AND JUSTICE FOR ALL? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections

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The intervention of multinational corporations may be a positive force for development if the state and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities.¹

INTRODUCTION

Contemporary globalization has thrust a powerful new non-State actor onto the international stage, the multinational corporation ("MNC"). The reach of the MNC is felt today by every individual who participates in the global economy as a consumer or producer of goods and services. MNC activity has witnessed trade and investment in products as divergent as satellite-powered telecommunications technologies and rural textiles. Globalization has also allowed for the dissemination and consumption of intellectual, cultural and political ideologies.

Despite the many benefits of globalization, one significant and growing problem has emerged. When an individual's human rights have been violated by a direct or complicit act of a foreign-headquartered MNC, what recourse is available? The question of plaintiffs' recourse raises challenging legal issues: (a) if international

human rights laws chiefly apply to States regarding the rights owed to individuals, which laws apply to MNCs given that MNCs are non-State actors?; (b) if an MNC is complicit or directly responsible for a human rights violation, in which legal forum can a plaintiff seek redress? The issue is significant given the rise of MNCs as a powerful non-State actor, working in numerous jurisdictions, but seemingly beyond the reach of any law which might hold them accountable to victims of human right violations. Further, in addressing solutions to this issue, one must consider the realities whereby (a) host-States may be unable or unwilling to demand that MNCs protect human rights, (b) home-States\(^2\) may be unwilling to monitor MNCs for extraterritorial action, and (c) plaintiffs who are economically vulnerable may be thwarted from bringing suit against MNC giants who may have annual profits exceeding one hundred billion U.S. dollars.\(^3\)

Because these issues remain contentious and unresolved, they threaten to overshadow the potentially great benefits which can be achieved by globalization and MNCs. Indeed, globalization is considered by many to be an "evil," as evidenced by the impassioned and anti-globalization demonstrations in Seattle, Geneva, and Montreal. Fuelling the anger in part, it seems, is the perception of impunity for MNCs who are accused of human rights abuses such as murder, torture including rape, environmental degradation, forcible relocation of populations, forced labor, and war crimes. The perception of impunity also includes the notion that the rights of key stakeholders in globalization – individuals, local populations, civil society – are unimportant, unprotected, or both.

The legitimate concern about impunity calls for responsibility and accountability on the part of MNCs. Legal human rights standards with enforcement mechanisms that would apply to MNCs to ensure that the rights of all stakeholders are protected, would address impunity concerns. The issue then becomes whether we currently have such legal standards holding MNCs accountable, or whether such legally enforceable standards must be created.

This paper will examine whether there currently exist any avenues of legal recourse for plaintiffs seeking redress for human rights

\(^2\) That is, the home state where an MNC is incorporated. This paper is typically looking at instances where a company is incorporated in a home State and operates in a different legal jurisdiction – that of the host-State.

\(^3\) See infra note 19.

\(^4\) The perception of globalization's chief actors operating without a regulatory framework capable of monitoring and enforcing compliance with human rights standards appears to have contributed to the protests against market-led globalization. See Amnesty International Oral Statement made to the 54th Session of the U.N. Commission on Human Rights, August 1, 2002, available at http://web.amnesty.org/library/Index/engIOR400212002?Open?.
violations committed by MNCs. Part I will examine the links between globalization and human rights, and the evolution of contemporary globalization from an "economics-centric" approach. Part II will examine, in an informal survey, some of the advances (and suggestions) on domestic, regional, and international levels towards securing redress for plaintiffs. Part III will offer recommendations on what is required to ensure that all MNCs are observant of international human rights norms, and that plaintiffs have legal recourse for any human rights violations.

I. GLOBALIZATION & INTERNATIONAL HUMAN RIGHTS LAW

A. Globalization

The term "globalization" is controversial, and difficult to define. Yet some definition is required because globalization has repercussions beyond the pursuit of economic profit alone.

Globalization is multifaceted with a great potential for catalyzing or contributing to sustainable development including human rights protections and economic growth. For example, globalization has enabled and catalyzed the free flow of information, ideas, and ideologies that can help people to mobilize and make informed choices in their daily lives regarding government.5

Still, globalization has been criticized by some as deepening the divide between rich and poor, creating a homogenous world devoid of rich cultural differences and contributing to the exploitation and abuse of the disadvantaged poor. In rejecting a depiction of globalization as contributing directly to increased human rights violations, the U.S. Ambassador George Moose stated to the 57th session of the U.N. Commission on Human Rights (2001) that:

The United States does not accept the premise that the net effect worldwide of the many phenomena grouped under the term "globalization" has been an increase in poverty, nor that globalization has had a broad negative impact on the enjoyment of human rights. In its non-economic aspects, the vastly increased information flows facilitated by globalization have allowed a much brighter light to be focused on human rights abuses around the world, bringing greater international attention than ever before . . . .6

5. For example, some consider the fall of the Berlin Wall to be an early indication of globalization's power to spread political and cultural ideologies, which ignited the demands of East Germans for liberal reforms.

While agreeing generally that globalization in some cases has contributed to development and human rights awareness, I believe that a more nuanced consideration of globalization might permit greater realization of its potential benefits. In this regard, I suggest that discussion of globalization which is the context for MNC responsibility in this paper, be predicated upon the following key assumptions:

(1) globalization has resulted in liberalized markets and tremendous U.S. economic growth that has contributed in some instances to increased realization of human rights;

(2) increased focus on human rights issues has not been merely a byproduct of the economic aspects of globalization but rather the result of an emerging, increasingly unified and vocal force of a global civil society that is demanding human rights and accountability; and

(3) if the driving economic forces of globalization can be harnessed by an achievable commitment to the promotion and protection of international human rights norms (i.e. including cultural rights), then the full economic promises of globalization may be universally enjoyed.

These assumptions lie at the heart of the discussions below, in which the various approaches to globalization, and the corresponding implications for the realization of human rights, are discussed.

1. Economics-Centered/Market-Based and Human Rights-Centered Approaches to Globalization

Globalization promises maximum profits achieved through the liberalization of markets and the free movement of goods, services, capital and knowledge. Proponents of globalization typically cite the

7. However, as World Bank Chief Economist Joseph Stiglitz noted, "as developing countries take steps to open their economies and expand their exports, they find themselves confronting significant trade barriers, which in effect leave them with neither aid nor trade. They quickly run up against dumping duties (when no economist would say they are really engaged in dumping), or they face protected or restricted markets in their areas of natural comparative advantage, such as agriculture or textiles." Joseph E. Stiglitz, Two Principles for the Next Round, Or, How to Bring Developing Countries in from the Cold (September 21, 1999). The debates over equalization of opportunities for free trade and access to markets is beyond the scope of this paper.

reduction in global poverty, the increase in jobs, and the virtues of competition such as efficiency, productivity and economies of scale chiefly being enjoyed by consumers. Note, however, that the emphasis tends to focus almost solely on economic indicators, with any other benefits, if recognized, considered a tangential benefit. In other words, by constraining the dialogue of globalization within an economic rhetoric, the various levels on which globalization can occur is unobserved.  

For example, the International Chamber of Commerce defines globalization and its merits, in part, as follows:

Globalization is about worldwide economic activity . . . . Consumers are its principal beneficiary. Its benefits in terms of faster growth, quicker access to new technology, cheaper imports and greater competition are available for all. Globalization has made the world economy more efficient and has created hundreds of millions of jobs, mainly, but not only, in developing countries.  

A solely economics-centric approach to globalization may also place the entire onus for domestic human rights protection on States, thereby overlooking the real threat posed to human rights protections by MNCs, globalization's new, legally unaccountable actors. For example, during a discussion on globalization held at the 57th Session of the U.N. Commission on Human Rights, the U.S. delegation stressed that the developing countries, which had most successfully reduced poverty, were those countries that had most successfully integrated their markets with the global market. The U.S. representative categorically rejected a proposition that globalization had a negative effect on human rights, stressed that globalization had contributed to greater human rights awareness, and suggested that any "change" is accompanied by challenge:

It is certainly true that globalization embodies change, that change presents challenge to any society, and that among these challenges is the problem of helping those who may find it difficult to adapt for whatever reason. National policies promoting participation in globalization's opportunities


and providing safety nets for those who may be adversely affected are vital in this regard.\textsuperscript{11}

Both the International Chamber of Commerce and the U.S. Ambassador's comments approach globalization from an economics-centered approach. An arguable inference of such an approach is that the right to development or the right to a healthy standard of living is a "fringe-benefit" of globalization, as opposed to these rights being goals that should be pursued as earnestly as free-market goals. In other words, the human rights benefits of globalization seem to be viewed as tangential to the overriding economic imperatives, and therefore less significant.

