⁹ provides under its first principle that “human beings are at the centre of

329. Nick Hildyard et al., *Azerbaijan, Georgia & Turkey – BTC Pipeline, in RACE TO THE BOTTOM TAKE II 10* (Gabrielle Watson ed., 2003), available at [http:// globalpolicy.igc.org/soecon/tnc/2003/0915racetothetbottom.pdf](http://globalpolicy.igc.org/soecon/tnc/2003/0915racetothetbottom.pdf) (last visited June 22, 2004).

330. *Id.*

331. CESC, *supra* note 21, at art. 1 ¶ 1; CCPR, *supra* note 22, art. 1 ¶ 1.

332. CCPR, *supra* note 22, at art. 2 ¶ 3(b); *Universal Declaration*, *supra* note 18, at art. 8.

333. CESC, *supra* note 21, at art. 4.

334. Hildyard, et al., *supra* note 329, at 11.

335. *Id.*

336. *Id.*

337. UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, STOCKHOLM DECLARATION ON THE HUMAN ENVIRONMENT, U.N. Doc A/CONF.48/14, U.N. Pub. E73, IIA 14 (1973), at pmb. ¶1.

338. *Id.* at Principle 18.

339. RIO DECLARATION, *supra* note 140, at pmb.

concerns for sustainable development,” and that “they are entitled to a healthy and productive life in harmony with nature.”³⁴⁰ Principle 25 of the Rio Declaration provides that “peace, development and environmental protection,” like economic, social, cultural, civil and political rights, “are interdependent and indivisible.”³⁴¹ There is no doubt that BP and other consortium members violated the human rights and fundamental freedoms of the Georgian people. That human rights enforcement should be left to nation states is an assertion nothing short of contemptuous in a context such as this.

In Azerbaijan, again according to the United States Department of State, ninety percent of the country’s export revenues come from the oil and gas sector.³⁴² Corruption and patronage are rampant, while the government’s human rights record is poor.³⁴³ Georgia’s government record is also poor, and corruption in law enforcement is pervasive.³⁴⁴ The Georgian judiciary is also “subject to pervasive corruption and does not ensure due process.”³⁴⁵ Trafficking in forced labor remains a problem.³⁴⁶ Nonetheless, representatives of international business aver the Norms are flawed because “human rights violations are a task for national governments.”³⁴⁷

Instead of using its influence to help promote and ensure respect for human rights, BP actually boasts about its own ingenuity with regards to human rights violations committed against the Georgian and Azerbaijan people.³⁴⁸ The construction of the pipeline directly below people’s houses without compensation,³⁴⁹ violates the fundamental rights to self-determination,³⁵⁰ to health,³⁵¹ to enjoy the *benefits* of scientific progress and its applications³⁵² and not to be arbitrarily deprived of property.³⁵³

340. *Id.* at Principle 1.

341. *Id.* at Principle 25.

342. U.S. DEPT OF STATE, 2002 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: AZERBIJAN (2003), *available at*: <http://www.state.gov/g/drl/rls/hrrpt/2002/18353.htm> (last visited July 2, 2004).

343. *Id.*

344. U.S. DEPT OF STATE, 2002 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: GEORGIA, (2003), *available at*: <http://www.state.gov/g/drl/rls/hrrpt/2002/18366.htm> (last visited July 2, 2004).

345. *Id.*

346. *Id.*

347. *Joint Views*, *supra* note 15.

348. Hildyard, et al., *supra* note 329, at 12.

349. *Id.*

350. CESC, *supra* note 21, at art. 1; CCPR, *supra* note 22, at art. 1.

351. CESC, *supra* note 21, at art. 12.

352. *Id.* at art. 15 ¶(1(b)).

353. *Universal Declaration*, *supra* note 18, at art. 17 ¶(2).

