

“ORGANS OF SOCIETY”: A PLEA FOR HUMAN RIGHTS ACCOUNTABILITY FOR
TRANSNATIONAL ENTERPRISES AND OTHER BUSINESS ENTITIES

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I think we need to put the corporate world on notice that they just cannot move about the world, rape, pillage and plunder and then walk away from something just because they are for-profit¹

Transnational companies have been the first to benefit from globalization. They must take their share of responsibility for coping with its effects.²

INTRODUCTION

Transnational business enterprises (TNEs)³ emerged from the tumultuous economic integration that accompanied the spread of global capital. While TNEs had predecessors in prior centuries (the British East India Company certainly comes to mind),

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¹ David Crane, Accountability for Crimes Against Humanity: Sierra Leone, Briefing at the United States Holocaust Memorial Museum (May 16, 2003), available at <http://www1.ushmm.org/conscience/events/leone/leone.php#full>.

² Kofi A. Annan, *Help the Third World Help Itself*, WALL ST. J., Nov. 29, 1999, at A28.

³ Definitions of TNEs abound. There is much hairsplitting over whether the proper terms are “multinational” or “transnational,” “business entity,” “business enterprise,” or “corporation.” I have no desire to wade into that thicket, and adopt the term TNE solely as a matter of convenience. When I use the term, I am referring to a profit oriented business entity that has the capacity to locate production across national borders, trade across frontiers, exploit foreign markets, and affect the international allocation of resources. This definition comes almost verbatim from VILJAM ENGSTRÖM, WHO IS RESPONSIBLE FOR CORPORATE HUMAN RIGHTS VIOLATIONS 6 (2002), available at <http://www.abo.fi/instut/imr/norfa/ville.pdf>. Engström in turn relied on PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 12-15 (1995). Readers looking for a lengthy discussion of definitional principles should see, Luzius Wildhaber, *Some Aspects of the Transnational Corporation in International Law*, 27 NETH. INT’L L. R. 79 (1980), and sources cited therein.

modern TNEs are largely a product of the post-World War II era.⁴ As primary beneficiaries of an increasingly borderless economic order, TNEs play a pervasive role in world trade. They routinely operate across international borders, exploit multiple national markets, and shift production, resources and expertise from state to state. As such, TNEs are the most common face of what has come to be known as globalization – economic deregulation, privatization and trade liberalization across borders.⁵

Growth of TNEs has been largely insulated from the parallel evolution of human rights norms and expectations. In 1970, economist Milton Friedman proclaimed that “the one and only . . . social responsibility of business” is to increase profits.⁶ This is still a real perspective.⁷ As part of South Africa’s Truth and Reconciliation process, many business representatives appeared before the Truth and Reconciliation Commission:

⁴ If nothing else, the speed with which they can communicate and share information distinguishes today’s TNEs from their earlier predecessors. See Asbjørn Eide, *Globalisation and the Human Rights Agenda: The Petroleum Industry at Crossroads*, in HUMAN RIGHTS AND THE OIL INDUSTRY 25 (Asbjørn Eide, et al. eds., 2000). There are many books detailing the rise of transnational business entities, one good one is MIRA WILKINS, *THE EMERGENCE OF MULTINATIONAL ENTERPRISE: AMERICAN BUSINESS ABROAD FROM THE COLONIAL ERA TO 1914* (1970); see also MUCHLINSKI, *supra* note 3, at 19-47.

⁵ By 1995, TNEs accounted for approximately 2/3 of international transactions. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *WORLD INVESTMENT REPORT 1995: TRANSNATIONAL CORPORATIONS AND COMPETITIVENESS* at 39, U.N. Sales No. E.95.II.A.9 (1995), available at <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=2430&lang=1>; see also *The Relationship Between the Enjoyment of Human Rights, In Particular, International Labour and Trade Union Rights, and the Working Methods and Activities of Transnational Corporations*, U.N. ESCOR, Hum. Rts. Comm., 47th Sess., Agenda Item 8, UN Doc. E/CN.4/Sub.2/1995/11 (1995).

⁶ Milton Friedman, *The Social Responsibility of Businesses is to Increase Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

⁷ See, e.g., *The Good Company: A Survey of Corporate Social Responsibility*, ECONOMIST (Jan. 21, 2005); Marina Ottaway, *Reluctant Missionaries*, FOREIGN POL’Y, July-Aug. 2001, at 44. For a critique of this view, see David Kinley, *Human Rights, Globalization and the Rule of Law: Friends, Foes or Family?*, 7 UCLA J. INT’L L. & FOREIGN AFF. 239 (2002); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443 (2001).