Alternatively, a human rights-centered approach would seek to ensure that every human being's fundamental rights are protected, including their economic rights, and could seek to work synergistically with economic objectives.

A human rights-centered approach and an economics-centered approach are not necessarily antithetical. From a human rights-centered context, a solely economic-centered approach to globalization appears dangerous because it (a) subordinates or marginalizes human rights concerns, (b) creates conditions permitting the continuation of human rights violations, (c) fails to recognize the multifaceted aspects of globalization and the panoply of stakeholders and participants and (d) fails to seek or identify solutions which will protect civil, political, economic, social, and cultural rights and therefore enable the economic benefits of globalization to be reaped fully.

2. International Financial and Multilateral Trade Organizations and a Human Rights Centered Approach

The concepts of human rights emerge from the recognition that every individual human being has inherent dignity and is entitled to fundamental rights and freedoms which can never be violated.\textsuperscript{12} Although international institutions such as the World Bank and World Trade Organization ("WTO") have been severely criticized for their

\textsuperscript{11} In this presentation, the Ambassador further asserted: As for globalization's economic aspects, the past three decades have seen more people rise out of absolute poverty than in any comparable period in the world's history. The countries that have succeeded best at helping their citizens escape from poverty have been those with effective governments that largely embraced freer markets, freer trade, and technological change .... The lessons of recent decades are clear, however. The developing countries with the fastest growth rates for extended periods have been those that are most integrated in the world economy, and the most involved in the process of globalization. See Remarks, Ambassador Moose, supra note 6.

\textsuperscript{12} See discussion on human rights and international law infra Part I.B.
role in creating conditions which allegedly permitted human rights violations to occur, a consideration of the mandates of these organizations appears somewhat mitigating in the sense that their mandates did not include human rights, which were considered to lie in the sole domain of States. States have failed in their responsibility to protect human rights and this failure has been compounded by international institutions which did not consider the potential impact of their actions upon human rights.

For example, The World Bank, which has played a key role in structuring forces of globalization, has come under criticism for projects, which failed to consider and protect human rights.\textsuperscript{13} Negotiating human rights protections falls outside of its traditional mandate – a position taken by the institution. Today, the World Bank seeks to apply a more liberal interpretation of its mandate to insert human rights considerations into negotiations with States regarding economic ventures.\textsuperscript{14}

Similarly, the WTO is attempting to engage civil society and create transparency regarding the impact of trade rules upon human rights. In response to the intense public criticism of its role in engineering globalization, the World Trade Organization has sought to engage with civil society groups with varying success, and has put forth "10 benefits of the WTO Trading System,"\textsuperscript{15} which include promotion of peace, life being "easier for all" and "more efficient," greater incomes, more jobs, and raised standards of living.

While these overtures towards incorporating human rights awareness into financial agendas are encouraging, they do not ensure that MNCs will operate with respect for human rights. That is, while it is reasonable to demand that international financial institutions and multilateral trading regimes respect and promote human rights, it is not reasonable to demand that they also be the custodians of

\textsuperscript{13} For a thorough overview of World Bank development projects in terms of human rights, and a consideration of ways to improve the situation from within the World Bank itself, see Halim Maris, \textit{The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?}, 4 ILSA J. INT'L & COMP. L. 174 (1997).


\textsuperscript{15} Arguments in favor of globalization for reasons beyond the economic are expressed in a variety of fora. See, e.g., World Trade Organization, 10 Benefits of the WTO Trading System, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/benefits_e.htm (last visited October 2003), stating:

1. The system helps promote peace; 2. Disputes are handled constructively; 3. Rules make life easier for all; 4. Freer trade cuts the costs of living; 5. It provides more choice of products and qualities; 6. Trade raises incomes; 7. Trade stimulates economic growth; 8. The basic principles make life more efficient; 9. Governments are shielded from lobbying; 10. The system encourages good government.
human rights norms. This is unrealistic and would in effect suggest an acceptance of the subordination of human rights to economic objectives.  

This hierarchy is evidenced for example in the North American Free Trade Agreement ("NAFTA") between Canada, the US and Mexico. The NAFTA in its preamble sets out its purposes, which include: "harmonious development and expansion of world trade . . . [to] provide a catalyst to broader international cooperation," "expanded and secure market for the goods and services produced in their territories," "reduce distortions to trade," and to "improve working conditions and living standards in their territories," "flexibility to safeguard the public welfare," and "development and enforcement of environmental laws and regulations," and to "enhance and enforce basic workers' rights." Although NAFTA respects the human rights elements listed above, it does so from its perspective of advancing trade. The full goals of international human rights laws are not, nor could they be, fully reflected in the aspirations of NAFTA.  

And yet, the problem remains that while the full goals of human rights laws are not reflected in these economic agendas, the economic agendas are played out in civil, political, social, economic, and cultural arenas that directly impact upon the enjoyment of human rights. That is to say, economic imperatives and goals do not actualize in a vacuum, but have an enormous impact upon human rights. References to the promotion of "workers rights," "standards of living," "environmental goals" while laudable, reinforce a fragmented and therefore diminished vision of the range of international human rights, and subordinate human rights to the imperative of economic goals.  

In fact, the early failure to recognize the interconnectedness of globalization's economic imperatives with international human rights norms, perhaps contributed to a failure to observe the emergence of a globalized civil society. The first major demonstrations in Seattle seemed to catch the WTO by surprise. While the protestors knowledge of the WTO may be in question, the WTO neglected to include and engage with civil society and this may have well contributed to the which resentment by that civil society. The 2001 attempt by the WTO to engage with civil society was again derided by representa-

tives of special interest groups, NGOs, and civil representatives, indicating perhaps that civil society still feels underfoot to the governing forces of economic globalization.

It seems that a global civil society is here to stay, as we have seen even recently. While this paper does not seek to comment on the merits of the recent war in Iraq, the international day of protest on March 15th\textsuperscript{20} does bear comment. The movement throughout the world evidenced a coordination, commitment, and implementation on a global level by members of civil society that was unprecedented. One writer referred to the spectacle of March 15th, as the rise of the "global citizen."\textsuperscript{21} Indeed it would appear that the power of the global civil society was born that day, and as with any new life, all of its potential for contribution, evolution, and destruction, lie ahead.

3. The MNC

If multilateral institutions and trading regimes are the architects of globalization, the MNCs are both its engineers and prime beneficiaries.

MNCs have participated in greater liberalized markets to realize enormous profits across the world. MNCs are operating in almost every country worldwide, through foreign direct investment, mergers and acquisitions of local companies, the expansion of foreign-based subsidiaries, and joint-venture agreements with local firms.

Seeking out new economic opportunity and growth has been the traditional mandate of the MNC. MNCs were traditionally responsible only to their shareholders\textsuperscript{22} for compliance with the articles of their corporate charters and maximum yield. In turn, the true ability of shareholders to monitor MNC decisions was perhaps compromised by the managerial structures that were not scrutinized\textsuperscript{23} so long as the

\textsuperscript{19} For a number of articles recounting NGO responses to this, and other WTO meetings, see the Global Policy website at http://www.globalpolicy.org/ngos/role/wtoindex.htm.

\textsuperscript{20} Globally coordinated protests occurred around the world on a number of dates in 2003, including January 18, February 15, March 15, and April 12. For a list of demonstrations by country, see the International ANSWER website at http://www.internationalanswer.org/news/update/032703a12intl.html.

\textsuperscript{21} See David Corn, in The Nation.

\textsuperscript{22} See also Principles of Corporate Governance, Organization for Economic Co-Operation and Development, (OECD Publication Services) (1999).