BTC did not single out Azerbaijan and Georgia for human rights violations. The host agreements give Turkish security forces controlling the project permission to take action for "civil disturbance."³⁵⁴

The extraordinary vagueness of a rubric like civil disturbance would be worrying enough in a country with a decent human rights record; in Turkey, where responsibility for security has been handed to the gendarmerie, a paramilitary force implicated in the very worst atrocities of the civil war against the country's Kurds, it is hugely disturbing.³⁵⁵

BP has hired Turkish security forces to guard both construction and maintenance of the BTC pipeline.³⁵⁶ This despite the easily ascertainable fact that Turkish security forces committed serious human rights abuses, particularly in the Turkish countryside even though civilian and military authorities publicly commit to respect human rights and the rule of law.³⁵⁷ Is this the national government to whom the Turkish and ethnic Kurdish people's human rights should be "left"?

Finally, transnational corporations have a legal duty to "inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses."³⁵⁸ Under a contract with the United States government, DynCorp Corporation sprays toxic herbicide on Ecuadorian communities as part of the United States Government's "Plan Colombia," an operation attempting to eradicate coca plants in Colombia.³⁵⁹ The International Labor Rights Fund filed suit against DynCorp "on behalf of at least 10,000 Ecuadorian plaintiffs [who] are suffering serious health effects as a result of the spraying."³⁶⁰ DynCorp certainly violated its duty to inform itself of the impact of its own activities. If true, its actions clearly violate the Ecuadorian plaintiffs' right to health.³⁶¹ By failing to inform itself of the human rights impact of its activities, DynCorp will most likely not avoid complicity in the human rights abuses that the United States Government is perpetrating on the plaintiffs.

"The Unocal case is significant because it was the first lawsuit in which a court acknowledged that a [multinational

354. Hildyard, et al., *supra* note 329, at 12.

355. *Id.*

356. *Id.*

357. U.S. DEPT OF STATE, 2002 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: TURKEY (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18396.htm> (last visited July 2, 2004).

358. *Commentary, supra* note 14, at art. 1.

359. Collingsworth, *supra* note 292, at 195.

360. *Id.*

361. CESC, *supra* note 21, at art. 12.

corporation] could be liable for a violation of international law.”³⁶² Under their legal obligations to respect, protect and fulfill required by the Norms, neither Nike nor Coca-Cola could put forth the kinds of arguments Unocal did in its defense in a suit brought under the Alien Torts Claim Act.³⁶³ Unocal argued that, as a passive investor in the Myanmar pipeline, it was removed from the decisions related to forced labor made by the Myanmar government.³⁶⁴ Therefore, Unocal had no liability for violating the villagers’ universal human right against forced labor.³⁶⁵ The 9th Circuit, nonetheless, found sufficient evidence for a jury to find that Unocal had aided and abetted the Myanmar government.³⁶⁶ Under an expanding definition of “aiding and abetting,” accomplice mens rea need not be that of perpetrator mens rea.³⁶⁷ “Knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime” is sufficient to determine the requisite mental state of the private party defendant, the 9th Circuit held.³⁶⁸ This is further evidence of an evolving understanding of private party liability in international law.

However, the human rights duties imposed by the Norms require neither assertion nor proof of this mens rea. Instead, the corporation itself is accountable for its unitary actions that breach the duties it owes the human beings whose lives it affects. “Accountability establishes the right of the target state or group to hold the intervenors responsible for the consequences of their action.”³⁶⁹ Because under the Norms, international law governs the company’s own actions, color of law need not be established. It is clear that the Myanmar military government was violating its duties toward its people under the CCPR.³⁷⁰ In addition to nearly a century’s worth of treaties and conventions setting forth international human rights law, “case law and statements of the

362. Ramasastry, *supra* note 197, at 132.

363. Collingsworth, *supra* note 292, at 188-89.

364. *Id.* at 189.

365. *Id.*

366. *John Doe I v. Unocal Corp.*, Nos. 00-5663, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, *35 (9th Cir. 2002), *vacated by Doe v. Unocal Corp.*, Nos. 00-5663, 00-57197, 00-56628, 00-57195, 2003 U.S. App. LEXIS 2716, *3 (9th Cir. 2003).

