

# REIMAGINING HUMAN RIGHTS LAW: TOWARD GLOBAL REGULATION OF TRANSNATIONAL CORPORATIONS

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## INTRODUCTION

Existing human rights law, the body of law that delineates the contours of legal protections for human rights, does not do enough to prevent or provide remedies for corporate-related human rights abuses.<sup>1</sup> Transnational corporations are generally excluded from direct responsibility under international human rights law.<sup>2</sup> The state-centered nature of modern human rights law is inconsistent with the actual power and influence of many transnational corporations.<sup>3</sup> Current human rights law has been conflated with international human rights law and so looks almost exclusively to states to create laws to protect human rights and mechanisms to enforce those laws.<sup>4</sup> However, many modern transnational cor-

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1. See SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 9 (2004); see also Edward L. Rubin, *Response to Comments*, 9 INT’L LEGAL THEORY 167, 173 (2003) (“[H]uman rights discourse fails to reflect the conceptual structure and practical realities of the modern administrative state.”). See generally JOSEPH, *supra* note 1 (analyzing human rights litigation against transnational corporations).

2. See Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where From Here?*, 19 CONN. J. INT’L L. 1, 1 (2003) (“[S]ince the existing international mechanism was not designed to apply to [transnational corporations], its inadequacy is exposed.”).

3. See *id.* (“States no longer enjoy the monopoly as violators of human rights and no longer solely bear the duty to protect human rights.”). States are at the center of international human rights law because they are at the center of international law. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57–58 (5th ed. 1998).

4. See, e.g., International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at <http://www2.ohchr.org/english/law/ccpr.htm> (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”); see also, e.g., International Covenant on Economic, Social, and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], available at <http://www2.ohchr.org/english/law/cescr.htm> (“Each State Party

porations have achieved a level of power, wealth, and influence that rivals that of states.<sup>5</sup> Failure to regulate the power, wealth, and influence of transnational corporations is a weakness in human rights law that should be remedied.<sup>6</sup>

This Article argues that transnational corporations require specialized and targeted regulations and laws, and that the conflation of human rights law and international human rights law should be reversed to allow the advancement of other forms of human rights law. It makes two proposals. First, reimagine human rights law and international human rights law as separate categories. Specifically, classify international human rights law as a sub-category of human rights law. This distinction highlights the need to encourage the development of other forms of human rights law, for example, global human rights law and national human rights law. Second, establish global human rights law as a sub-category of human rights law. Specifically, create a new global human rights regime with three main elements: a Global Law Commission, global laws and regulations, and universal civil jurisdiction.

In the summer of 2009, the U.S. news media was dominated by reports about the BP oil spill.<sup>7</sup> The United States Environmental Protection Agency Administrator described it as “the largest environmental disaster in American history.”<sup>8</sup> But although similar events have occurred many times over in developing countries, they have not captured the attention of the U.S. media in the same way.<sup>9</sup> For example, a major oil spill the size of the Exxon Valdez disaster has occurred every year for half a cen-

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to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”). However, “international legal institutions typically only have advisory powers and are unable to ‘make’ states take particular action.” Angela M. Banks, *CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa*, 32 *FORDHAM INT’L L.J.* 781, 782 (2009).

5. JOSEPH, *supra* note 1, at 1; Hope Lewis, *Embracing Complexity: Human Rights in Critical Race Feminist Perspective*, 12 *COLUM. J. GENDER & L.* 510, 519 (2003) (“Many [transnational corporations] have more economic resources at their disposal than the entire budget available to some developing countries; they can exert influence that approximates that of a state in some circumstances.”).

6. *See* Deva, *supra* note 2, at 3 (“[T]he approach of indirect regulation has failed to deliver the desired results.”).

7. For example, a search on July 3, 2010 for “BP oil spill 2010” in Google news resulted in 22,100 hits.

8. Lisa P. Jackson, *Administrator Jackson: Keep Moving America Forward into Energy Independence*, ENVIRONMENTAL PROTECTION AGENCY, <http://blog.epa.gov/administrator/2010/06/08/administrator-jackson-%e2%80%9ckeep-moving-america-forward-into-energy-independence-%e2%80%9d/> (last updated Oct. 27, 2010). However, others contend that the “Dust Bowl” of the 1930s may be the largest environmental disaster on U.S. territory. *See, e.g.*, Ed Stoddard, *Is Gulf Spill the Worst Ecological Disaster in U.S. History?*, REUTERS ENVIRONMENT FORUM (June 22, 2010, 10:09 AM), <http://blogs.reuters.com/environment/2010/06/is-gulf-spill-the-worst-ecological-disaster-in-u-s-history/>.

9. A search for “Niger Delta oil spill” in Google news on July 3, 2010 resulted in 154 hits.

ture in the Niger Delta.<sup>10</sup> Environmental disasters overseas often involve a subsidiary of a U.S. corporation, as was the case in the Bhopal disaster in which toxic gas leaked from a pesticide plant, killing an estimated 2,100 people and injuring over 200,000 others.<sup>11</sup> Nonetheless, oil spills in the Niger Delta and other developing countries—and the harms they cause—do not receive the same level of attention in the U.S. media.<sup>12</sup>

Environmental catastrophes like the 2010 BP oil spill and the decades of oil spills in other places like the Niger Delta impinge upon human rights—such as the rights to life, health, adequate food and housing, and clean water.<sup>13</sup> Life, health, and other human rights are enumerated, for example, in the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social, and Cultural Rights, and other human rights documents.<sup>14</sup> In the BP oil spill, eleven people were killed in the explosion.<sup>15</sup> In some cases in the Niger Delta, oil drilling and associated gas flares have made entire villages uninhabitable.<sup>16</sup> Oil drilling and gas flares have had devastating effects on both the environment and human health, and have led to convulsions, chromosomal dam-

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10. Adam Nossiter, *Far From Gulf, a Spill Scourge 5 Decades Old*, N.Y. TIMES, June 17, 2010, at A1, available at <http://www.nytimes.com/2010/06/17/world/africa/17nigeria.html> (“The Niger Delta, where the wealth underground is out of all proportion with the poverty on the surface, has endured the equivalent of the Exxon Valdez spill every year for 50 years by some estimates.”). For details of the amount of oil spilled in the Niger Delta between 1976 and 1996, see Odjuvwuederie Emmanuel Inoni, Douglasson Gordon Omotor & Felicia Nkem Adun, *The Effect of Oil Spillage on Crop Yield and Farm Income in Delta State, Nigeria*, 7 J. CENT. EUROPEAN AGRIC. 41, 43 (2006), available at <http://www.agr.hr/jcea/issues/jcea7-1/pdf/jcea71-6.pdf>.

11. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 634 F. Supp. 842, 844 (S.D.N.Y. 1986), *aff'd and modified*, 809 F.2d 195 (2d Cir. 1987).

12. A search for “Niger Delta oil spill” on July 3, 2010 resulted in less than one percent of the hits for “BP oil spill 2010” on the same date although the search is narrower and there has been the equivalent of a major spill in the Niger Delta every year for at least 50 years.

13. See U.N. Special Representative of the Secretary General, *Protect, Respect & Remedy: A Framework for Business & Human Rights: Second Addendum*, 3, 29, U.N. Doc. A/HRC/8/5/Add.2 (May 23, 2008) [hereinafter *Protect, Respect & Remedy*], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/136/61/PDF/G0813661.pdf?OpenElement>.

14. ICCPR, *supra* note 4, at art. 6; ICESCR, *supra* note 4, at art. 7, 12; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III) (Dec. 10, 1948) [hereinafter UDHR]. However, there continues to be disagreement about the legitimacy and enforceability of economic, social, and cultural rights. See, e.g., Edward L. Rubin, *Rethinking Human Rights*, 9 INT'L LEGAL THEORY 5, 5–6 (2003) (discussing the controversy associated with the extent to which social, cultural, and economic rights are accepted).

15. Bradley Blackburn, *BP Oil Spill: Families Gather to Honor 11 Who Died, Express Frustration With BP*, *Transocean*, ABC NEWS (May 25, 2010), <http://abcnews.go.com/WN/bp-oil-spill-transocean-holds-memorial-11-lost/story?id=10739080>.

16. *Factsheet: Shell's Environmental Devastation in Nigeria*, CENTER FOR CONST. RTS., <http://ccrjustice.org/learn-more/faqs/shell%2526%2523039%3Bs-environmental-devastation-nigeria> [hereinafter CCR] (last visited Oct. 27, 2010). The devastation was so extensive that Ken Saro-Wiwa, the leader of the Movement for the Survival of the Ogoni People, described the oil drilling operations as “an ecological war against the Ogoni.” Fifth Amended Complaint and Demand for Jury Trial ¶¶ 1, 53, *Wiwa v. Shell Petroleum*, No. 96 Civ. 8386 (S.D.N.Y. Mar. 16, 2009), <http://ccrjustice.org/files/3.16.09%205th%20Amended%20Complaint.pdf> [hereinafter *Wiwa Fifth Amended Complaint*].

age, birth defects, and other serious illnesses.<sup>17</sup> The U.S. news was filled with pictures of the extreme damage of BP's spills and yet most people in the United States are completely unaware of the Niger Delta disasters.

However, environmental catastrophes are not the only way that the operations of transnational corporations like BP negatively affect human rights.<sup>18</sup> Transnational corporations, as "economic entit[ies] operating in more than one country or [as] a cluster of economic entities operating in two or more countries," help shape the economic, political, social, and legal environments in which they operate.<sup>19</sup> Transnational corporations are a subset of corporations and, therefore, much of the discussion of transnational corporations in this Article also applies to domestic corporations, although there are, of course, important differences.<sup>20</sup>

Transnational corporations also impinge on human rights in the labor context.<sup>21</sup> One well-known example is the Nike scandal in the 1990s, when Life magazine exposed Nike's involvement with the use of child labor in the production of soccer balls by publishing a picture of a child assembling Nike soccer balls in Pakistan.<sup>22</sup> More recently, underpaid workers, including child workers, produced the soccer balls used in the 2010 World Cup.<sup>23</sup> This case of corporate-related human rights abuse—thirteen years after the initial Nike scandal—received only minimal media attention.

A 2007 U.N. study reviewed 320 alleged cases of corporate-related human rights abuses and concluded that corporations affect "the full range of human rights" through their acts or omissions.<sup>24</sup> The study fo-

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17. CCR, *supra* note 16.

18. JOSEPH, *supra* note 1, at 2; *Protect, Respect & Remedy*, *supra* note 13, at 2.

19. Comm'n on Human Rights, Subcomm'n on Promotion and Protection of Human Rights, Rep. on its 55th Sess., July 28–Aug. 15, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En). The influence of transnational corporations is discussed *infra* in Part II.

20. See, e.g., Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and The Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123, 126–27 (1996) (discussing "the vastly different standards that exist under U.S. law that give [transnational corporations from the U.S.] license to treat U.S. citizens in one manner, but allow foreigners to be treated in a completely different (and inferior) way").

21. JOSEPH, *supra* note 1, at 2; *Protect, Respect & Remedy*, *supra* note 13, at 2.

22. Richard M. Locke, *The Promise and Perils of Globalization: The Case of Nike* 11–13 (Mass. Inst. of Tech. Indus. Performance Ctr. Working Paper Series, Paper No. 02-007, 2002), available at <http://web.mit.edu/ipc/publications/pdf/02-007.pdf>.

23. See Michelle Chen, *FIFA's World Cup Having a Ball with Child Labor*, COLOR LINES (June 11, 2010, 10:42 AM), [http://colorlines.com/archives/2010/06/south\\_africas\\_world\\_cup\\_brims\\_with\\_broken\\_promises.html](http://colorlines.com/archives/2010/06/south_africas_world_cup_brims_with_broken_promises.html); James Rupert, *World Cup Profits Bypass Asian Soccer-Ball Stitchers (Update 1)*, BLOOMBERG BUSINESSWEEK (June 9, 2010, 4:39 AM), <http://www.businessweek.com/news/2010-06-09/world-cup-profits-bypass-asian-soccer-ball-stitchers-update1-.html>; Trina Tocco, *World Cup Soccer Balls Missed the Goal Set 13 Years Ago: Child Labor, Poverty Wages, Temporary Workers*, COMMONDREAMS.ORG (June 7, 2010, 10:46 AM), <http://www.commondreams.org/newswire/2010/06/07-6>.

24. *Protect, Respect & Remedy*, *supra* note 13, at 1–3, 29. The cases were posted on the Business and Human Rights Resource center webpage (<http://www.business-humanrights.org>).

cused on the rights enumerated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and International Labour Organization Core Conventions.<sup>25</sup> These include “civil and political rights; economic, social and cultural rights; and labor rights.”<sup>26</sup> The study found that corporate-related human rights abuses take place in all industrial sectors and in all regions of the world.<sup>27</sup> In some cases, the harms include loss of life.<sup>28</sup>

Although corporate-related human rights abuses are not proportionately represented in the U.S. media, scholars and decision-makers are aware of the issue.<sup>29</sup> So, if scholars and decision-makers have been aware of corporate-related human rights abuses for decades at the very least, why are there still such wide-scale problems with corporations negatively affecting human rights? This Article argues that the answer is not simply a lack of regulations or a lack of enforcement. Instead, it argues that part of the answer lies in the conflation of human rights law with international human rights law, and the ways that human rights law intersects with corporate law and foreign direct investment law.<sup>30</sup>

Addressing the complex problem of human rights abuses by transnational corporations requires a comprehensive framework.<sup>31</sup> One avenue toward a comprehensive framework is international law; another avenue is global law. International law is the law between nation-states

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which “is the most comprehensive” and “objective” resource on the intersection of business and human rights. *Id.* at 6.

25. *Protect, Respect & Remedy*, *supra* note 13, at 2. See generally ICCPR, *supra* note 4; ICESCR, *supra* note 4; UDHR, *supra* note 14; INT’L LABOUR OFFICE, THE INTERNATIONAL LABOUR ORGANIZATION’S FUNDAMENTAL CONVENTIONS 8 (2002), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_095895.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf). There are eight core International Labour Organization conventions: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111). *Id.*

26. *Protect, Respect & Remedy*, *supra* note 13, at 2.

27. *Id.* Based on the cases reviewed in the U.N. study, the regional breakdown of alleged human rights incidents is as follows: Asia & the Pacific – 28%; Africa – 22%; Latin America – 18%; Global – 15%; North America – 7%; Europe – 3%; and Middle East – 2%. *Id.* at 8.

28. JOSEPH, *supra* note 1, at 2–4.

29. See generally, e.g., JOSEPH, *supra* note 1; Locke, *supra* note 22; *Protect, Respect & Remedy*, *supra* note 13.

30. For a parallel argument addressing the question of why transnational corporations do not have obligations under international human rights law, see Iris Halpern, *Tracing the Contours of Transnational Corporations’ Human Rights Obligations in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 129, 131 (2008) (positing that the omission of transnational corporations is “a product of the systemic separation between international economic development, human rights enforcement, and the regulation of private players”).

31. See *id.* at 134 (“The international legal system must be refashioned so as to be capable of simultaneously regulating all the numerous important actors vis-à-vis their human rights behavior.”).

and, as such, it does not directly regulate transnational corporations.<sup>32</sup> Instead, it regulates the regulators, the nation-states, thereby concentrating on nation-states and marginalizing issues that do not directly implicate nation-states.<sup>33</sup> Since transnational corporations are (by definition) not nation-states, they do not fall within the natural scope of international law. Further, since transnational corporations operate in multiple jurisdictions, the laws of any one jurisdiction are not sufficient to govern their activities.<sup>34</sup>

Global law is an emerging legal order. It is a next iteration of law, following the law of nations and international law.<sup>35</sup> Global law is neither superior nor inferior to other legal orders.<sup>36</sup> Instead, it presupposes the interconnection and interdependency of all legal orders of the world, including international law and national law.<sup>37</sup> Human rights are a core value of global law.<sup>38</sup> There are multiple sources of global law, including specific economic or other subsectors, and organizational and functional networks.<sup>39</sup> *Lex mercatoria*, also known as commercial law, transnational law, or the New Law Merchant, is an example of global law.<sup>40</sup> Through various means, global law provides an opportunity to address corporate-related human rights abuses, in part because it is not state-centered.

This Article is part of a larger project. My previous article, *Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law*, argued that the asymmetry and fragmentation of foreign direct in-

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32. See PHILIP C. JESSUP, *TRANSNATIONAL LAW* 1–2 (1956). As early as 1956, Philip Jessup noted the inadequacy of using “international law” to address issues that arise within the “complex interrelated world community.” *Id.* at 1. Instead, Jessup used the term “transnational law” to include all law which regulates actions or events that transcend national frontiers.” *Id.* at 2 (“Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.”). For a more detailed discussion of the term “transnational,” see generally *id.* *Transnational law, thus, may regulate “individuals, corporations, states, organizations of states, or other groups.” Id.* at 2–3.

33. See *id.* at 11.

34. See *id.* at 4–5; see also Rachel J. Anderson, *Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law*, 18 MICH. ST. J. INT’L L. 1, 2 (2009).

35. RAFAEL DOMINGO, *THE NEW GLOBAL LAW*, at xiv (2010); see also Harold J. Berman, *World Law*, 18 FORDHAM INT’L L.J. 1617, 1617 (1995). For more on national human rights law, see generally UNITED NATIONS, *BUSINESS AND HUMAN RIGHTS: A SURVEY OF NHRI PRACTICES* (2008), available at <http://www.reports-and-materials.org/OHCHR-National-Human-Rights-Institutions-practices-Apr-2008.doc>.

36. See DOMINGO, *supra* note 35, at 147.

37. *Id.*; see also Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 447 (2007) (arguing that “the dichotomy of national law and state law is false”).

38. DOMINGO, *supra* note 35, at 142–44.

39. Gunther Teubner, *‘Global Bukowina’: Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3, 3–4 (Gunther Teubner ed., 1997). See generally *id.* for a discussion of global law.

