Foreign direct investment ("FDI") is on the rise, astronomically. In 2004, FDI inflows reached US $648 billion and outflows reached US $730 billion. Inflows to developing countries rose 40% from the previous year reaching US $233 billion.

Transnational corporations ("TNCs") are the primary actors in FDI,
and are mostly based in developed countries. It is estimated that the stock in FDI approximates US $9 trillion, and is held by 70,000 TNCs and their 690,000 affiliates worldwide.

India was the leader in FDI for South-East Asia, with an increase of 30% in 2004 amounting to approximately US$7 billion. In Latin America FDI is rising again reaching US$54 billion in 2004, representing an increase of 44% from 2003, and the first increase since 1999. The bulk of FDI in developing countries seems to be in the equity stake other than that of 10 per cent is still used. In the United Kingdom, for example, a stake of 20 per cent or more was a threshold until 1997.). A foreign affiliate is an incorporated or unincorporated enterprise in which an investor, who is resident in another economy, owns a stake that permits a lasting interest in the management of that enterprise (an equity stake of 10 per cent for an incorporated enterprise or its equivalent for an unincorporated enterprise).

See also Global Governance: Multinational enterprises or money has no homeland, at http://globgov.collegium.edu.pl/kmmeng.html (last visited Jan. 6, 2006), which offers one explanation of the difference between multinational and transnational corporations:

'Multinational' is a preferred terminology among business society and most academic environments of developed countries. The name 'transnational' was accepted by the United Nations in 1974 upon request of Latin America states, which wanted to distinguish foreign investors with headquarters inside the region from absolutely external entities. Companies from outside Central America were named then 'transnational corporations.'


5. UNCTAD WIR 2005, supra note 1, at 4.

6. Id. at 10. But note that while India's FDI is increasing, China enjoys "ten times" the amount of FDI as India, and China has "five times" India's share of world trade. See "Why India Will Overtake China", by Cait Murphy, CNN Money, available at http://money.cnn.com/2006/08/30/magazines/fortune/IndiavsChina_pluggedin.fortune/index.htm, last visited September 14th, 2006.

resource extraction sectors, but is also present in privatization and manufacturing. Developing countries are encouraged to seek out FDI as a means to development. The increased capital flows, technology transfers, and jobs can aid a developing country in growing its economies and infrastructures. But there is considerable opposition by local populations to the rise of FDI in both India and Latin America. Opposition stems from the perception that India and Latin American states, in their eagerness to court FDI by granting numerous incentives and legal protections to TNCs, are compromising their legal and moral commitments to human rights and sustainable development. Not only are local populations excluded from any meaningful participation in the agreements between States and TNCs which give the latter legal standing and other protections; these local populations are too often put at serious risk without any safeguards or legal protections in those agreements. In fact, in developing countries around the world, TNCs have been accused of direct or complicit violations of human rights including murder, rape, torture, forcible dislocation of populations,
forced labor, destruction of the environment, and extrajudicial executions.11 And the victims, usually indigent or indigenous peoples who are of the most vulnerable in local populations, find themselves with little or no recourse against the TNC or State regarding these violations.12

Latin America has been particularly vocal in its civil society opposition to market liberalism and FDI.13 Leftist leaders opposing Washington economics are garnering support in their "fight against neoliberalism and imperialism".14 Bolivia has just elected its first indigenous president, farmer Evo Morales. Morales won his campaign on a platform of fighting US backed economic policies and renationalizing Bolivia's natural gas resources proclaiming "This is not about Evo Morales. This is about the people who are reclaiming their rights."15

What are these rights? What are the obligations of States and TNCs in international law towards local populations? Should these obligations be enhanced? And if so, how? This paper seeks to answer these questions in the parts that follow.

First, I will look at the Union Carbide tragedy which occurred in Bhopal, which was the precursor to the more recent cases against TNCs. Second, I will overview key human rights guaranteed in international law. I will also focus on sources of law and hierarchies within and

12. Id.; see generally Jota v. Texaco, Inc., 157 F.3d 153 (2nd Cir. 1998); Aguindo v. Texaco, Inc., 303 F.3d 470 (2nd Cir. 2002); Terence Chea, Chevron Fights Rights Abuse Allegations, Jan. 1, 2006, http://www.chevrontoxico.com/article.php?id=283. Note the claims of the Indians in Ecuador regarding destruction of the Amazon rainforest by Texaco over a 25 year period (Texaco merged with Chevron in 2001) and resulting human rights violations of the Ecuadorian people, and the claims of the Ogoni people who claim that Chevron was complicit in Nigerian military attacks in Ogoniland resulting in murder and torture. See discussion infra in section X of this paper.
among fields of law, which can help determine which rights should prevail in case of a conflict. Third, I will consider the circumstances of market liberalization that contribute to TNC impunity, the emerging norms regarding TNC responsibility and voluntary initiatives undertaken by TNCs. Finally, I conclude with observations and recommendations to bring justice to the victims of the Union Carbide disaster, and to ensure that FDI going forward will do so in a manner that is not contrary to the protection of human rights and sustainable development.

I. BHOPAL AND THE UNION CARBIDE CHEMICAL DISASTER

A. The Union Carbide Chemical Disaster

Bhopal. The incident has been referred to as the "chemical hiroshima" and the world’s greatest "chemical catastrophe". What happened? In the midnight hours of December 3rd, 1984, over 27,000 tons of the deadly gas methyl isocyanate was leaked. Within the next 24-48 hours, over 7,000 people were dead. The Indian government and Union Carbide had estimated the deaths to be around 2,800. Makeshift workers who hauled corpses onto carts for burial or cremation have estimated that they collected 15,000 dead people that night. Other estimates culled from the sales of funeral shrouds and cremation wood place the number at a more conservative 8,000.

Before December 1984, Bhopal was relatively unknown outside of India. It was a city of charm, replete with the romantic architecture of the mughal empire, historic mosques, and all-night poetry sessions by

19. Id.
the city’s ample riverbeds. This textured history was usurped by the chemical disaster of Union Carbide.

The effects of this horrific incident did not end in 1984, but are felt actively to this day. Twenty-one years later, the death toll attributed to Union Carbide stands at 20,000.\(^{20}\) The number of those afflicted with illness or injury due to the gas leak stands at 150,000, with one-third of those people too sick to work. Residents of Bhopal continue to suffer birth defects, impaired or destroyed reproductive systems, lung problems, vision problems including blindness, and illnesses including stomach problems and skin eruptions. It seems the crime is one which continues in perpetuity, not simply affecting those thousands exposed to the gas leak in 1984, but today in 2006, through continued health and genetic injuries, and the ongoing environmental pollution including the contamination of drinking water—this is a crime affecting generations.

Despite litigation efforts in the United States, and India, the victims have yet to receive justice. Union Carbide continues to deny any responsibility of the incident. Initially Union Carbide claimed the leak was caused by a disgruntled employee or saboteur. Evidence later emerged indicating the incident was predictable given an earlier, smaller leak which had occurred at the plant in Bhopal, and documents linking decisions of safety standards to Union Carbide headquarters in the United States.\(^{21}\)

In the aftermath of the tragedy, Union Carbide CEO Warren Anderson and a team of corporate officers visited Bhopal, India. Warren Anderson was arrested, officially for his protection from angry mobs, and released later the same day. He subsequently left India, never to return despite requests and extradition orders to the contrary.