Some to take responsibility for their institutional part in the crimes of apartheid, more to declare that the realm of business is not and need not be concerned with gross human rights abuses that they loosely collected under the term “morals.”⁸

While it is certainly beyond the power of TNEs to single-handedly build democratic, decent societies in which to operate, these powerful entities routinely mold the contours of society to corporate liking. Despite fine rhetoric about “constructive engagement,” the desire for profits has too often blinded them, and us, to the unsavory role TNEs have actually played throughout the world.⁹

Because TNEs operate across national borders, beyond the constraints of any one nation’s domestic law, their actions are too often viewed as beyond the reach of any law. This unique ability to elude national legal systems makes TNEs ripe for greater investigation under international law.¹⁰ To make this claim is not to deny the daunting nature of the task. The sheer complexity of oversight has so far blunted calls for accountability for corporate bad acts. However, if “the business of business is business,”¹¹ then gross violations of human rights must have business consequences.

⁸ Crane, *supra* note 2. The sentiment, however, oozes from corporate testimony before the South African Truth and Reconciliation Commission. See *Report of the South African Truth and Reconciliation Commission, Vol. 4 and 6* for details on the intimate connections between various TNEs and the apartheid regime.

⁹ As Human Rights Watch noted, “In countries characterized by severe human rights violations, . . . corporations often justify their presence by arguing that their operations will enhance respect for rights, but then adopt no substantive measures to achieve that end.” HUMAN RIGHTS WATCH, *THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA’S OIL PRODUCING COMMUNITIES* 3 (1999).

¹⁰ One primary effect of economic globalization has been a weakening of state-based accountability structures. For a critique of international law’s slowness in responding to this question, see Phillip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT’L L. 435 (1997).

¹¹ For some of the myriad articles making this claim see, *The Good Company: A Survey of Corporate Social*

Otherwise, there is little incentive for abusive corporate actors to alter their practices in ways that will protect and support human rights.

Large natural resource TNEs, including oil giants like Enron,¹² Unocal,¹³ and Shell,¹⁴ have been dogged for years by allegations of illegal violence, forced labor, and support of armed conflicts in pursuit of their corporate interests.¹⁵ Similarly, private, for-

Responsibility, ECONOMIST (Jan. 21, 2005); *see also*, Henry Miller, *The Business of Business is Business*, PROJECT-SYNDICATE (July 2004) (comment written by former Hoover Institute Fellow), *available at* http://www.project-syndicate.org/commentaries/commentary_text.php4?id=1568&m=series.

¹² For a detailed analysis of Enron's human rights record in India, *see* HUMAN RIGHTS WATCH, THE ENRON CORPORATION: CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS (1999), *available at* <http://www.hrw.org/reports/1999/enron/>.

¹³ Unocal's relationship to the Burmese military and its culpability in human rights violations associated with efforts to build the Yadana oil pipeline have been subject to a long-running Alien Tort Claims Act case in California. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) [hereinafter Unocal I]; *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part by Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *vacated by Doe v. Unocal Corp.*, 2003 WL 359787 (9th Cir. Feb. 14, 2003) (granting en banc review) [hereinafter Unocal II]. The Unocal II court found that the evidence presented by the plaintiffs suggested that the corporation knew forced labor, which it called the modern equivalent of slavery, was being used to build the pipeline and that Unocal was benefiting from the use of such labor. The OECD acknowledges that these abuses along the Yadana pipeline are, unfortunately, not unique. "Similar problems have occurred in connection with oil and gas developments in Columbia, Congo-Brazzaville, Indonesia, Nigeria and Sudan." OECD, MULTINATIONAL ENTERPRISES IN SITUATIONS OF VIOLENT CONFLICT AND WIDESPREAD HUMAN RIGHTS ABUSES 11 (2002), *available at* <http://www.oecd.org/dataoecd/46/31/2757771.pdf>. *See also* Eide, *supra* note 4.

¹⁴ *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 9 (describing a litany of serious human rights abuses by Chevron, Shell and others); *see also* *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002) (finding that plaintiffs' allegations that Shell participated in deportation, forced exile and torture of the Ogoni people in Nigeria, as part of a widespread attack, satisfied a claim for crimes against humanity under the Alien Tort Claims Act); *see also* *Bowoto v. Chevron*, 312 F. Supp.2d 1229 (N.D. Cal. 2004) (refusing to dismiss allegations that Nigerian plaintiffs suffered gross human rights abuses at Chevron's behest, and with the company's support, cooperation and financial assistance).