40. *Id.* at 3. *Lex mercatoria* is also defined as “the transnational law of economic transactions.” *Id.*; see also ANA M. LÓPEZ RODRÍGUEZ, *LEX MERCATORIA AND HARMONIZATION OF CONTRACT LAW IN THE EU* 90 (2003) (defining global law as “a body of rules, different in origin and content, created by the community of merchants to serve the needs of international trade”).

vestment law encourages excesses by transnational corporations.<sup>41</sup> That article proposed transforming the theories and practices of voluntary Global Corporate Citizenship into a mandatory legal framework and developing a legal theory of Global Corporate Citizenship that reconceptualizes the role of transnational corporations in the global economy. This Article builds on *Toward Global Corporate Citizenship* and attempts to reimagine human rights law.<sup>42</sup> It argues for the development of a global law regime as a sub-category of human rights law, distinct from international human rights law, and proposes a global institution, global laws, and global enforcement to regulate transnational corporations and help fill gaps in human rights law.<sup>43</sup> This Article makes that argument in three stages.

Part I, Limits of a State-Centered Human Rights Regime, argues for the re-remembering of human rights law as the super-category and international human rights law as one of several possible sub-categories of human rights law. In the wake of the dramatic expansion of international human rights law in the post-World War II era, it came to be thought of as synonymous with human rights law. This conflation of human rights law and international human rights law has inhibited the development of other sub-categories of human rights law such as global human rights law and national human rights law. Although international human rights law has achieved significant progress, the state-centered human rights regime is limited, and, in the absence of other forms of human rights law, leads to the under-regulation of transnational corporations as a result of state resistance, impotency, and complicity. Part I proposes decoupling and distinguishing between human rights law and international human rights law to allow for the development of other forms of human rights law, including global human rights law.

Part II, Transnational Corporations Need Dedicated Regulation, posits that transnational corporations require dedicated regulation under human rights law that goes beyond the ambit of international human rights law. International human rights law requires states to enact and enforce laws to protect human rights within their jurisdiction. However, international human rights law alone is an insufficient tool with which to regulate transnational corporations when their economic, political, and

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41. See Anderson, *supra* note 34, at 6.

42. This article attempts to respond to the challenge identified by Philip Alston in *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 3, 4 (Philip Alston ed., 2005) ("The challenge that [the state-centered focus of the international human rights regime] lays down is one of re-imagining, as the social scientists would put it, the nature of the human rights regime and the relationships among the different actors within it. Lawyers, not being noted for their willingness to depart from precedents, might prefer to see the task in terms for re-interpreting existing concepts and procedures rather than re-imagining.")

43. Sarah Joseph has argued, "Ultimately, a preferable approach might be for all nations to agree on international minimum human rights standards for TNCs, which could be incorporated into national legislation and enforced by domestic courts." JOSEPH, *supra* note 1, at 153.

legal influence exceeds that of the countries in which they operate. The interests of states in preserving sovereignty inhibit the development of comprehensive multijurisdictional international human rights enforcement mechanisms. Finally, the importance of human rights as core values contrasted with the inadequacy of international human rights law as the sole tool to protect them at the global level, demonstrate the need for protection and enforcement of these rights in multiple forms of human rights law.

Part III, Global Regulation of Transnational Corporations, sets out a proposal for the development of global human rights law as a subcategory of human rights law that could address the problem of corporate-related human rights abuses. This proposal has three main components: creation of a Global Law Commission, development of global laws, and implementation of universal civil jurisdiction. A primary purpose of the Global Law Commission would be to develop global human rights law regulations and legislation to prevent and address corporate-related human rights abuses. The Global Law Commission would develop model global regulations and laws informed by theories of Global Corporate Citizenship and promote their enactment. Global regulations and laws could be enforceable via multiple avenues, including national courts, alternative dispute resolution, and universal civil jurisdiction for corporate-related human rights abuses. However, this proposal does not preclude the creation of a global court or other global mechanism for adjudication or alternative dispute resolution.

#### I. LIMITS OF A STATE-CENTERED HUMAN RIGHTS REGIME

International human rights law categorizes all actors on the global stage as either state actors or non-state actors.<sup>44</sup> For the purposes of international human rights law, non-state actors can be defined only by their relationship to the state.<sup>45</sup> This state-centered focus inhibits an accurate analysis of corporate-related human rights abuses and limits the development of measures with which these issues can be addressed.<sup>46</sup> In light of these weaknesses, this Article argues for the development of other forms of human rights law.

Although states are no longer assumed to be the only actors in the international arena, modern human rights law remains state-centered.<sup>47</sup>

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44. Alston, *supra* note 42, at 3.

45. *Id.* at 3–4.

46. *See id.* at 4 (“[S]uch a uni-dimensional or monochromatic way of viewing the world is not only misleading, but also makes it much more difficult to adapt the human rights regime in order to take adequate account of the fundamental changes that have occurred in recent years.”).

47. *See* Deva, *supra* note 2, at 1 (“The conventional international framework for protection of human rights is state-centric; it obligates primarily states to promote, and not violate, human rights.”); PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 209 (7th ed. 1997) (“[E]very individual has certain inalienable and legally enforceable rights protecting him or her against state interference and the abuse of power by governments.”); *see also* Rafael

This means that when we think of human rights law, we think primarily of *international* human rights law. Modern international human rights law is anchored in the series of international declarations and conventions that were generated in the decades following the fall of the Third Reich and the end of World War II.<sup>48</sup> The atrocities perpetuated by the Nazi state against its own citizens and those of other countries were still fresh in the minds of the policy makers who organized the Nuremberg trials and drafted and signed the Universal Declaration of Human Rights.<sup>49</sup> This explains, in part, the post-World War II focus on state action.

However, although corporations were often complicit and, in many cases, actively involved in human rights abuses under the Nazi regime and in many other contexts, the emerging international human rights regime did not incorporate direct rules governing transnational corporations.<sup>50</sup> Although some argue that the primary focus of international decision-makers in the post-World War II period was responding to the atrocities of the Nazi regime, the reasons more likely lie in the complexities of political machinations and conflicts of interest set in a particular historical context.<sup>51</sup> The exclusion of transnational corporations from international human rights law is not inevitable, but rather results from historical events, flawed assumptions, and lack of political will among some influential policy makers.<sup>52</sup>

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Domingo, *The Crisis of International Law*, 42 VAND. J. TRANSNAT'L L. 1543, 1549–50 (2009). For a discussion of the nation-state paradigm and its history, see *id.* at 1556–66.

48. See Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and Development of Indigenous Rights*, 31 AM. INDIAN L. REV. 291, 296–97 (2007). The post-World War II period marks the beginning of broad international action in the area of human rights. See MALANCZUK, *supra* note 47, at 209. Prior to World War II, actions addressing human rights concerns tended to be focused on specific regions, groups, or abuses. *Id.*

49. See LOUIS HENKIN, *THE AGE OF RIGHTS* 1 (1990).

50. See Halpern, *supra* note 30, at 130–31.

51. See Mark Mazower, *The Strange Triumph of Human Rights, 1933–1950*, 47 HISTORICAL J. 379, 380, 397 (2004) (“It does no service to the cause of human rights to disguise the political struggles and conflicts of interest that accompanied their emergence into the international arena. On the contrary, a better understanding of that story, their relationship to prior rights regimes, and their dependence on the international balance of power may help us recognize their true weight and worth.”); see also Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117, 119 (2004) (“While university-based historians such as Paul Lauren, Lynn Hunt, and Jeffrey Wasserstrom have addressed the subject, journalists, legal scholars, political activists, and political scientists have still done far more of this history writing. The field remains refreshingly inchoate.”).

52. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 111–14 (2004) (arguing that modern international law is deeply and fundamentally shaped by imperialism and colonialism). Colonial trading companies, the predecessors of modern transnational corporations, were arms of the state and, therefore, did not require a separate body of governing law. Their purpose was to further political, legal, economic, and social goals. For example, the Dutch West India Company was “started as a move in the war game” and “[t]he aim and objective of the Company had from the first been to carry on active war with Spain.” Hugh E. Egerton, *The Transference of Colonial Power to the United Provinces and England* 728, 749, in 4 *THE CAMBRIDGE MODERN HISTORY: THE THIRTY YEARS’ WAR*, 749 (A.W. Ward, G.W. Prothero & Stanley Leathes eds., 1906). The shareholders of the Dutch West India Company were five Dutch government institutions, the Dutch legislature made annual payment to the Dutch West India Com-

Protected from the reach of international human rights law, transnational corporations continue to impinge upon human rights. The most common labor-related rights that the operations of transnational corporations affect include “the right to work (34%), [the] right to just and favorable remuneration (30%), the right to a safe work environment (31%), and the right to rest and leisure (25%).”<sup>53</sup> For example, in the late 1990s, an Ernst and Young<sup>54</sup> report on a Nike subcontractor in Vietnam claimed that concentrations of a chemical solvent, chemical releases, and excess dust in the shoe plant (in each case, many multiples above the allowed levels) had caused extensive harm to the workers’ human rights.<sup>55</sup> Specifically, workers suffered from respiratory ailments and skin and heart disease that were allegedly caused by the health and safety violations at the factory.<sup>56</sup> The Ernst and Young report also stated that the employees were forced to work more hours than allowed by Vietnamese law.<sup>57</sup>

As mentioned above, not only do corporate-related human rights abuses take place in the labor context, they are also linked to environmental harms. Those human rights affected include the right to physical health and to an adequate standard of living, and the right to life, liberty and personal security.<sup>58</sup> Corporate-related human rights harms are often caused by pollution, contamination, and environmental degradation.<sup>59</sup> For example, the plaintiffs in *Sarei v. Rio Tinto PLC*<sup>60</sup> alleged that Rio Tinto’s Panguna Mine in Papua New Guinea polluted the Kawerong-Jaba River with waste and poisoned the air with dust and emissions from a copper concentrator.<sup>61</sup> The plaintiffs asserted that this air and water pollution led to an increase in respiratory infections and asthma, and that the decreased food supply due to crop damage and the deaths of traditional sources of food like fish led to health problems in the local popula-

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pany, and the Dutch legislature promised to provide the Dutch West India Company with a fleet of ships in the event of a serious war. *Id.* at 749–50.

53. *Protect, Respect & Remedy*, *supra* note 13, at 11.

54. Ernst and Young is a global accounting firm that provides assurance, tax, transaction, and advisory services. See *About Us*, ERNST AND YOUNG, <http://www.ey.com/US/en/About-us> (last visited Oct. 28, 2010).

55. Locke, *supra* note 22, at 13; see also Steven Greenhouse, *Nike Shoe Plant in Vietnam is Called Unsafe for Workers*, N.Y. TIMES, Nov. 8, 1997, at A1, available at <http://www.nytimes.com/1997/11/08/business/nike-shoe-plant-in-vietnam-is-called-unsafe-forworkers.html?scp=1&sq=nike%20shoe%20plant%20in%20vietnam%20is%20called%20unsafe&st=cse>.

56. Locke, *supra* note 22, at 13.

57. Greenhouse, *supra* note 55 (stating that employees were forced to work 65 hours a week for \$10). Over 9,000 workers were employed at the factory. Locke, *supra* note 22, at 13.

58. *Protect, Respect & Remedy*, *supra* note 13, at 2.

59. See *id.*

60. 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *aff’d in part, vacated in part, rev’d in part*, 456 F.3d 1069 (9th Cir. 2006), *withdrawn and superseded on reh’g in part*, 487 F.3d 1193 (9th Cir. 2007), *reh’g en banc granted*, 499 F.3d 923 (9th Cir. 2007). On October 26, 2010, an en banc panel of the Ninth Circuit referred the case to a mediator to “explore the possibility of mediation.” *Sarei v. Rio Tinto*, 02-cv-56256 (9th Cir. Oct. 26, 2010). The mediator is scheduled “to report to the en banc court within twenty-eight (28) days as to whether mediation should proceed or whether this case should be returned to the en banc court.” *Id.*

61. *Id.* at 1124 & n.31.

tion.<sup>62</sup> Corporate-related human rights abuses harm not only individuals but also entire communities.<sup>63</sup>

In addition to direct abuses such as under-compensation or chemical spills, abuses by transnational corporations create ripple effects that lead to additional harms.<sup>64</sup> For example, exploitative compensation practices can contribute to harassment and sexual abuse of women.<sup>65</sup> The use of child labor affects enjoyment of the right to education and, in some cases, the rights to health and even life.<sup>66</sup> By way of illustration, children between the ages of five and seventeen are employed at vanilla orchards in Madagascar.<sup>67</sup> They are among the twenty-eight percent of children in Madagascar who are employed in the agriculture and fishing industries.<sup>68</sup> These children are unable to enjoy the right to education because they work six to seven hours a day for approximately twelve cents a day.<sup>69</sup>

Corporations also contribute to or benefit from indirect involvement in human rights abuses by third parties—including governments, other businesses, and individuals.<sup>70</sup> For example, the Swedish Company Lundin Oil AB, together with Sudapet Ltd.—which is wholly owned by the Sudanese government—has been accused of complicity in war crimes and crimes against humanity perpetrated by government security forces.<sup>71</sup> Most of the indirect cases are alleged in Africa, Asia and the Pacific, Latin America, and the Middle East.<sup>72</sup>

Even though we tend to think of human rights in terms of international human rights law—that is, in a post-1948, post-Universal Declaration of Human Rights context—human dignity and other concepts underlying human rights predate the Universal Declaration of Human Rights and even predate the nation state. Louis Henken,<sup>73</sup> a leading international

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62. *Id.*

63. *Protect, Respect & Remedy*, *supra* note 13, at 4, 29.

64. *Id.* at 3, 29.

65. Lewis, *supra* note 5, at 519 (“Transnational corporations exploit the low-wage status of women (often women of color) and, in doing so, create new avenues for sexual abuse and harassment.”); see also *Nike Admits Abuse at Indonesian Plants*, BBC NEWS (Feb. 22, 2001, 13:55 GMT), <http://news.bbc.co.uk/2/hi/asia-pacific/1184103.stm> (reporting that underpaid workers in a Nike plant in Indonesia, who are 85% women, have reported being coerced into sex and being fondled by managers).

66. *Protect, Respect & Remedy*, *supra* note 13, at 3.

67. Dan McDougall, *Bitter Plight of the Vanilla Trade Children*, THE SUNDAY TIMES (Mar. 14, 2010), <http://www.timesonline.co.uk/tol/news/world/africa/article7060962.ece>.

68. *Id.*

69. *See id.*

70. *Protect, Respect & Remedy*, *supra* note 13, at 4.

71. EUROPEAN COAL. ON OIL IN SUDAN, UNPAID DEBT: THE LEGACY OF LUNDIN, PETRONAS AND OMV IN BLOCK 5A, SUDAN 1997-2003, at 10 (2010), available at [http://www.ecosonline.org/reports/2010/UNPAID\\_DEBT\\_fullreportweb.pdf](http://www.ecosonline.org/reports/2010/UNPAID_DEBT_fullreportweb.pdf). (“[T]here are grounds to investigate whether the Consortium provided financial and material support to the security agencies that were responsible for the commission of international crimes and gross violations of human rights.”).

72. *Protect, Respect & Remedy*, *supra* note 13, at 15.

73. Louis Henkin (1917-2010) was a professor of law at Columbia University, a president of the American Society of International Law, and held many important positions over the course of his

law and human rights scholar, defined human rights as “legitimate, valid, [and] justified claims” of individuals and communities upon society.<sup>74</sup> Although human rights are claims or entitlements that can be asserted, they are not always coexistent with legal rights.<sup>75</sup> Human rights arise on the basis of a person’s humanity and do not require anything more than the nature of a human being to exist; legal rights are government created and require a government or other institutional act to exist.<sup>76</sup> Thus, human rights may exist, even when law does not yet protect them.

#### A. Underregulation of Transnational Corporations

Modern human rights law does not generally directly regulate transnational corporations. International human rights agreements are—by definition—agreements between nation-states.<sup>77</sup> International human rights documents range from recording understandings of human rights and human dignity, to setting out aspirational goals, to establishing requirements and guidelines for state actors.<sup>78</sup> The idea is that state signatories of international agreements will enact laws that protect human rights.<sup>79</sup> Such laws would also apply to domestic and transnational corporations where appropriate.<sup>80</sup>

The exclusion of transnational corporations from the international human rights regime puts the burden on states to enact and enforce laws that protect human rights.<sup>81</sup> However, this expectation, although arguably correct in principle, does not account for realities that make state en-

life, including at the State Department, the United Nations, and the Permanent Court of Arbitration. *Louis Henkin*, COLUM. L. SCH., [http://www.law.columbia.edu/fac/Louis\\_Henkin](http://www.law.columbia.edu/fac/Louis_Henkin) (last visited Dec. 20, 2010). Henkin was a prolific and influential scholar and was “credited with founding the study of human rights law and inspiring generations of legal scholars.” *Louis Henkin: Preeminent Scholar in Constitutional and International Law*, COLUM. L. SCH., [http://www.law.columbia.edu/louis\\_henkin/55703](http://www.law.columbia.edu/louis_henkin/55703) (last visited Dec. 20, 2010).

74. HENKIN, *supra* note 49, at 2; *see also id.* at 2–5 (providing a more detailed discussion of this conception of human rights); Rubin, *supra* note 14, at 9 (“[H]uman rights must be rights, that is, they must represent some claim or entitlement that can be asserted by the human beings in question.”).

75. See Rubin, *supra* note 14, at 9 for a discussion of the difference between human rights and legal rights.

76. *See id.* at 8–9.

77. See Domingo, *supra* note 47, at 1549 (quoting HANS Kelsen, *PURE THEORY OF LAW* 320 (Max Knight trans., 1967)).

78. For example, at the time it was passed by the United Nations General Assembly, most states did not regard the Universal Declaration of Human Rights as legally binding. MALANCZUK, *supra* note 47, at 213. However, in the time since the Universal Declaration of Human Rights was passed some of its provisions may have become binding customary international law. *Id.* (discussing the resolution passed at the United Nations Conference on Human Rights at Teheran in 1968 “proclaiming, inter alia, that ‘the Universal Declaration of Human Rights . . . constitutes an obligation for the members of the international community.’” (alteration in original)).