1. **US Litigation, 1985**

The Indian government immediately passed the *Bhopal Act*\(^{22}\) proclaiming itself the exclusive representative of the Bhopal victims.\(^{23}\)

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20. **Id.**


23. This response of the Indian government is curious because in so doing, they effectively obstructed direct access of the Bhopal victims to the courts. The justifications of
Appropriating the claims of hundreds of plaintiffs, the Indian government filed an "unprecedented"24 claim April 8th, 1985. The symbolism is worth noting: India, a sovereign state in the developing world representing thousands of indigent plaintiffs, was asking the courts of the United States to determine the liability of an MNC. Further, this case represents the first time the issue of MNC and TNC liability was raised for violations of fundamental rights in the third world.25 India claimed that an MNC must be held to a standard of absolute liability for foreign harms, regardless of whether it was a subsidiary or head office that caused the harm, because the MNC is in the best position to prevent those harms in its profit-seeking enterprises.26
Union Carbide requested the US court to dismiss the action on the ground of *forum non conveniens*, pleading that India would be the most appropriate forum. Justice Keenan granted Union Carbide's motion. Ironically, the Indian government argued that its laws were inadequate to handle this mass tort litigation, while Union Carbide countered that Indian courts were in fact capable. Union Carbide employed a strategy which appears callously indifferent to the plight of the Indian victims and racist, pleading that:

> The practical impossibility for American courts and juries, imbued with US cultural values, living standards and expectations, to determine living

through thousands of daily actions, by a multitude of employees and agents. Persons harmed by the acts of a multinational corporation are not in a position to isolate which unit of the enterprise caused the harm, yet it is evident that the multinational enterprise that caused the harm is liable for such harm. The multinational must necessarily assume this responsibility, for it alone has the resources to discover and guard against hazards and to provide warnings of potential hazards. This inherent duty of the multinational is the only effective way to promote safety and assure that information is shared with all sectors of its organization and with the nations in which it operates.

*Id.* (emphasis added).

27. Also noted by Justice Keenan in his decision in *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984*, 634 F.Supp. 842 (S.D.N.Y. 1986):

Since it is defendant Union Carbide, which perhaps ironically, argues for the sophistication of the Indian legal system in seeking a dismissal on grounds of *forum non conveniens*, and plaintiffs, including the Indian government, which state a strong preference for the American legal system, it would appear that both parties have indicated a willingness to abide by a judgment of the foreign nation....Thus this Court conditions the grant of a dismissal on *forum non conveniens* grounds on Union Carbide's agreement to be bound by the judgment of its preferred tribunal, located in India, and to satisfy any judgment rendered by the Indian court, and affirmed on appeal in India.


The latest expression of racial subordination both within nations and at the international level is the globalisation of the economy and culture. It is important to see ongoing globalisation as part of a historical process of socioeconomic-political domination and abuse. The perpetuation of hierarchies of race, ethnicity, class, and gender must be situated in that larger context. Problematising the danger of permanently re-inscribing a subordinated and life-threatening status for people of colour all over the globe becomes a very urgent project.

Also, "[g]lobalisation perpetuates the inequities of colonialism while wearing the mask of race neutrality." *Id.* at 7.
standards for people living in the slums or 'hutments' surrounding the UCIL, Bhopal, India, by itself confirms that the Indian forum is overwhelmingly the most appropriate. Such abject poverty and the vastly different values, standards and expectations which accompany it are commonplace in India and the third world. They are incomprehensible to Americans living in the United States.29

The inherent discrimination in those pleadings seemed lost on Justice Keenan, who himself, in dismissing the action, reasoned that a dismissal would best serve US public interest factors:

The cost to American taxpayers of supporting the litigation in the United States would be excessive . . . there is no reason to press the United States judiciary to the limits of its capacity. No American interest in the outcome of this litigation outweighs the interest of India in applying Indian values to the task of resolving this case.30

Justice Keenan’s comments suggest disregard for the thousands of Indian people harmed permanently or killed by the actions of Union Carbide, an American TNC; surely in that context the US ought to have had considerable public interest in the outcome of the litigation, and in ensuring that American TNCs abroad, at a minimum, did not use substandard safety procedures with hazardous substances in developing countries.31 Indeed the amicus brief filed by Americans in the case plead that:

This case provides an opportunity to bind all American multinationals to a standard of care that will help prevent the recurrence of a catastrophe such as Bhopal. Declining to undertake this challenge would allow a double standard to govern American corporations; whereas preserving a uniform standard would deter multinational corporations from presenting Americans with a choice between the flight of jobs abroad and maintenance of safety standards at home. A double standard of justice for U.S. corporations is antithetical to both the economical and environmental interests of Americans. Because the United States benefits from the foreign operations of its corporations, we have a further responsibility to respond to pleas for justice from the victims of those operations that result in catastrophic loss. To abandon that

30. See In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984, supra note 27, at 867.
31. There is evidence that Union Carbide used significantly higher safety standards at its West Virginia Sevin plant than it did in Bhopal. See Amnesty Report, supra note 16, at 42-44.
responsibility would both injure our standing the world community and betray the spirit of fairness inherent in the American character.32

In his reasons for dismissal, Justice Keenan further remarked that to allow an American court to hear the case of Union Carbide’s actions in India would be tantamount to imperialism of which the Indians had struggled to rid themselves (i.e., British rule).33 Given that the alleged perpetrator was a multimillion dollar US MNC, and the victims were the ‘abject poor’ who had lived in slums and hutments in India, the stated concern to avoid imperialism seems disingenuous.

2. Indian Court Ordered Settlement, 1989

After the dismissals in the US courts, the Indian government filed an action in the Bhopal District Court in September 1986. While proceedings were underway, a Bhopal District Judge called for interim compensation to the plaintiffs and ordered Union Carbide to deposit Rs. 350 crores34 with the court. Union Carbide appealed this interim compensation order to the High Court which reduced the amount to be deposited for interim compensation to Rs. 250 crores.35 Union Carbide then appealed to the Supreme Court of India. Although Indian laws required that a judgment debtor must deposit the disputed amount with


33. See Justice Keenan’s conclusion: [p]laintiffs allege that the Indian justice system has not yet cast off the burden of colonialism to meet the emerging needs of a democratic people. The court thus finds itself faced with a paradox. In the Court’s view to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947. 634 F. Supp. at 867.

34. A crore is equivalent to U.S. $10,000,000.00.

the court prior to any appeals, Union Carbide never deposited any amount prior to either appeal.

Then, a strange sequence of events took place. Without any consultation with the victims, and while the appeal was proceeding before the Supreme Court of India, the Indian government, Union Carbide and Union Carbide India Limited ("UCIL") reached a settlement in the amount of US$470 million. On February 14th, 1989, the Indian Supreme Court affirmed this settlement in an order, specifying that the compensation was not being awarded as "fines, penalties or punitive damages." The settlement order also indicated that any civil and criminal charges against Union Carbide, UCI, or officials were quashed, and no further suits would be permitted. The next day the India Supreme Court released a further order indicating that the undertaking for US$3billion given by UCC to the Bhopal District Court was discharged.

Why did the Indian government agree to a settlement of $470 million when the Bhopal District Court had obtained an undertaking from Union Carbide in the amount of US$3billion? Why did the Indian government even agree to a settlement offer in 1989 when the exact number of victims of the Bhopal tragedy was in dispute? Why did the Indian government and the India Supreme Court quash all civil and criminal charges against Union Carbide, Union Carbide India, and certain corporate officers? Was the Indian government, in its unwillingness to enforce existing laws, complicit in not ensuring stricter safety measures from Union Carbide?

36. See Order 14-02-89 in Civil Appeal Nos. 3187-89, Union Carbide Corporation v. Union of India, Supreme Court of India.
37. Id.
38. Amnesty Report, supra note 16, at 61 (discussing settlement in general but no separate order no. 15-02-89 appears on the electronic database of India’s Supreme Court though it is referenced in Order 14-02-89).
40. The Indian government’s actions in amending its Factories Act to limit the liability of TNCs during the same time period that the Bhopal litigation was pending in India, is inconsistent with the State’s claims that it sought to protect its citizens from TNC violations. See Dr. Usha Ramanathan, Business and Human Rights: The Indian Paper, IELRC Working Paper, 10-11 (2001-02), http://www.ielrc.org/content/w0102.pdf [hereinafter India Paper].
In response to the public outcry, the Indian government claimed that it had agreed to the US$470M settlement because it was greater than the US$350M UCC initially agreed to pay, and that “a case of this kind could not have reached a conclusion in less than 15 to 20 years from now.” 41 Sadly, 21 years later, a conclusion still has not been reached.