367. *Id.*

368. *Id.*

369. Grossman & Bradlow, *supra* note 97, at 25.

370. “In its *Country Reports on Human Rights Practices for 1991*, the U.S. Department of State reported that the Myanmar military government ‘routinely employs corvee labor on its myriad building projects’ and the ‘the Burmese army has for decades conscripted civilian males to serve as porters.’” *John Doe I*, 2002 U.S. App. LEXIS 19263 at *15 n. 6. Such action has been a violation of international human rights law since the Convention concerning Forced or Compulsory Labor. ILO No. 29, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932).

Nuremberg Tribunals unequivocally establish that forced labor violates customary international law.³⁷¹ Unocal's knowledge of the Myanmar government's actions as of January 4, 1995 is undisputed.³⁷² It is equally clear, as established by the UN Norms, that Unocal's unitary actions³⁷³ breached its international legal obligations to respect, protect and fulfill the rights of the Myanmar pipeline workers under Article 6 of the CESC³⁷⁴ as well as other international human rights instruments and customary international law.³⁷⁵

As established by Nuremberg over fifty years ago: "economic interests are not a defense to human rights violations."³⁷⁶ Unocal's actions very much *affected* the lives of the Burmese villagers. Almost ninety years ago, Judge Cardozo held that the law imposed a duty on a defendant-manufacturer because of its affirmative conduct, which it had to know would likely affect the interests of another.³⁷⁷ International law has finally evolved to the point of imposing liability on *all* actors, not just state actors, whose affirmative conduct affects the interdependent and intertwined human rights of people such as these Burmese villagers.

VII. ENFORCEMENT

What was missing, until now, was an enforcement

371. *Iwanowa*, 67 F. Supp. 2d at 441.

372. See *John Doe I*, 2002 U.S. App. LEXIS 19263, at *14 (finding the existence of substantial evidence that Unocal had knowledge of the human rights violations occurring as early as May 1992, when its consultants, Control Risk Group informed that the Myanmar government habitually used forced labor).

On January 4, 1995, Unocal's president met with human rights organizations at Unocal's headquarters in Los Angeles and told them that "people are threatening physical damage to the pipeline," that "if you threaten the pipeline there's gonna [sic] be more military," and that "if forced labor goes hand and glove with the military yes there will be more forced labor." *Id.* at *16.

373. So, of course, were TotalFina's, Unocal's joint venture partner and original co-defendant in the case. TotalFina S.A., is a French corporation over whom the United States District Court was unable to assert personal jurisdiction. *John Doe I*, 963 F. Supp. at 894-95.

374. Providing that the right to work includes the right of everyone to have the opportunity to make his/her living by work he/she freely chooses or accepts. CESC, *supra* note 21, at art. 6.

375. CCPR, *supra* note 22 at art. 8 The CCPR prohibits slavery, servitude and forced or compulsory labor; the Universal Declaration recognizes the right of everyone to free choice of employment. *Id.*; *Universal Declaration*, *supra* note 18, at art. 23. Unocal and TotalFina also allegedly violated the Burmese villagers human rights protected by the ILO core conventions, ILO Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105). *John Doe I*, 963 F. Supp. at 885.

376. Collingsworth, *supra* note 292, at 191.

377. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

mechanism. The United Nations finally answered, or at least arguably addressed, the nagging question posed by so many parties involved or interested in international legal problems: "Of what good is the jungle of documents created by these fancy international organizations if they cannot deliver an iota of satisfaction to the poor masses of our so-called civilized universe?"³⁷⁸

Transnational corporations and other business entities will be subject to "periodic monitoring and verification by United Nations and other international and national mechanisms already in existence or yet to be created regarding the application of the Norms."³⁷⁹ The existing United Nations monitoring bodies set forth in the Commentary include the human rights treaty bodies, the specialized agencies, country rapporteurs, and the Sub-Commission on the Promotion and Protection of Human Rights and its relevant working group.³⁸⁰ The human rights treaty bodies were, of course, all established as committees under the international human rights covenants.³⁸¹ The committees, in turn, report to the ESCOC, who, in turn, reports to the General Assembly. None of these committees lacks experts, expertise or structural or institutional validity. What they lack is obvious: a sanction mechanism.