79. See, e.g., ICCPR, *supra* note 4, art. 2; ICESCR, *supra* note 4, art. 2.

80. See Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT’L & COMP. L. REV. 273, 305 (2002) (suggesting that, under the ICESCR, states will be held responsible for controlling non-state actors “over which they exercise jurisdiction”).

81. See, e.g., ICCPR, *supra* note 4, art. 2; ICESCR, *supra* note 4, art. 2.

forcement improbable at best and completely unrealistic at worst.<sup>82</sup> For example, developing countries have a disincentive to enact and enforce laws to protect human rights and remedy abuses because “developing countries compete among themselves for a limited pool of investment.”<sup>83</sup> This environment of competition leads governments to make different choices about legislation and enforcement than might be the case if they were working in concert with other governments.<sup>84</sup> This situation leaves transnational corporations under-regulated.

Under-regulation of transnational corporations is problematic because it encourages decision-making that results in corporate-related human rights abuses.<sup>85</sup> Although transnational corporations are subject to the laws of multiple jurisdictions, the decisions that guide the acts of transnational corporations are, in practice, rarely exposed to judicial scrutiny.<sup>86</sup> Only a small percentage of alleged corporate-related abuses make it into court, and even fewer result in an outcome that would create incentives for corporations to change their business practices to reduce negative effects on human rights.<sup>87</sup>

There are at least five ways to address the problem of corporate-related human rights abuses: laws, pressure by consumers and non-governmental organizations (NGOs), self-regulation, socially responsible investment, and enforcement.<sup>88</sup> These can be categorized into legal and non-legal remedies. Nonetheless, in their current forms, each of these avenues is insufficient.

Legal measures include legislation and litigation. While domestic and international laws do exist, they are fragmented and are often not enforced.<sup>89</sup> In addition, many plaintiffs do not have the financial resources to pursue legal remedies. As a result, most cases of alleged violations never make it to court. Reaching a settlement often first requires the incentive of a pending court case. Even then, there is a possibility that

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82. See Deva, *supra* note 2, at 3 (“[T]he approach of indirect regulation has failed to deliver the desired results.”); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 448 (2001) (“Without some international legal standards, we will likely continue to witness both excessive claims made against such actors for their responsibility and counterclaims by corporate actors against such accountability.”).

83. Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 674 (1998).

84. See *id.* (suggesting that the environment of competition influences the policies adopted by developing countries).

85. See JOSEPH, *supra* note 1, at 153 (arguing that measures are needed to incentivize transnational corporations to adopt better practices with regard to human rights).

86. See *id.* (explaining that the human rights abuses by transnational corporations actually subjected to transnational litigation represent “only the tip of the iceberg”).

87. See *id.*

88. See *id.*

89. See *id.* at 8–12.

the plaintiffs may not meet all jurisdictional, substantive, and evidentiary hurdles—which are often substantial in these types of cases.<sup>90</sup>

Non-legal measures can contribute to filling the gaps in law and enforcement. These measures include external incentives, such as public pressure and socially responsible investment, and internal incentives, such as self-regulation.<sup>91</sup> Pressure by consumers and NGOs has achieved some high profile successes.<sup>92</sup> However, this option is limited by the need for abuses to be sufficiently widespread or public, or both, to come to the attention of consumers and NGOs, at which point substantial harms have often already occurred.<sup>93</sup> Socially responsible investment offers shareholders an opportunity to avoid financing transnational corporations with questionable practices.<sup>94</sup> However, socially responsible investment itself does not prevent other people from investing in companies that are less socially responsible. In addition, the effectiveness of socially responsible investment remains disputed.<sup>95</sup>

The good works for goodwill model underlies more recent developments in scholarship such as corporate citizenship and enlightened shareholder value.<sup>96</sup> The essence of the good works for goodwill model is that, although good works may be more costly from a short-term perspective, they have a beneficial effect on profits from a long-term perspective.<sup>97</sup> The good works for goodwill model harkens back to issues raised in cases like *Dodge v. Ford Motor Co.*,<sup>98</sup> *A.P. Smith Manufactur-*

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90. For a discussion of some of these hurdles, see Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 764–71 (2002).

91. JOSEPH, *supra* note 1, at 153.

92. See Halpern, *supra* note 30, at 135 (“Currently, the most acute pressure felt by TNCs to modify their behavior results from concerted NGO and consumer action campaign activity.”).

93. For example, in the Nike case, the underpayment of the workers in Indonesia “became publicized through the skillful use of media by several NGOs” and reported in “The New Republic, Rolling Stone, The New York Times, Foreign Affairs, and The Economist.” Locke, *supra* note 22, at 10–11. However, this practice had gone on for several years before it was brought to the attention of the public. See *id.* (noting that the practice was taking place in the early 1990s and was not discontinued until the mid-1990s). For a discussion of other examples of successful applications of pressure by consumers and NGOs, see *id.* at 18–19.

94. See Michael S. Knoll, *Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment*, 57 BUS. LAW. 681, 690 (2002).

95. See PAUL HAWKEN & THE NATURAL CAPITAL INSTITUTE, *SOCIALLY RESPONSIBLE INVESTING: HOW THE SRI INDUSTRY HAS FAILED TO RESPOND TO PEOPLE WHO WANT TO INVEST WITH CONSCIENCE AND WHAT CAN BE DONE TO CHANGE IT* 16 (2004) [hereinafter HAWKEN & NCI], available at [http://www.community-wealth.org/\\_pdfs/articles-publications/sri/report-harkin.pdf](http://www.community-wealth.org/_pdfs/articles-publications/sri/report-harkin.pdf).

96. See generally DAVID LOGAN, DELWIN ROY & LAURIE REGELBRUGGE, *GLOBAL CORPORATE CITIZENSHIP: RATIONALE AND STRATEGIES* (1997) (discussing Global Corporate Citizenship); David Millon, *Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law* (Wash. & Lee Pub. Legal Studies Research Paper Series, Paper No. 2010-11, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1625750](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625750) (discussing enlightened shareholder value).

97. See Millon, *supra* note 96, at 1–2.

98. 170 N.W. 668, 683–84 (Mich. 1919) (examining when shareholders challenged the authority of the board of directors to prioritize philanthropic contributions over profit maximization).

ing Co. v. Barlow,<sup>99</sup> and *Shlensky v. Wrigley*<sup>100</sup> with which U.S. law students and corporate law scholars alike are familiar.<sup>101</sup> The good works for goodwill model essentially shifts the framework from a short-term to a long-term emphasis but retains a focus on profit-maximization as a primary goal.<sup>102</sup>

Finally, the level of judicial review of business decisions in the United States has global implications because approximately one-fifth of the top 100 non-financial transnational corporations are located in the United States. Currently, the main forum for corporate-related human rights abuse cases is also the United States.<sup>103</sup> U.S. courts subscribe to a doctrine of minimal judicial review of the substance of business decisions called the business judgment rule.<sup>104</sup> This rule presents a particularly problematic hurdle for enforcement in cases of corporate-related human rights abuses because it means that they, too, are subjected to only minimal judicial review.

### *B. State Resistance, Impotency, and Complicity*

To date, international human rights law has had a limited trickle-down effect on corporate-related human rights abuses. Not all countries have signed on to all international human rights agreements. For example, the United States has ratified only seventeen of fifty-one international human rights agreements, and five of the agreements ratified by the United States relate to terrorism.<sup>105</sup> In addition, ratification of an in-

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99. 98 A.2d 581, 585–87 (N.J. 1953) (discussing shareholders who challenged the authority of the board of directors to make a contribution to a university).

100. 237 N.E.2d 776, 778 (Ill. App. Ct. 1968) (discussing shareholders that challenged the authority of the board of directors to act “for a reason or reasons contrary and wholly unrelated to the business interests of the corporation”).

101. It is worth noting here that Geoffrey P. Miller argues that although the narratives of these situations are often told as charitable corporate giving cases, these narratives did not accurately reflect the underlying motives and issues in these cases. See generally Geoffrey P. Miller, *Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases* (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-56, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1495069](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1495069).

102. See generally Millon, *supra* note 96, at 4 (discussing corporate purpose and the shift from short-term shareholder value to be broadened to encompass nonshareholder interest as well).

103. JOSEPH, *supra* note 1, at 21 (“Most of the transnational human rights cases against corporations have arisen under the Alien Tort Claims Act [ATCA] in the United States.”). However, the ability to bring claims against corporations under the Alien Tort Statute was recently called into question in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010) (holding that (1) customary international law governs the scope of Alien Tort Statute liability, (2) in matters of first impression, the Alien Tort Statute does not confer jurisdiction over claims against corporations, and (3) corporate defendants were not subject to Alien Tort Statute liability because corporations were not subject to liability under customary international law).

104. The business judgment rule is based on the presumption that directors possess more expertise than judges when it comes to making business decisions and so should not be second-guessed by judges as long as appropriate procedures have been followed in the decision-making process. See, e.g., *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 361–62 (Del.Ch. 2000); *Aronson v. Lewis*, 473 A.2d 805, 812–13 (Del. 1984); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981).

105. See *Ratification of International Human Rights Treaties – USA*, U. MINN. HUM. RTS. LIBR., <http://www1.umn.edu/humanrts/research/ratification-USA.html> (last visited Oct. 29, 2010).

ternational human rights agreement does not automatically ensure that a country will enact comprehensive laws to implement the agreements to which it is a party.<sup>106</sup>

Further, even if enacted, such laws may not achieve the goals of the agreement under which they were mandated. For example, the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1994.<sup>107</sup> However, in its October 2000 report on efforts made to implement the CERD, the U.S. government admitted that enactment of laws has been insufficient to fulfill the goals of the CERD.<sup>108</sup>

There are numerous factors that affect states' ability to protect human rights.<sup>109</sup> These include historical, economic, and institutional constraints as well as weak legal systems, regime change, wars, politics, and geopolitical power plays.<sup>110</sup> Some states—for example, failed states (states that have collapsed and can no longer perform basic functions)—are unable to protect human rights.<sup>111</sup> In some cases, developing countries do not have the political will or legal processes to protect human rights.<sup>112</sup>

In other cases, states actively resist the development, implementation, and enforcement of the international human rights regime.<sup>113</sup> Even at the inception of the modern international human rights regime, politi-

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106. See Mazower, *supra* note 51, at 379 (“To many people, [human rights] are honoured in the breach, an ideal which statesmen pay lip-service to but flout in practice.”).

107. Comm. on the Elimination of Racial Discrimination (CERD), *Reports Submitted by States Parties Under Article 9 of the Convention: Third Periodic Reports of States Due in 1999*, ¶ 3, U.N. Doc. CERD/C/351/Add.1 (Oct. 10, 2000) [hereinafter United States 2000 CERD Report], available at <http://www.state.gov/documents/organization/100294.pdf> (combining the first three periodic reports of the United States). It may seem surprising that the United States has ratified CERD since the United States has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. See *Ratification of International Human Rights Treaties – USA*, U. MINN. HUM. RTS. LIBR., <http://www1.umn.edu/humanrts/research/ratification-USA.html> (last visited Oct. 29, 2010). It is worth noting that this exception—U.S. ratification of an international human rights agreement—was prompted by the very public presentation of petition to the United Nations in 1947 by W.E.B. Du Bois on behalf of the National Association for the Advancement of Colored People. Mazower, *supra* note 51, at 395.

108. United States 2000 CERD Report, *supra* note 108, at 18–21. Reasons given in the report for the inadequate implementation of the CERD include inadequate enforcement of existing laws, inefficient use of data, economic disparities, and lack of access to educational opportunities, technology, and high technology skills. *Id.* at 19–20. In addition, the report notes that persistent discrimination is a primary factor affecting the implementation of laws designed to eliminate discrimination. *Id.* at 19–21. Ironic. However, it is worth noting that the section on factors affecting implementation has been reduced to less than a page in the 2007 report and no longer gives discrimination as a reason for persistent discrimination despite the enactment of laws. See Periodic Report of the U.S., U.N. Comm. on the Elimination of Racial Discrimination, *Periodic Report of the U.S.*, ¶¶ 52–54 (April 2007), available at <http://www.state.gov/documents/organization/83517.pdf>.

109. See Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 943–44 (2005).

110. See *id.*

111. See *id.* at 858.

112. JOSEPH, *supra* note 1, at 11.

113. See Mazower, *supra* note 51, at 393.

cal decision-makers attempted to limit the scope, implementation, and enforcement of international human rights law.<sup>114</sup> For example, during the establishment of the United Nations in the 1940s, the U.S. Congress actively took steps to protect U.S. domestic jurisdiction and prevent direct applicability of the U.N. Charter's human rights provisions.<sup>115</sup>

As a result of U.S. and British concerns about national jurisdiction, a domestic jurisdiction clause was incorporated into the U.N. Charter.<sup>116</sup> Article 2 of the U.N. Charter states that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.”<sup>117</sup> The inclusion of this domestic jurisdiction clause effectively circumscribed the ability of the U.N. Charter to serve as a direct basis for effective implementation and enforcement of the emerging post-World War II international human rights regime.<sup>118</sup>

The state-centered focus of international human rights law relegates to the periphery complex relationships between public and private actors—as well as relationships between private actors, and individuals and communities.<sup>119</sup> For example, the real and perceived need for foreign capital creates incentives for states to establish an investment climate that is attractive to transnational corporations.<sup>120</sup> In response, states that are looking to foreign direct investment to provide capital and know-how for infrastructure development may choose not to monitor or enforce laws and regulations that would increase the cost of operating within their borders.<sup>121</sup>

In some cases, states are also complicit in corporate-related human rights abuses<sup>122</sup> and, therefore, have a disincentive to implement and enforce protection from and remedies for human rights abuses. For example, in response to the Niger Delta disasters discussed above, Ken Saro-Wiwa, a businessman, novelist, television producer, and former government official, spoke out against land appropriation, pollution, and other alleged negative effects of the acts of multinational oil companies, including Royal Dutch/Shell.<sup>123</sup> In November 1995, Ken Saro-Wiwa and

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114. See *id.* (“The higher human rights moved up the agenda, the greater the pressure for a further limitation on the new [United Nation]’s ability to intervene in the domestic affairs of member states.” (emphasis added)).

115. See *id.*

116. See *id.* at 393.

117. U.N. Charter art. 2, para. 7.

118. See Mazower, *supra* note 51, at 393 (discussing how Article 2 undermined the scope and effectiveness of the U.N. Charter’s ability to serve as the basis for an effective human rights regime).

119. See Hope Lewis, *Transnational Dimensions of Racial Identity: Reflecting on Race, the Global Economy, and the Human Rights Movement at 60*, 24 MD. J. INT’L L. 296, 306 (2009).

120. See *id.* at 306–07.

121. See *id.*

122. See generally Wiwa Fifth Amended Complaint, *supra* note 16.

123. See *id.* at 2.

five other men were beaten, and denied food, water and bedding for several days.<sup>124</sup> On November 10, 1995, the six men were hanged after a “special military trial” based on fabricated charges.<sup>125</sup> The Royal Dutch Shell consortium had knowledge of these acts and gave its consent and support.<sup>126</sup> Royal Dutch/Shell made payments to the military police, contracted for the purchase of weapons supplied to the Nigerian police and military, exchanged information with and provided logistical support to the Nigerian police and military, and participated in the planning and coordination of raids and terror campaigns in Ogoni and the Niger Delta.<sup>127</sup> At one point, the Nigerian subsidiary, a member of the Royal Dutch Shell consortium, publicly praised the working relationship between the subsidiary and the Nigerian Police Force.<sup>128</sup>

Even in cases in which states are not acting in collusion with transnational corporations, the state-centered human rights regime does not provide sufficient incentives for transnational corporations to respect human rights. In the 2007 U.N. study of cases of alleged corporate-related human rights abuses discussed above, two of the main contexts in which transnational corporations impinged upon human rights were labor and the environment.<sup>129</sup> In most of the cases reviewed in the U.N. study, each alleged instance of corporate-related human rights abuse affected at least one hundred people, and the numbers were often much higher.<sup>130</sup> For example, in one case, one alleged instance of corporate-related human rights abuse affected approximately 60,000 people.<sup>131</sup>

Although the international human rights regime has made progress since the United Nations General Assembly adopted the 1948 Universal Declaration of Human Rights, state resistance continues to inhibit development of an implementable and enforceable human rights regime domestically and internationally.<sup>132</sup> States, which bear the responsibility for implementing and enforcing international human rights law, fail to ade-

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124. *See id.* at 3, 17.

125. *Id.* (“Defendants Royal Dutch/Shell, together with the military regime governing Nigeria, acting through the Shell Petroleum Development Company of Nigeria Limited . . . , and acting with other agents and co-conspirators have, in the past and continuing through the present, used force and intimidation to silence any opposition to their activities in Nigeria which includes the exploitation of the petroleum resources of the Delta and spoliation of the environment there.”).

126. *Id.* at 2 (“The executions of Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, Daniel Gbokoo, and Dr. Barinem Kiobel and the imprisonment and torture of Michael Tema Vizer by the Nigerian military junta and the campaign to falsely accuse them were carried out with the knowledge, consent, and/or support of Defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c., . . . and their agents and officers, as part of a pattern of collaboration and/or conspiracy between [Royal Dutch/Shell] and the military junta of Nigeria to violently and ruthlessly suppress any opposition to Royal Dutch/Shell’s conduct in its exploitation of oil and natural gas resources in Ogoni and in the Niger Delta.”).

127. *See id.* at 8–9.

128. *Id.* at 13.

129. *Protect, Respect & Remedy*, *supra* note 13, at 2.

130. *Id.* at 13–14.

131. *Id.* at 13.