\textsuperscript{23} Such dynamics between hands-off shareholders and corporate management, prior to the Enron and World Com scandals were considered acceptable in capitalist systems which have enjoyed economic prosperity. The Enron and World Com scandals unveiled the necessity of meaningful corporate governance as billions of investor dollars were lost to fraud, and thousands of employees lost jobs and retirement savings. The Enron scandal also revealed that unscrupulous corporate governance activities at home may also go hand-in-hand with human rights violations committed
shareholders received acceptable profits. Today however, the effects of MNCs are felt by local villagers, local and home employees, state economies, the global economy, and the shareholder – in other words, the stakeholders in any MNC have multiplied.

For example, civil society groups, indigenous groups, NGOs, IGOs, and most of all, the local populations are now stakeholders in abroad. Enron has been accused of serious human rights violations including political corruption, unfair labour practices, environmental degradation, and fraud for its power plant in Dabhol outside of Mumbai. For a complete account, see the Human Rights Watch website, http://www.hrw.org/reports/1999/enron/.

24. However, new international conventions recognizing the potential for crime and corruption create obligations on States to enforce certain norms, e.g. prohibition of bribery, which can have impact upon the actions of MNCs. See, e.g., multilateral initiatives intended to promote corporate accountability:


See also John Doe v. Exxon Mobil Corp., No: 01CV01357 (D.C. Cir. filed 2001); Doe v. Unocal Corp., Nos. 00-56603, 00-56605, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), reh’g granted, Nos. CV-96-06959-RSWL, CV-96-06112-RSWL, 2003 WL 359787 (9th Cir. 2003) (motion to dismiss was denied on February 14, 2003, and court of appeals agreed to rehear the case en banc); Wiwa v. Royal Dutch Petroleum, No. CV-96-8386, 2002 WL 319887 at *31 (denying a motion to dismiss); In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); The Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003). See also Saunders, infra note 35.

25. See, e.g., CESR and SERAC who have been supporting the Ogoni people in Nigeria.

26. See, e.g., The Amungme people (Indonesia), The Ogoni people (Nigeria), The Cofan, Secoya, and Siona peoples (Ecuador), the rural people of the Tenasserim Region (Myanmar), and dozens of unique peoples in Chiapas.

27. See, e.g., Human Rights Watch, Amnesty International, Lawyer’s Committee for Human Rights, CHR, Oxfam, Federation Trade Union of Burma, International
MNC ventures if for no other reason than that they are directly and indirectly affected by the specific actions of MNCs. The recent protests in Brazil and Switzerland also necessitate MNC attention to human rights issues, if for no other reason than public opinion and the direct effect upon share value in trading markets.

The perception that MNCs are currently un-sheriffed is not entirely false. Although they operate in the sovereign jurisdiction of States, host-States are not capable either of adequately policing MNC activity regarding human rights issues, or of ensuring that the rights of the wider panoply of stakeholders are protected. Host-States welcome MNCs for their capital infusions into local economies, which can create or improve infrastructures, improve standards of living, new or improved infrastructures and even increase jobs. These dynamics are replete with inequities in bargaining power between the


29. The Enron power plant in Dabhol, India is an example of this. Here an Enron investment appeared ready to help India, and Enron allowed that nation's government into underwriting enormous U.S. debt, all for a project that the World Bank deemed financially unviable from the outset. See Human Rights Watch Online at http://www.hrw.org/reports/1999/enron/enron8-1.htm (last visited October 2003). The project was ultimately left incomplete when Enron declared bankruptcy. Indian banks have a total exposure of approximately 60 billion Rupees (1.2 billion U.S. dollars). See also "India sets Dabhol Deadline," January 31, 2002, available at BBC News Online, http://news.bbc.co.uk/1/hi/business/1793456.stm (last visited October 2003). The company has been criticized for signing a deal, which despite being favorable for the company, was certain to cause embarrassment for the politicians and bureaucrats who negotiated it. "India's Power Crisis Escalates," May 23, 2001, available at BBC News Online, http://news.bbc.co.uk/1/hi/business/1351100.stm (last visited October 2003).

30. Anti-Globalization gatherings in recent years have include the WTO riots in Seattle (Nov. 30 - Dec. 3 1999); riots in Geneva during G-8 meetings (June 2003); and a large demonstrations in Porto Alegre, Brazil (January 2003) for the World Social Forum.


32. For example, telecommunications industries can contribute to developing countries by establishing operating communications infrastructures, creating jobs, and contributing to the economy through direct capital infusions (e.g. through license fee payments) and the effect of increased jobs and spending powers.
host-State and MNCs. Their capital infusions into domestic markets and their net worth, often greater than the GDP of host countries, give MNCs trumping leverage. Even if a host-State were inclined, the economics are such that the host-State is rarely in a position to insist that an investing MNC respect human rights. In some cases, host-States can themselves be violators of human rights, embroiling MNCs in complicit actions, which perpetrate further human rights viola-


34. Of the top 100 economies in the world, 51 belong to corporations and 40 to States. For example, see below:

<table>
<thead>
<tr>
<th>Corporation / Country (2001 est.)</th>
<th>Revenue / GDP (2001 est.)</th>
<th>SOURCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>$10.08 trillion</td>
<td><a href="http://www.cia.gov/cia/publications/factbook/country">www.cia.gov/cia/publications/factbook/country</a> listing.html</td>
</tr>
<tr>
<td>Mexico</td>
<td>$920 billion</td>
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<tr>
<td>Exxon</td>
<td>$191.6 billion</td>
<td><a href="http://www.fortune.com/fortune/global500">www.fortune.com/fortune/global500</a></td>
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<tr>
<td>Royal Dutch/Shell Group</td>
<td>$135.2 billion</td>
<td><a href="http://www.fortune.com/fortune/global500">www.fortune.com/fortune/global500</a></td>
</tr>
<tr>
<td>Nigeria</td>
<td>$105.9 billion</td>
<td><a href="http://www.cia.gov/cia/publications/factbook/country">www.cia.gov/cia/publications/factbook/country</a> listing.html</td>
</tr>
<tr>
<td>Chevron / Texaco</td>
<td>$99.7 billion</td>
<td><a href="http://www.fortune.com/fortune/global500">www.fortune.com/fortune/global500</a></td>
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<tr>
<td>Sudan</td>
<td>$49.3 billion</td>
<td><a href="http://www.cia.gov/cia/publications/factbook/country">www.cia.gov/cia/publications/factbook/country</a> listing.html</td>
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<tr>
<td>Lesotho</td>
<td>$5.3 billion</td>
<td><a href="http://www.cia.gov/cia/publications/factbook/country">www.cia.gov/cia/publications/factbook/country</a> listing.html</td>
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<tr>
<td>Sierra Leone</td>
<td>$2.7 billion</td>
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<tr>
<td>Cambodia</td>
<td>$18.7 billion</td>
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tions. In other cases, host-States may not have the resources or legal infrastructures to enforce human rights protections. Yet another scenario is the MNC itself at risk in a hostile political environment where it is targeted for its relations with the host-State, or faces risks such as hostage-taking and employs security forces or relies on the State's security forces.

Whatever the origin of the human rights violation, in those cases where plaintiffs have sought redress they have faced significant obstacles from many quarters.

B. Human Rights and International Law

The term "human rights," like the term "globalization," can have different meanings for different audiences. In this paper, "human rights" means those rights set out in the Universal Declaration of Human Rights and guaranteed in customary and conventional international law through the following frameworks:

- International Human Rights Law
- International Humanitarian Law
- International Criminal Law

These frameworks work together. However, international humanitarian law applies only to armed conflict (i.e. war crimes), and international criminal law applies only to crimes of a most egregious nature such as genocide, crimes against humanity, and war crimes. Although these two areas of law can operate as *lex specialis*, in certain circumstances, they require thresholds to be met before they can apply.