¹⁵ *See, e.g.*, HUMAN RIGHTS WATCH, SUDAN, OIL AND HUMAN RIGHTS 48 (2003), *available at* <http://www.hrw.org/reports/2003/sudan1103/> (asserting that exploitation of oil by foreign companies has increased human rights abuses and made oil into "the main objective and a principle cause of [Sudan's] war."). For a more extensive account of TNE practices raising human rights concerns, especially in conjunction with state security forces, *see* Craig Forcese, *Detering "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses*, 31 OTTAWA L. REV. 171 (2000).

profit military actors, like Executive Outcomes and Sandline International,¹⁶ have participated in bloody conflicts around the world, and have often been paid through swap transactions involving mineral concessions.¹⁷ As private armies and as managers of mineral concessions, TNEs assume powers resembling those of states.¹⁸ Many of these TNE activities have been the source of substantial allegations of human rights abuses.¹⁹ At other times, various TNEs have supported, funded and benefited from human rights

¹⁶ Both companies have apparently disbanded, but appear to have reformed under new names. Lt. Col. Tim Spicer, former head of Sandline now runs a company called Aegis Defense, which was recently awarded a \$293 million contract to coordinate security for Iraqi reconstruction projects. Pratap Chatterjee, *Controversial Commando Wins Iraq Contract to Create the World's Largest Private Army*, CORPWATCH, June 10, 2004, at <http://www.corpwatch.org/article.php?id=11362>. See also Khareen Pech, David Beresford, *Africa's New-Look Dogs of War*, MAIL & GUARDIAN, Jan. 24, 1997, at 24; *The Fog and Dogs of War*, THE ECONOMIST, Mar. 20, 2004, at 45.

¹⁷ See David Shearer, *Outsourcing War*, FOREIGN POL'Y, Fall 1998, at 68. These companies typically keep their terms of employment secret. For a discussion of the role Executive Outcomes played in the Sierra Leone conflict and detailing financial ties between the company and energy and mining companies that received concessions in Sierra Leone, see David J. Francis, *Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation?*, 20 THIRD WORLD Q. 319 (1999); Michael van Maanen, *Saving the Sum of Things for Pay: Executive Outcomes and Private Military Intervention in Sierra Leone*, Incite, Oct. 1999 at <http://www.geocities.com/CollegePark/Square/6130/olvol03/michael1.htm>. See generally *Report on the Question of the Use of Mercenaries As a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, Hum. Rts. Comm., 57th Sess., Agenda Item 7, UN Doc. E/CN.4/1996/27 par. 85, 96, 98 (1996); IAN SMILLIE, LANSANA GBERIE & RALPH HAZLETON, THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS & HUMAN SECURITY (2000).

¹⁸ For an exploration of the "state-like" powers wielded by some TNEs, see, e.g., Chris Jochnick, *Confronting the Impunity of Non-state Actors: New Fields for the Promotion of Human Rights*, 21 HUM. RTS. Q. 56 (1999) (describing Texaco's activities in Ecuador's Amazonian region as "a state unto itself."); Maria McFarland Sanchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social and Cultural Rights in Bolivia*, 27 FORDHAM L. REV. 1663 (2004) (documenting the various state functions assumed by TNEs in Bolivia.); Jim Lobe, *Papua Killings Could Set Back U.S. Plans*, ASIA TIMES, Sept. 18, 2002, available at http://atimes01.atimes.com/atimes/Southeast_Asia/DI18Ae04.html (noting that the military in Papua "has often acted as partners or agents for foreign companies").

¹⁹ See *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. SCOR, U.N. Doc. S/2002/1146 (2002) (concluding that the drive to control natural resources was a major motive of the war). See also HUMAN RIGHTS WATCH, *supra* note 12; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (rejecting defendant's contention that corporations cannot violate international law in

violations perpetrated by the state. Rumor, anecdote and verified instances of sensational abuses have combined to create an impression that TNEs are beyond the reach of human rights law. Recent revelations about the role corporate interrogators may have played at the Abu Ghraib prison²⁰ focused a new attention on the constraints, if any, that bind TNEs to international norms.

Reining in these powerful, for-profit TNEs, many with resources and activities that rival those of states,²¹ will be the central human rights challenge for the twenty-first

light of plaintiffs' allegations of corporate participation in war crimes, torture, enslavement and genocide in conjunction with Sudanese oil production); OECD, *supra* note 13, at 3-4.

²⁰ See Seymour Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004 (quoting Major General Antonio M. Taguba's report that "Army intelligence officers, CIA agents, and private contractors 'actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses'"); MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, part 2, ¶ 30 at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html#ThR1.12> (last visited Jan. 15, 2004) (implicating two private companies (Titan and CACI) and some of their employees in the abusive conduct at the prison). While the duties of the United States, its officers and agents are relatively clear under international human rights and humanitarian law, those of "private contractors," and the companies that provide them, are more ambiguous.