The specialized agencies may have some bite in encouraging recalcitrant transnational corporations to implement procedures if they carry out the suggestions in the Commentary and use the Norms "as a basis for procurement determinations concerning products and services to be purchased."³⁸²

The Commentary advises the country rapporteurs to use the Norms and other relevant international standards to raise concerns about actions by transnational corporations and other business entities.³⁸³ *Raising concerns*, for all its hype as the great regulator of corporate conduct, is no more effective than the voluntary compliance theory, and never actually hits corporations

378. Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U. L. REV. 235, 240 (1994).

379. *Commentary*, *supra* note 14, at art. 16.

380. *Id.*

381. Human Rights Committee established by Article 28 of the CCPR; Committee on the Elimination of Racial Discrimination established by Article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination; Committee on the Elimination of Discrimination Against Women established by Article 17 of the CEDAW; Committee Against Torture established by Article 17 of the Torture Convention; Committee on the Right of the Child established by Article 43 of the CCR.

382. *Commentary*, *supra* note 14, at art. 16(b).

383. *Id.*

where it hurts: the bottom line.³⁸⁴ Although many people “assume that firms such as Nike, Nestle and Shell have paid hefty for being targeted by a high-profile [human rights] campaign . . . the evidence of damage is scarce.”³⁸⁵ “Despite all of the international reporting and pronouncements, Burma, a charter member of the World Trade Organization, is still open for business.”³⁸⁶ So are Unocal and TotalFina. Though the public revelation of the harsh working conditions endured by employees like fifteen year-old Wendy Diaz in Honduras certainly embarrassed Kathie Lee Gifford, there is no indication that Wal-Mart, who sold the clothing, saw any related decline in revenues.³⁸⁷

Professor François Rigaux presented a better enforcement suggestion at the Céligny Seminar on the Activities of Transnational Corporations organized by the American Association of Jurists (“AAJ”) and the Europe – Third World Center (“CETIM”) held on May 4 and 5, 2001:

An international court for TNCs should be created through a treaty between States, such as the International Criminal Court . . . in Rome and must be competent to judge TNCs both civilly and criminally without excluding the responsibility of individuals. International law in effect regarding human rights should be applied, establishing a hierarchy of rights where priority is granted to the most essential of these rights, such as the right to life, to health, the right not to suffer torture or cruel, inhuman or degrading treatment.³⁸⁸

The Norms now set forth the duties owed by transnational corporations to the human beings whose lives, health and environment they affect. Where “beyond all reasonable doubt” is the standard of proof for criminal conduct, transnational corporations and their officers and agents have neither a rational nor a justifiable basis to claim they will be railroaded. If their outcry over the Norms³⁸⁹ is any indication, if such a court were seriously considered, it is practically guaranteed that these corporations would raise an unprecedented clamor.

Given the Bush Administration’s “unprecedented act in international law” of withdrawing the United States’ signature from the Rome Statute of the International Criminal Court,³⁹⁰ it is most unlikely that the United States would sign a treaty

384. *Living with the Enemy*, THE ECONOMIST, Aug.9, 2003, at Bus. (U.S. Edition).

385. *Id.*

386. Collingsworth, *supra* note 292, at 184.

387. For background information, see the Clean Clothes website at <http://www.cleanclothes.org> (last visited June 24, 2004).

388. CELIGNY SEMINAR, *supra* note 216.

389. See *Joint Views*, *supra* note 15; CORPORATE RESPONSIBILITY, *supra* note 151; Birchall, *supra* note 2.

390. Wojcik, et al., *supra* note 54, at 597.

establishing an international court to try transnational corporations for human rights violations. Given the influence of corporations in the United States, it is unlikely that the United States would become a party to such a treaty even in a Democratic administration. It is doubtful that any of the G-7 countries would participate for the very same reason.