132. *See Peerenboom*, *supra* note 109, at 824.

quately do so. At the same time, the focus on international human rights law diverts attention and energy that could be used to develop alternative areas of human rights law. State resistance takes many forms including non-ratification, reservations to international agreements, non-compliance, and even withdrawal from international agreements.<sup>133</sup> The extent to which states make reservations to international human rights treaties undermines the effectiveness of those treaties.<sup>134</sup>

### C. Extraterritorial Application of Domestic Law

The combination of sovereignty and territorial integrity imbues states with jurisdiction within a state's territories.<sup>135</sup> Generally, under modern international law, sovereign states have the jurisdiction to make and enforce laws within their own territories.<sup>136</sup> This also means that, generally, states may not interfere in affairs that are within the jurisdiction of another state or in another state's exercise of its authority within its jurisdiction.<sup>137</sup>

States also exercise extraterritorial jurisdiction.<sup>138</sup> In fact, there is an increasing trend toward extraterritoriality.<sup>139</sup> Familiar examples include extraterritorial application of antitrust, securities, and merger and takeover laws.<sup>140</sup> However, the extraterritorial application of domestic laws is problematic.<sup>141</sup> For example, the checks and balances that develop out of mutual obligations, such as those embodied in international treaties, do not constrain extraterritorial application of domestic law.<sup>142</sup> Individual nations are able to use their domestic laws to influence international policy in a non-transparent manner.<sup>143</sup> Such laws are not first subjected to

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133. *Id.*

134. *See id.* However, ratification alone is not inherently correlated with increased protections for human rights.

135. For a discussion of sovereignty, territoriality, and jurisdiction, see Domingo, *supra* note 47, at 1556–76.

136. *See* PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 175 (1993).

137. U.N. Charter art. 2, para. 7.

138. *See* BLUMBERG, *supra* note 136, at 175–77 (discussing the bases for extraterritoriality). Blumberg differentiates between home and host country territoriality. *Id.* at 177–91. For examples of home and host country extraterritoriality, see generally *id.* For a brief history of extraterritorial jurisdiction in the international criminal context, see Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 3–11 (2007).

139. Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 818 (2009). For a discussion of U.S. attempts to regulate transnational corporations, see Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT'L L.J. 89, 107–18 (2001).

140. BLUMBERG, *supra* note 136, at 192–93.

141. *See* Parrish, *supra* note 139, at 820.

142. *Id.* at 846. For a response to arguments that extraterritorial laws encourage international lawmaking, see *id.* at 871–72.

143. *See id.* at 846, 857, 860, 862.

public debate and discourse at the global level, which poses a threat to democratic sovereignty and to international cooperation and stability.<sup>144</sup>

The extraterritorial application of domestic law also tends to make enforcement of human rights dependent on private litigation.<sup>145</sup> On its face, private litigation has certain benefits because it affords potential plaintiffs an opportunity to pursue a remedy for their harms. However, as mentioned above, many plaintiffs do not have the significant financial resources necessary to pursue remedies through private litigation. Further, even if private litigants have the resources to successfully pursue litigation against a corporation, there is no guarantee that those plaintiffs would have the financial resources to enforce the judgment. After all, large transnational corporations have comparatively infinite time and resources with which to oppose litigation and the enforcement of judgments.

In addition, “[e]xtraterritorial laws undermine international law . . . .”<sup>146</sup> Domestic litigation can divert energy toward short-fixes with limited scope that could be better concentrated on working toward comprehensive laws and enforcement with long-term effects.<sup>147</sup> For example, when decisions are not recognized and enforced abroad, battles won in one domestic court must then be re-litigated over and over again in all of the jurisdictions around the world to achieve truly international protections and remedies.

The state-centered human rights regime is characterized by an emphasis on domestic jurisdiction.<sup>148</sup> Thus, laws governing the protection and enforcement of human rights are at the whim of the prevailing political will or lack thereof in any given country at any given time. Arguably, it might be possible to fill gaps in the human rights protections and enforcement of one country with the extraterritorial application of the domestic laws of another country. However, as this Part I demonstrated, such extraterritorial application of domestic law is problematic and can undermine the international human rights law regime.<sup>149</sup>

This Part I highlighted the weaknesses of the state-centered international human rights regime and its inability to respond to the realities of

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144. *See id.*

145. *See id.* at 862–63.

146. *Id.* at 865. However, this is not to suggest that the territorial jurisdiction of a state is holy and should be protected from any and all encroachments. *See* BLUMBERG, *supra* note 136, at 201 (“[T]he extraterritorial assertion of national law inherent in the application of enterprise principles to components of multinational groups inevitably will engender international confrontation and disrupt international trade and relations.”); Domingo, *supra* note 47, at 1575–76 (arguing that universal harms should be resolved in a universal way).

147. *See* Parrish, *supra* note 139, at 865–66.

148. U.N. Charter art. 2, para. 7.

149. *See* Parrish, *supra* note 139, at 865–66.

modern transnational corporations.<sup>150</sup> State resistance, impotency, and complicity lead to under-protection of human rights.<sup>151</sup> Extraterritorial application of domestic laws is insufficient to fill these gaps and can have far-reaching detrimental effects.<sup>152</sup> Although the weaknesses of the existing regime are well-known and well-documented, the question of how to comprehensively address these issues remains unanswered.

This Article argues that this question is unanswered largely because the conflation of human rights law and international human rights law has inhibited the evolution of human rights law in other directions. The development of new forms of human rights law could address the under-protection of human rights that results from an over-reliance on international human rights law. One issue that new forms of human rights law could address is corporate-related human rights abuse. Part II argues that human rights law should be extended directly to transnational corporations because the intersection of human rights and transnational corporate activity is special and, therefore, requires a specialized regulatory regime.

## II. TRANSNATIONAL CORPORATIONS NEED DEDICATED REGULATION

Alternative forms of human rights law are needed because international human rights law is inadequate to enact and enforce comprehensive protections from corporate-related human rights abuses. The intersection of transnational corporations and human rights presents particular challenges which existing legal regimes are ill-equipped to regulate. One reason for this is the combination of the nature of transnational operations and the importance of human rights. Many transnational corporations have achieved a level of wealth and influence that strain the regulatory competence of nation-states.<sup>153</sup> Transnational corporations operate and cause or contribute to harms in multiple jurisdictions, which challenges the effectiveness of traditional territorial jurisdiction. Finally, human rights represent a special set of societal values that require a level of regulation that may exceed those deemed sufficient in other areas of the law. This Part II analyzes each of these characteristics of corporate-related effects on human rights in turn.

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150. See Erika R. George, *The Place of the Private Transnational Actor in International Law: Human Rights Norms, Development Aims, and Understanding Corporate Self-Regulation as Soft Law*, 101 AM. SOC'Y INT'L L. PROC. 473, 474 (2007).

151. See Peerenboom, *supra* note 109, at 943–44.

152. See Parrish, *supra* note 139, at 866.

153. See generally JOEL BALKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 3 (2004) (examining the strength and wealth of transnational corporations).

*A. Wealth and Influence of Transnational Corporations*

Transnational corporations have achieved vast wealth and immense influence.<sup>154</sup> They exercise economic, political, and legal influence in home countries, the country of incorporation, and host countries—the country in which assets or operations are located.<sup>155</sup> This exercise of influence inhibits the ability of states to prevent and redress corporate-related human rights abuses.<sup>156</sup>

## 1. Economic Might of Transnational Corporations

Foreign direct investment, which takes the form of owning, operating, or managing a business in host countries, is an important component of transnational corporations' operations.<sup>157</sup> States allow foreign direct investment by transnational corporations within their borders for a variety of reasons. Two of the main reasons that host countries allow—and more importantly *encourage*—foreign direct investment are to gain infusions of capital and know-how in the short term and to achieve economic prosperity in the long term.<sup>158</sup>

In 2007, there were approximately 77,000 transnational corporations.<sup>159</sup> The foreign assets of the top twenty transnational corporations amounted to over \$2,904,995 million.<sup>160</sup> The majority of the largest transnational corporations are incorporated in more developed countries.<sup>161</sup> However, at least since the European occupation of Africa and other former colonies, transnational corporations have chosen to own, operate, and manage business operations in countries in which they are not incorporated, and they continue to do so today in increasing numbers.<sup>162</sup> In some cases, the wealth of a transnational corporation may ex-

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154. See generally United Nations Conference on Trade and Development, *The Universe of the Largest Transnational Corporations*, U.N. Doc. UNCTAD/ITE/IIA/2007/2 (2007) [hereinafter UNCTAD], available at [http://www.unctad.org/en/docs/iteiia20072\\_en.pdf](http://www.unctad.org/en/docs/iteiia20072_en.pdf) (compiling a list of the 100 largest non-financial transnational corporations and the top fifty transnational corporations from developing countries).

155. Jernej Letnar Cernic, *Corporate Human Rights Obligations under Stabilization Clauses*, 11 GER. L.J. 210, 218 (2010); see also *Citizens United v. FEC*, 130 S. Ct. 876, 962–63 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing the ability of corporations to exert political influence through political speech and election contributions).

156. Cernic, *supra* note 155, at 211.

157. UNCTAD, *supra* note 154, at 3 (stating that 770,000 foreign affiliates of transnational corporations have globally generated an estimated \$4.5 trillion in value since the early 1990's).

158. Padma Mallampally & Karl P. Sauvart, *Foreign Direct Investment in Developing Countries*, FINANCE & DEVELOPMENT, Mar. 1999, at 34–36, available at <http://www.imf.org/external/pubs/ft/fandd/1999/03/pdf/mallampa.pdf>.

159. UNCTAD, *supra* note 138, at 3.

160. *Id.* at 40.

161. *Id.* at 4. The European Union, Japan, and the United States are the home countries for eighty-five percent of the top one hundred transnational corporations. *Id.* The number of transnational corporations incorporated in less developed economies is growing but only a handful have entered the ranks of the world's largest. *Id.* at 15–16.

162. See Cernic, *supra* note 155, at 211.

ceed the wealth of the host country itself.<sup>163</sup> The wealth of transnational corporations gives them room to influence the abuse or enjoyment of human rights by individuals and communities in both home and host countries.<sup>164</sup>

## 2. The Siren Song of Foreign Direct Investment

Foreign direct investment by transnational corporations is considered to be a significant source of private external financing for developing countries.<sup>165</sup> In 2008, approximately forty-three percent of all inward foreign direct investment flowed into transitional and developing countries.<sup>166</sup> Foreign direct investment is also important to developing countries as an opportunity for innovation, technology transfer, human capacity development, and access to various forms of corporate governance.<sup>167</sup> The need (real or perceived) for foreign capital makes many host countries dependent on it for development and, therefore, susceptible to the influence of transnational corporations.<sup>168</sup>

In addition to potential economic benefits, foreign direct investment by transnational corporations also exerts socio-cultural, political, and legal influence in host countries.<sup>169</sup> In some countries, transnational corporations may reinforce gender hierarchies by paying, or allowing their subsidiaries to pay, women less than men for the same work.<sup>170</sup> The effects of foreign direct investment may also be indirect and unexpected. Between 1989 and 1992 in Papua New Guinea, for example, increased income resulting from foreign direct investment was linked to increased

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163. Halpern, *supra* note 30, at 144 (“[T]he process of economic globalization has allowed many TNCs to accumulate vast sums of resources and power, often times in excess of the host state’s own.”); see also Baker, *supra* note 139, at 94.

164. JOSEPH, *supra* note 1, at 1–2.

165. Mallampally & Sauvant, *supra* note 158, at 35; see also, United Nations Conference on Trade and Development, *World Investment Directory: Volume X Africa 2008*, at 1, U.N. Doc. UNCTAD/ITE/IIT/2007/5 (2008), available at [http://www.unctad.org/en/docs/iteiit20075\\_en.pdf](http://www.unctad.org/en/docs/iteiit20075_en.pdf) (“The ratio of FDI inflows to the region’s gross fixed capital formation . . . [was] 20 per cent in 2006.”).

166. See *Inward & Outward Foreign Direct Investment Flows*, UNCTADSTAT, <http://unctadstat.unctad.org/TableViewer/tableView.aspx?ReportId=88> (last visited Oct. 29, 2010) (calculated using 2008 data available on UNCTADSTAT).

167. Mallampally & Sauvant, *supra* note 158, at 35–36.

168. See *id.* at 36.

169. Baker, *supra* note 139, at 89 (“[Transnational corporations are] potentially more economically powerful than Stalin’s Soviet Union, and with more broad-based political influence than The Third Reich.”).

170. See U.N. Secretary-General, *The World’s Women 2005: Progress in Statistics*, 54, U.N. Doc. ST/ESA/STAT/SER.K/17 (2006), available at [http://unstats.un.org/unsd/demographic/products/indwm/ww2005\\_pub/English/WW2005\\_text\\_complete\\_BW.pdf](http://unstats.un.org/unsd/demographic/products/indwm/ww2005_pub/English/WW2005_text_complete_BW.pdf). For a discussion of the gendered effects of foreign direct investment, see generally Rachel J. Anderson, *Foreign Direct Investment and Distributional Equity for Women*, 31 WOMEN’S RTS. L. REP. (forthcoming 2010). See also Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 74–80 (2009) for a more comprehensive discussion of women’s work and DOUGLAS BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM (2006) for a discussion of implicit male bias in corporate governance and the effects of this bias on women’s rights.

consumption, which was linked to increased rates of polygamy.<sup>171</sup> Men with more income were able to take more wives.<sup>172</sup>

### 3. Political Influence of Transnational Corporations

Transnational corporations exert political influence in both home and host countries. This influence may be direct or indirect or both. In home countries, for example, transnational corporations exert political influence through lobbying and campaign contributions.<sup>173</sup> When a transnational corporation exerts political influence, it affects government decision making in a way that encourages government action or inaction.<sup>174</sup>

Transnational corporations may also use their political influence in their home country to influence decisions in host countries. For example, transnational corporations incorporated in countries like the United States pressure their home governments to pressure governments in developing countries to provide protections for the corporations' intellectual property.<sup>175</sup>

### 4. Legal Influence of Transnational Corporations

Transnational corporations are often able to influence the application and enforcement of laws in the countries in which they operate. For example, Nike's Korean suppliers operating shoe factories in Indonesia in the early 1990s successfully petitioned for and received an exemption from the minimum wage.<sup>176</sup> The companies claimed that paying mini-

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171. See Glenn Banks, *Globalization, Poverty, and Hyperdevelopment in Papua New Guinea's Mining Sector*, 46 *FOCCAL-EUR. J. ANTHROPOLOGY* 128, 135 (2005).

172. See *id.*

173. See *Citizens United v. FEC*, 130 S. Ct. 876, 881–86 (2010). This recent U.S. Supreme Court case ensured the ability of corporations, whether domestic and foreign, to exert political influence through political speech and election contributions. *Id.*; cf. 2 U.S.C. § 441e(a)(1) (2006) (prohibiting foreign nationals from directly or indirectly making contributions or independent expenditures in connection with a U.S. election). However, the majority opinion does not address whether the “[g]overnment has a compelling interest in preventing foreign individuals or associations from influencing” the domestic political process. *Citizens United*, 130 S. Ct. at 911. Further, the majority does not consider the issues in this case in the context of transnational corporations. *Id.* at 936 (Stevens, J., concurring in part and dissenting in part).

174. *Id.* at 961–63.

175. See Peter Straub, *Farmers in the IP Wrench—How Patents on Gene-Modified Crops Violate the Right to Food in Developing Countries*, 29 *HASTINGS INT'L & COMP. L. REV.* 187, 193 (2006). For example, U.S. companies have tried to “invent restrictions that do not exist within international law and compel developing countries to accept them through U.S. trade pressures.” *Special 301 Review Public Hearing: Hearing Before the Special 301 Subcommittee of the Office of the U.S. Trade Representative*, at 104 (2010) (from testimony given by a representative from Doctors Without Borders) available at [http://www.ustr.gov/webfm\\_send/1726](http://www.ustr.gov/webfm_send/1726). Strong intellectual property rights can have detrimental effects on human health and life. *Id.* at 97–98 (“People in developing countries are dying because medicines do not exist due to inadequate incentives for their development or because they're unavailable due in part to patent barriers and high costs.”). For a more comprehensive discussion of the intersection of trade and human rights, see BERTA HERNANDEZ-TRUYOL & STEPHEN J. POWELL, *JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS* (2009).

176. Locke, *supra* note 22, at 10.

imum wage would be a hardship for them.<sup>177</sup> The local minimum wage at the time was approximately \$1 per day (2,100 rupiah) and covered only 70% of the basic needs of one individual.<sup>178</sup> This arrangement allowed factories producing Nike products to underpay more than 25,000 workers without violating the letter of the law in Indonesia—the host country.<sup>179</sup> This practice was discontinued on Nike's request in the mid 1990s—an example of transnational corporations' ability to prevent human rights abuses by their subsidiaries and suppliers, if they choose to do so.<sup>180</sup>

One important way that transnational corporations affect the legal regimes in host countries is through investment agreements between the state and one or more investors. Investor-state investment agreements are agreements between host states and investors to set rules, standards, and even determine the laws that will apply to the transaction that is the object of the contract.<sup>181</sup> Investor-state investment agreements are problematic for the protection of human rights because they insulate “projects from standards of protection of basic rights that apply elsewhere in a host country; and [they] shrink[] certain remedies that victims would otherwise have.”<sup>182</sup> Investment agreements between states and transnational corporations are common, for example, in the extraction sector.<sup>183</sup>

Investor-state investment agreements highlight a key problem associated with transaction-based law and policymaking that takes place outside of a comprehensive legal and regulatory framework. This is signaled by the fact that investor-state investment agreements are commonly referred to as *international* investment agreements.<sup>184</sup> This nomenclature supports claims that some transnational corporations have amassed previously unknown influence over the law and policymaking power of these agreements. In the international investment agreement, transnational corporations become quasi-states that enter into agreements with nation-states, and they imbue the transnational corporations with rights and powers that allow them to encroach upon prerogatives of the public

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177. *Id.*

178. *Id.*

179. *See id.*

180. *Id.* at 11. Nike first denied the ability to affect the practices of companies in its supply chain and then only did so after substantial bad press. *Id.* at 10–11.

181. *See* Sheldon Leader, *Human Rights, Risks, and New Strategies for Global Investment*, 9 J. INT'L ECON. L. 657, 703–04 (2006) (discussing the types of clauses in investment contracts and international investment contracts in conjunction with human rights); *see also* Wendy N. Duong, *Partnerships with Monarchs—Two Case Studies: Case One*, 25 U. PA. J. INT'L ECON. L. 1171, 1265 (2004) (“In various forms, the [Stabilization] Clause restricts the host jurisdiction’s exercise of ‘permanent sovereignty’ by contractually preventing the nation-state from subsequently modifying the governing law of the investment contract.”). Concession agreements between early transnational corporations, formerly colonial trading companies, are the predecessors of modern international investment contracts. *See* ANGHIE, *supra* note 52, at 233–34.