²¹ TNEs account for more than a quarter of the world's economic activity, control a quarter of the world's productive assets, and employ over 54 million people. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2002: TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS, U.N. Sales No. E.02.II.D.4 (2002), available at <http://www.unctad.org/Templates/webflyer.asp?docid=2574&intItemID=2477&lang=1&mode=downloads>; see also Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power*, CORPWATCH, Dec. 4, 2000, at <http://www.corpwatch.org/article.php?id=377>. The 20 largest TNEs have annual incomes greater than those of 80 developing countries. See SILVA DANAILOV, THE ACCOUNTABILITY OF NON-STATE ACTORS FOR HUMAN RIGHTS VIOLATIONS: THE SPECIAL CASE OF TRANSNATIONAL CORPORATIONS 11 (1998), at http://www.humanrights.ch/cms/pdf/000303_danailov_studie.pdf. Siemens AG, for example, has annual sales that exceed the combined GDP of Chile, Costa Rica, and Ecuador. Compare SIEMENS AG, ANNUAL REPORT 2004 – AT A GLANCE, at http://www.siemens.com/index.jsp?sdc_p=t4cz3su20o1228673pGB04flmi1227322&sdc_sid=2260046987&sdc_bcpath=1226722.s_0;1226694.s_0,& (last visited Jan. 21, 2005) with WORLD BANK, TOTAL GDP 2003, at <http://www.worldbank.org/data/databytopic/GDP.pdf> (last visited Jan. 21, 2005). See also William Meyer, *Human Rights and MNCs: Theory versus Quantitative Analysis*, 18 HUM. RTS. Q. 368 (1996). In 2003, Exxon-Mobil's revenues totaled almost \$247 billion, while Chad's GDP (a state in which Exxon-Mobil is active) was \$2.65 billion. Compare EXXONMOBIL, 2003 SUMMARY ANNUAL REPORT, 32 at <http://www2.exxonmobil.com/corporate/files/corporate/ExxonMobilAR2003.pdf> (last visited Jan. 21, 2005) with WORLD BANK, *supra*.

century. There is no other way to ensure respect for human rights in a world increasingly peopled by powerful actors who are neither states nor individuals. One need not expect TNEs to “proactively create positive societal value”²² in order to demand that they adhere to the same *jus cogens* norms to which we hold individuals and states.

I. WHO MUST RESPECT HUMAN RIGHTS NORMS?

The Universal Declaration of Human Rights assigns individuals, states and “organs of society” the duty to promote and protect human rights.²³ The term “organs of society” is left undefined, but obviously refers to entities not captured by the terms “individuals” or “states.” Even in 1948, it was already clear to the Universal Declaration’s drafters that the individual/state dichotomy no longer fully captured the complex relationships that make up modern society. New power relationships enabled new abuses of power, or, more accurately, enabled a new set of actors to be potential rights abusers. Perhaps to encompass these new relationships, Article 29 of the Universal Declaration states that “everyone has duties to the community.”²⁴

²² JANE NELSON, *THE BUSINESS OF PEACE: THE PRIVATE SECTOR AS A PARTNER IN CONFLICT PREVENTION AND RESOLUTION* 7 (2000).

²³ *International Bill of Human Rights: Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., at 72, U.N. Doc A/810 (1948) [hereinafter UDHR]. While the Universal Declaration is neither a treaty nor a statute, and thus not a binding international document, its main principles have come to embody a universally accepted vision of human rights. Louis Henkin, Chief Reporter for the Restatement (Third) of Foreign Relations, has characterized the Declaration in this fashion: “[e]very individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.” Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 *BROOK. J. INT’L L.* 17, 25 (1999). See also Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 *VAND. J. TRANSNAT’L L.* 801, 803 (2002).

²⁴ See UDHR, *supra* note 23, art. 29, at 76.

By any definition, TNEs are important “organs of society.” They own property; pay taxes; consume raw materials; generate goods, services and wastes; and play a central role in the lives of their workers and customers. Additionally, TNEs routinely lay claim to the rights espoused by the Universal Declaration, most particularly the right to own property²⁵ and the right to freedom of opinion and expression.²⁶

However, even while claiming some Universal Declaration rights, TNEs have argued, so far successfully, against any legal responsibility to abide by the *jus cogens* norms enshrined in the Universal Declaration. Corporate participation in, and sponsorship of, killings, torture, forced labor, and other atrocities therefore remains a grey area – the indignities themselves plainly violate international law, but victims frequently have no remedy against the corporate sponsor. Individuals may be culpable for their role in corporate abuses but there is no international law mechanism for calling the corporation itself to account. A culture of impunity, if not outright immunity, surrounds TNE activities.²⁷ The irony is that corporate actors are far more likely than are

²⁵ *Id.* art. 17, at 74. TNE’s frequently avail themselves of the protection of Article 17(2)’s prohibition on arbitrary deprivation of property. In addition, a web of over 200 bilateral treaties among approximately 170 countries has given these private actors the right to engage in direct arbitration with states.

²⁶ *Id.* art.19.

²⁷ One recent United States Alien Tort Claim Act case expressly rejected the contention that “the law of nations simply does not encompass principles of corporate liability.” *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308 (S.D.N.Y. 2003). In contrast, no less eminent scholars of international law than James Crawford and Christopher Greenwood had submitted declarations asserting this interpretation of international law. *Id.* See also *Iwanowa v. Ford*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999) (“No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law”).

individuals to be rationally deterred from human rights violations by the presence of explicit legal consequences.²⁸

The international community must step into this legal vacuum and must clarify that TNEs are held to the same *jus cogens* norms as are individuals and states.²⁹ Only then will there be a fundamental core of norms that are truly inviolable. Such a proposal is in keeping with modern trends in corporate law.³⁰ In today's world, business entities are routinely subject to criminal liability for actions or omissions taken by agents acting on the corporation's behalf.³¹ It is, moreover, a logical consequence of current efforts to extend international criminal responsibility to those who facilitate the crime of terrorism by financing it – a central effort in the “war on terror.”