In May 1989, the India Supreme Court issued its reasons for the settlement order, stating that the interests of providing relief to the victims superseded any lengthy interpretations of the law42, and furthermore, Union Carbide maintained that $470M was the most it would be willing to pay. The Court did not address the liability of Union Carbide, the responsibilities of India to protect the human rights of its citizens, or the responsibilities of the United States to hold its TNC accountable for human rights abuses committed abroad.

Because the Court’s reasoning did not address any of the questions listed above, I would describe the Court’s reasons as unsatisfactory, and contributing to the long-running problems still in existence today.

Moreover, the Indian government’s rationale is undermined by its contemporaneous amendments to the Factories Act which essentially limited liability of multinational corporations for industrial accidents.43

3. Supreme Court of India Decision, 1991

The settlement was widely criticized throughout India, and lawyers representing victims and NGOs challenged the settlement in a review petition.44 The Indian Supreme Court upheld the settlement, but reinstated the criminal charges against UCC, UCIL, and several officers45, including UCC Chief Executive Officer Warren Anderson.

To date, none of UCC, UCIL, Warren Anderson or other indicted officers have appeared before the Bhopal courts. Because of their failure

41. Amnesty Report, supra note 16, at 60 (citing UPENDRA BAXI ET AL. VALIANT VICTIMS AND LETHAL LITIGATION (1990)).
42. Id. at 59 (citing Order 05-04-1989 in Civil Appeal Nos 3187-89, Union Carbide Corp. v. Union of India, Supreme Court of India).
43. See India paper, supra note 40.
44. Amnesty Report, supra note 16, at 60.
45. The charges were initially registered under the Indian Penal Code s.304, with 12 accused including CEO Warren Anderson, Union Carbide, Union Carbide India Limited (“UCIL”), and Union Carbide Hong Kong (“UCE”). Union Carbide Corp. v. Union of India, 1992 A.I.R. 248, ¶ 6, available at http://judis.nic.in/supremecourt/qrydisp.asp?tnm=12603.
to appear before the Indian courts on the criminal charges, the Indian courts branded UCC, UCIL, Warren Anderson et al, as "absconders", or fugitives from justice.

4. 2004-2005: Current Efforts to Re-Open Settlement Decision

Today, efforts in India are underway to re-open the 1989 settlement. And earlier in 2004, the India Supreme Court held that compensation payments in the amount of US$330 million held by the Indian government should be paid out to the Bhopal victims.

Bhopal victims launched a suit under the US Alien Tort Claims act in the United States in 1999 that was dismissed in part in 2001. However evidence did emerge in these proceedings linking Union Carbide CEO Warren Anderson directly to the decisions to lessen the safety standards at the UCIL plan in Bhopal prior to the accident. The Court ordered that Union Carbide should commence proceedings to clean up the Bhopal plant which has remained a hazardous site since the accident in 1984, and continues to emit pollutants into its environs. The decision of the Court has been interpreted by Indian lawyers as an invitation to the Indian government to commence renewed proceedings against Union Carbide, and in light of the new evidence, to press for the extradition of Warren Anderson to face criminal charges in India.

B. Relationship of Union Carbide, Union Carbide India, and the State of India

Union Carbide was a New York corporation. It opened its Bhopal plant in India in 1968, at a time when India’s economic policies favored state-owned operations. India’s Foreign Exchange Regulations Act (FERA) 1973, was amended in the 1980s to reduce foreign ownership

47. See Amnesty Report, supra note 16.
48. Bano, 273 F.3d at 122,133.
49. Id. at 132.
51. Also known as FERA, the legislation only permitted what is specifically provided
of joint-venture enterprises to a maximum of 51%, anticipating the liberalizing of the markets and seeking to ensure that Indian interests would be protected. The measures were meant to guard against an economic imperialism by foreign corporations. For Union Carbide, this meant it had to reduce its ownership in its Indian operating company, Union Carbide India Limited ("UCIL"). Union Carbide reduced its stock to 50.99%. The remaining stock in UCIL was owned by Indian investors, though the exact breakdown of shareholders appears to be unavailable or inaccessible to researchers; it is however stated that 22% of the Indian stock was held by two Indian life insurance companies which were State-run entities. This reduction in ownership has been suggested as the reason that UCC cut costs in the safety procedures at UCIL, to limit its losses in the ownership restructuring, leading ultimately to the disastrous gas leak.

C. Merger of Union Carbide and Dow Chemical

In 2001, Dow Chemical and Union Carbide completed the largest merger in the chemical industry, with Union Carbide continuing to operate as a wholly owned subsidiary of Dow. Operating as Dow Chemical, the new corporation had combined annual assets of US $28.4 billion, and assets over US $36 billion, making it the largest chemical company in the world. Effective that day, Union Carbide stock ceased to be traded, and all Union Carbide stock became Dow stock, with

for in the Act, and anything not addressed was deemed to be prohibited. Infringement of FERA resulted in criminal sanctions. FERA 1973 has been replaced today by the more permissive Foreign Exchange Management Act (1999), which came into effect June 1, 2000. Some of the FERA's provisions have been incorporated into FEMA. See also Foreign Exchange Management Act 1999, Act. No. 42, http://www.indialawinfo.com/bareacts/fema.html (last visited Feb. 22, 2006).

52. See Baxi, supra note 24 (noting that Unit Trust of India and Life Insurance Corporation of India together owned 22% of UCIL stock. Given that there were only two life insurance companies in India in 1984, that life insurance was a 100% state-run enterprise, the inference is that the majority shareholder in UCIL stock was the Indian State).


55. Id.
Union Carbide stockholders receiving 1.611 Dow shares for every 1 Union Carbide share held. Dow declared that it did not acquire Union Carbide’s liabilities\(^\text{56}\) regarding Bhopal because those liabilities were settled by the terms of the 1989 Indian settlement. However, Bhopal activists continue to challenge this assertion, and Dow stockholders also believe that they remain exposed to a potential finding of criminal liability, and liability for the ongoing environmental contamination.\(^\text{57}\)

D. Current Position of Union Carbide and Dow Chemical

Since the Bhopal disaster, Union Carbide has consistently maintained that it was not liable for the chemical leak or any injuries or damage related thereto. This of course, has been the subject of controversy and the central issue of the claims filed by or on behalf of Bhopal victims. To date, no court has yet ruled on whether Union Carbide bears any responsibility for the Bhopal disaster,\(^\text{58}\) but victims groups continue to press for such a finding.

Further, Union Carbide has always taken the position that its partner Union Carbide India Limited (“UCIL”) was solely responsible for plant operations at the time of the disaster; an example of a foreign parent company seeking to shield itself from liability by laying all responsibility and liability upon its foreign subsidiary. However, evidence indicates that effective management, operational, and voting control of the subsidiary UCIL vested with the parent Union Carbide.\(^\text{59}\) Further evidence indicates that the decisions to cut costs by reducing

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56. Corporate mergers and acquisitions result in the new entity typically assuming the assets and liabilities of the subsumed company, unless expressly reserved. Consider for example, the Canadian Business Corporations Act, cite, which in Section 137 subsection 14 provides that the rights of creditors shall be preserved upon an amalgamation of two companies:

Rights of creditors preserved: All rights of creditors against the property, rights, assets, privileges and franchises of a company amalgamated under this section and all liens upon is property, rights, assets, privileges and franchises are unimpaired by the amalgamation, and all debts, contracts, liabilities and duties of the company thenceforth attach to the amalgamated company and may be enforced against it. Canadian Business Corporations Act, §137(14).


safety procedures were made by the Union Carbide management in the US. Particularly damning is the fact that safety standards upheld at Union Carbide's sevin production plant in West Virginia were significantly higher than safety standards at the Bhopal plant.

Investigations indicate that the negligence surrounding the Bhopal disaster falls upon UCIL, where two leaks had occurred prior to the fatal 1984 leak; on the Indian government for failing to adequately enforce existing safety laws; and on Union Carbide for its negligence in ordering sub-par safety measures, and transferring a sub-standard method for storing and producing methyl isocyanate for its production of sevin. Union Carbide's negligence specifically contributed to the temperature decrease, and in combination with water, resulted in the catastrophic leak.

Litigation is also underway in the United States regarding the liability of Dow to clean up the Bhopal plant site.