International human rights law applies at all times, and operates to provide protections even where in some cases the above frameworks may not yet extend. International human rights law affords a wide range of rights, which the international community agreed were due to every human being, such as the right to health, education, due process, freedom of expression, and the environment. After World War II, the international community drafted the Universal Declaration of Human Rights, which sets the panoply of fundamental human rights that States agreed should be afforded to individuals. The

35. *Exxon Mobil* is an example of this. The U.S. State Department has submitted a letter to the court stating that the case may adversely affect U.S. interests in Indonesia. A ruling on Exxon Mobil's motion to dismiss is still pending. *See also Talisman*, 244 F. Supp. 2d at 354. In *Talisman*, Defendant's motion to dismiss was denied on March 19, 2003. The case is now expected to proceed to discovery. *See also Lucinda Saunders, Rich and Rare the Gems They War: Holding DeBeers Accountable for Trading Conflict Diamonds*, 24 FORDHAM INT’L L.J. 1402 (2001) (alleging that large mining companies have contributed to the strife in Sierra Leone and Angola).

rights in these declarations were later entrenched in the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which as treaties are legally binding (unlike the Universal Declaration of Human Rights ("UDHR") which is a declaration and was not legally binding, but today is considered to have attained customary international law status). Unfortunately, some attribute this distinction among the rights, framed by two separate conventions, as sparking a hierarchy of rights wherein civil and political rights are considered "first generation" rights; economic, social and cultural rights are considered "second generation rights;" and the rights to development and environmental rights are considered "third generation rights." 37  

Ironically, the promise of globalization vis-a-vis standards of living is most accessible through the realization of social, economic, and cultural rights with respect to better standards of living, health care, shelter, and environmental rights. 38

In addition to the rights contained in treaties, human rights protections are also found in peremptory norms considered to be *jus cogens*. The prohibition against torture is considered for example to have achieved the status of *jus cogens* with binding obligations *erga omnes* in international law. Another important source of international law is customary international law, evidenced among other indicia, by the accepted widespread practice of States. 39

While this article cannot delve into the complexities of the challenges of implementing international humanitarian and human rights law, 40 one of the ongoing endeavors of the international community is to enforce State compliance with international human rights and humanitarian law obligations. States are bound in such cases by peremptory norms, customary international law, and their ratifications of international treaties.

The difficulties in holding corporations accountable to these standards is that international law was crafted to bind States in their human rights obligations to individuals. MNCs are not States and are therefore not generally bound by international human rights laws. This emergence of a powerful non-State actor with the potential to be

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37. For an excellent discussion on the sources and application of international law, including international human rights law, see Francisco Forrest Martin, Delineating a Hierarchical Outline of International Law Sources and Norms, 65 SASK. L. REV. 333 (2002).


39. See supra note 36.

40. But see William Schabas, Twenty-five Years of Public International Law at the Supreme Court of Canada, 79 CAN. B. REV. 174-195 (2000). See also supra note 36.
as influential as States in the enjoyment of rights of individuals calls for a universal understanding of the rights owed to individuals and mechanisms to ensure the legal enforcement of those rights. This is not to suggest that the primary responsibility of protecting human rights should shift from States to MNCs. Rather, acknowledging the realities of the impact of MNCs with respect to both individual rights and the ability to influence or affect State behavior, the role of MNCs vis-à-vis rights must be addressed.

To be certain, some form of uniform legal accountability is needed. MNCs operating in oil, gas, energy, mining including diamonds, and apparel industries have been linked to the full gamut of human rights violations including for example, murder, assassination, environmental degradation, health hazards, forcible relocation of populations, forced labour, torture including rape, and war crimes. The activities of extraction MNCs (e.g. energy, oil, mining) appear to be the most likely to contribute to or cause human rights violations. Although such violations are proscribed under international human rights law and international humanitarian laws, regional laws, and domestic laws, lack of implementation and failure

41. See Unocal, 2002 WL 31063976 at *24; 2003 WL 359787 at *1 (motion to dismiss was denied on February 14, 2003, and the majority of the 9th Circuit agreed to rehear the case en banc); Wiwa, 2002 WL 319887 at *2-*3, *31 (denying a motion to dismiss); Marcos, 25 F.3d at 1469; Kadic, 71 F.3d at 236-38; Filartiga, 630 F.2d at 878-80; Talisman, 244 F. Supp. 2d at 296-303. See also Saunders, supra note 35.

42. See Unocal, 2002 WL 31063976 at *1-*6; Wiwa, 2002 WL 319887 at *2-*3, *31; Marcos, 25 F.3d at 1469; Kadic, 71 F.3d at 236-38; Filartiga, 630 F.2d at 878-80; Talisman, 244 F. Supp. 2d at 296-303. See also Saunders, supra note 35.


44. See Aguinda, 303 F.3d at 473-74; Jota, 157 F.3d at 155-56; and Wiwa, 2002 WL 319987 at *2. See also In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 809 F.2d 195, 201 (2d Cir. 1987). This case was dismissed on grounds of forum non conveniens, but a settlement was reached in India amounting to 470 million U.S. dollars. See also African mercury and asbestos cases infra note 81. See also Mexican Maquiladora cases: Auto Trim/Custom Trim/Breed Case (U.S. NAO Case No. 0001), Echlin Case (U.S. NAO Case No. 9703), and Han Young Case (U.S. NAO Case No. 9702) (all involving occupational health and safety matters heard by tribunals associated with the North American Agreement on Labour Cooperation ("NAALC") – the labour side of NAFTA). NAALC cases are available online through Human Rights Watch, at http://www.hrw.org/reports/2001/nafta/nafta0401-05.htm#P649_94817 (last visited October 2003).

45. See Wiwa, 2002 WL 319887 at *2; Talisman, 244 F. Supp. 2d at 299.

46. See Unocal, 2002 WL 31063976 at *3. See also Saunders, supra note 35.

47. See Unocal, 2002 WL 31063976 at *4; Wiwa, 2002 WL 319887 at *1-*2; Marcos, 25 F.3d at 1469; Talisman, 244 F. Supp. 2d at 298; Kadic, 70 F.3d at 236-37; Filartiga, 630 F.2d at 878-79. See also Saunders, supra note 35.

48. See Exxon Mobil, No. 01CV01357 (D.C. Cir. files 2001); Kadic, 70 F.3d at 236.
or unwillingness to implement these laws results in an interstice through which MNCs pass, evading responsibility to uphold human rights and accountability for human rights violations.\textsuperscript{49} The humanitarian law violations in Sudan, Angola, and Sierra Leone, and the civil and political rights violations in Ogoniland, Nigeria, have de facto led to acknowledgment by the involved MNCs that a human rights policy is required.\textsuperscript{50}

II. \textbf{A Survey of Efforts to Enforce and Promote Human Rights in the Context of Globalization}

When plaintiffs believe they have been victims of human rights violations perpetrated directly or with complicit participation of MNCs, in what forum can they bring suit against an MNC? Should they bring suit in the country where the violation occurred? In the country of their nationality if it is different than the \textit{locus delicti}? Or in the country where the MNC is headquartered?

\textbf{A. Seeking Redress in Domestic Courts}

The majority of plaintiffs seeking redress in a domestic court against corporate violators of human rights have brought suit in the U.S.\textsuperscript{51} under the reinvigorated 1789 Alien Tort Claims Act ("ATCA").\textsuperscript{52} U.S. courts have interpreted the relevant section of this Act as granting jurisdiction to U.S. courts to hear foreign tort cases as

\textsuperscript{49} Cases which haven't seen redress include: \textit{Exxon Mobil} in Indonesia (State Department interference may prevent the case from being heard); \textit{Aguinda}, 303 F.3d 470; \textit{Jota}, 157 F.3d 153 (dismissed in the U.S. and returned to the courts of Ecuador on grounds of \textit{forum non conveniens}); \textit{Bhopal}, 809 F.2d 195 (As part of the \textit{forum non conveniens} ruling, the defendants agreed to recognize the Indian Supreme Court's authority. Once in India, Union Carbide settled the case, though not to everyone's satisfaction). \textit{See also Filartiga}, 630 F.2d 876 (award never paid); \textit{Sierra Leone} (no suits filed at present).

\textsuperscript{50} Evidence of corporate recognition of the need for discussions on voluntary principles may be inferred by the presence of numerous infamous corporations at United Nations Global Compact meetings. Global Compact Policy Dialogue: Supply Chain Management and Partnerships, June 12-13, 2003, ECOSOC Chamber, United Nations Headquarters, New York, available at \url{www.unglobalcompact.org/content/docs/scm_part_120603.pdf} (last visited October 2003). British Petroleum, Chevron/Texaco, Exxon Mobil, General Motors, Rio Tinto, Shell International, and Total Oil were among the 200 participants.