Although this claim seems sweeping, I mean it in its most narrow sense. Not every harmful act will render a TNE criminally culpable under international law. The principle of international TNE responsibility, like the principle of individual

²⁸ See Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468 (1988) (containing a thorough discussion of the theoretical underpinnings of corporate criminal responsibility); see also CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 63-83 (2d ed. 2001); E.T. Mitchell, *A Theory of Corporate Will*, 56 ETHICS 96, 103 (1946) (postulating that the corporation itself can foresee the legal consequences of action, and therefore plan accordingly, more readily than can individuals).

²⁹ See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

³⁰ See, e.g., *Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 33 (Feb. 1970) (recognizing that corporate entities are important institutions in domestic law and “have an important and extensive role in the international field”). The prospect of corporate liability raises important questions about scope. For example: will a parent company be responsible for acts by its subsidiaries or business partners? Who within a corporation must have knowledge before that knowledge will be attributed to the corporate entity? These questions are the usual considerations of corporate lawyers and thus pose no more insurmountable hurdles in this context than in others.

³¹ See, e.g., Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT'L L. 18, 20 (1998).

responsibility, should be limited to those acts striking at the very heart of international humanitarian and human rights law. When the conduct in question involves war crimes, genocide, or other *jus cogens* norms, there can be no justification for differentiating between corporate abuses of power and state or individual abuses.

A. Nuremberg Casts a Giant Shadow

The Nuremberg Tribunals were the first significant international attempt to prosecute grave violations of humanitarian law and human rights³² – rights that we now presumptively believe will be vindicated and respected by international law. Along with recognizing individuals as holders of international rights, Nuremberg recognized individuals as actors in the international arena that were capable of upholding or violating international law. During its very first session, the United Nations' General Assembly affirmed the Nuremberg principles as part of the bedrock of international law.³³ Thus, in the post-Nuremberg world, individual responsibility exists alongside state responsibility.

³² Although some have cast aspersions on Nuremberg as “victors’ justice,” *see, e.g.*, Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT’L L. 725, 764 (1999), more have argued for the essential fairness of the proceedings. *See* THEODORE MERON, *From Nuremberg to The Hague, in WAR CRIMES LAW COMES OF AGE – ESSAYS* 198 (1998). For a contemporaneous rejection of this charge, *see generally* SHELDON GLUECK, *WAR CRIMINALS – THEIR PROSECUTION & PUNISHMENT* (1944). Justice Richard Goldstone, the first prosecutor of the Yugoslav and Rwanda Tribunal, and member of the South African Truth and Reconciliation Commission, also rejects the characterization of Nuremberg as victor’s justice. “It is not really fair to criticize Nuremberg by today’s standards. By the standards of 1945 that there was a trial at all was a huge step forward. Moreover, it was not that unfair of a trial. There were acquittals of some of the defendants. I suggest that one should test the fairness of courts not by their convictions but by their acquittals. I always feel rather satisfied when there are acquittals in the Yugoslavia or the Rwanda Tribunal because I think that is the best indication that the system is working efficiently and fairly.” Justice Richard Goldstone, *The Trial of Saddam Hussein: What Kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?*, 27 FORDHAM INT’L L.J. 1490, 1493 (2004).

³³ *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95(1), U.N. GAOR, 1st Sess., U.N. Doc. A/Res/95(I) (1946). The Nuremberg principles thus

One key rationale for imposing responsibility directly on individuals was to make it impossible for individuals to hide behind the abstraction of the state.³⁴ In the words of the Nuremberg Tribunal:

enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.³⁵

These words have sometimes been interpreted as precluding liability for corporations – another abstraction. This is a misreading. After Nuremberg, individual culpability exists side-by-side with state responsibility, it does not replace it.³⁶ Without an overarching vision of state responsibility, international law could not hope to confront the systemic nature of state policies that violate human rights and humanitarian law. Just

became customary international law. That same day, the General Assembly passed a resolution condemning the crime of genocide as “shock[ing] the conscience of mankind.” *The Crime of Genocide*, G.A. Res. 96(1), U.N. GAOR, 1st Sess., U.N. Doc. A/Res/96(I) (1946).

³⁴ As originally conceived, human rights were held by individuals vis-à-vis the State. Only the state had obligations, both positive and negative, to ensure these rights. Nuremberg was a solid rejection of this vision of human rights.