II. INTERNATIONAL HUMAN RIGHTS LAW

The Bhopal case raises several questions regarding the rights of the Union Carbide victims in international law. First, what rights were they entitled to under international law? What rights were owed to them by the Indian government, and possibly by the United States government, where Union Carbide was headquartered and incorporated? Finally what rights, if any, were owed to the Bhopal victims by Union Carbide?

In today's environment of booming bilateral investment agreements and trade agreements, the Union Carbide case raises another question regarding the application of laws. What is the relationship between these investment and trade treaties, and international human rights law,
if any? Additionally, which system of law prevails if there is a conflict between the two?

These questions are addressed below. First I will briefly overview the range and types of rights protected in international law. Next, I will briefly outline the sources of law with a view to discerning which laws would prevail in the event of conflicting fields of laws. The latter sections of this part will focus on the specific rights to development and the Millennium Development Goals, which are of course issues frequently raised (if not brandished) by TNCs in the discourse on FDI.

A. Protected Rights in International Human Rights and Humanitarian Law

The legal frameworks of international human rights law, and international humanitarian and criminal law, protect individual and collective rights of human beings. These rights include: (a) economic, social and cultural rights, which include rights to development, an adequate standard of living, health, environment, labor standards, and culture; (b) civil and political rights, which include the right to life, the right to be free from torture, arbitrary detention, and cruel and unusual punishment, the right to a legal remedy, and the right to self-determination; and (c) certain fundamental rights which are guaranteed during armed conflict through the prohibition of genocide, war crimes, and crimes against humanity.

In the latter part of the twentieth century, there were debates about a so-called 'hierarchy' of within the body of human rights itself. Civil and political rights were considered as the “first generation” of rights, which reflected the tensions of the cold war era; economic, social and cultural rights were considered the “second generation of rights;” and development rights were the “third generation” of rights. Such categorizations did not serve the advancement of human rights, but operated to justify the subordination or neglect of so-called second and third generation rights, to first generation rights.

At the 1993 UN World Conference on Human Rights held in Vienna, the international community finally succeeded in recognizing, at least

64. Hereinafter referred to collectively as “international human rights law.” For a comprehensive list of international human rights treaties and instruments, visit the website of the UN High Commissioner for Human Rights, http://www.ohchr.org/english/law.
on paper, the equality and interdependence of all human rights without distinction. The unproductive hierarchy within categorizations of human rights was in effect discarded.

B. Sources of International Human Rights Law

The international human rights law framework is complex and unlike any other field of international law. It derives from complex, interconnected, and tiered sources of law. Some of these sources are considered to constitute a “higher law”, which must prevail over any conflicting treaty or custom, as is described below.

1. Jus Cogens

Certain rights are considered to be so fundamental to humankind that they constitute a “higher law.” This higher law is derived from “fundamental principles deeply rooted in the international community” and “based on the legal conscience and moral beliefs of mankind” that compels all nations to observe them. These peremptory norms are referred to as jus cogens and are the source of international law “with the greatest authority.” No deviation is ever permitted from the observation of jus cogens norms, which include prohibitions on torture, genocide, slavery, war crimes, and crimes against humanity.

It is generally accepted that for a norm to be recognized as jus cogens, the international community as a whole must recognize and

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68. Martin defines jus cogens as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Id. at 342. “How does jus cogens have greater legal authority than other international law? Unlike customary international law, states do not need to consent to a jus cogens norm to be legally bound by that norm.” Id. at 343.
accept the norm as being peremptory or *jus cogens*. However, this does not require that a majority consensus be declared for a *jus cogens* norm to exist or be legally binding. Further, any treaty that conflicts with *jus cogens* is void, as is any conflicting national law. The content of a *jus cogens* norm is such that it cannot be derogated from by international treaties or local or special customs or even general customary rules not endowed with the same normative force.

The decisions of the International Criminal Tribunals for the former Yugoslavia and Rwanda have demonstrated that *jus cogens* norms are legally binding not only against States but also against individuals. The WTO has also required that its dispute resolution decisions must be made in compliance with customary international law. Why then

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[T]his certainly does not mean the requirement of unanimous recognition by all the members of the community, which would give each state an inconceivable right of veto. What it is intended to ensure is that a given international wrongful act shall be recognized as an 'international crime,' not only by some particular group of states, even if it constitutes a majority, but by all the essential components of the international community.


73. See the Vienna Convention on the Law of Treaties, Article 53: "A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." See also the decision of the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Furundzija (1998), Case No. IT-95-17/1-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at paras. 153-154 defines the nature of *jus cogens* in the context of the peremptory norm prohibition against torture as follows:

Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rulers. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force. Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.
should *jus cogens* norms not be binding against non-State actors like TNCs?\(^{74}\)

2. Obligations *Erga Omnes* and Customary International Law

Obligations *erga omnes* concern the protection of rights, which all States have a legal interest in protecting, and thus create obligations among all States, regardless of whether a State has assented to such obligation.\(^{75}\) Unlike *jus cogens* norms, derogation is permissible with obligations *erga omnes*.

Customary international law is a source of law derived from the general and consistent practice of States, which creates a sense of legal obligation upon States. It requires the acquiescence of states or *opinio juris*, and thus has less authority than obligations *erga omnes*, which do not require the acquiescence of States. Multilateral international instruments, which are widely accepted by States, can attain the level of customary international law, which is the categorization given to the Universal Declaration of Human Rights (UDHR). The UDHR was also the starting point for the legally binding international human rights treaties, which are another important source of law discussed below.

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74. Our contemporary understanding of the concept of *jus cogens* emanates from the progressive understandings of the rights of human beings, unveiled by the painful events of decolonization, the World War II atrocities in Europe and in Asia, and more recently the bloody conflicts of Rwanda and the former Yugoslavia. Beginning with decolonization, the international community began to realize that international law was not confined to the domain of dominating European interests, nor defined alone by those interests, but rather there were peremptory norms existing at a higher level that remained unspoken “but intuitively understood by reference to a common social reservoir of understanding which delineated the crucial line between civilization and barbarity.” In other words, *jus cogens* norms began to demand a deference by virtue of their moral authority that placed them on a level above any conflicting international laws, for example the prohibition against apartheid. See Martin, supra note 67, at 343-44.


An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. 
3. Treaty Law

Treaties create legally binding obligations upon states. They cannot violate *jus cogens* norms or customary international law. Treaties can however codify *jus cogens* norms, obligations *erga omnes*, or customary norms.

States are legally bound to abide by the obligations contained in the treaties, upon signature and ratification of these treaties. Treaties can be multilateral or bilateral, and specific in scope. The rules agreed to and recorded in such treaties will become legally binding upon parties upon ratification. Trade treaties for example contain rules regarding trade such as the removal of tariff barriers between State parties; investment treaties contain rules binding upon States and the investors or TNCs which are nationals of such States. Such treaties will typically create rules for such dispute resolution such as the Chapter 11 rules in NAFTA, or provide for the incorporation of international arbitration rules such as the International Center for Settlement of Investment Disputes (ICSID) rules. In this regard, the problem is that international trade and investment treaties may be in conflict with international human rights law treaties. In particular, trade and investment rules or practices may have the effect of violating *jus cogens* norms, obligations *erga omnes*, or customary law. This problem is amplified when treaty bodies in the field of trade law focus on the scope of their treaties to the extent that they fail to consider the aforementioned conflicts. As such, it is recommended that international legal norms and rules pertaining to human rights must as a principle of international law—in addition to any ‘moral’ imperative—be observed by any other treaties.

The International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the Geneva Conventions, and the Rome Statute, as well as

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76. The international investment treaties signed and ratified by states on multilateral and bilateral bases, also create international legal obligations specific to those states. They are also a source of international law for those specific states. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 297 (1993).