182. Leader, *supra* note 181, at 700.

183. *See id.* at 661, 696 (discussing the BTC pipeline connecting the Caspian and Mediterranean Seas and the Chad-Cameroon pipeline agreement).

184. This is a post-World War II development in international law. ANGHIE, *supra* note 52, at 230.

domain.<sup>185</sup> Taking this one step further, international investment agreements even have the potential to trump both domestic and international law.<sup>186</sup>

These investor-state agreements are, thus, not subject to domestic law but rather a legal system of a different kind.<sup>187</sup> Generally, these agreements are considered to be subject to “an international law system.”<sup>188</sup> Thus, although the agreement is not between two nations, it is treated as *inter*-national if one of the parties is a developing country and one of the parties is a transnational corporation, but not if the country involved is a “developed” country.<sup>189</sup> As *international* agreements, arbitration of disputes is subject to international rather than national law.<sup>190</sup>

However, the shifting of transnational corporations into a quasi-state status glosses over important distinctions. Transnational corporations are not states and, although the line between public and private is a topic for debate, according them a quasi-state status contributes to the obfuscation of problematic trends related to transaction-based law and policy making. Transaction-based law and policy making is not subjected to the scrutiny accorded a more public deliberative process, and the immediate interests of the parties are narrower than would be the case, for example, if third parties with differing interests were directly involved.

States are at a greater disadvantage when entering into investment agreements than may be apparent at first blush. Initially, it might seem that the state has all the power since it is a sovereign nation and is the maker and enforcer of law and policy within its territories. However, the reason that states enter into investment agreements with investors is that they do not have the domestic capacity, whether public or private, to achieve the purpose of the agreement.<sup>191</sup> Thus, they need to attract one or more foreign investors, although they may not necessarily need to attract a specific foreign investor. Depending on the industry, the number of potential foreign investors may be extremely limited due to high barriers to entry. For example, only a limited number of corporations have equipment readily available to dedicate to drilling oil, and corporations that want to enter this market must have sufficient capital to lay out in

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185. See ANGHIE, *supra* note 52, at 232.

186. See Cernic, *supra* note 155, at 218 (analyzing the language of the 2005 Mineral Development Agreement between the National Transitional Government of Liberia and Mittal Steel Holdings AG).

187. See ANGHIE, *supra* note 52, at 231.

188. See *id.*

189. See ANGHIE, *supra* note 52, at 231–32 (quoting Derek Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 BRITISH Y.B. INT'L L. 49, 51 (1988)).

190. *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, 53 I.L.R. 389, 433 (Arb. Trib. 1977).

191. See generally Leader, *supra* note 181, at 657–694 (discussing investment contracts).

advance to purchase the expensive equipment necessary for oil drilling.<sup>192</sup>

Investment agreements between transnational corporations and host countries create special legal regimes of limited duration with potentially substantial effects.<sup>193</sup> These special legal regimes can weaken legal protections for individuals and communities in host countries.<sup>194</sup> For example, existing human rights standards may be affected indirectly or are limited directly by the terms of the international investment contract.<sup>195</sup> When this happens, the host state may effectively lose its ability to enforce otherwise applicable human rights laws and standards.<sup>196</sup>

Most investor-state investment agreements include stabilization clauses.<sup>197</sup> A stabilization clause is “contract language which freezes the provisions of a national system of law chosen as the law of the contract as of the date of the contract, in order to prevent the application to the contract of any future alterations of this system.”<sup>198</sup> The purpose of stabilization clauses is to protect transnational corporations from unfavorable and perhaps unfair changes in legislation or regulations after they are locked into the contract and have sunk money into the project.<sup>199</sup> These stabilization clauses can, for example, prevent host states from applying laws that come into existence after the contract is signed to the transaction that is the object of the contract.<sup>200</sup>

On their face, stabilization clauses make sense because they mitigate the risk to a transnational corporation that the other party to the contract, a sovereign state with law-making power, might change the laws for its own benefit at any time. However, a broad stabilization clause may also have the effect of depriving individuals and communities in the host country of human rights protections that may become enforceable by law after the date of an investment contract. In fact, stabilization

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192. See *id.* at 682–83.

193. See *id.* at 660. Although the duration is limited, it still extends for the life of the investment project, which is often as long as seventy years. *Id.*

194. *Id.*

195. See, e.g., Cernic, *supra* note 155, at 220–21 (discussing the stabilization clause in the Host Government Agreements between a consortium of oil corporations and the governments of Azerbaijan, Georgia, and Turkey regarding the Baku-Tbilisi-Ceyhan pipeline project).

196. Leader, *supra* note 181, at 671.

197. Cernic, *supra* note 155, at 213. There are various forms of stabilization clauses. *Id.* at 214. See J. Nna Emeka, *Anchoring Stabilization Clauses in International Petroleum Contracts*, 42 INT’L LAW. 1317, 1318–20 (2008) (discussing the rationale for and the origin of stabilization clauses); see also Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT’L L.J. 317, 321 (1988) (describing both stabilization and governing-law clauses in an investment agreement).

198. Cernic, *supra* note 155, at 213; see also Curtis, *supra* note 197, at 346–47 (discussing the nature of stabilization clauses); Sang-Jick Yoon, Comment, *Critical Issues on the Foreign Investment Laws of North Korea for Foreign Investors*, 15 WIS. INT’L L.J. 325, 364–65 (1997) (describing how stabilization clauses are “grandfathered exceptions to the new law”).

199. See Cernic, *supra* note 155, at 213–14.

200. See Leader, *supra* note 181, at 672–681 (discussing stabilization clauses in international investment contracts).

clauses are sometimes structured so that the entry into an international agreement to protect human rights by a host state can make the host state liable to the transnational corporation for profit lost due to the need to comply with laws protecting human rights.<sup>201</sup>

### *B. Complexities of Multijurisdictional Regulation and Enforcement*

The complex structure of transnational operations often triggers questions of jurisdiction and impedes transnational enforcement.<sup>202</sup> It also creates a need for the development of comprehensive global regulation. Although there are jurisdictional challenges, there are also options that offer promising alternatives to address existing jurisdictional hurdles.

#### 1. Territorial Jurisdiction

Territorial jurisdiction, also known as national jurisdiction, state jurisdiction, domestic jurisdiction, and sovereignty, is the power a state has to make laws that govern its territories and the power of its courts to exercise jurisdiction within the bounds of its territories.<sup>203</sup> Territorial jurisdiction is one of the oldest, most fundamental, and accepted forms of jurisdiction.<sup>204</sup> Article 2 of the U.N. Charter, which prohibits states from interfering in the territorial jurisdiction of other states, further protects the territorial jurisdiction of states.<sup>205</sup>

Territorial jurisdiction makes it possible, at least theoretically, to enact and enforce laws governing transnational corporations in the jurisdictions in which they are incorporated, operate, or have assets.<sup>206</sup> In part, this is because respect for state sovereignty remains a central tenet of international human rights law.<sup>207</sup> Thus, domestic tax, labor, business, and antitrust laws, etc., primarily govern transnational corporations. This is not to suggest that these laws do not sometimes have extraterritorial

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201. See Leader, *supra* note 181, at 673–75.

202. Jurisdiction is the power to regulate and to enforce. See generally GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009); Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 7–25 (1987) (discussing judicial jurisdiction in the international context).

203. Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in UNIVERSAL JURISDICTION 168, 171–72 (Stephen Macedo, ed., 2004); see also M. Cherif Bassiouni, *The History of Universal Jurisdiction*, in UNIVERSAL JURISDICTION 39, 40 (Stephen Macedo ed., 2004); cf. Blakesley & Stigall, *supra* note 138, at 12 (discussing two types of jurisdiction: “rule-making and rule-enforcing jurisdiction,” which take three forms: “prescriptive or legislative, adjudicative, and enforcement”).

204. See Bassiouni, *supra* note 203, at 40.

205. U.N. Charter art. 2, para. 4.

206. See JESSUP, *supra* note 32, at 74–76 (discussing territorial jurisdiction governing transnational corporations and the past resentments between the judicial authorities of the United States and Canadian companies).

207. See Parrish, *supra* note 139, at 824 (discussing one reason for this central tenant-fears of some scholars, theorists, and policy makers that international law has more democratic legitimacy than domestic law). See also MALANCZUK, *supra* note 47, at 17–18 and Domingo, *supra* note 47, at 1556–65 for a discussion of the theory, doctrine, and concepts of sovereignty.

reach, but rather that—in most cases—they are dependent on domestic enforcement.<sup>208</sup> However, in practice, territorial jurisdiction has proven to be a limited tool. Transnational corporations often operate in the context of a multinational enterprise, which includes multiple entities incorporated in multiple jurisdictions working with various partners and suppliers.<sup>209</sup>

In the case of lawmaking to protect human rights, territorial jurisdiction generally determines which state and law-making bodies have prescriptive jurisdiction, also known as legislative jurisdiction.<sup>210</sup> In addition, as discussed above, prescriptive jurisdiction may determine the application of international law and extraterritorial application of domestic law. For example, bilateral investment treaties are forms of international lawmaking that govern foreign direct investment.<sup>211</sup> However, domestic and international laws, when they exist, are often fragmented and not enforced. Recall the minimum wage exceptions granted by the Indonesian government to Nike suppliers.<sup>212</sup>

When corporate-related human rights abuses occur in the context of a multinational operation, multiple states may have the right to exercise jurisdiction. Domestic conflict of laws rules can be used to determine which of the states that have the right to exercise jurisdiction should exercise that right in a particular case.<sup>213</sup> Although this may seem to offer plaintiffs multiple jurisdictions and thus multiple opportunities to pursue redress for their claims, in practice this can work to the disadvantage of potential plaintiffs. For example, the courts in the home country of a defendant transnational corporation may—based on their own national conflict of law rules—decide not to assert jurisdiction under the principle of *forum non conveniens*. In dismissing a case for *forum non conveniens*, the court finds that another forum, the host country for example, would be a better suited—more convenient—alternative forum. At the same time, the plaintiffs claims may be blocked for political or other reasons in the host country. Therefore, if such a claim is dismissed, the effect in practice is often that potential plaintiffs are left without a forum in which to bring their claims. This is particularly true for claims dismissed in the United States since it is one of the primary—and only—forums in which

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208. See Parrish, *supra* note 139, at 820, 846 for a discussion of the rise of extraterritorial domestic law and associated problems.

209. See Anderson, *supra* note 34, at 2.

210. See Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 271–72 (2009) (discussing the international law implications for foreign investors responsible for human rights abuses in developing nations in which they do business).

211. See generally Leader, *supra* note 165, at 660–70.

212. Locke, *supra* note 22, at 10–11.

213. See JESSUP, *supra* note 32, at 35–39 (discussing the difference between international law and conflicts of law and which one holds the power in a particular problem).

is possible to bring claims for corporate-related human rights violations.<sup>214</sup>

## 2. Other Forms of State Jurisdiction

In addition to territorial jurisdiction, there are numerous other types of jurisdiction in the transnational context. The least controversial form of jurisdiction is where there is a tie between the prescribing or enforcing state and the party who is the object of this prescription or enforcement. The traditional bases of prescriptive jurisdiction, the power to make rules and regulations, are territory and citizenship.<sup>215</sup> As discussed above, countries commonly make laws that govern their citizens and people within their territory.<sup>216</sup> These are also generally accepted as a matter of customary international law.<sup>217</sup>

Forms of judicial jurisdiction, the power of a court to exercise jurisdiction, include personal jurisdiction and jurisdiction based on effects, consent, nationality, and property.<sup>218</sup> However, the recognized forms of judicial jurisdiction are not uniform and vary from country to country. For example, the United States recognizes tag or transient jurisdiction, whereby the courts may assert personal jurisdiction even if the defendant is passing through their jurisdiction on a wholly unrelated matter.<sup>219</sup> French courts will generally grant jurisdiction in any case that involves a French national on either side.<sup>220</sup> German courts grant jurisdiction in cases involving property located in Germany whether or not the owners have any other ties or connections to Germany.<sup>221</sup>

## 3. Universal Jurisdiction

In addition to the various forms of jurisdiction recognized by different countries, there is also jurisdiction that stems from the nature of the conduct. Universal jurisdiction allows courts to exercise jurisdiction based on the type of conduct alone without any other connection to the state that is exercising jurisdiction.<sup>222</sup> Often, people think only about

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214. See Anderson, *supra* note 34, at 4–5.

215. Paul B. Stephan, *Symmetry and Selectivity: What Happens in International Law When the World Changes*, 10 CHI. J. INT'L L. 91, 105 (2009).

216. See Ramsey, *supra* note 210, at 284.

217. *Id.*

218. See Born, *supra* note 202, at 1–3, 14–20.

219. *Id.* at 12, 36 n.147.

220. See Born, *supra* note 202, at 14 (citing CODE CIVIL [C. CIV.] art 14–15 (Fr.)).

221. See Born, *supra* note 202, at 14–15 (citing ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] Sept. 12, 1950, § 23 (Ger.); Christof von Dryander, *Jurisdiction in Civil and Commercial Matters Under the German Code of Civil Procedure*, 16 INT'L LAW. 671, 678 (1982)).

222. Peter Weiss, *Universal Jurisdiction: Past, Present and Future*, 102 AM. SOC'Y INT'L L. PROC. 406, 407 (2008) (citing PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (Stephen Macedo ed., 2001) [hereinafter PRINCETON PRINCIPLES] (“[U]niversal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such juris-

criminal universal jurisdiction when they think about universal jurisdiction.

Criminal universal jurisdiction applies to conduct that falls within one of the following categories: “piracy, slavery, genocide, crimes against humanity, war crimes, torture, and ‘perhaps certain acts of terrorism.’”<sup>223</sup> Although much of the discussion about universal jurisdiction focuses on criminal cases, universal jurisdiction can also apply in civil contexts.<sup>224</sup> Despite a lack of consensus as to whether human rights are universal, it may be possible to reach a consensus that human rights should be protected from private actors. However, universal civil jurisdiction for corporate-related human rights abuses is not yet an established principle of law.

### *C. Human Rights and Core Values in Crisis*

Alone, the power and influence of transnational corporations may not be sufficient to justify developing alternative regulatory and enforcement options. Even coupled with the challenges of multijurisdictional regulation and enforcement, it may be difficult to convince many scholars and policy makers that additional administrative and regulatory mechanisms are necessary to restrain and harness the power and influence of transnational corporations. However, the nature of human rights as core values and the history of corporate-related human rights abuses lend support to arguments for the need to regulate transnational corporations at a global level.<sup>225</sup>

In western cultures, the idea of human rights as an individual’s claim that can be asserted against society (whether or not there is a legal right) has its roots in the medieval era.<sup>226</sup> The western origins of civil and political rights as protections against government have their roots in the Renaissance and the Reformation.<sup>227</sup> However, protection of human

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diction.”)). Universal jurisdiction is one of the most controversial forms of jurisdiction. See Henry J. Steiner, *Three Cheers for Universal Jurisdiction—or Is It Only Two?*, 5 THEORETICAL INQUIRIES L. 199, 224–26 (2004) (describing reaction from other states to the potential exercise of extraterritorial jurisdiction by Belgian courts).

223. Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT’L L. 149, 151 (2006) (citing *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991)); see also PRINCETON PRINCIPLES, *supra* note 222, at 29; Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes*, 36 GEO. J. INT’L L. 537, 578–603 (2005).

224. See Weiss, *supra* note 222, at 407.

225. See Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT’L L. 211, 304 (2005) (“From a compliance point of view, what is most distinctive about human rights law is that it requires extraordinarily high compliance levels.”).

226. Rubin, *supra* note 14, at 10 (discussing the origins of the doctrine of natural rights). For a justification for a rights approach, see Barbara Stark, *Women’s Rights*, in ENCYCLOPEDIA OF HUMAN RIGHTS 341–44 (David P. Forsythe, ed., 2009) (arguing that the benefits of a rights approach include the moral weight carried by rights rhetoric, the provision of a theoretical framework, a well-established infrastructure, and the power and flexibility of rights as a tool).

227. *Id.* at 35–37 (discussing the origins of civil and political rights).

rights through law emerged out of religious and public policy considerations.<sup>228</sup>

Historically, rules and laws protecting human dignity and human rights were often articulated in response to extreme power and influence combined with encroachments upon those rights and dignity. Crisis is often the catalyst that prompts change. There are many examples of these times of crisis and change, including in the history of the Catholic Church, the American Revolution, and the post-World War II creation of the international human rights regime.<sup>229</sup>

Religious institutions have espoused human rights—albeit under another name—as core values for centuries. The predecessor of early western human rights theory, natural rights theory, emerged at a time when the Catholic Church exercised enormous power.<sup>230</sup> This time of crisis is exemplified by the tension between the growth of the Franciscan Order after its recognition by Pope Innocent III in 1209 and the Inquisition's increasing violence, including torture.<sup>231</sup> Under the doctrine of natural rights, there are certain “claims that can be asserted by all human beings.”<sup>232</sup> These ideas are captured in the writings of William von Ockham, author of the first Western theory of natural rights and a follower of the Franciscan philosophies.<sup>233</sup> They have also been delineated in the Catholic social doctrine.<sup>234</sup>

Human rights have been articulated as core values as part of the creation of nations. In the eighteenth century, the American Declaration of Independence, one of the most famous articulations of individual rights as a political idea, was signed in the context of economic oppression by the British government of its American colonies.<sup>235</sup> This crisis is exemplified by oppression in the form of, for example, the Sugar, Stamp, and Townshend Acts. These acts imposed taxes and import restrictions

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228. *Id.* at 168.

229. See generally THOMAS D. WILLIAMS, WHO IS MY NEIGHBOR?: PERSONALISM AND THE FOUNDATIONS OF HUMAN RIGHTS 31–52 (2005), for a historical perspective of the Church's attitudes concerning human rights.