³⁵ 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947). Although much about Nuremberg represented a clear break with past visions of accountability, the proposition that international law imposed duties and liabilities upon individuals as well as upon States was not exactly novel. In a World War II case that has recently resurfaced as the Bush Administration’s source for the designation “enemy combatant,” the Supreme Court wrote: “[f]rom the very beginning of its history this Court has . . . applied the law of war as including that part of the law of nations which prescribes, for the conduct of war the status, rights and duties of enemy nations as well as of enemy individuals.” *Ex parte Quirin*, 317 US 1, 10 (1942). The Court then provided a list of cases where individual offenders had been charged with offenses against the “laws of nations.” The Bush Administration’s broad interpretation of *Quirin* was called into question by *Padilla v. Rumsfeld*, 352 F.3d 695 (2nd Cir. 2003), and was rejected in part in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004).

³⁶ See Anne-Marie Slaughter, *Rogue Regimes and the Individualization of International Law*, 36 NEW ENG. L. REV. 815, 816-18 (2002) (a brief recap of the evolution from purely state-based international law to international law that includes individuals and groups). Readers looking for a detailed discussion of individual responsibilities and rights under international law will find Andrew Clapham, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (1993) both useful and interesting.

as there are individual and state international crimes against humanity, so to there should be individual crimes and corporate crimes against humanity.

As Nuremberg prevented the individual from hiding behind the abstraction of the state, it surely should not be interpreted to permit corporations to hide behind their own abstraction. Unfortunately however, the careful balance struck by Nuremberg, and later by the United Nations, between individual and state culpability has no parallel in current international law *vis á vis* individuals and corporations. While individual actors can be held individually liable for their part in corporate crimes against humanity, the corporate entity itself escapes responsibility for systemic corporate policies that violate *jus cogens* norms. It does so by claiming to be a legal abstraction.

Under current interpretations, even business entities systematically employing slave labor,³⁷ or intentionally resorting to disappearances to settle labor disputes,³⁸ would escape accountability under international law. Prosecuting individuals in the face of corporate policies that violate *jus cogens* norms does little to confront the structural nature, or “corporateness” of the conduct.³⁹ The missing link is corporate responsibility for corporate policies that violate basic international human rights norms. We must close

³⁷ In *Unocal I*, for example, the court found credible plaintiffs’ allegations that Unocal had knowingly employed slave labor. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 896 (C.D. Cal. 1997). The OECD indicates that Unocal’s situation in Burma is not unique, and that similar allegations have been made in many different countries against a variety of oil companies. *See* OECD, *supra* note 13, at 11.

³⁸ For example, see the allegations of corporate involvement in the murder of Columbian trade union leaders contained in *Rodriques v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (denying Drummond’s motion to dismiss for failure to state a claim).

³⁹ As Peter French pointed out, corporate policy is much more than the intentions of individual company directors, officers or employees and is instead “a corporate long-range point of view that is distinct from the

the gap between the standards that apply to states and individuals, and those for “other organs of society” such as TNEs. No actor, neither individual nor state nor “organ of society,” should be able to violate *jus cogens* norms with impunity.

Of course it is not enough to merely suggest that corporate accountability would be a good idea. Unless corporate accountability is possible under international law, the conversation remains wholly hortatory. The primary focus of international human rights law and international humanitarian law is, and ought to be, the protection of individuals and groups from abusive action by states and state agents. Because of this focus, some have argued that there is no space in international law for corporate accountability.⁴⁰ I disagree. In explaining how I reach that conclusion, it helps to begin with the baseline of conduct that constitutes international crime for which individuals can be held accountable.

1. Individual and Group Responsibility at Nuremberg

At Nuremberg, various Nazi groups were found criminally responsible for gross violations of international law.⁴¹ In particular, the International Military Tribunal ruled

interests and purposes” of the natural persons associated with the enterprise. PETER FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 45 (1984).

⁴⁰ See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (containing assertion by defendant that corporations could not violate international law). Similarly, many corporations claimed, before the South African Truth and Reconciliation Commission, that corporate conduct had nothing to do with human rights.

⁴¹ See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280 [hereinafter *Nuremberg Charter*]. In particular, the Tribunal observed that Article 9 of the Charter gave it discretion to declare an organization criminal and stated that “[t]his discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided.” *TRIAL OF THE MAJOR WAR CRIMINALS*, *supra* note

that the Gestapo, the SS and the Leadership Corps of the Nazi Party were criminal groups.⁴² These groups, *qua* group, were declared criminal for engaging in slavery, mass murder, aggressive war and plunder.⁴³ In addition to these political groups, the Nuremberg prosecutors set out to expose and punish German industries that had participated in, benefited from, and promoted the atrocities associated with the German war effort.