\textsuperscript{51} Yet some have brought suits in Canada and Australia. \textit{See Halina Ward, Securing Transnational Corporate Accountability Through National Courts, 24 Hastings Int'l & Comp. L. Rev. 454 (2001).}

\textsuperscript{52} In the past ten years, approximately twenty-five suits have been brought against corporations by foreign plaintiffs under the ATCA in U.S. courts. Eight suits were dismissed before proceeding to trial, and in no instance have damages been awarded. \textit{See Human Rights Watch: Myths and Facts About the Alien Tort Claims Act, available at \url{www.hrw.org/campaigns/atca/myths.htm} (last visited October 2003).}
follows: U.S. 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."

The ATCA was generally overlooked until the 1980 decision in *Filartiga v. Pena-Irala*, which established that aliens could sue foreign tortfeasors in the U.S. for crimes, which "offend the law of nations." In *Filartiga*, the family of a murdered Paraguayan man was allowed to bring suit against a Paraguayan state official for torture resulting in death of the deceased. Recognizing that the right to be free from torture was part of customary international law, binding upon States and therefore constituting "law of nations," the court held that it had jurisdiction to hear the plaintiff's claim under § 1350, ATCA. *Filartiga* is a watershed decision for recognizing international customary norms and the elements of *jus cogens*, and also for opening the door to ATCA claims. Notwithstanding *Filartiga* and initially positive judicial interpretation of plaintiff's rights and jurisdiction under the ATCA, the ATCA decisions began creating a pattern of high threshold obstacles for plaintiffs to overcome. First of all, U.S. courts narrowly interpreted their jurisdiction to hear claims of torts which violated *jus cogens* norms, however, this is problematic because in the

53. 28 U.S.C. § 1350 (2000). Critics of ATCA claim the statute was intended to permit foreign plaintiffs in the territory of the U.S. to have access to U.S. courts, and not to sue for violations of international law committed outside of the U.S. However, the Court in *Filartiga* held that "law of nations" must be interpreted in the context of what international law means today, and not what it meant in 1789. *Filartiga*, 630 F.2d at 881.

54. In the U.S., federal courts have jurisdiction over actions brought under the Alien Tort Claims Act, for a tort "committed in violation of the law of nations." *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (citing *Marcos*, 25 F.3d at 1475). The *Papa* court explained that the law of nations is part of federal law. In *Unocal*, 2002 WL 3106976 at *8 n.12, the United States Court of Appeals for the Ninth Circuit referred Black's Law Dictionary stating, "The 'laws of nations' is 'the law of international relations, embracing not only nations but also ... individuals (such as those who invoke their human rights or commit war crimes).'" See also BLACK'S LAW DICTIONARY 822 (7th ed. 1999).

55. However, the court of appeals in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), the first case decided after *Filartiga* under 28 U.S.C. § 1350 (2000), limited the jurisdiction of the court to hear cases involving the law of nations, with three separate opinions, which have not been followed in subsequent decisions.

56. *See, e.g., Abee-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), in which the court rendered an expansive interpretation of a plaintiff's ability to invoke the ATCA: "On its face, section 1350 requires the district court to hear claims 'by an alien for a tort only, committed in violation of the law of nations.' ... We read the statute as required no more than an allegation of a violation of the law of nations in order to invoke section 1350." *Abee-Jira*, 72 F.3d at 847 (citing 28 U.S.C.A. § 1350 (2000)). See also William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 HASTINGS INT'L & COMP. L. REV. 354 n.3 (Spring 2001).

57. *jus cogens* norms include torture, murder, and slavery. *Unocal*, 2002 WL 31063976 at *8. Judge Wood in *Wiwa*, 2002 WL 319887 at *5, affirmed that a plain-
context of human rights, very few rights have been recognized as attaining *jus cogens* status.\(^5^8\) Again, those that tend to be civil and maintain political rights, serve to contribute to the hierarchy of rights and sweep aside a significant ratio\(^5^9\) of economic, social and cultural rights violations which arise in the MNC foreign investment context. Secondly, the torts needed to be committed as part of state action, and if against an individual, the individual needed to have been acting on behalf of the State.

A third high threshold obstacle is the defendants' arguments of *forum non conveniens* which have been successful in avoiding jurisdiction for ATCA claims for violations of economic, social and cultural rights.\(^6^0\) However, in three recent decisions, the U.S. courts have interpreted ATCA claims relatively favorably. The cases *Wiwa v. Royal Dutch Petroleum Company and Shell Transport and Trading Company*, *Doe v. Unocal*, and *The Presbyterian Church of Sudan v. Talisman*, involve respectively claims against corporations for civil and political rights violations in Nigeria, Myanmar, and Sudan. In these cases, the courts held that the U.S. has a significant interest in trying cases involving human rights violations,\(^6^1\) and that certain egregious human rights violations claims can be heard without establishing state action and can attract individual liability.\(^6^2\)


\(^6^0\) An example of an ATCA case that was never heard in an American court on *forum non conveniens* grounds is *Aguinda*, 303 F.3d 470, which was returned to Ecuador's courts, as the New York courts felt it would be too difficult for an American court to arrange transportation, and translators for the tens of thousands of indigenous people slated to testify. See also *Bhopal*, 809 F.2d 195.

\(^6^1\) See *Wiwa*, 2002 WL 319887 at *3-*12; *Unocal*, 2002 WL 31063976 at *8-*11; *Talisman*, 244 F. Supp. 2d at 304-10.

\(^6^2\) *Kadic* extended liability to individuals not acting on behalf of State but in furtherance of genocide. 70 F.3d at 241-42. The *Kadic* court recognized that the
Despite these encouraging developments of Wiwa, Unocol, and Talisman, the ATCA in its current avatar is not a satisfactory solution for foreign plaintiffs seeking redress for corporate violation of human rights.

Notwithstanding the expanded interpretation of U.S. jurisdiction coming out of Wiwa, in subsequent decisions regarding environmental violations by Texaco in Ecuador, the Court did not grant jurisdiction. In fact the district court held in Aguinda:

1) the conventional doctrine of *forum non conveniens* "applies in undiminished fashion" to ATCA claims, id. at 554 (citing Wiwa v. Royal Dutch Petroleum. . . .); 2) because environmental torts are unlikely to be found to violate the law of nations, plaintiffs' ATCA claim is unlikely to survive dismissal; 3) the United States has no special public interest in hosting an international law action against a U.S. entity that can be adequately pursued in the place where the violation actually occurred; and 4) the ATCA does not compel providing a U.S. forum when an adequate and more convenient foreign forum exists.

On appeal, the U.S. Court of Appeals for the Second Circuit upheld the district court's decision, finding that there was no evidence that Ecuador was not an appropriate forum or antagonistic to tort law cases, that on balance the public interest did not outweigh the private interest factors such as accessibility to witnesses:

We find no abuse of discretion in the district court's conclusion that these interests "weigh heavily" in favour of an Ecuadorian forum. The relative ease of access to sources of proof favours proceeding in Ecuador. All plaintiffs, as well as members of their putative classes, live in Ecuador or Peru. Plaintiffs sustained their injuries in Ecuador and Peru, and their relevant medical and property records are located there. Also located in Ecuador are the records of decisions taken by the Consortium, along with evidence of Texaco's defenses implicating the roles of PetroEcuador and the Republic. By contrast, plaintiffs have failed to establish that the parent Texaco made decisions regarding oil operations

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*crimes of genocide, war crimes, and slavery do not require state action because the law of nations attaches individual liability to those crimes. Id. at 236. The Ninth Circuit affirmed the Second Circuit's extension of the principle in Kadic whereby other crimes such as torture, rape, summary execution, if committed in furtherance of genocide and war crimes will attract individual liability. Unocal, 2002 WL 31063976 at *9.*

63. *Aguindo*, 303 F.3d at 476.
64. *See Jota*, 157 F.3d 153; *Aguindo*, 303 F.3d 470.
65. *Aguindo*, 303 F.3d at 476.
in Ecuador or that evidence of any such decisions is located in the U.S.\textsuperscript{66}

The court went on to cite the "onerous" translation difficulties arising from cases with 55,000 putative class members of different indigenous groups speaking various dialects.\textsuperscript{67}

The above decision is troubling on two counts. First, it reinforces the hierarchy of rights in setting "environmental torts" on a lesser tier than civil and political torts such as torture (or rape, summary execution, genocide, forced labour, etc.). Second, the decision reinforces the \textit{forum non conveniens} defence and couples it with what appears to be a jurisdiction threshold criterion of the need to establish decisions or participation of the American-incorporated parent company or any other link to the U.S. Such criteria appear to contravene the spirit and intent of ATCA that prima facie seeks to address "violations of international law" by limiting the reach of the Act to torts, which have an "actus" connection to the U.S.