230. See Rubin, *supra* note 14, at 10.

231. See *id.* at 12; *Inquisition*, CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/08026a.htm#IIA> (last visited Oct. 31, 2010).

232. Rubin, *supra* note 14, at 10.

233. *Id.* at 13–14; see *id.* at 14–17 (discussing Ockham's writings).

234. See generally JAY P. CORRIN, CATHOLIC INTELLECTUALS AND THE CHALLENGE OF DEMOCRACY 41–81 (2002) (describing the development of Catholic social action and the principles of *Rerum Novarum* (On Capital and Labor)); RICHARD W. ROUSSEAU, HUMAN DIGNITY AND THE COMMON GOOD: THE GREAT PAPAL SOCIAL ENCYCLICALS FROM LEO XIII TO JOHN PAUL II (2002) (describing the eight major papal encyclicals on the Church's social teaching); JOHAN D. VAN DER VYVER, LEUVEN LECTURES ON RELIGIOUS INSTITUTIONS, RELIGIOUS COMMUNITIES AND RIGHTS 91–116 (2004) (discussing economic and social human rights and Pope Leo XIII and the *Rerum Novarum*, the “Magna Carta of Catholic social teaching”). See generally MODERN CATHOLIC SOCIAL TEACHING 72–174 (Kenneth R. Himes ed., 2005) for an extensive discussion of the economic, legal, political, cultural, and social context leading to the creation of the Catholic social doctrine.

235. See HENKIN, *supra* note 49, at 1.

upon colonists who did not have a voice in the government and were backed by the threat of and acts of violence. The Declaration of Independence posits that all human beings, or at least all men, possess “certain unalienable Rights,” including “Life, Liberty and the pursuit of Happiness.”<sup>236</sup>

The international community has championed human rights as core values. Modern international human rights documents delineating the rights of individuals and communities against abuses of state power flourished in the wake of the Nazi-driven horrors of the last century.<sup>237</sup> This time of crisis is exemplified by the genocide committed by the German National Socialist government against Jewish, black, Sinti and Roma, and other peoples as well as political dissidents. The 1948 Universal Declaration of Human Rights was signed in the wake of these atrocities.<sup>238</sup>

Private economic actors and international organizations have endorsed human rights as core values. The crisis of corporate-related human rights abuses has been detailed above and there is increasingly broad recognition that transnational corporations should be subject to human rights law.<sup>239</sup> Many corporations are reconsidering their role in respecting human rights.<sup>240</sup> Voluntary codes of conduct have proliferated.<sup>241</sup> At the international level, the U.N. Global Compact promotes core human rights and other principles in the context of global business activities.<sup>242</sup> However, to effectively regulate transnational corporations, regulations and regulatory control must be comprehensive and enforceable.<sup>243</sup> Part III looks towards the development of a comprehensive global legal framework for regulating transnational corporations.

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236. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

237. HENKIN, *supra* note 49, at 1; see MALANCZUK, *supra* note 47, at 209. However, some scholars argue that the Nazi’s human rights abuses are less central to the development of the international human rights regime than is often ascribed to them. See Mazower, *supra* note 51, at 381 (“As for Nazi evil, we know now that the Holocaust as such was much less central to perceptions of what the war had been about in 1945 than it is today.”).

238. HENKIN, *supra* note 49, at 1.

239. See Deva, *supra* note 2, at 1 (“The international community is realizing that in order to achieve fuller and wider realization of human rights, the umbrella of human rights obligations and their enforcement should cover MNCs.”); see also Ratner, *supra* note 82, at 446–47 (providing examples of human rights violations in different regions and the response toward transnational corporations operating there).

240. See George, *supra* note 150, at 474–75.

241. George, *supra* note 150, at 475; Ratner, *supra* note 82, at 448. See generally Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 771–826 (2007), for a discussion of the behavioral significance of corporate rhetoric.

242. See JOSEPH, *supra* note 1, at 7–8; Anderson, *supra* note 34, at 17; George, *supra* note 150, at 475.

243. BLUMBERG, *supra* note 136, at 200–01 (“The reality of the matter is that effective regulation of corporate groups or their activities inevitably requires control of all the components participating in the enterprise. . . . [I]t is essential that the legal structure match the economic structure of the enterprise subject to the regulatory system.”); see also Edward L. Rubin, *Passing Through the*

## III. GLOBAL REGULATION OF TRANSNATIONAL CORPORATIONS

This Part III sets out a proposal for the global regulation of transnational corporations. This proposal has three parts that address existing institutional, legislative, and enforcement weaknesses in current regulation of transnational corporations. Specifically, it proposes the creation of a global institution, development of uniform model laws, and implementation of universal enforcement mechanisms for corporate-related human rights abuses.

A global regulatory scheme has the potential to be more successful than a political one. In recent years, regulatory cooperation has successfully developed international rules.<sup>244</sup> In part, this is explained by economic assumptions that regulations are needed in the case of market failure; for example, when sovereign national governments cannot regulate global actors or where market failures are combined with government failures.<sup>245</sup> As discussed in Parts I and II, in the context of corporate-related human rights abuses, regulation by national governments is inadequate for a number of reasons—including the power and influence of transnational corporations.

To be successful, a regulatory system for transnational corporations should meet several criteria. Regulation should be truly global so that transnational corporations cannot avoid responsibility and accountability by jurisdiction hopping or forum shopping. Global regulations and laws also have the potential to reduce the incentives for states to allow standards that are so low that they encourage human rights abuses in order to encourage foreign direct investment. If laws and regulations are global and set a globally adhered to minimum standard, this would not eliminate competition between states but it could increase the enactment and enforcement of human rights laws.

Global regulation should include rulemaking, adjudicatory, and enforcement components.<sup>246</sup> Rulemaking would define appropriate conduct for transnational corporations and protections for potential victims of corporate-related human rights abuses. Providing for global adjudication options would increase access for potential plaintiffs to bring a claim for

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*Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 83 (2001) (“The recognition of human rights may be won by the activism of social movements, but this victory must be secured by the development of legal concepts that can be understood and used by public decision makers.”); Aneel Karani, *The Case Against Corporate Social Responsibility*, WALL ST. J., Aug. 23, 2010 (arguing that voluntary measures fail when they conflict with financial goals).

244. David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT’L L.J. 281, 282 (1998).

245. John-ren Chen, *Global Market, National Sovereignty and International Institutions*, in THE ROLE OF INTERNATIONAL INSTITUTIONS IN GLOBALISATION: THE CHALLENGES OF REFORM 1, 1 (John-ren Chen ed., 2003).

246. See generally David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT’L L. 563, 563–611 (2008), for a discussion of rulemaking, adjudication, and the increasing importance administrative institutions at the global level.

harms before an adjudicatory body. Global enforcement would create an avenue by which successful plaintiffs could obtain remedies anywhere in the world. Ideally, a global regulatory system should not only create disincentives for harmful behavior, but should also encourage beneficial behavior. Further, it should be informed by other prior and current efforts to create global and transnational regulatory bodies and rules.<sup>247</sup> It should also be compatible with existing structures like the U.N. Framework wherever possible.

Creating a global regulatory framework and component mechanisms will not happen overnight. This is a multi-stage, multi-component proposal comprised of short-term, medium-term, and long-term elements. In the short term, developing a global institution is a matter of the first order. As the proposed site for the drafting of uniform model laws, a global institution is a pre-requisite for the medium-term element of creating a body of uniform model legislation. In the medium term, this proposal foresees the drafting of model uniform laws that can be adopted *in toto* or with some variations by the nations of the world.<sup>248</sup> In the long term, this proposal envisions adjudication of claims in domestic courts or the use of alternative dispute resolution mechanisms or both and enforcement of remedies for successful plaintiffs.

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247. Earlier attempts include the failed UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and the comparatively successful OECD Guidelines for Multinational Enterprises. U.N. Comm'n on Human Rights, Sub-Comm'n on the Promotion and Prot. Of Human Rights, Rep. on its 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (August 26, 2003) [hereinafter U.N. Norms]. See generally Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 292–93 (2006) (discussing the U.N. Norms as evidence of an increasing trend toward mandatory Corporate Social Responsibility); Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J. INT'L & COMP. L. 493 (2004) (discussing the strengths and weaknesses of the U.N. Norms); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 901–08 (2003) (discussing the background and drafting history of the U.N. Norms). Most prior attempts to extend human rights law to transnational corporations were usually unsuccessful. Other attempts include, for example, the 1983 *Draft United Nations Code of Conduct on Transnational Corporations*, the 1958 *Abs Shawcross Proposed Convention to Protect Foreign Investment*, and the 1957 *Draft International Convention for the Mutual Protection of Private Property Rights*, U.N. Comm'n on Transnat'l Corps., Draft U.N. Code of Conduct on Transnat'l Corps., E/1983/17/Rev.1 (1983). Arguably, one main reason these attempts failed is that they were trying to work within the *international* system, which suffers from an aggregated lack of incentives for states to enforce human rights laws as discussed above. As long as states have a disincentive to reform, such attempts face an uphill battle that almost dooms them to failure from the start.

248. Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317, 323 (1984) (“The model law process represents a compromise between the treaty process and purely unilateral action by nations.”). However, variations to model laws should not be for the purpose of limiting their scope as is often the case with the use of reservations in the adoption of international treaties but rather, for example, for the purpose of integrating the model laws and the existing national legal system.

This proposal differs from earlier attempts in important ways. It is not set within the *international* political system, which suffers from an aggregated lack of incentives for states to enforce human rights laws as discussed above. Instead, it is structured as a *global* regulatory proposal. This will avoid some of the reasons that states have a disincentive to reform and sidestep the uphill battle that has doomed some prior efforts. This proposal envisions a global institution that, among other things, should be structured in a way to allow it to explicitly address the needs of developing countries from a developing country perspective, which is not the case for most international institutions.<sup>249</sup> This proposal draws on theories of Global Corporate Citizenship, which are a recent development of the past decade. However, Global Corporate Citizenship is currently voluntary and this Article is proposing mandatory regulations.<sup>250</sup> It also proposes universal civil jurisdiction for corporate-related human rights abuses, which extends beyond current understandings of universal civil jurisdiction.<sup>251</sup>

#### A. Global Law Commission

The first component of this proposal is a global institution, specifically, a Global Law Commission. This is an initial proposal that will be expanded and refined in a future article entitled *Global Law Commission: Institutionalizing Global Human Rights Regulation of Transnational Corporations* (working title). This Section sets out some of the options and challenges for a Global Law Commission.

A Global Law Commission would facilitate effective and simultaneous regulation of transnational corporations in multiple jurisdictions.<sup>252</sup> One goal of the Global Law Commission would be to provide countries with well-conceived, well-drafted legislation that brings clarity and stability to this critical area of the law. The Global Law Commission could contribute to protecting human rights and providing access to remedies for corporate-related human rights abuses. Among other things, the Global Law Commission should explicitly address the needs of developing countries. This Subsection sets out in broad brushstrokes basic contours of a proposal, including formation, membership, level of institutionalization, funding, selection of representatives, transparency of deci-

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249. Kunibert Raffer, *Some Proposals to Adapt International Institutions to Developmental Needs*, in *THE ROLE OF INTERNATIONAL INSTITUTIONS IN GLOBALISATION: THE CHALLENGES OF REFORM* 81, 81 (John-ren Chen ed., 2003) (“Most international institutions were not drafted for the specific needs of so-called ‘developing countries’ . . .”).

250. Anderson, *supra* note 34, at 29.

251. See generally Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT’L L. 142 (2006) (discussing universal civil jurisdiction).

252. See Mark Tushnet, *Keeping Your Eye on the Ball: The Significance of the Revival of Constitutional Federalism*, 13 GA. ST. U. L. REV. 1065, 1067 (1997) (“It seems obvious that only transnational political institutions are likely to be in a position to control transnational corporations.”).

sion-making, and the role of the Global Law Commission as an advocate.<sup>253</sup>

### 1. Formation

The Global Law Commission should be formed in a manner that allows it to act independently of the international legal system while at the same time recognizing the interdependent nature of all legal systems. For example, like international financial regulatory organizations, the Global Law Commission could be informally constituted.<sup>254</sup> It should not be created through international treaties, as it is not intended to be a creature of international law.<sup>255</sup>

Instead, the constituting documents of the Global Law Commission could be a constitution (or similar document) and bylaws. This is a model that has been employed in the creation of successful international financial institutions including the Basle Committee on Banking Supervision and the International Organization of Securities Commissions.<sup>256</sup> Domestically, it is also the constituting structure of the U.S. National Conference of Commissioners on Uniform State Laws (“U.S. Uniform Law Commission”).<sup>257</sup> This structure would facilitate the operation of the Global Law Commission as a global administrative and regulatory institution rather than a political institution. It would also allow the bylaws to be “broad and flexible.”<sup>258</sup>

### 2. Membership

The membership of the Global Law Commission should be composed of commissioners who represent the people of the world. In the Global Law Commission, states would not be members.<sup>259</sup> This Subsec-

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253. David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 569–71 (2005) (developing a model of regulatory cooperation on which these categories are based). Instead of Zaring's term “proselytizer,” this Article uses the term “advocate.”

254. See *id.* at 569–71 (discussing a model of regulatory cooperation based on common features of international law of the Basle Committee, the International Organization of Securities Commissions, and their successors).

255. See *id.*

256. See Zaring, *supra* note 244, at 282. International financial regulatory cooperation is one area in which institutions and rules have been successfully developed. *Id.* at 282; see also David Zaring, *Three Challenges for Regulatory Networks*, 43 INT'L LAW. 211, 211–17 (2009) (discussing the evolution and effectiveness of regulatory networks); Zaring, *supra* note 253, at 549 (discussing the Basle Committee on Banking Supervision and the International Organization of Securities Commissions).

257. The Uniform Law Commission has existed in the United States for over 100 years. *Unif. Law Comm'n.*, NCCUSL HOME, at <http://www.nccusl.org/Update/> (last visited Oct. 31, 2010). The Uniform Law Commission “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law.” *Id.* Historically, the Uniform Law Commission has made numerous contributions including resolving conflict-of-law issues, facilitating commerce, and advancing reciprocity and remedies between states. Chato Hazelbaker, *National Legislation, One State at a Time*, 66-DEC BENCH & B. MINN. 22, 23 (2009).

258. Zaring, *supra* note 253, at 570 (stating that “many treaties that create traditional international organizations” are “specific, detailed, and constraining”).

259. See *id.* at 569.

tion discusses initial proposals for the selection of members of the Global Law Commission. Other issues that will need to be addressed include determining criteria for membership and the size of the Global Law Commission, specifically the minimum and maximum number of members.

One option is to allow only national governments to appoint or nominate commissioners in a process that is similar to that used for the U.S. Uniform Law Commission or the International Law Commission.<sup>260</sup> A downside to this membership structure is individual countries' ability to interfere in the process by simply refusing to appoint or nominate commissioners. However, this could be remedied by giving the Global Law Commission the power to request the body that regulates the legal profession in that country to make appointments or nominations—assuming that the body regulating the legal profession is able to act independently. More significantly, it is inherently inconsistent and problematic to base membership selection on the international legal system since the global law system is intended to function in parallel with but not be dependent on the international legal system. If national governments appoint or nominate the commissioners, then they are arguably representatives of countries even if the Global Law Commission is structured to ensure them as much independence as possible.

Instead, one alternative for membership selection is proportional representation. The Global Law Commission would have a fixed or flexible—within a certain range—number of members. The commissioners could be allocated proportionally, for example, by continent according to population or other criteria and the allocation could be reviewed and revised at set intervals. This would reflect the nature of the Global Law Commission as a global institution rather than an international institution.

Commissioners could be nominated by national governments, NGOs, bodies that regulate the legal profession, as well other institutional actors. To be elected, nominees would need to meet the criteria set for membership in the Global Law Commission. Institutions that are given the right to nominate could also constitute the body that elects the commissioners from those nominated based on a one-entity, one-vote principle. One challenge associated with this option is determining which institutions and groups would have the right to make nominations. A benefit of this mode of selection would be to expand the pool of nominators and, thus, the pool of potential nominees. It would also serve to de-

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260. UNIFORM LAW COMMISSION CONST. art. II, available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18>; UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION, 8-17 (Vol. I, 2007); JEFFREY S. MORTON, THE INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS 10-12 (2000); and SIR IAN SINCLAIR, THE INTERNATIONAL LAW COMMISSION 13-21 (1987).

crease the level of control by national governments but recognize the importance of national governments and the interconnection and interdependency of all legal orders of the world.

Another issue that will need to be addressed is the possibility of creating multiple forms of membership, such as *ex officio* membership in addition to elected membership, and the advantages and disadvantages of these alternative forms. Having different forms of membership would make it possible to select commissioners in more than one way. For example, some percentage of the commissioners could be nominated and elected among national governments, some could be nominated and elected by NGOs and other institutional actors, and some could be nominated and elected by bodies that regulate the legal profession. Allocating certain percentages of commissioners to certain interest groups such as national governments would help garner support from those groups for the Global Law Commission's work. However, this might expose the Global Law Commission's work to becoming more political than regulatory.

### 3. Institutionalization

The Global Law Commission should meet at regular intervals, for example annually, to draft model uniform laws in key human rights areas affected by transnational corporations. In addition, it is likely that the Global Law Commission would need to continue work on ongoing projects in committees. Committees could be determined based on substantive areas or type of tasks. Substantive committees offer an advantage because they allow the clustering of substantive expertise. However, task oriented committees may present a better option because the make-up of the committee would bring together people with varying substantive expertise who, together, have the skills and knowledge to achieve the committee's assigned tasks.

The Global Law Commission should have a permanent presence. Either a small permanent presence or a more substantial permanent presence would have their benefits. A small permanent presence would keep costs, and thus the need for funding, low.<sup>261</sup> A more substantial permanent presence would cost more but would allow the Global Law Commission to operate year-round. However, an increased need for funds amplifies questions about sources of funding and the level of influence of governments and intuitions providing those funds.