77. *Id.* at 11(B).

a plethora of other international human rights treaties have been ratified by India, and many Latin American states, thereby creating binding legal obligations on these states to domestically implement the protection and promotion of these rights. In this context, the ICCPR and ICESCR imposed legal obligations upon India to ensure that the fundamental human rights enshrined therein were guaranteed to the Indian people and the residents of Bhopal. In particular, the Indian government was legally bound to protect and guarantee for the Indian people the right to life, health, an adequate standard of living, and


80. Whether the treaties guaranteeing these rights are self-executing or require domestic legislation to be legally binding in their jurisdictions is a source of contention and varies from state to state. Note the Restatement on Foreign Relations in the United States provides that, “[i]nternational law and international agreements of the United States are law of the United States and supreme over the law of the several States.” Restatement (Third) of Foreign Relations Law of the U.S. § 111(1) (1987). In Canada, recent Supreme Court of Canada decisions have required that legislation is necessary for international treaties to be legally binding in Canada, to ensure the executive and the judiciary do not undermine or bypass the role of the legislative branch of government, see R. v. Law, [2002] SCC 10 (Can.).

81. See International Covenant on Economic, Social and Cultural Rights art. 6, Dec. 19, 1966, 6 I.L.M. 360, 370 (1967) [hereinafter ICESCR] (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

82. Id. art. 12 (“[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”). See Center on Economic, & Social Rights, Committee on Economic, Social & Cultural Rights General Comment 14 (2000), http://cesr.org/generalcomment14?PHPSESSID=91...a78f9969da61bd9 (last visited Feb. 24, 2006), where The Committee on Economic, Social and Cultural Rights in its General Comment 14, 2000 have interpreted pt. I, art. 12,

[T]he right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

Pt. I, art. 12(2)(b) of the ICESCR, Dec. 19, 1966, 6 I.L.M. 360, 363 (1967), imposes duties upon States to take [steps necessary] for “[t]he improvement of all aspects of environmental and industrial hygiene.” The Center on Economic, & Social Rights, Committee on Economic, Social & Cultural Rights General Comment 14 (2000), http://cesr.org/generalcomment14?PHPSESSID=91...a78f9969da61bd9 (last visited Feb. 24, 2006), has interpreted Pt. I, art. 12(2)(b), as requiring States to take “preventive measures in respect of occupational accidents and diseases . . . the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.”

83. Center on Economic, & Social Rights, Committee on Economic, Social & Cultural
the right to a legal remedy. India then did not fulfill its legal obligations in the Bhopal tragedy; it did not have adequate environmental safety legislation in place to regulate the activities of Union Carbide and UCIL, and it did not afford an adequate legal remedy to the victims. Similarly, it may even be argued that the U.S. failed its legal obligations. If it had a duty to protect international human rights law, then can that duty not extend to ensure that American legal entities also act in a manner consistent with international human rights law inside or outside of the United States?

C. Direct and Indirect Responsibility under International Human Rights Law

The challenge in the realization of international human rights law is its enforcement. Traditionally, international law has been interpreted as applying to States and State actors. Non-State actors such as TNCs have passed through a “loophole” in the law, evading direct responsibility for international human rights obligations. The viability of this approach is questionable in today’s global environment where TNCs have more wealth, power, and influence than many nation states. International law is capable of reflecting this shift in power and addressing the actions of powerful non-State actors, as is already evidenced by the discourse at the United Nations on corporate social responsibility.


84. Art. 1 of the International Covenant on Civil and Political Rights, Jan 30, 1992, 34 I.L.M. 635, 370 (1992), provides that: “The Covenant obligates each State Party to respect and ensure these rights, to adopt legislative or other necessary measures to give effect to these rights, and to provide an effective remedy to those whose rights are violated.”


86. Indeed as is commonly cited, of the top 100 economies in the world, 51 are said to belong to multinational corporations.

87. For example, see the UN Secretary General’s initiatives for a Global Compact on Corporate Social Responsibility, infra note 142, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), infra note 145. The challenge of course is compliance with the norms, and the current absence of legally enforceable standards.
Additional justification for applying direct responsibility to TNCs can be found in the language of the UDHR, and similarly the ICCPR and ICESCR which calls upon “all organs of society” to respect and uphold the rights. Second, this responsibility can be enhanced by the direct responsibility on States\textsuperscript{88} to protect international human rights law. TNCs are also required to create the conditions necessary for the enjoyment of these rights; this obligation creates an obligation upon States to regulate TNC behavior where it may impact upon human rights. It is important to note that under international criminal law, and domestic criminal and tort law, a corporation can be held accountable for violations such as war crimes, forced population transfers, and murder and torture\textsuperscript{89}. For example, decisions have ordered corporations to pay compensation to holocaust victims during World War II\textsuperscript{90}. In the US under the Alien Tort Claims Act\textsuperscript{91}, some TNCs have been held accountable for violations of the law of nations. However, these cases under the ATCA are subject to a series of legal hurdles which may prevent a plaintiff from access to US courts under ATCA. As such, a more effective method of recourse and access to justice must be made available to plaintiffs who suffer violations of human rights directly or indirectly from TNCs.

D. Indigenous Rights in International Human Rights Law

Although international human rights law protects such rights as the right to culture, life, adequate standard of living, and self-determination, indigenous groups have frequently found these rights violated. They are often among the most impoverished peoples in the states in which they live. Decisions affecting their land for resource extractions and including forcible relocation of indigenous groups are made without

\textsuperscript{88} Id.
\textsuperscript{89} For an overview of cases in which corporations have been linked to such allegations in legal proceedings in the United States, see the report “In Our Courts: ATCA, SOSA and the Triumph of Human Rights,” July 1, 2004, Earthrights International, available at http://www.earthrights.org/blogsection/page_2.html.
their participation.92 Indigenous peoples whose lands are rich with natural resources and thus attractive to TNCs, are vulnerable to gross violations of the human rights such as forcible transfer of populations, forced labour, and murder, all of which are contrary to international human rights law.

Recognizing the particular vulnerabilities of indigenous groups, the international community in 1994 created the Draft UN Declaration on the Rights of Indigenous Peoples.93 The Declaration affirms the rights of indigenous persons in international law, while recognizing the particular rights of indigenous persons to, for example, their cultures, dignity, distinct identities and characteristics, lands, natural resources, security, self-determination, and importantly the right to a remedy for the violation of any of these rights.94 The Draft Declaration provides an important benchmark for the protection of indigenous populations, and its provisions should be incorporated into the laws of states and the practices of MNCs. The UN High Commissioner for Human Rights, Louise Arbour, recently expressed her desire that the Draft Declaration will be finally adopted in 2006-2007.95

However, like other international instruments, the Draft Declaration also appears to be predominantly directed to the responsibilities of States and the United Nations in furthering these objectives. Again, non-state actors like MNCs which of course have today great potential to impinge upon these rights, are not directly addressed in the provisions of the Draft Declaration.

94. Id.
E. The Right to Development and the Millennium Development Goals

The right to development is a process for the realization of all human rights contained in the Charter of the United Nations, the UDHR, the ICCPR, and the ICESCR. The Declaration on the Right to Development states in Article 1 that "[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

The Declaration also contains key protections that obligate States to create the economic and social conditions that promote development of all human persons. The right to development includes self-determination, full sovereignty over natural resources, popular participation in development, equality of opportunity, and the creation of favorable conditions for the enjoyment of other civil, political, economic, social and cultural rights. The Draft Declaration provides an important touchstone to advance global standards in the protections of indigenous populations, and its provisions should be incorporated into the laws of states and the practices of MNCs. The UN High Commissioner for Human Rights Louise Arbour recently expressed her desire that the Draft Declaration will be finally adopted in 2006-2007.

According to the UN High Commissioner for Human Rights:

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96. See Charter of the United Nations, which in Article 1 identifies international cooperation in promoting and encouraging respect for human rights and fundamental freedoms as one of the purposes of the UN, www.un.org/aboutun/charter/.


98. Id. For example, in Article 2:
States have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Further, in Article 6: "States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights," and Article 8 states that "[a]ppropriate economic and social reforms should be carried out with a view to eradicating all social injustices."