Another universal remedy to address human rights violations in the global economy is the one put forth by the International Labor Rights Fund ("ILRF").³⁹¹ The ILRF is promoting "the creation of a procedure to enforce human rights on equal footing with property rights in the World Trade Organization and other regional trade agreements."³⁹² They developed "a model provision for human rights to be added to existing and future trade agreements and [are] working with human rights organizations around the world to develop support for this approach."³⁹³ Nonetheless, "efforts to strengthen human rights protections in trade law have run into difficulties. The WTO Singapore Ministerial Declaration made reference to international labor standards, yet primarily affirmed the jurisdiction of the ILO over the matter."³⁹⁴

At present, American and other first-world companies "can participate in or aid human rights abuses in other countries confident that the host governments will not enforce local laws. Often the host governments themselves are participants in the abuses. This frames the reality of the global economy."³⁹⁵

Threats of enforcing human rights laws by host countries need not offend transnational corporations. Nor do they face significant hazards to the other host-country action potentially threatening their overseas operations and profits: corporate property rights. Their own national governments have shielded them from this peril and have clearly acknowledged that the rights of these behemoths are inviolable through the terms negotiated on their behalf under the bilateral investment treaty regime currently in place.³⁹⁶ As advertised, the transnational corporate lobby has definitely been "given business a seat at the table" in the standard dispute resolution clause available to corporations in bilateral investment treaties ("BITs").³⁹⁷ Expropriation, (direct or indirect), currency exchange controls and war and other civil disturbances pose the greatest danger to

391. Collingsworth, *supra* note 292, at 203.

392. *Id.*

393. *Id.*

394. Shelton, *supra* note 41, at 289.

395. Collingsworth, *supra* note 292, at 196.

396. Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 632-33 (1998).

397. *Id.* at 633.

transnational corporations.³⁹⁸ BITs establish *legal* mechanisms to enforce those protections.³⁹⁹ Under the dispute resolution provisions negotiated by the United States in its BIT treaties, a private party investor ultimately has the legal power to invoke compulsory arbitration against the host country before the International Centre for the Settlement of Dispute Resolutions and to secure a binding award against a sovereign state.⁴⁰⁰ Most other BITs between first-world capital-exporting state parties and third-world capital-importing state parties provide the same protection.⁴⁰¹ Although the Kurds living in the villages through which the BTC pipeline will pass have no tribunal in which to seek redress, private actors such as BP can bring binding arbitration against any sovereign state with whom they have an investment dispute, provided that state is a party to a bilateral investment treaty ("BIT") with the United Kingdom.

There are currently over 2,000 BITs in existence.⁴⁰² Today bilateral investment treaties are the "dominant international vehicle through which investment is regulated."⁴⁰³ Negotiation of these BITs has been one of the most active areas of public international lawmaking since the 1960s.⁴⁰⁴ Under the standard U.S. Model BIT, from which it accepts only small deviations in actual negotiation, the definition of investment includes hard investments, such as real estate, financial assets, contractual property, as well as "any right conferred by law or contract, and any licenses and permits pursuant to law."⁴⁰⁵ A breach of an agreement between the host country and an American investor, therefore, becomes a violation of international law.⁴⁰⁶

The ability of a private party to impose binding legal arbitration on a nation state, as provided in bilateral investment treaties, is without doubt one of the most salient examples of how

398. *Id.*

399. *Id.*

400. Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 655 n. 3 (1990).

401. Eloisa Obadia, Int'l Centre for Settlement of Investment Disputes, *ICSID, Investment Treaties and Arbitration: Current and Emerging Issues* (Fall 2001), <http://www.worldbank.org/icsid/news/news.htm> (last visited Aug. 10, 2004).

402. Margrete Stevens, Int'l Centre for Settlement of Investment Disputes, *Arbitration and Investment Disputes – Are We Heading in the Right Direction?* (Spring 2002), <http://www.worldbank.org/icsid/news/news.htm> (last visited Aug. 10, 2004).

403. Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 640 (1998).

404. Salacuse, *supra* note 400, at 655.

405. Guzman, *supra* note 403, at 640.

406. *Id.* at 654.

international law has evolved. If the Norms set forth the duties of transnational corporations, then BITs most definitely provide for their rights. Given the legal power and personality of these private actors, it is not possible to make a straight-faced assertion that international law is the subject only of states.