### 4. Funding

Funding will be a significant factor in the size and success of the Global Law Commission's administrative apparatus. The level of fund-

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261. Zaring, *supra* note 253, at 571 (stating that international financial regulatory organizations "have little permanent presence" and "[t]heir annual budgets are minute").

ing required will depend in large part on whether the Global Law Commission has a large or small permanent presence. The larger the permanent presence, the greater the need will be for funding.<sup>262</sup> However, funding will be a less significant factor if the commissioners work on a volunteer basis and are not compensated. Nonetheless, some minimal funding would be necessary, even for volunteer commissioners, to defray expenses.

Contributions from interested parties such as national governments are one likely source of funding for the Global Law Commission. States would need to have an incentive to contribute to the Global Law Commission. One incentive for states would be that they could receive legal expertise in the form of drafting of uniform laws worth millions of dollars. Many individual states could not otherwise afford the cost of this type of legal expertise.<sup>263</sup>

### 5. Transparency

Ensuring a high level of transparency can help the Global Law Commission gain and maintain legitimacy. One question is whether meetings of the commission should be open to the public.<sup>264</sup> Open meetings may increase accessibility for those who have the time and financial resources to attend. However, on a global scale, open meetings may also create and legitimize preferential access for more influential actors and exclude interested parties with fewer resources. In addition, open meetings may stifle open and frank discussion.

Instead, the Global Law Commission should have a forum for publicizing drafts and accepting comments from interested parties.<sup>265</sup> The Global Law Commission should also commit to making a wide range of relevant documents available online.<sup>266</sup> Ensuring an opportunity for public comment on drafts via the Internet will increase transparency—assuming that the opportunity to comment is widely publicized in a manner that reaches interested parties.

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262. *See id.* This discussion is intended only to raise the complex and fundamental issue of state support, in particular financial support. The question of securing state support will be analyzed in greater detail in a future article entitled *Global Law Commission: Institutionalizing Global Human Rights Regulation of Transnational Corporations* (working title).

263. *Financial Support*, NCCUSL, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited on Oct. 31, 2010) (drawing from the Uniform Law Commission model).

264. This draws from the U.S. Uniform Law Commission model. UNIFORM LAW COMMISSION, art. XLI. In contrast, international financial regulatory organization meetings are generally not open to the public. Zaring, *supra* note 253, at 571 (“[International financial regulatory organizations] generally operate through closed meetings . . .”).

265. *See* Zaring, *supra* note 253, at 571 (“[T]he Basle Committee and [International Organization of Securities Commissions] . . . make an effort to invite comment from interested parties on their most significant regulatory efforts.”).

266. *Id.* at 571–72 (discussing a practice that has become common among international financial regulatory organizations).

## 6. Advocacy

Model laws drafted by the Global Law Commission can contribute to the development of both soft and hard law. Like other documents written by international organizations and NGOs, model laws drafted by the Global Law Commission may influence soft-law norms and contribute to the enactment of hard law. Model laws drafted by the Global Law Commission for domestic implementation would need to be passed by national governments to be enforceable in domestic courts. This could change if, at a later stage, a global court is established or countries sign onto conventions to enforce alternative dispute resolution or universal civil jurisdiction for claims related to corporate-related human rights violations.

Encouraging national governments to implement draft laws in their jurisdiction will be an important role for the Global Law Commission.<sup>267</sup> Like international financial regulatory organizations, the Global Law Commission would need to work actively to disseminate best practices. In addition, the Global Law Commission could advocate for and play a role in drafting conventions to enforce forms of alternative dispute resolution or universal civil jurisdiction as well as the creation of a global court.

Implementing the Global Law Commission will not be simple or without challenges. One of the key challenges is how to get countries on board with the Global Law Commission and enact the model laws developed by the Global Law Commission. However, there are examples that can provide insights into avenues that may lead to success. For example, forty-two countries adhere—more or less—to the OECD Guidelines for Multinational Enterprises.<sup>268</sup> An examination of the strengths and weaknesses of that process can provide valuable insights. Further, an analysis of why the United States became a member of the United Nations but not the League of Nations, and why the United States signed onto the General Agreement on Tariffs and Trade but not the International Trade Organization offers an opportunity to identify factors that may encourage countries like the United States to support—or at least accept—the Global Law Commission.

### *B. Global Laws and Regulations*

The second component of this proposal is the development of global laws and regulations by the Global Law Commission informed by a the-

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267. *Id.* at 572 (discussing the proselytizing roles played by international financial regulatory organizations).

268. Directorate for Fin. & Enter. Affairs, *The OECD Guidelines for Multinational Enterprises: Frequently Asked Questions*, ORG. FOR ECON. CO-OPERATION & DEV., [http://www.oecd.org/document/58/0,3343,en\\_2649\\_34889\\_2349370\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,3343,en_2649_34889_2349370_1_1_1_1,00.html) (last visited on Oct. 31, 2010).

ory of Law and Global Corporate Citizenship.<sup>269</sup> This is an initial proposal that will be expanded and refined in a future article entitled *A Legal Theory of Global Corporate Citizenship: Reimagining Global Regulation of Transnational Corporations* (working title). Existing legal theory does not provide a viable framework in which to adequately address the effects of corporate activities on human rights. In addition to the weaknesses in international human rights law discussed above, theories of corporate law and foreign direct investment law are also inadequate to comprehensively theorize and regulate the intersection of transnational economic activity and human rights.<sup>270</sup> Because there is not an adequate theoretical framework to address issues raised by the effects of transnational corporations on individuals' and communities' enjoyment of their human rights, corporate-related human rights abuses remain on the periphery of law and theory.

In corporate law and theory in the United States, corporations are generally depicted as economic entities that should be regulated by the market through economic incentives and mechanisms.<sup>271</sup> This position is solidly established at the heart of American corporate legal theory.<sup>272</sup> However, there is a minority in the United States that argues that corporations are economic *and social* entities.<sup>273</sup> This minority often identifies with the Corporate Social Responsibility movement.<sup>274</sup> This line of argument does not limit the means of controlling corporations to economic incentives. Nonetheless, it remains on the periphery of U.S. corporate legal theory and is not likely to become a central tenet of U.S. corporate law and theory anytime in the near future.

Lacking traction in corporate law and theory, we might logically turn to the web of domestic laws, bilateral investment treaties, and other international law that govern foreign direct investment. However, foreign

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269. Although the development of model global laws does not reduce the need for plaintiffs to have the financial capacity to bring suits, adherence to human rights-related laws and norms by transnational corporations can reduce the need for plaintiffs to bring suits by reducing the occurrence of corporate-related human rights abuses. See Backer, *supra* note 247, at 351–54.

270. Similar arguments can be made for other areas of law and theory, for example, law and development.

271. Backer, *supra* note 247, at 296–98 (“The state was to define the parameters within which this flexible framework could be effected and policed, but otherwise the market was to provide the mechanism for regulating corporate activity.”).

272. *Id.* at 296–99 (tracing this position back to the acceptance of arguments made by Adolph Berle in a debate with E. Merrick Dodd in the 1930s); see also A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (discussing the impact of corporate actions taken serve to benefit its shareholders); E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1145–47 (1932) (discussing the purpose and function of the corporate structure).

273. See Cynthia A. Williams, *Corporations Theory and Corporate Governance Law: Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 716 (2002).

274. The exact scope and contours of Corporate Social Responsibility are disputed within the U.S. legal discourse. See *id.* at 711–20 (categorizing positions taken on CSR in the U.S. legal discourse).

direct investment is generally thought of as a primarily economic activity and the laws governing such activities reflect those assumptions.<sup>275</sup> Purely domestic laws often fall prey to lax enforcement in the face of government goals to bring in funds and promote economic development through foreign investment.<sup>276</sup> Bilateral and other international agreements between countries tend to focus on protecting their own natural and legal citizens' foreign investments from expropriation and nationalization without appropriate compensation.<sup>277</sup> It is unlikely that the protection of the rights and interests of non-citizens will be given a higher priority than the protection of a state's own citizens and economic interests in foreign direct investment law. Thus, the regulation of the negative environmental and human rights effects of corporations is likely to remain on the periphery of foreign direct investment law and theory.

However, theoretical advancements have been made in other disciplines. Global Corporate Citizenship is a body of theoretical work initially developed in the management and business literature in the late 1990s that could provide a strong basis for developing global laws to regulate transnational corporations.<sup>278</sup> Over the past decade, a robust Global Corporate Citizenship literature has developed in the business and management fields.<sup>279</sup> This literature argues for voluntary initiatives by transnational corporations.<sup>280</sup> The rationale for transnational corporations

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275. See Dr. Elfraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 *BROOK. J. INT'L L.* 303, 328 (2009).

276. This problem should be addressed in part by universal civil jurisdiction, which would allow plaintiffs to bring cases in courts of countries with a record of more consistent enforcement. See Donovan & Roberts, *supra* note 251, 142–46 (“[U]niversal jurisdiction provides a mechanism for enhancing accountability.”).

277. See, e.g., Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 *LAW & SOC'Y REV.* 805, 808 (2008) (“Most BITs contain a common core of substantive promises to investors, including rights to some combination of ‘most-favored nation,’ national, ‘non-discriminatory,’ or ‘fair and equitable’ ‘treatment’; rights to ‘full protection and security’; rights to ‘prompt, adequate, and effective’ compensation in the event of expropriation or of government measures ‘tantamount to expropriation’; and the right to transfer investment assets or proceeds out of the host state in convertible currency.”).

278. See LOGAN, ROY & RUGELBRUGGE, *supra* note 96, at 13, 16.

279. See, e.g., LOGAN, ROY & RUGELBRUGGE, *supra* note 96, at 6–7; James E. Post & Shawn L. Berman, *Global Corporate Citizenship in a Dot.com World: The Role of Organisational Identity*, in *PERSPECTIVES ON CORPORATE CITIZENSHIP* 66, 66–67 (Jörg Andriof & Malcolm McIntosh eds., 2001); Jeanne M. Logsdon & Donna J. Wood, *Business Citizenship: From Domestic to Global Level of Analysis*, 12 *BUS. ETHICS Q.*, no. 2, 2002, at 155; James E. Post, *Global Corporate Citizenship: Principles to Live and Work By*, 12 *BUS. ETHICS Q.*, no. 2, 2002, at 143, 148–49 [hereinafter *Principles to Live and Work By*]; James E. Post, *Moving from Geographic to Virtual Communities: Global Corporate Citizenship in a Dot.com World*, 105 *BUS. & SOC. REV.* 27, 27–29 (2000); Klaus Schwab, *Global Corporate Citizenship: Working With Governments and Civil Society*, 87 *FOREIGN AFF.* 107, 107–108 (2008); Sandra Waddock & Neil Smith, *Relationships: The Real Challenge of Global Corporate Citizenship*, 105 *BUS. & SOC. REV.* 47, 47–49 (2000); Grahame Thompson, *Tracking Global Citizenship: Some Reflections on ‘Lovesick’ Companies* 1–2 (Inst. for Int'l Integration Studies, Discussion Paper No. 192, 2006), available at <https://www.tcd.ie/iis/documents/discussion/pdfs/iisdp192.pdf>.

280. See generally Schwab, *supra* note 269, at 107–18 (discussing participation and benefits in engaging in global corporate citizenship and corporate social responsibility).

to undertake these initiatives is that they have economic benefits for the corporations in addition to being beneficial for society.<sup>281</sup>

However, one danger of relying on voluntary measures is that they themselves often rely on the flawed assumptions of a purely economic analysis of business management. Purely economic analyses of business choices are susceptible to over-reliance on quantitative tools.<sup>282</sup> Overreliance on quantitative tools is often accompanied by a disregard for moral and cultural factors, which artificially limits our understanding of issues and the range of corresponding regulatory options.<sup>283</sup> Instead, some scholars argue for a “deeply human-centered conception of business” that “depend[s] on the exercise of virtue, respect for dignity, and a shared sense of the common good.”<sup>284</sup> Voluntary measures are also problematic because the self-interests of transnational corporations may not always align with societal interests. In such situations, voluntary measures are often—at most—a minimal but not dispositive incentive.

Global Corporate Citizenship literature builds on corporate citizenship literature by expanding it to the global sphere. Global Corporate Citizenship initiatives have garnered the attention and support of transnational corporations.<sup>285</sup> At the international level, the Global Compact, a United Nations initiative, has promoted a set of values that are aligned with theories of Global Corporate Citizenship.<sup>286</sup> However, the voluntary nature of these initiatives exposes them to the same weaknesses as other voluntary measures—transnational corporations can pick and choose among measures. From a business perspective, this is beneficial because it allows managers and directors to choose measures that suit their context and that fit their business modes.<sup>287</sup> From a human rights perspective, this is a disadvantage because voluntary norms and standards do not require transnational corporations to consider, recognize, or adhere to any domestic or international norms or standards such as international

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281. See *Principles to Live and Work By*, *supra* note 279, 143–44, 148.

282. Kevin T. Jackson, *The Scandal Beneath the Financial Crisis: Getting a View from a Moral-Cultural Mental Model*, 33 HARV. J.L. & PUB. POL’Y 735, 746–47 (2010) (stating that the trend of increasing mathematization of science “is not as suitable for examining a broad range of phenomena—such as institutions, values, culture, and traditions—that clearly have an enormous bearing on economic life.”).

283. *Id.* at 747 (quoting WILHELM RÖPKE, A HUMANE ECONOMY: THE SOCIAL FRAMEWORK OF THE FREE MARKET 247 (Elizabeth Henderson trans., 1960) (lamenting the decline of morality in economics)).

284. *Id.* at 752–53 (“[The] human-centered conception of business is supported by a long tradition of thought common to ancient cultures.”) (citing SAMUEL GREGG, THE COMMERCIAL SOCIETY: FOUNDATIONS AND CHALLENGES IN A GLOBAL AGE 9 (2007)).

285. Anderson, *supra* note 34, at 22–23.

286. *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited on Oct. 31, 2010).

287. *Cf.* Jackson, *supra* note 282, at 758 (stating that reactionary corporate social responsibility measures may be disadvantageous when companies are “placed under strict accountability, compliance, and enforcement demands in utter disregard of the type and character of the business at hand the conditions under which it might prosper”).

human rights law.<sup>288</sup> Further, such voluntary measures are often reactionary and piecemeal rather than proactive and comprehensive.<sup>289</sup>

Although Global Corporate Citizenship is well developed in the management and business literature, it is not yet firmly established in legal scholarship.<sup>290</sup> In the business and management context, it is an evolving voluntary practice. Businesses are supposed to be good corporate citizens because it makes business sense—there are economic benefits. In the legal context, mandatory Global Corporate Citizenship is more appropriate when core values such as human rights are at issue. Mandatory laws and regulations are better suited to ensuring compliance and recourse to enforcement than voluntary ones. Thus, it is important to develop mandatory regulations in addition to voluntary initiatives.

There are four principles of Corporate Citizenship: *Minimize Harm*; *Maximize Benefit*; *Accountability and Responsiveness to Key Stakeholders*; and *Strong Financial Return*.<sup>291</sup> The first principle of Corporate Citizenship is *Minimize Harm*, which is defined as:

Work[ing] to minimize the negative consequences of business activities and decisions on stakeholders, including employees, customers, communities, ecosystems, shareholders and suppliers. Examples include operating ethically, supporting efforts to stop corruption, championing human rights, preventing environmental harm, enforcing good conduct from suppliers, treating employees responsibly, ensuring the safety of employees, ensuring that marketing statements are accurate, and delivering safe, high-quality products.<sup>292</sup>

The second principle of Corporate Citizenship is *Maximize Benefit*, defined as:

“Contribut[ing] to societal and economic well-being by investing resources in activities that benefit shareholders as well as broader stakeholders.” Examples include participating voluntarily to help address social issues (such as education, health, youth development, economic development for low-income communities, and work force

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288. Donovan & Roberts, *supra* note 251, at 145.

289. See Jackson, *supra* note 282, at 758 (“Under the ‘corporate social responsibility’ approach, the province of ‘business ethics’ gets denigrated to harum-scarum stratagems formulated as reactions to alarms sounded by ‘stakeholders’ that are in turn dictated by galleries of activists purporting to be their appointed representatives.”). Jackson critiques such measures and argues that such measures are often aimed at “promoting politically correct agendas.” *Id.*

290. See Anderson, *supra* note 34, at 23–24.

291. E-mail from Susan Thomas, Assistant Dir., Boston College Center for Corporate Citizenship, to Sarah Millard, Executive Editor, *Denver University Law Review* (Sept. 16, 2010, 15:59 MDT) (on file with *Denver University Law Review*) (This was originally posted in on the Boston College Center for Corporate Citizenship website as *What is Corporate Citizenship?*, BOSTON COLLEGE CENTER FOR CORPORATE CITIZENSHIP.) [hereinafter Boston College]. These principles are no longer listed on the Boston College Center for Corporate Citizenship website. However, I continue to use them here because I believe they set out a solid initial framework for corporate citizenship.

292. *Id.*

development), ensuring stable employment, paying fair wages, and producing a product with social value.<sup>293</sup>

The third principle of Corporate Citizenship is *Accountability and Responsiveness to Key Stakeholders*, which has two parts.<sup>294</sup> The first part of the third principle is “[b]uild[ing] relationships of trust that involve becoming more transparent and open about the progress and setbacks businesses experience in an effort to operate ethically.”<sup>295</sup> The second part of the third principle is “[c]reat[ing] mechanisms to include the voice of stakeholders in governance, produce social reports assured by third parties, operate according to a code of conduct and listen to and communicate with stakeholders.”<sup>296</sup> Examples include creating mechanisms to include the voice of stakeholders in governance, producing social reports assured by third parties, operating according to a code of conduct, and listening to and communicating with stakeholders.<sup>297</sup>

Finally, the fourth principle of Corporate Citizenship is a *Strong Financial Return*; this is defined as “return[ing] a profit to shareholders.”<sup>298</sup> Business and management scholars have expressed the view that the responsibility of a company to return a profit to shareholders must always be considered part of its obligation to society.<sup>299</sup>

Developing uniform model laws informed by principles of Global Corporate Citizenship will require, among other things, transforming voluntary guidelines and standards into mandatory and enforceable rules and regulations.<sup>300</sup> The first principle of Corporate Citizenship, *Minimizing Harm*, requires transnational corporations to minimize negative effects on all categories of stakeholders.<sup>301</sup> In many ways, a legal standard of *Minimizing Harm* could parallel this standard as it is set out in the business and management literature. However, in a legal framework, *Minimizing Harm* and sector-specific standards would be legally mandated. These would need to be enforceable under law to encourage compliance and provide legal avenues for redress. Such standards already exist in a variety of areas such as the environment and labor law. In some ways, developing laws to address this element are the easiest because they fit easily into existing models that prohibit harmful behavior. Laws

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293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *See id.*

299. H. Jeff Smith, *The Shareholders v. Stakeholders Debate*, 44 MIT SLOAN MGMT. REV. 85, 85–86 (2003) (discussing the rationale for profit in both shareholder and stakeholder theories of management).