99. Id.

100. See Arbour Comments, supra note 89.
The human person is identified as the beneficiary of the right to development, as of all human rights. The right to development can be invoked both by individuals and by peoples. It imposes obligations both on individual States—to ensure equal and adequate access to essential resources—and on the international community—to promote fair development policies and effective international cooperation.101

However, like other international instruments, the Draft Declaration also appears to be predominantly directed to the responsibilities of States and the United Nations in furthering these objectives. Again, non-state actors like MNCs which of course have today great potential to impinge upon these rights, are not directly addressed in the provisions of the Draft Declaration.

In 1993 at the Vienna World Conference on Human Rights, the international community recognized that “[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing,” and reaffirmed that the right to development is “a universal and inalienable right and an integral part of fundamental human rights.”102

The Copenhagen Declaration of the World Social Summit in 1995 reaffirmed these links but also established a new consensus placing people at the center of “sustainable development”.103 Recognizing that development is integral to achieving a “more peaceful, prosperous and just world”, UN Member Nations at the General Assembly in 2000 endorsed the Millennium Declaration104. The relationship between globalization and development was articulated in Article 5:

We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world’s people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed.

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Article 5 continues to call for "broad and sustained efforts" which "include policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation."\textsuperscript{105} Despite the spread of globalization, poverty remains a scourge on the earth with people in the least developed countries living on less than $1/day, and people in middle income economies like East Asia and Latin America living on $2/day.

The endorsement of the Millennium Declaration includes an international commitment to achieving the Millennium Development Goals ("MDGs") intended to reverse poverty, which are specific and measurable and seek fulfillment by 2015: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria and other diseases; ensure environmental sustainability; and develop a global partnership for development.\textsuperscript{106}

The International Institute for Sustainable Development released a study in September 2005 entitled "International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals," which found that FDI could have a significant impact upon the MDGs, but because of restraints upon developing country governments with respect to regulating the activities of MNCs, the positive impact has not been realized.\textsuperscript{107}

\textsuperscript{105} Id. ¶ 5.

\textsuperscript{106} For more information on the background and progress of the UN Millennium Development Goals, visit the UN website http://www.un.org/millenniumgoals/ (last visited Feb. 24, 2006).

\textsuperscript{107} See International Institute for Sustainable Development [IISD], International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals a Scoping Paper Prepared for the International Development Research Centre, Canada, Sept. 2005, http://www.iisd.org (prepared by Aaron Cosbey). The report concludes that: Neither the benefits nor the risks of IIAs [international investment agreements] are straightforward from a development perspective. There is, in the end, nothing in the IIAs that compels, or even encourages, investors to align their activities with the development goals of the host countries. This is not surprising; in fact it is standard practice. It does beg the question, however, whether a new model of IIA might be employed that does explicitly seek to achieve such goals. There have been only a few calls for such agreements, and they are mentioned above. But on the basis of the evidence presented here if IIAs are to be the tools for development that they are sold to be, there will need to be first a fix of those provisions that may in fact threaten development, and then a proactive search for ways to boost the quality of FDI such
The report is remarkable for its conclusion that International Investment Agreements, which are "sold" on the promise of promoting development, should contain provisions which would legally obligate investors or TNCs to align their activities to the development goals of host countries, which goals of course are inextricably intertwined with the broader set of international human rights.

The context of investment and economic globalization and its effects upon MNC activity and human rights violations are discussed below.

III. GLOBALIZATION: LATIN AMERICA, INDIA, AND MNCs

A. Globalization

Globalization has linked nations, cultures, ideas, economies, technologies, and human beings at a speed, scale and scope unprecedented in human history. Economic globalization has witnessed the liberalization of markets, privatization and deregulation, removal of trade barriers, flows of capital, and foreign direct investment. All of these initiatives, orchestrated primarily by western governments responding to powerful corporate lobbies, and international financial institutions such as the World Bank, the International Monetary Fund, and the World Trade Organization, enable TNCs to access markets which were previously restricted.

Market liberalization and FDI is achieved in large part through trade and investment treaties. Today there are more than 2,300 bilateral investment treaties ("BITs") in operation. Regional trade agreements like the North American Free Trade Agreement ("NAFTA") also create rules permitting FDI. These BITs and even the NAFTA create legal rules that protect investors, granting them standing to bring actions against States through investor-state dispute resolution mechanisms. Dispute resolution in investment is typically carried out through arbitration, according to rules and fora previously agreed by the parties.

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that it in fact achieves that which most host countries hope for when they sign on the dotted line.

108. See UNHCHR, supra note 19; UNCTAD report, supra note 1.

109. Many of these treaties incorporate the ability of parties to submit their dispute to the rules and procedures of the International Center for the Settlement of Investor Disputes ("ICSID").
States and investors are protected by these agreements and have standing to pursue legal remedies against each other in the event of a dispute. However neither these agreements nor the tribunals or adjudicators presiding over these disputes grant standing to aggrieved local populations or indigenous groups, nor do they seemingly consider the effects of higher international human rights law such as *jus cogens* and customary international law norms which may be violated by investor actions.

Another characteristic of the current globalized environment is the pressure on developing countries to pursue FDI as a means for development. International financial institutions and developed countries pressure developing countries to accede to rules that favor FDI, but these rules require developing countries to forego domestic safeguards such as performance requirements and other regulatory measures that could ensure that FDI is actually benefiting development through "capital retention, technology transfer, and human resource capacity-building."\(^{110}\) Recent studies by the IEG and the South Centre\(^ {111}\), indicate that FDI does not always result in economic gain for host countries; profits are often remitted in large part back into the TNC or the home country. The inequalities between rich and poor in developing countries continue to widen despite the growth in FDI worldwide in 2005, and corresponding increases in trade ratios and gross domestic product.

Developing countries are also caught in a conundrum in pursuing economic development. Purely economic goals tend to focus solely on economic indicators, such as trade volume and GDP, with no consideration of progress in any other aspect of human life. A human rights-centered approach to development will not only consider economic goals, but will do so within the broader context of an individual’s ability to enjoy his or her rights to health, life, environment, standard of living, self-determination etc. Further, economic gauges which focus on rising GDPs or trade volumes are blind to other indicators of regression in development, such as the rising inequities between rich and poor, the further marginalization and exploitation of

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111. *Id.*
indigenous and other vulnerable groups, and the destruction of environment, livelihoods, and culture.

As such, developing nations must find a balance between protecting investors rights through FDI incentives, and protecting the human rights and development agendas of their own people in accordance with their legal obligations under international law.

B. Market Liberalization, India and Latin America

The Union Carbide tragedy is likely to resonate with Latin Americans, and hopefully provide some lessons to Latin Americans protect the human rights of their peoples. In the past two decades, India and Latin America have taken legal reform measures in pursuit of market liberalization, including foreign exchange laws and privatization of previously run state enterprises. For a while, political and public attitudes that were suspicious of American multinational corporate interests relented to permit the penetration of US and other MNC enterprises through goods, services, and FDI.

India shares characteristics in common with Latin American countries. Both regions enjoy rich cultural traditions, indigenous populations, and a wealth of natural and human resources. Both have emerged from oppressive colonial rule. Latin American countries in particular have cast off decades of autocratic and at times bloody leadership in favor of democratic regimes. Latin America enjoys one of the highest populations of indigenous groups in the world. Although India touts having the world’s largest democracy, like many Latin American countries, the democracy is yet to reach its full potential in terms of the rights and participation of all members of society. In both regions, there continues to be gross inequalities between the rich and poor, and the gap is widening despite concurrent growths in GDPs attributable to trade and other market liberalization activities. The legal systems in India and Latin America are inherited colonial systems that are still evolving and need to be strengthened to afford Indians and Latin Americans full protections. Finally, both regions are actively pursuing development, and use this goal as the incentive for actively engaging in multilateral, regional and bilateral trade agreements with states and MNCs.

The Bhopal tragedy, which occurred at the beginning of early economic liberalization in India, epitomizes the failures of (a) the State
to protect its peoples either through the regulations of safety and operations standards or through provision of an effective legal remedy; (b) the failure of the non-State actor Union Carbide to take responsibility for the violations caused to tens of thousands of Indians; and (c) the ultimate ineffectuality of the international community in seeking justice for the Indian victims.