In addition to the \textit{forum non conveniens} defence, a U.S. court hearing an ATCA decision will go through a determination process regarding the relevant law to be applied to the issues, as was demonstrated even in \textit{Wiwa}. Should a court hearing ATCA cases apply international law, the law of the locus delicti state, or the law of the forum state?\textsuperscript{68} Again, from the perspective of an international human rights lawyer, international human rights law should always be applied. However, the recent \textit{Unocal} decision suggests that international law should be applied only if the alleged tort would constitute a violation of a \textit{jus cogens} norm. Such an interpretation limits the application of law to the few norms which have attained \textit{jus cogens} status.\textsuperscript{69} The court in \textit{Unocal} has taken this more limited approach, despite a more expansive approach taken in \textit{Wiwa}. The court cited the Restatement and \textit{Wiwa} in favour of applying international law, even where relevant domestic criminal legal frameworks exist, in order to best "serve the needs of the . . . international system," and the purposes of the ATCA which is to remedy violations of the law of nations. The court also recognized that courts look to decisions from international criminal tribunals to determine how to apply international human rights law, under a civil ATCA.

It is important to note that the merits of the issues in \textit{Wiwa}, \textit{Unocal} and \textit{Talisman} remain to be decided.\textsuperscript{70} At this juncture the deci-

\begin{footnotesize}
\begin{enumerate}
\item Id. at 479.
\item Id.
\item See \textit{Wiwa}, 226 F.3d at 95.
\item Alston, supra note 58, at 21.
\end{enumerate}
\end{footnotesize}
sions to affirm jurisdiction can be considered encouraging only with caution. There appears to be too much opportunity for inconsistency in issues involving the application of international law and *forum non conveniens* arguments. Even where international law is applied, it is applied in a tertiary fashion – as a tool to interpret criminal domestic laws for example – rather than in full force as international law. In other words, even though a plaintiff claims there has been a violation of international human rights law, a court may elect to apply instead the law of the *locus delicti* state, or the forum state, and use international law as a means of interpreting either of the two domestic legal frameworks. It is this paper’s position that such an approach dilutes the full strength of accepting and applying international human rights law by relegating it to applicability only if there are not more relevant domestic laws, or as a means to interpret domestic laws, rather than as determinative law.

Therefore, although the recent spate of ATCA decisions in the U.S. are promising in terms of holding corporations accountable for human rights violations, a number of caveats prevail preventing favourable predictions of the future utility of ATCA for plaintiffs, namely:

a) In the cases of *Wiwa*, *Unocal* and *Talisman*, judgments are yet to be rendered on the merits of the decision; i.e. the cases are going forward in U.S. courts and have successfully overcome defendants claims of lack of jurisdiction and *forum non conveniens*. It remains to be seen what the courts will find in terms of assessing corporate direct liability for human rights violations;

b) U.S. courts will not automatically apply international law (international human rights law) directly or *in toto* to an ATCA claim, but will consider whether to apply U.S., international or *forum delecti* law. Even where international law is applied it may be applied as a tool of interpretation vis-à-vis domestic laws, thereby diluting the effect of international laws.  


d) Existing jurisprudence suggests that corporate liability may not be direct, but dependent upon complicit liability with States, which is difficult to prove. Even the open door to individual liability expounded in *Kadic* and *Unocal,* suggest a high threshold marked by serious international crimes. Since majority of torts and human rights violations alleged to be committed by MNCs are environmental, labour and health related falling within the category of economic, social and cultural rights, it is unlikely the threshold for individual liability established in *Kadic* and *Unocal* will be met.

73. See *Kadic*, 70 F.3d 232; *Unocal*, 2002 WL 31063976.


75. See *Corporate Ethics: Big Oil's Dirty Secrets*, ECONOMIST (London), May 10, 2003 at 54.

76. See Press Release, Human Rights Watch, *Ashcroft Attacks Human Rights Law* (May 15, 2003), *available at* http://www.hrw.org/press/2003/05/us051503.htm (last visited June 25, 2003), stating, "This is a craven attempt to protect human rights abusers at the expense of victims," said Kenneth Roth, executive director of Human Rights Watch. "The Bush administration is trying to overturn a longstanding judicial precedent that has been very important in the protection of human rights." See also Press Release, Lawyer's Committee for Human Rights, *Justice Department Seeks to Re-

e) Despite the potential desirability of a U.S. forum, it is not always accessible to foreign plaintiffs and many claims may not be made if the only forum is a U.S. courts

f) Despite the decision in *Wiwa,* *Aquinda* illustrates that the defence of *forum non conveniens* continues to be formidable and an obstacle to overcome by plaintiffs.

Finally, the ATCA may not be a reliable recourse for plaintiffs because the future of ATCA is uncertain. ATCA has come under "attack" in the U.S. and the oil industry has been lobbying U.S. Congress to repeal the statute. Coupled with a recent amicus brief filed by the U.S. Justice Department on behalf of *Unocal,* the threat to the future viability of ATCA is significant. The position of the U.S. Justice Department is that ATCA should not be used by plaintiffs to file civil cases; that the "law of nations" covered by the ATCA did not include international human rights treaties; and that abuses committed outside of the United States would not be covered under the law. No previous administration has challenged the legitimacy of ATCA cases against gross human rights abusers. If the Justice Department de-
nounced ATCA, lobbying of Congress will not be necessary, because ATCA will effectively be rendered impotent.

There are commentators who agree with the critics of ATCA, reasoning that using ATCA to hear claims against MNCs for acts committed in other jurisdictions could unduly influence MNC decisions to carry on business in the U.S., and could be tantamount to the judiciary shaping foreign policy, or the hegemonic spread of American legal jurisdiction. Responses to these criticisms are similar to that of Ken Roth, Executive Director of Human Rights Watch, who responded to the U.S. Justice Department brief by saying: "This is a craven attempt to protect human rights abusers at the expense of victims. The Bush administration is trying to overturn a longstanding judicial precedent that has been very important in the protection of human rights."
There have also been examples of plaintiffs seeking redress for alleged corporate violations of human rights in other domestic jurisdictions, such as Canada, the UK and Australia. However, it appears that these jurisdictions with their historic aversion to extraterritoriality will not be amenable to hearing cases with a foreign locus delicti.

B. Seeking Support for Human Rights Protection from Regional Trade Structures

Civil society groups in the Americas, Asia, Africa, the Middle East and Europe has been vocal in fighting for threatened human rights related to MNC ventures, particularly in terms of labor and forced labor conditions including child labor and prostitution, and

80. In Cambior, 1998 Q.J. No. 2554 (Q.S.C) (Can.), RIA requested permission to bring a class action suit against Cambior on behalf of Guyanese people affected by a chemical spill at a mine in Guyana; Cambior had a significant interest in the mine. A Québec court ruled that Guyana would be the appropriate venue for a trial. In Rex v. Acres International, October 2002 the High Court of Lesotho found a Canadian engineering company Acres International guilty of bribing government official and levied a significant fine. The fine has yet to be paid, pending an appeal.

81. In England, actions have been brought against Rio Tinto (at the time still known as RTZ) arising out of working conditions at its Rossing Uranium Mine in Namibia; against former asbestos mining company Cape in Respect of its operations in South Africa; and against Thor Chemicals over mercury poisoning suffered by workers at its South African mercury recycling plant.

Ward, supra note 51, at 456. The Namibia claim failed due to a statute of limitations. The Thor Chemical cases were all settled out of court. But the House of Lords decided in July 2000 that the asbestos cases could continue. Id. at 457.

82. See the recent decision of the African Commission on Human Rights re: SERAC and CESR v. Nigeria (2001) (the Commission attributed responsibility for Royal Dutch Petroleum and Shell to the state of Nigeria). While this is certainly a welcome decision, it again does not provide plaintiffs with a possibility of attributing direct liability to a TNC that has been responsible for human rights violations. "The intervention of multinational corporations may be a positive force for development if the state and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities." African Commission on Human and Peoples' Rights, Banjul, The Gambia, Reference: ACHPR/COMM?AO44/1, 27 May, 2002.