300. Options for lawmaking will need to be worked through in detail but this goes beyond the scope of this paper.

301. Boston College, *supra* note 291.

in this category could include and build on concepts developed in the context of Corporate Social Responsibility.

As a legal standard, the second principle of Corporate Citizenship, *Maximizing Benefit*, would require by law affirmative steps on the part of transnational corporations to contribute to societal and economic well being. This would go beyond the investment of resources in activities that benefit various groups of stakeholders. Laws requiring *Maximizing Benefit(s)* would need to be informed by research that explores what kinds of laws create positive incentives. One way to maximize the benefits of foreign direct investment is for transnational corporations to exert positive influence over things like water and sanitation,<sup>302</sup> property rights,<sup>303</sup> and entrepreneurial skills and capabilities.<sup>304</sup> This may be one of the most controversial principles of corporate citizenship in a legal context, particularly from the perspective of U.S. scholars and decision makers.

The third principle of Corporate Citizenship, *Accountability and Responsiveness to Key Stakeholders* would require standards and transparency in a legal context.<sup>305</sup> It would differ from the business and management perspectives because it would not focus on developing trust, which is an essential goal of voluntary businesses relationships. Instead, it would stem from the idea that transnational corporations have duties and obligations to specific groups of stakeholders and to society as whole. In a mandatory legal framework, this principle could encompass the setting of standards for ethical business operation. It would also include core principles of corporate citizenship in the business and management literature, such as stakeholder participation and third party monitoring<sup>306</sup> Laws in this category could include and build on those developed in the context of Corporate Social Accountability.

For a mandatory legal framework, this Article proposes a substantive change to the fourth principle of Corporate Citizenship. Rather than a *Strong Financial Return*, a legal framework could instead require a *Competitive Financial Return*. This would be a shift from traditional profit-maximization models, which go further than the goal of a *Strong*

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302. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2008: TRANSNATIONAL CORPORATIONS AND THE INFRASTRUCTURE CHALLENGE, at 140, U.N. Sales No. E.08.II.D.23 (2008), available at [http://www.unctad.org/en/docs/wir2008\\_en.pdf](http://www.unctad.org/en/docs/wir2008_en.pdf) (discussing the effects of the lack of water and sanitation on child mortality, maternal health and gender equality).

303. See, e.g., Leslie Kurshan, *Rethinking Property Rights as Human Rights: Acquiring Equal Property Rights for Women Using International Human Rights Treaties*, 8 AM. U. J. GENDER SOC. POL'Y & L. 353, 357–59 (2000).

304. See OECD, FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMIZING BENEFITS, MINIMIZING COSTS 14–15 (2002) (discussing potential for multinational corporations to enhance entrepreneurial capacity in developing countries), available at <http://www.oecd.org/dataoecd/47/51/1959815.pdf>.

305. Boston College, *supra* note 291.

306. See *id.*

*Financial Return*.<sup>307</sup> Achieving a *Strong Financial Return* is a goal for a corporation and its officers and directors.<sup>308</sup> It is an internal guideline. Achieving a *Competitive Financial Return* is a standard that can be balanced against industry norms and practices as well as the other three principles of corporate citizenship. A *Competitive Financial Return* standard would allow corporations to consider the interests of stakeholders other than shareholders. In contrast to a *Strong Financial Return*, a *Competitive Financial Return* is an external standard that should be determined with consideration of external factors. In a legal context, appropriate legislation would need to be enacted to give transnational corporations an incentive to balance economic goals with socio-political goals.

This proposal is structured to be compatible with the U.N. Framework. Transnational corporations' effects on human rights have been the focus of recent work by John Ruggie's team under the auspices of the United Nations.<sup>309</sup> Ruggie and his team have developed a "protect, respect, and remedy framework," also known as the U.N. Framework, that can serve as a foundation for further work in this area.<sup>310</sup>

Integrating Global Corporate Citizenship into the U.N. Framework will allow for the development of a more robust and comprehensive system. Imagine then a matrix in which to classify global lawmaking. The x-axis would be populated by the categories of protect, respect, and remedy from the U.N. Framework. The y-axis would be populated by the four principles of corporate citizenship. Laws would be classified by their position at the intersection of the x- and y-axes.

Simply drafting model global laws has the potential to create soft law and encourage practices that reduce or prevent corporate-related human rights abuses. However, without hard law, potential plaintiffs would not be able to seek judicial or other enforcement of their rights. The next Section sets out an initial proposal for enforcement, the final element of this proposal.

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307. See Smith, *supra* note 299, at 85 ("As Milton Friedman wrote, 'There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it . . . engages in open and free competition, without deception or fraud.'" (alteration in original)).

308. See Boston College, *supra* note 291 (articulating principle of "support[ing] strong financial results" using normative rather than binding language).

309. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/14/27 (April 9, 2010) (by John Ruggie), available at <http://www.reports-and-materials.org/Ruggie-report-2010.pdf>; Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (April 7, 2008) (by John Ruggie), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

310. *Id.*

### C. Global Enforcement

The rights of victims of corporate-related human rights abuses are under-enforced and, therefore, the third component of this proposal is the expansion of adjudicatory and enforcement options.<sup>311</sup> This expansion should help compensate for the fact that some states enforce and adjudicate fewer claims or adjudicate less consistently than others. This proposal envisions adjudication of claims of corporate-related human rights abuses in domestic courts and universal civil jurisdiction for corporate-related human rights abuses.<sup>312</sup> However, it does not exclude the possibility of a global court or convention on enforcement of alternative forms of dispute resolution in the future.<sup>313</sup> This is an initial proposal that will be expanded and refined in a future article entitled *Universal Civil Jurisdiction: Adjudicating Corporate-Related Human Rights Abuses* (working title). Universal civil jurisdiction would allow civil claims of corporate-related human rights abuses to be brought in domestic courts regardless of the nationality of the parties or the location and effects of the conduct.<sup>314</sup>

Universal civil jurisdiction should be established for the limited scope of corporate-related human rights abuses. In a multinational context, jurisdiction is generally determined by domestic and international rules.<sup>315</sup> Universal civil jurisdiction would make it possible to bring a civil suit against a transnational corporation for corporate-related human rights abuses by any plaintiff in a domestic court in any country. One issue raised by universal civil jurisdiction is how to prevent unfairly overburdening the courts of any one jurisdiction.

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311. This is an initial proposal that I am expanding and refining in a forthcoming article entitled *Toward Global Adjudication and Enforcement of Corporate-Related Human Rights Abuses* (working title).

312. See Beth Van Shaack, *Justice Without Borders: Universal Civil Jurisdiction*, 99 AM. SOC'Y INT'L L. PROC. 120, 122 (2005) (arguing that "[s]upranational mechanisms will never supplant domestic proceedings, so domestic courts will continue to play a central role in enforcing international law"); see also Dubinsky, *supra* note 225, at 306 (arguing that "[b]ecause much that is productive has come out of human rights adjudication to date, because the phenomenon is still fairly recent, and because there is not much that suggests it is harmful, we should go forward with a series of rebuttable presumptions: that victims of fundamental human rights treaty violations should not be beyond effective judicial protection; that alleged perpetrators should not enjoy impunity; that courts, as institutions best designed to provide fair process and decision-making insulated from political pressure, are appropriate for dealing with guilt, punishment, liability, and compensation").

313. See Dubinsky, *supra* note 225, at 307–12 (comparing the advantages and disadvantages of international vs. domestic courts).

314. See Menno T. Kamminga, *Universal Civil Jurisdiction: Is it Legal? Is it Desirable?*, 99 AM. SOC'Y INT'L L. PROC. 123, 123 (2005) (defining universal civil jurisdiction as "the principle under which civil proceedings may be brought in a domestic court irrespective of the location of the unlawful conduct and irrespective of the nationality of the perpetrator or the victim, on the grounds that the unlawful conduct is a matter of international concern").

315. See generally Born, *supra* note 202, at 11–22 (conducting comparative assessment of jurisdiction determinations among national courts facing transnational controversies).

Existing international law does not explicitly authorize universal civil jurisdiction.<sup>316</sup> However, universal civil jurisdiction also is not inconsistent with international law.<sup>317</sup> Thus, an expansion of universal civil jurisdiction is not precluded under international law. The Global Law Commission could contribute to ensuring the enforceability of universal civil jurisdiction by helping establish and advocating for soft-law norms that eventually could become customary international law. Another way to establish universal civil jurisdiction would be via an international convention. This would not undermine the development of global law but rather would reflect the interconnectedness and interdependency of global law and international law.

A Global Law Commission and the uniform model laws promulgated by the Global Law Commission should define the types of conduct to which universal civil jurisdiction would apply. The scope of relevant conduct should be broader than the types of tort claims that have been permitted, for example, under the U.S. Alien Tort Statute.<sup>318</sup> In addition, it should explicitly apply to conduct by and claims against transnational corporations.<sup>319</sup> However, it would not have to include every form of conduct that impinges on a human right enumerated in uniform model laws as drafted by the Global Law Commission. Further, universal civil jurisdiction should not prevent tort claims from being brought in proceedings based on universal criminal jurisdiction.

#### CONCLUSION

One of the most important issues in human rights law today is the role of corporations. The crisis of corporate-related human rights abuses demands a response. Corporate-related activities continue to cause harm

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316. See Kamminga, *supra* note 314, at 123–24 (claiming that “[n]o rule of international law specifically authorizes let alone obliges the exercise of universal civil jurisdiction in respect of human rights offenders”).

317. See *id.* at 124 (discussing the lack of objections to U.S. courts’ exercise of universal civil jurisdiction for alien tort claims); cf. Shaack, *supra* note 312, at 120 (claiming that “[i]nternational law authorizes universal civil jurisdiction”).

318. 28 U.S.C. § 1350 (2006); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004) (requiring ATCA claims “based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized,” namely violation of safe conducts, infringement of the rights of ambassadors, and piracy). See generally William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 HASTINGS INT’L & COMP. L. REV. 351 (2001) for a discussion of the types of torts that are actionable under the Alien Tort Statute. See generally Richard M. Buxbaum & David D. Caron, *The Alien Tort Statute: An Overview of the Current Issues*, 28 BERKELEY J. INT’L L. 513 (2010) for issues in Alien Tort Statute jurisprudence.

319. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010) (finding that Alien Tort Claims Act does not apply to corporate defendants). See generally David A. Dana & Michael Barsa, *Three Obstacles to the Promotion of Corporate Social Responsibility by Means of the Alien Tort Claims Act: The Sosa Court’s Incoherent Conception of the Law of Nations, The ‘Purposive’ Action Requirement for Aiding and Abetting, and The State Action Requirement for Primary Liability*, FORDHAM ENVTL. L. REV. (forthcoming), available at <http://ssrn.com/abstract=1711934>, for a discussion of obstacles inhibiting successful claims against transnational corporations.

around the world in every area of human rights. This Article has argued that the current state-centered international human rights regime is inadequate to respond comprehensively to this pressing problem.

At least three questions are central to determining whether corporate-related human rights abuses present a problem of sufficient importance and consequence that they can be adequately addressed only with a new legal and regulatory regime. First, is there a deficit in domestic and international regulation of transnational corporations? Second, what are possible explanations for this deficit? Third, what are the effects of this deficit? This Article has attempted to answer each of these questions as well as others. However, there are many questions that remain unanswered that will be explored in more depth in a series of future articles.

Understanding corporate-related human rights abuses, their causes, and the reasons they persist requires the analysis of a series of secondary questions. These include questions that focus on existing structures as well as questions that are forward looking. What is the current system for regulating transnational corporations, who makes the rules, and who controls implementation and monitoring? What are the goals of the current system and is it achieving those goals? What are the assumptions underlying the current system and are they accurate? How does the system work and what parts are working or not working? If the system is not working, why is it not working? Are the parts that are not working important, who does this affect, and how?

What needs to be done to improve the regulation of transnational corporations? Do we need new laws, a new system, or even to change the way we theorize the regulation of transnational corporations?

This Article has made two main proposals: (1) decouple and distinguish human rights law and international human rights law, and (2) create a global human rights law system. This Article argued that it is necessary to understand human rights law as a super-category and international human rights law as a sub-category rather than as synonyms. This reclassification highlights a deficiency in the development of human rights law and creates a space in which to generate and advance other areas of human rights law. This Article then proposed global human rights law as a new area of human rights law that is well suited to address corporate-related human rights abuses.

Of course, the creation of a new regulatory framework is neither simple nor easy. It requires consideration of multiple constituencies with a wide range of—sometimes competing—interests. Proposals for increasing regulation may be met with resistance from many directions, including states that fear the loss of capital and other benefits from foreign direct investment, bureaucrats who fear the loss of power, and companies that fear increased costs. Decision makers may worry about insti-

tutional competence, administrability of rules, and overburdening existing enforcement mechanisms.

This Article made several specific proposals for the development of a global human rights law regime: a Global Law Commission, uniform model laws and regulations, and universal civil jurisdiction. The emphasis of this proposal on global law rather than international law sets it apart from many earlier attempts to comprehensively regulate the activities of transnational corporations. Although implementation of this proposal would take time and would need to be achieved in stages, forward progress can be made in all three components of this proposal simultaneously.

One possible critique of this Article stems from the assumptions it makes about the role of morality and ethics in theorizing business practices, assumptions that are disputed in the U.S. legal academy, and in fact represent a minority perspective in the United States. However, part of the value of an academic discourse is the dialogue itself and the dissection, agreement, disagreement, and refinement of ideas. Therefore, if, in the United States, this Article simply sparks further discussion about global law and Global Corporate Citizenship among U.S. legal scholars and policy makers, it will have achieved one of its purposes.

Future articles will need to respond to a number of questions about prior and existing measures and attempts in greater detail. First, what attempts have been made to account for social considerations in the regulation of transnational corporations? Second, what can we learn from prior successes and failures? Third, are global law and Law and Global Corporate Citizenship new names for existing initiatives pulled together in a systematic way or do they represent completely new frameworks or something in between? This Article and earlier articles have begun answering some of these questions.

An exploration of the strengths and weaknesses of prior and existing regulatory efforts can be facilitated by answering another set of secondary questions. These include questions that focus on an assessment of specific measures. What is the status quo in academic literature and policy making? Is Global Corporate Citizenship already influencing law and policy and, if so, where and how? Which aspects are working or not working? What other types of measures and regulation have been tried in the past? Are there successful examples that we can draw from? Are there steps that we can take to avoid past failures? Where different approaches have been used, why were they chosen, what can be gleaned from a comparison? Can models that are developed and implemented in different countries be adapted to work in other countries or at a global level?

Finally, there are three questions that are arguably central to developing a new regulatory framework built on a foundation of global law

and Law and Global Corporate Citizenship. First, what should be the values and goals of a new legal regime? Second, what form should the implementation of a new framework take and who should play a role in the implementation? Third, how will the new laws and regulations be enforced? This Article proposed initial responses to these questions, which will be explored in more depth in a series of future articles.

Moving toward a more comprehensive regulatory framework will require the analysis of a final cluster of secondary questions. These are set out in sub-groups below. Some questions aim to flesh out values and goals. Who should decide what values should inform the new framework and from what sources can we draw such values? What steps should be taken in the short-, mid-, and long-term? Are there stages or can all parts of a new system be implemented simultaneously?

Other questions aim to assess what is needed to achieve the creation of a new regulatory regime. Is the existing literature sufficient or do we need more research? What types of data and studies would be useful? What is required to garner sufficient state support and participation in a global system? Who will fund a global legal system? Will this new global law system require new institutions and laws and, if so, what form should they take?

Some questions focus on roles and responsibilities. Who would be responsible for developing a Global Corporate Citizenship approach? What institutions will be involved? Is there a role for corporations in the development of a new framework and, if so, what is it?

Further questions would address the purpose of a new regulatory system and those who would benefit from or oppose such a framework. What would be the purpose and goals of a new institution and laws? Who would benefit from the new regulatory regime? Are there groups or institutions on which the new framework would have a detrimental effect? Who would be opposed to this approach and why?

Finally, it is also necessary to address questions of administrability. How would we administer and monitor the effectiveness of this approach? What structures should be set up to carry out this evaluation? How much will this approach cost and how can we achieve sustainability? What would be some of the stumbling blocks and how could we address them?

Some people may find the conclusion of this Article with more questions than answers unsatisfying. They may be even more unsatisfied to learn that the many questions noted here are not exhaustive. However, I believe this reflects the fact that this is the beginning of a large project and this Article does not aspire or attempt to comprehensively explore all relevant questions.

As is always the case when proposing a new or different regulatory regime, one opens oneself up to critique. For example, when one suggests revisiting the relationship between human rights law and international human rights law, as is the case with this Article—one question that does or should follow is, if we ask a different question, then are we asking the right one. This Article argues that the question of whether international human rights law is able to or even should be the sole or primary system of laws to govern corporate-related human rights abuses is pivotal—although there may also be other “right” questions that should be asked.

The goals of this Article are both ambitious and modest. They are ambitious because the proposal of a new or different regulatory regime can almost always be described as ambitious. At the same time, global law is attracting increasing attention in non-national legal scholarship. Global Corporate Citizenship is not new but was developed in other fields and in practice, and enjoys the support of international institutions. Nonetheless, the proposal to develop a systematic framework for regulating transnational corporations in the area of human rights is ambitious. Therefore, the proposal set out in this Article is necessarily rudimentary and will require fleshing out over time in future articles.