Latin Americans are no strangers to the potential for human rights violations carried out directly or with complicity by multinational corporations. Following Latin America’s move to market liberalism, foreign direct investment soared to reach US$68 billion in 2005.\textsuperscript{112} MNCs entered Latin America vigorously, responding to the new access, with significant rise in manufacturing and resource extraction operations. Unfortunately, the effects of FDI within Latin America have resulted in human rights violations against indigenous and local populations.\textsuperscript{113} One of the most renowned cases is that of \textit{Jota v. Texaco}, 157 F.3d 153 (2nd Cir. 1998) and \textit{Aguindo v. Texaco}, 303 F.3d 470 (2nd Cir. 2002). In these cases, plaintiffs brought consolidated actions against Texaco in a US court for environmental harms causing suffering to tens of thousands of plaintiffs, at the hands of Texaco for the release of highly toxic petroleum wastes into the drinking water supply of the region, damaging the environment, health, and ability to carry on traditional cultural practices, all violating fundamental human rights. The action was brought pursuant to the Alien Tort Claims Act. The US court dismissed the action and appeal, citing \textit{forum non conveniens}. Today the plaintiffs are working to pursue the action in courts in Ecuador,\textsuperscript{114} and are suing ChevronTexaco.

Cases such as these have left many Latin Americans disenchanted with US economic policies pushed in their region. At the time of writing, voters are responding to politicians that campaign for human rights including equality and non-discrimination, and take a more circumspect position to the domineering US trade agenda. Indeed, there

\textsuperscript{112} Following a decline in FDI during the years 1999 to 2003, FDI has increased 44% in Latin America and the Caribbean. See UNCTAD WIR 2005, \textit{supra} note 1, and ECLAC Report 2004, \textit{supra} note 7.

\textsuperscript{113} See \textit{Flores v. Southern Peru Copper Corporation}, 414 F.3d 233 (2nd Cir. 2003) (claims by plaintiffs for the loss of life, mass pollution and severe injuries to the people of Ilo, Peru, caused by the Southern Peru Copper Corporation’s smelter).

\textsuperscript{114} See the plaintiffs’ website and related stories covering the current litigation, www.texacorainforest.org.
has been considerable opposition to the forces of globalization in Latin America with so-called "left-leaning" candidates currying favor with local populates on the platform that they will end foreign direct investment equated with the exploitation of local peoples and resources, and re-nationalize industries. As recently as October 2005, 150 indigenous leaders protesting the entry of Spanish Oil Company Repsol and its US partner Burlington Resources into the Ucayali region of the Peruvian Amazon, declared a state of emergency in the Ucayali region, and considered launching legal action against the Peruvian government for violation of international agreements.

C. Multinational Corporations and Impunity

Within these parameters of economic globalization, the potential for direct or complicit violation of human rights by TNCs is great.

115. For example, the recent election of Evo Morales on this platform in Bolivia. See generally BBC News, Evo Morales: Profile, http://news.bbc.co.uk/1/hi/world/americas/3203752.stm (last visited Apr. 12, 2006). Mining companies and oil companies are poised to bring actions against him pursuant to existing bilateral investment agreements. See id.


Indigenous people have been and continue to be historically discriminated against and disfavored with regard to fundamental human rights, respect for our languages, cultures, traditional economies, natural resources and religious practices. In addition, we continue to be victims of forced relocation . . . Faced with the lack of respect for our fundamental rights by the Peruvian State and with the serious impacts already caused by the companies REPSOL and PLUSPETROL on our . . . environments, we resolve . . . (2) To say no to the entrance of the oil companies PLUSPETROL and REPSAL in our territories, as well as mining, logging and other transnational companies. (3) To accuse the Peruvian government of noncompliance with the following international treaties: ILO Convention 169.


117. For example, even the UN Security Council recognized the impact that business can have upon internal armed conflict when, in response to the illegal trade in diamonds and its impact upon the Sierra Leone conflict, it passed Resolution 1306 calling on the international diamond industry to cooperate in a ban against all rough diamonds from Sierra Leone. G.A. Res. 4168/1306, U.N. Doc. S/RES/3601 (July 5, 2000).
1. **Globalization and its Contributions to MNC Impunity**

Firstly, TNCs abuses tend to occur in developing countries, affecting the most vulnerable or disenfranchised populations including indigenous populations. Particularly in the case of resource extractions, TNCs have been linked to egregious human rights violations.  

Second, contemporary international human rights and humanitarian law continue to place the responsibility for the protection of these rights upon States. In some instances, the States themselves may be abusers of human rights, enjoining MNCs into complicit violations against local populations. In other instances, the States may have little or no leverage against the TNCs due to the strength and position of the TNC, and perhaps even the terms of the bilateral investment agreement or trade rules under which the MNC has gained access to the host state’s territory and market. Alternatively, the host state which engaged in providing incentives to a TNC for its FDI is now caught in an awkward position of having to take action to effectively regulate or stymie activities related to the particular FDI initiative. In yet another scenario, the host state may be the beneficial owner of a partner operating in a joint venture with the TNC, thereby compromising the host state’s real ability to hold the TNC accountable for any violations of human rights. Finally, the host state may simply lack the resources to engage in any action against the TNC, either because of lax environmental or labor standards which contributed to the incident at hand, or the lack of legal or judicial infrastructure to adequately try a TNC. Indeed these last two scenarios factored into the state of India’s suit against Union Carbide.  

Third, the TNC wields unprecedented power in international relations. Today, of the top 100 economies in the world, over 50 of the

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118. *See id.*  
120. *See also* Jota v. Texaco, 157 F.3d 153 (2nd Cir. 1998), and Aguindo v. Texaco, 303 F.3d 470 (2nd Cir. 2003) (arguing that a state does not have adequate resources to hear a claim involving mass torts was also made in). In both of these cases the plaintiffs argued that Ecuador did not possess the legal infrastructure and laws to adequately process the claims against Texaco. In all of these cases, the US courts dismissed the actions launched under ATCA, on the grounds of *forum non conveniens* or lack of subject matter jurisdiction. See *Jota,* 157 F.3d at 157; *Aguindo,* 303 F.3d at 479.
largest ones are enjoyed by corporations.\textsuperscript{121} The corporation Walmart for example, which earned in 2003 US$244 billion annually, earned more than 161 countries.\textsuperscript{122}

The spread of the TNC is also unprecedented and enhances its powers. Building on the central characteristics of the corporations itself (centralized management, limited liability of directors and officers, primary duties only to shareholders in terms of profits generated, and legal status enabling it to generate capital through shareholder investment which it can then use to generate profits for itself and its shareholders), the TNC operates from a home jurisdiction with centralized control, and throughout jurisdictions worldwide regardless of borders. The permeation of TNCs into host states through joint ventures agreements and the creations of subsidiaries enable it to spread its operations across borders while retaining its concentration of power through a chain of subsidiaries. The legal status and power of corporations and TNCs has caused writers to ponder the "psychopathic" characteristics of the corporation, and the need to perhaps invest the corporation with \textit{morality} as a means of achieving accountability.\textsuperscript{123}

Fourth, international law does not legally bind non-state actors like TNCs with respect to the ICCPR, ICESCR, and other human rights treaties. These treaties place binding obligations upon States and state agents.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{121} Of the top 100 economies in the world, 51 belong to corporations and 40 to States. The Office of the UN High Commissioner for Human Rights, in the report Globalization, Business and Human Rights, notes that half of the world's largest economies are corporations, and not states, and as such, corporations should be accountable for their impact on human rights. \textit{See generally} HCRC, \textit{supra} note 95.
\item \textsuperscript{123} \textit{See generally} William H. Meyer, \textit{Human Rights and MNCs: Theory Versus Quantitative Analysis}, 18 HUM. RTS. Q. 368, 370 (1996), citing Peter French's argument: "French believes that the changing nature of postmodern politics and the socioeconomic influence of large corporations often make them more important than states when it comes to impacting day-to-day life: corporate entities 'define and maintain human existence within the industrialized world.'" He further argues that "moral claims and responsibilities are as legitimate with regard to corporations as they are with regard to individuals and governments." \textit{Id.}
\item \textsuperscript{124} Indeed, even traditional proponents of international human rights law like the EU have argued that the responsibility for the protection of international human rights rests
Fifth, MNC activity in host jurisdictions is typically protected under the guise of “investor rights” protections contained in bilateral investment agreements, and also in regional trading agreements such as the NAFTA. These protections enable an investor or MNC to legally resolve any disputes it has with a host state in arbitration. The focus is on investor rights, and not really on investor responsibility.