To that end, industrialists associated with Krupp,⁴⁴ I.G. Farben⁴⁵ and other major German industries were tried for crimes against the peace and against humanity.⁴⁶ The I.G. Farben indictment alone exceeded sixty pages and alleged corporate participation in unparalleled atrocities⁴⁷ including crimes against humanity, mass murder, and exploitation of slave labor at I.G. Auschwitz.⁴⁸ Farben's embrace of Nazi slave labor

35, at 256. For a thought-provoking series of essays on Nuremberg and its legacy, see FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE (Philippe Sands ed., 2003).

⁴² TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 35, at 261, 267.

⁴³ *Id.* These prosecutions were based on the 1907 Hague Convention, in particular on the Martens clause which provided that:

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Convention Respecting the Laws and Customs of War on Land, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, reprinted in M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 638 (1992)

⁴⁴ Case No. 58, Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and eleven others, *in* 10 LAW REPORTS OF TRIALS OF WAR CRIMINALS 69 (1949).

⁴⁵ 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1081, 1081-1325 (1952).

⁴⁶ 7 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 10, 10-80 (1953).

⁴⁷ See JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 137 (1978).

⁴⁸ *Id.*

became grounds for criminal convictions for crimes against humanity. In all, fourteen I.G. Farben executives were convicted of gross violations of the laws of civilized nations. The convictions were based, in part, on judicial findings that Farben itself had committed international war crimes.⁴⁹ Even though it had no jurisdiction over the company, the Tribunal clearly treated Farben as itself violating international law. The opinion, along with J. Herbert's concurrence, leaves little doubt that the Tribunal concluded that Farben itself committed crimes against humanity.⁵⁰ A similar result obtained in the Zyklon B

⁴⁹ For example, the Tribunal concluded that "[a]ll of the defendants, acting through the instrumentality of Farben . . . participated in . . . the enslavement of concentration camp inmates . . . and the mistreatment, terrorization, torture and murder of enslaved persons," and that "Farben, in complete defiance of all decency and human considerations, abused its slave workers by subjecting them, among other things, to excessively long, arduous and exhausting work, utterly disregarding their health or physical condition. The sole criterion of the right to live or die was the production efficiency of said inmates." TRIALS OF WAR CRIMINALS, *supra* note 46, at 50-51, 58. The Tribunal also found:

that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich. . . . Such action on the part of Farben constituted a violation of the Hague Regulations.

TRIALS OF WAR CRIMINALS, *supra* note 45, at 1140. The language of the decision makes it clear that the court considered that the corporation itself had violated international law. The same logic guided the court in a case involving the Krupp corporation, in which the tribunal states that "the confiscation of the Austin plant [a tractor factory owned by the Rothschilds] . . . and its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations" 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1352-53 (1950). Despite the Tribunal's language, Farben and Krupp received no punishment for war crimes. In part because the Tribunal had no authority to impose criminal or civil punishment on Farben and its ilk, slave labour questions remained unredressed, festering for almost 50 years. Only in the last few years have these issues resurfaced in a spate of Alien Tort Claims Act lawsuits. For a discussion of these lawsuits, see discussion *infra* Part II.A.

⁵⁰ The Tribunal stated:

Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague

trial, where the supplier of the gas used to kill concentration camp inmates was convicted of complicity in international crimes.⁵¹ The convicted industrialists, and the companies they represented, were found to have violated international law.⁵²

B. Modern Incarnations of Individual and Group Liability for Atrocities

Although the United Nations embraced Nuremberg as a basic articulation of international law, cold war jockeying stalled implementation of its legacy.⁵³ Since the end of the cold war, however, the international community has reaffirmed that violation of *jus cogens* norms triggers individual criminal liability. The Yugoslav Tribunal,⁵⁴ the

Regulations, is in violation of international law. . . . Similarly, where a private individual or a *juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.

TRIALS OF WAR CRIMINALS, *supra* note 45, at 1132-33 (emphasis added).

⁵¹ Case No. 9, The Zyklon B Case, *in* 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 102 (1947). As early as 1947, it was clear that commercial transactions conducted by civilians could give rise to war crimes liability. Indeed the British Military Court rejected in 1946 many of the same claims we hear today from TNEs. Among the defenses rejected at trial were claims that the CEO was too busy to be expected to know details of the business and that no one in the company committed any crimes personally but instead merely sold a lawful product with no control over the use to which it was put. Any reader of today's financial press will find both those defenses familiar.

⁵² Although the convicted individuals were not party to international treaties, they were held to standards contained in those treaties. The International Military Tribunal concluded:

It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts judged criminal when done by an officer of the Government are criminal also when done by a private individual. . . . There is no justification for a limitation of responsibility to public officials.

Case No. 48, Trial of Friedrich Flick and Five Others, *in* 9 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 18 (1949).

⁵³ See, e.g., GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY, CRIMES AGAINST HUMANITY 208-10 (1999).

⁵⁴ *Statute of the International Criminal Tribunal for the Former Yugoslavia* (1993) (amended 2002), available at <http://www.un.org/icty/basic/statut/stat2000.htm> (last visited Jan. 27, 2004); see also VIRGINIA

Rwandan Tribunal,⁵⁵ and the International Criminal Court,⁵⁶ all modeled in part on Nuremberg, explicitly provide that individuals are criminally accountable for war crimes, crimes against humanity, genocide, and grave breaches of the Geneva convention of 1949.