83. Many such groups exist in nations typifying the unequal power balance between states and TNC's. See e.g., the Maquiladora cases in Mexico; in Brazil, the Instituto Ethos, available at http://www.ethos.org.br/ (not only self-contained, but also acts as a hub for a variety of similar initiatives); in India, the Partners in Change, available at http://www.picindia.org/, the Social Ventures Network, and the Fund for Peace, available at http://www.fundforpeace.org/sitemap.php; in Thailand, the Population and Community Development Association, available at http://www.pda.or.th/e_projectdon.html; or the Thai Business Initiative in Rural Development, available at http://www.sli.unimelb.edu.au/pda/tbird.htm); in Guatemala, initiatives such as Casa Alianza, available at http://www.casa-alianza.org/. For an impressive database containing these, and other civil-society-based organizations
promoting environmental rights. This trend continued recently with
the fierce opposition by local and international NGOs to the proposal
of a Free Trade Area for the Americas, because of the perception that
MNCs and States will trade unfairly to the detriment of local popula-
tions, and particularly local farmers.  

The European Union ("EU") however has been liberalizing
markets since the end of World War II, and as such the relationships
between human rights and trade in Europe may provide some lessons
for advancing human rights protections in a globalized world.

1. Lessons From the EU for the WTO and Other Trading Structures?

Europe has human rights protection mechanisms as well as the
trade and dispute resolution mechanisms of the European Union. The
European Court on Human Rights hears cases involving State re-
sponsibility to protect human rights, and not human rights account-
ability of MNCs.

This has fostered debate among scholars, most prominently be-
tween Petersmann and Alston, about whether existing trade dispute
resolution mechanisms or international institutions may be used for
human rights enforcement. Petersmann suggests the EU's trade
mechanisms are models for enforcing human rights in the modern
globalization era. Alston has countered that this proposal would be
tantamount to making the already challenged human rights agenda
hostage to trade and market value interests.

Part of Petersmann's position relies on the assumptions that the
EU has evolved with human rights underpinnings, present in the lan-
guage of the coal and steel and Maastricht treaties:


85. I.e. the former European Commission on Human Rights and the European Court on Human Rights, hearing cases brought pursuant to the European Convention on Human Rights.


88. Treaty Establishing the European Coal and Steel Community, April 18, 1951.

The EU has consistently insisted on including "human rights clauses" and "democracy clauses" in international agreements concluded by the European Convention (EC) with more than 100 third-world countries. The adoption of the Charter of Fundamental Rights of the European Union in December 2001, and the proposal for incorporating into this Charter into a European Constitution at the intergovernmental conference scheduled for 2004, confirm the "function theory" underlying European integration, i.e. the view that economic market integration can progressively promote peaceful cooperation and the rule of law beyond economic areas, thereby enabling more comprehensive and more effective protection of human rights than has been possible in traditional state-centred international law.90

Petersmann's position has been criticized by Professors Alston91 and by Howse92 for assumptions supposedly unsupported in the historical evolution of the EU as recorded in its treaties and jurisprudence, and the absence of enforceable legal obligations upon international organizations like the EU, the WTO93 or the International Monetary Fund ("IMF") to apply international human rights law—despite this being a proposition towards which international human rights lawyers may be theoretically supportive.94 Petersmann has rebutted Alston's criticisms stating that Alston has misrepresented his arguments, and his proposition that international organizations are

90. Petersmann, supra note 87, at 16.
93. Note however the WTO-GATT Dispute Resolution provision in Article XX regarding "public health" has been invoked. Again the issue here is that State parties are limited. However, F.F. Martin reveals that non-discrimination is a jus cogens norm in Francisco Francis Martin, Delineating a Hierarchical Outline of International Law Sources and Norms, 65 SASK. L. REV. 333, 333-68 (2002).

The point is that the conclusion of the WTO adjudicating bodies would only relate to the WTO aspects of the measure and would not affect or deal with the compatibility of the same measure with human rights law. WTO adjudicating bodies do not have the competence to interpret and assess formally whether a WTO measure is compatible with human rights law. States must comply with all their international obligations at all times.

Id.
evolving with an awareness of the need to incorporate international human rights law into their operations and decisions, and at a minimum, should not act inconsistently with international human rights law.\footnote{See Petersmann's rejoinder, supra note 87, at 4. See also Marceau, supra note 94, at 82. "The WTO adjudicating bodies are not courts of general jurisdiction and they cannot interpret and apply treaties and customs provisions and resolve conflicts with human rights treaties as they consider best. They can only interpret and apply WTO law, but they should do this consistently with international law."}

A thorough analysis of the debate between these scholars is beyond the scope of this survey; however, the issue of whether regional organizations provide a venue either for plaintiffs seeking redress against MNCs for human rights violations, or whether they provide structures capable of monitoring MNCs to respect and uphold human rights, is within the scope of this survey. The short answer appears to be that while there is certainly an argument that international organizations should ideally factor human rights into their decision making processes, there is no enforceable legal obligation for them to do so; furthermore, these international organizations are driven by their mandates regarding specific claims, causes of actions, and remedies regarding trade law, and the attempts to incorporate international human rights law into their decision-making processes may result in a weakened hybrid that would diminish international human rights law.\footnote{Id.}

2. A Role for NAFTA in Human Rights Protection?

Like the EU, the region of the Americas has currently regional human rights treaties and trade structures, most prominently the Inter-American Convention and Court on Human Rights\footnote{Both were created by the Inter-American Convention on Human Rights. The Commission also applied the American Declaration on the Rights of Man.} and the NAFTA. The Inter-American Convention does not enjoy the "status" regionally of the European Court of Human Rights ("ECHR") or EU Charter, which is perhaps attributable in part to the significant place of the ECHR in the post WWII evolvement of the European market and European society. Opinions of the Inter-American Court and

\begin{itemize}
\item The following is a list of signatories to the Inter-American Convention on Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Columbia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. See Organization of American States, available at www.oas.org/XXXIIGA/english/key_issues/GAhumanrights.htm (last visited October 2003).
\end{itemize}
Commissions on Human Rights, while persuasive, have not been legally binding on States and have generally not enjoyed the same deference by States as the ECHR has in Europe. In any event, insofar as MNC plaintiffs are concerned, the Inter-American Convention on Human Rights applies directly to States only, and does not appear to directly provide a forum for plaintiffs to bring suit against an MNC tortfeasor or human rights violator.

a. Is There a Forum Through NAFTA Which Would Have Jurisdiction to Hear Claims of Human Rights Abuses Against MNCs?

NAFTA recognizes human rights objectives. The aims of NAFTA, set out in its preamble, acknowledge the importance of "public welfare," "employment opportunities and improving working conditions and living standards," "sustainable development" and "proceeding in a manner consistent with environmental protection" and strengthening "environmental laws and regulations" and "basic


The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:

STRENGTHEN the special bonds of friendship and cooperation among their nations;
CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;
CREATE an expanded and secure market for the goods and services produced in their territories;
REDUCE distortions to trade; ENSURE clear and mutually advantageous rules governing their trade;
BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation;
ENHANCE the competitiveness of their firms in global markets;
FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights;
CREATE new employment opportunities and improve working conditions and living standards in their respective territories;
UNTERTAKE each of the preceding in a manner consistent with environmental protection and conservation;
 PRESERVE their flexibility to safeguard the public welfare;
 PROMOTE sustainable development;
 STRENGTHEN the development and enforcement of environmental laws and regulations; and
 PROTECT, enhance and enforce basic workers’ rights; HAVE AGREED as follows . . . .
AND JUSTICE FOR ALL

workers rights." The arguments of Alston, Howse and Marceau\textsuperscript{101} resonate here given that the NAFTA recognizes the values of human rights, but its purposes and objectives\textsuperscript{102} are driven by trade and market values and the considerations are inherent therein. Trade values are not necessarily adverse to human rights values; indeed as mentioned at the outset of this note, in the promise of free trade areas is the implicit assumption, and prescribed objective,\textsuperscript{103} that standards of living will be improved. Human rights issues were raised in a seemingly questionable manner in one case, before a Chapter 11 panel,\textsuperscript{104} which allows investors (i.e. MNCs) to bring suit against States. In this case, it seems that the state of Mexico attempted to justify an illegal expropriation by claiming \textit{de facto}, that the expropriation was meant to protect the environment from a plant that would have caused environmental damage. This attempt to inject human rights concerns into a case about an illegal expropriation did not succeed before the Chapter 11 panel, and Mexico was ordered to pay 16.7 million U.S. dollars in damages for its illegal expropriation.\textsuperscript{105} And it is difficult to see how Chapter 11 or other NAFTA panels can be expected to be used as a forum to enforce human rights complaints by individuals against MNCs.