Sixth, although an MNC may in recent times be liable for its extraterritorial activities relating to financial reporting and accounting, pursuant to corporate governance laws, home states are exceedingly reluctant to prosecute MNCs for human rights abuses committed abroad. The willingness of home states worldwide to adhere to stringent corporate governance rules that attack white collar crime and protect “the integrity of markets”, and a careful circle of stakeholders (i.e. shareholders, employees, those in the immediate environs) is in unconscionable contrast to the silence which greets allegations of gross human rights violations abroad.

Seventh, the above categories combine to create a situation in which there is a “gap” in the international law in that there are no direct legal obligations upon MNCs to protect the human rights of local populations in the foreign venues in which they operate.

Eighth, all of the above combine to create a situation in which victims are afforded no real recourse against MNCs for human rights violations. In essence, because of the failure of host states and their legal regimes, and the unwillingness of home states to entertain claims, victims are further victimized by being denied a legal remedy, which is a right under the ICCPR. There should be a footnote here.


2. Domestic Efforts to Hold TNCs Accountable

For the reasons set out above, domestic efforts to hold TNCs accountable for international human rights abuses have been largely unsuccessful. Most plaintiffs have sought relief under a U.S. statute, but with limited success.

The Alien Tort Claims Act ("ATCA") is a two hundred plus year old statute that permits foreigners to sue for international law violations in U.S. courts. The statute essentially lay dormant until the watershed case of Filartiga v. Pena-Irala, in which the parents of a slain Paraguayan youth successfully sued the Paraguayan police officer who tortured their son to death in Paraguay. The court permitted the parents, to sue in the United States, against a foreign plaintiff, for a tort committed on foreign soil. The decisions has subsequently been used with varying degrees of success to bring claims against TNCs for violations of international human rights law in foreign countries.

Human rights lawyers heralded the decision for the recognition of the universality of human rights norms, including the right to life and the right to be free from torture, in turn affirming the United States' jurisdiction over crimes resulting from violations of these rights.

126. See supra notes 115-22 and accompanying text.
127. 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) paved the way for aliens to sue in US courts for violations of human rights abuses. In the late 1990s, plaintiffs invoked the statute, with varying success, to bring actions against TNCs for violations of human rights abuses.
128. Filartiga v. Pena-Irala, 630 F.2d 880 (2d Cir. 1980).
129. Id. at 876
130. See id. at 880-90.
131. For a comprehensive overview of the cases which have been brought under the ATCA until 2004, see Earthrights International, supra at note 89.
Although plaintiffs from Latin America, India, Indonesia, and Nigeria, among others, have made efforts to hold TNCs accountable for human rights violations under the ATCA, these efforts have been met with limited success. Plaintiffs must clear hurdles relating to forum non conveniens, and proving a TNC action is linked to State action to trigger the provisions of ATCA relating to the "law of nations". While a recent decision has affirmed the viability of ATCA for pursuing claims that violate *jus cogens* norms, the aforementioned hurdles will most likely prohibit most plaintiffs from successfully pursuing claims under the ATCA. Further, the reliance on one domestic jurisdiction's legislation for relief is impractical for the myriad of plaintiffs worldwide. There must be a more accessible and reliable venue of recourse for plaintiffs.

3. Recent International Initiatives to Establish TNC Accountability

Whatever the cause, TNCs have recently demonstrated some awareness of their responsibility to stakeholders in society, other than shareholders. For example, many TNCs have web pages and information devoted to their corporate social responsibility (CSR) practices. Undoubtedly, TNCs who demonstrate good CSR practices avoid public castigation that is ultimately bad for business, but also are able to positively contribute to development initiatives in the environments in which they operate. The real test lies in whether TNCs would protect human rights at their expense of lowered profits.

TNCs are participating in some international initiatives to promote responsibility, such as the initiative of UN Secretary General Kofi

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134. For example, see Pillay, *supra* note 11, and see also the EarthRights Report, *supra* note 116.


137. For example, see the corporate brochure of Starbucks regarding its corporate social responsibility initiatives in supporting local coffee farmers around the world, http://www.starbucks.com/aboutus/FY05_CSR_Total.pdf (last visited Feb. 23, 2006).
Annan in his creation of the Global Compact.\textsuperscript{138} This is a voluntary initiative that operates to create a "global policy network"\textsuperscript{139} of TNCs, and other stakeholders including the private sector, States, and civil society to engage in a public "learning forum" whereby they can exchange experiences on voluntary action to uphold human rights. The Global Compact focuses on ten key human rights principles to protect rights, labor standards, the environment, and fight corruption.\textsuperscript{140}

Although the Global Compact is voluntary and does not create legally enforceable standards for TNCs, it is significant in shifting the paradigm of discourse towards positive initiatives, undertaken in a non-threatening manner, in an atmosphere of cooperation and learning, and in that sense moving forward the common internationally communal understanding of human rights and the need for their protection.

Recently, the international community adopted the UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.\textsuperscript{141} While recognizing the primary obligations of States to protect international human rights, the Norms significantly prescribe a duty for MNCs to "respect generally recognized responsibilities and norms contained in United Nations Treaties and other international instruments"\textsuperscript{142}, and the rights of all persons resident in countries in which they operate.\textsuperscript{143}

**CONCLUSION**

Although TNCs can make significant contributions to development, the potential for human rights violations by TNCs is great. The Union Carbide tragedy in India remains an outstanding and terrible example of TNC impunity. The outstanding legal issues of Bhopal, namely the

\textsuperscript{140} See id.
\textsuperscript{142} Id. at 2.
\textsuperscript{143} Id. at 6. See also The OECD Guidelines for Multinational Enterprises (2000), http://www.oecd.org/dataoecd/56/36/1922428.pdf.
liability of Union Carbide, its officers including CEO Warren Anderson, and the liabilities of the Indian government must be addressed to bring justice to the long suffering victims of Bhopal and the thousands who died following the incident. In addition, a proper compensatory scheme should be employed which includes payments of appropriate damages to survivors and the clean up of the site.

In addition, as set out in this paper, I make the following recommendations to the international community with respect to the responsibility of TNCs for international human rights law in general, and for Latin American countries embarking upon FDI initiatives:

1. Create a multilateral initiative with legally enforceable human rights standards for TNCs. Given that TNCs derive benefits and protections from globalization's architecture, it is logical then that they should be accountable and responsible in the jurisdictions in which they operate. International law is not static but capable of evolving to meet new challenges. The rise, power, and repercussions of actions by non-state actors, TNCs, require an international legal response to protect international human rights law.144

2. Have bilateral investment agreements and trade agreements balance investor protections with investor obligations. Ensure that these agreements understand the hierarchies of international law to the extent that these treaties must defer to *jus cogens* and customary international human rights norms.

3. States, especially developing countries, should focus on strengthening national legal systems so that their laws implement international human rights obligations, and that they have the infrastructure to protect rights and afford a legal remedy for violations. They should give effect to the *Draft Declaration on Indigenous Rights and the Declaration on the Right to Development*.

4. As a practical interim measure, States should insist that TNCs conduct a Human Rights Impact Assessment prior to FDI initiatives. Such an Assessment would go far in shifting the paradigm from “State responsibility” to one of “obligation on all organs of society to promote and protect human rights”. This Assessment should involve representatives of local populations to express their concerns and participate in

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decisions affecting themselves, their land, and their environments. There should be some impartial international body, perhaps the office of the UN High Commissioner for Human Rights and the Office of the UN Secretary General's Global Compact, which could assist in providing guidelines for these Assessments.

5. States, international financial institutions, and TNCs should recognize the full meaning of development, not just economic indicators, as set out in international human rights instruments and reflected in the Declaration on the Right to Development and the Millennium Development Goals.