"Victims of human rights violations should not have to clear more hurdles and accept more limited access to remedies than the owners of intellectual property."⁴⁰⁷ Under Article 18 of the Norms, "[t]ransnational corporations . . . shall provide *prompt, effective and adequate* reparation to those persons, entities and communities . . . adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken."⁴⁰⁸ Duty of reparation has been a standard duty of international law since Grotius.⁴⁰⁹ The ICJ in the Corfu Channel case confirmed this.⁴¹⁰

Prompt, effective and adequate reparation is the standard of reparation owed by a host government who violates the property rights of a United States corporation.⁴¹¹ This standard essentially restates the Hull Doctrine.⁴¹² Capital-exporting countries long considered the Hull rule to reflect customary international law⁴¹³ despite developing countries' assertions, including two General Assembly resolutions, to the contrary.⁴¹⁴ Germany, Switzerland, Great Britain and other first-world countries continue to negotiate similar or equal reparation standards in their BITs with developing countries. Simple justice and equity demand, therefore, that the legal standard of reparation for international

407. Collingsworth, *supra* note 292, at 203.

408. *Norms*, *supra* note 1, at art. 18 (emphasis added).

409. DAMROSCH ET AL., *supra* note 19, at 622.

410. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 9 (Apr. 9).

411. Guzman, *supra* note 403, at 657.

412. See, e.g., *id.* at 645 (discussing the origin of this standard of reparation). In response to Mexican agrarian and oil nationalization measures in 1938, U.S. Secretary of State Cordell Hull demanded *prompt, adequate and effective* compensation for American property owners. *Id.*

413. *Id.* at 655-56.

414. *Permanent Sovereignty over Natural Resources*, G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., 1194th plen. mtg., U.N. Doc E/RES/62/1803 (1962) (eighty-seven states voted in favor; 2 against, and the Union of Soviet Socialist Republics abstained) [hereinafter 1962 Resolution]. *Permanent Sovereignty over Natural Resources*, G.A. Res. 3171 (XXVIII), U.N. GAOR, 28th Sess., 2203d plen. mtg., U.N. Doc E/GEN/NRO/282/43 (1973) (One hundred-eight states voted in favor, one against - Great Britain - and sixteen abstained - essentially the developed world, including France, Federal Republic of Germany, Japan and the United States) [hereinafter 1973 Resolution]. The 1962 Resolution provided that the standard of reparation be "adequate," a term it did not define. 1962 Resolution, *supra*, at art. 4. The 1973 Resolution provided that "each state is entitled to determine the amount of possible compensation and the mode of payment." 1973 Resolution, *supra*, at art. 3.

human rights violations evolve into the same standard as that of international corporate property rights violations.

VIII. CONCLUSION

The transnational, or "polycorporate enterprise constitutes a new form of enterprise organization where a plurality of separate legal entities are submitted to a unitary economic direction."⁴¹⁵ The Norms provide a unitary body of human rights law, culled from separate legal instruments, such as the U.N. Charter, the International Bill of Rights, treaties, conventions, jus cogens norms of customary international law, the writings of eminent international jurists and United Nations General Assembly resolutions codified in a plurality of legal documents.⁴¹⁶ Under the rules of international law, some of these instruments carry more weight than others, but together they set forth international law of human rights, civil and political rights, employment rights and environmental and health rights as it has evolved and exists today. They are not mere assertions, nor is their context factually or legally dubious.

Moreover, the Commentary to the Norms encourages other stakeholders, such as trade unions, NGOs and industry groups to use the Norms in their human rights oriented dealings with transnational corporations.⁴¹⁷ The Commentary further promotes the Norms as benchmarks for ethical investment initiatives by businesses as well as standards of compliance.⁴¹⁸

The United Nations has established the unambiguous duty of these intervening actors to obtain authorization for their actions and to account to all those affected by their conduct. Despite gaps and wrinkles regarding precise enforcement mechanisms and procedures, the law is clear. Transnational corporations participate in the international arena more than most nation states. They cannot act and intervene in this community and simultaneously stay outside its norms and laws.

In international law it is well established that all parties need to be rule oriented. It is equally well established amongst outlaws, their lackeys and their victims that he who has the gold makes the rules.

415. Antunes, *supra* note 129, at 208.

416. Norms, *supra* note 1, at pmb1.

417. Commentary, *supra* note 14, at art. 16 cmt. (c).

418. *Id.*