The labor side agreements in NAFTA perhaps promise greater hope for improving working conditions.\textsuperscript{106} But the forum of NAFTA

\textsuperscript{101} Alston, \textit{supra} note 58; and Marceau, \textit{supra} note 94.

\textsuperscript{102} Ramsey, \textit{supra} note 77.

\textsuperscript{103} \textit{Id}.

\textsuperscript{104} This is evident in the arguments of appeal presented to Tysoe J. in Mexico v. Metalclad Corp., B.C.J. No. 950 (2001). For a complete documentary history of this case, see "Trading Democracy? NAFTA's Secret Tribunals," available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/.


\textsuperscript{106} Provisions in the NAACL preamble seek to "compliment the economic opportunities created by the NAFTA with the human resource development, labor-management cooperation and continuous learning," while acknowledging that "protecting basic workers' rights will encourage firms to adopt high-productivity competitive strategies" facilitated by "encouraging consultation and dialogue between labor,
panels do not appear to be appropriate to grant standing to human rights plaintiffs.

b. International Responses

i. WTO and OECD

Facing criticisms by civil society actors that the WTO caters to big business at the expense of human rights and is devoid of transparent procedures, the WTO has responded by attempting to engage with civil society on rights issues. Although a relatively young organization created in 1994, the WTO is premised on the assumption that States solely forged foreign policy, though in recent years the significant influence of MNCs on foreign and domestic policy has become apparent. The WTO is taking efforts today to address these concerns it seems, and has expressed its hopes that the Organization for Economic and Cooperative Development ("OECD") Principles for Multinational Enterprises on Corporate Responsibility, discussed infra, will achieve success in terms of reforming corporate practice and building public confidence.

ii. OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises are principles drafted by the 33 member States of the OECD. The Guidelines provides guidelines for MNCs regarding labour practices, environ-
mental standards, consumer protection and corruption. The guidelines are voluntary and are intended for MNCs to use in implementation of social responsibility policy in their domestic and foreign operations. This raises the debate of voluntary principles versus a legally enforceable rules-based approach. The OECD response has been that governments are committed to enforcing these principles with the MNCs operating in their jurisdictions, however there does not appear to be a satisfactory option to enforce or utilize leverage to ensure corporations comply with international human rights standards. Still the principles are perhaps significant in advancing the rights agenda with MNCs, and in underscoring the message that human rights observation is crucial for market integrity.

iii. The U.N. Global Compact

In 1999, U.N. Secretary General, responding to worldwide public demonstrations against the perils of "Globalization" particularly illustrated by the environmental, labour, and rights violations attributed to MNCs, introduced the Global Compact to draw on nine principles distilled from the Universal Declaration of Human Rights, the International Labour Organization, the Fundamental Principles on Rights at Work and the Rio Principles on the Environment and Development, and draws on the expertise of the associated U.N. organs. The Global Compact enables States to learn from each other.
by posting reports of their human rights protection steps regarding MNC activity on a designated website, which also permits MNCs to insert their voluntary codes. However, the principles are again non-binding, voluntary, and have been criticized by scholars as far from promising when existing and binding international human rights treaties and norms fail to achieve compliance by States. In other words, while the Global Compact may be catalyzing and moving States and MNCs toward greater recognition of human rights and responsibilities toward individuals, the Global Compact does not provide human rights victims with a forum in which they can seek redress against MNC perpetrators.


The Commission on Human Rights' Sessional Working Group on the Working Methods and Activities of Transnational Corporations, since 1999, has made focused the Commission's attention on the gravity of the connection between human rights and the operations of MNCs. The most recent April 2003 Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights also set out voluntary principles for adoption by MNCs with a focus on equality rights, security of persons, workers rights, respect for national sovereignty and human rights, consumer protection, environmental protection, and principles of implementation. The principles of implementation call for MNCs to adopt internal rules of operation in compliance with these norms, and to be subject to "periodic monitoring and verification by United Nations, other international, and national mechanisms already in existence, or yet to be created, regarding application of the Norms;" and for States to "establish and

http://www.ilo.org/ (last visited October 2003), is an incomparable resource for global labour issues with specific information for most countries.

118. Alston, supra note 58.


120. Id. at article B.

121. Id. at article C.

122. Id. at article D.

123. Id. at article E.

124. Id. at article F.

125. Draft Norms, supra note 119, at article G.

126. Id. at article H.
reinforce the necessary legal and administrative framework for assuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises." Again, the debates which have applied to other international instruments regarding "transforming rights to reality," "paper tigers," "toothless," are all valid concerns which await the actual efficacy of the Draft Norms should they be adopted.

v. International Criminal Law, Humanitarian Law, and the International Criminal Court

International criminal law including war crimes and the concurrent application of international humanitarian law, may be relevant in scenarios where MNCs have direct or complicit involvement with States or paramilitary organizations in armed conflicts in violations undertaken during armed conflict.

During the negotiations leading up to the Rome Statute for an International Criminal Court, France and Portugal intervened to include a provision for attributing criminal liability to "legal persons" which would include corporations. However international consensus was not reached on this and the phrase was not included in the provisions.

However, the recent jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), International Criminal Tribunal for Rwanda ("ICTR"), and even the Kadic decision, suggest that future interpretation of the International Criminal Court ("ICC") Statute provisions may confer individual liability on directors of corporations for international crimes. The jurisprudence of the Nuremberg tribunals in terms of attributing liability to a criminal organization may also become relevant in expanding liability to directors and MNCs in future interpretations of the ICC.

127. See e.g., supra note 43.
128. See Exxon Mobil (Indonesia); Beanal, 969 F. Supp. 362 (Indonesia); Talisman, 244 F. Supp. 2d 289; Wiwa, 2002 WL 319887 (Nigeria). See also mining companies operating in Sierra Leone, and Angola. Saunders, supra note 35.
CONCLUSION

Globalization is shaped by economic and corporate actors. Chief among these are MNCs. Globalization is also occurring in the public sphere at local levels, and is concurrently being shaped and is shaping civil society. The recognition of the interdependences of all stakeholders in a multi-faceted globalization is a prerequisite towards protecting human rights, and moving towards a fuller realization of the promises of globalization. The failure to make this conceptual connection, has arguably resulted in the economic forces of globalization making decisions almost exclusively driven by market values, which enables the violation of human rights. However, the emergence of a globalized civil society, the recognition by international institutions including the WTO and the U.N., and the awareness evidence by human rights policies and public outreach by MNCs\(^1\) has put the protection of human rights on the agenda, which previously consisted only of market-driven items.

This recognition will hopefully advance the creation of a workable legal framework that will set binding human rights standards binding upon MNCs with enforcement mechanisms. As this paper has demonstrated, there is currently no adequate or reliable forum for plaintiffs to seek redress for human rights violations. Attempts to rely upon international financial institutions or multilateral trading regimes alone will do a disservice to the understanding, strength, and breadth of international human rights norms. International financial institutions and multilateral trading regimes are not the actors that should be policing MNC human rights actions, although these actors can ensure a human rights awareness that would permeate and hopefully contribute to shaping their future operations.

The encouraging response of U.S. courts to hear plaintiff cases filed under ATCA is now under threat, and there does not appear to be any other forum with the ability (i.e. either lack of jurisdiction, legal infrastructure or unwillingness) to hear plaintiffs' claims against MNCs for human rights violations.

The aims of the U.N. Sessional Working Group on Globalization and Human Rights, and the release of the Draft Norms on the Responsibilities of Transnational Corporations are moving the interna-

tional community closer to an international legal framework that can operate to create and enforce legal human rights obligations upon MNCs. Without such an international framework, the human rights of people and populations remain vulnerable in this era of contemporary globalization.