The Yugoslav and Rwandan Tribunals built on and expanded Nuremberg's legacy. For example, most of the crimes against humanity in the former Yugoslavia were committed by paramilitary groups and armed civilian bands, rather than by state armies.⁵⁷ In *Prosecutor v. Dusko Tadic*,⁵⁸ the ICTY directly confronted the question of whether these private actors could be engaged in "armed conflict" for purposes of crimes against humanity prosecutions. Drawing on Nuremberg, the Tribunal decided that private actors could be criminally prosecuted for their complicity in crimes against humanity.⁵⁹

The Rwanda Tribunal built on *Tadic* in a fashion that tentatively paves the way towards corporate accountability. In the *Media Case*,⁶⁰ the ITCR recognized corporate

MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).

⁵⁵ *Statute of the International Criminal Tribunal for Rwanda* (1993), available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html> (last visited Jan. 27, 2004) [hereinafter Rwanda Statute].

⁵⁶ *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (July 17, 1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter ICC Statute]. The ICC has its roots in General Assembly Resolution 260 of December 9, 1948 but it took 50 years and the end of the Cold War to bring the court to fruition. The Rome Statute was adopted on July 17, 1998 and entered into force on July 1, 2002 and currently has 94 parties. The United States has not ratified the Statute.

⁵⁷ See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, UN SCOR, UN Doc S/1994/674 (1994).

⁵⁸ *Prosecutor v. Tadic*, Case No.: IT-94-1, Decision of the ICTY Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 128 (Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

⁵⁹ *Id.* paras. 128, 141.

⁶⁰ *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, Case No.: ICTR-99-52-T, Judgment and Sentence (Dec.

facilitation of crimes against humanity as itself an international crime.⁶¹ The case involved prosecution and conviction of the corporate directors of a radio station and newspaper accused of inciting the Rwandan genocide.⁶²

Even though the convictions were individual, (remember the ICTR has jurisdiction only over individuals)⁶³ the *Media case* marked a big step towards recognizing corporate criminal responsibility, with the Tribunal identifying certain corporate acts as genocide and crimes against humanity. For example, the Tribunal concluded that the Kangura newspaper “instigated the killing of Tutsi civilians,”⁶⁴ and “paved the way for genocide in Rwanda, whipping the Hutu population into a killing

3, 2003), available at <http://www.ictr.org/ENGLISH/cases/Ngeze/judgement/mediatoc.pdf> [hereinafter Nahimana]. The defendants were: Ferdinand Nahimana, the founder and principal ideologist of Radio-Télévision Libre des Mille Collines (RTLM); Hassan Ngeze, the founder, and editor-in-chief of the newspaper Kangura; and Jean-Bosco Barayagwiza, an RTLM executive, and leader in the political party Coalition pour la Défense de la République (CDR).

⁶¹ There was no international conflict in Rwanda, so the statute of the Rwanda Tribunal has been read as affirming that human rights and humanitarian law applies in all contexts and is not limited to the international sphere. In particular, the Rwanda statute recognized the criminality of violations of common Article 3 and of Additional Protocol II to the Geneva Convention even in the absence of international war. Rwanda Statute, *supra* note 55, arts. 4, 6. Thus violations of common Article 3 are now both humanitarian law and human rights law violations. See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 558 (1995).

⁶² See Nahimana, *supra* note 60; see also U.N. Tribunal Finds that Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity – Prosecutor v. Nahimana, Barayagwiza and Ngeze (*Media Case*) 117 HARV. L. REV. 2769 (2004).

⁶³ Because legal entities are abstractions and any such policies and operations are made and carried out by individuals acting in concert, there have been assertions that individual criminal liability for international crimes is a sufficient response to the occurrences. I disagree, and would agree with a characterization espoused by Bassiouni that this dichotomy is tautological. Criminal responsibility of legal entities must necessarily be established through proof of the conduct of individuals. To the extent that the actions of natural persons, even conduct on behalf of a legal entity, are deemed criminal, the natural person may also be individually accountable.

⁶⁴ Nahimana, *supra* note 60, at 325. As early as Nuremberg, there had been prosecutions for use of the media to incite genocide. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 547-49 (1948); *Id.* at 584-85.

frenzy.”⁶⁵ Similarly, the RTLM radio station⁶⁶ was found not only to have created a general climate of terror, but to have instigated and directed attacks on individuals who were tracked down and killed by its instructions.⁶⁷ Both Kangura and RTLM “explicitly and repeatedly, in fact relentlessly, targeted the Tutsi population for destruction” by calling “for the extermination of the Tutsi ethnic group.”⁶⁸ Even more explicitly than did the Nuremberg Tribunal in *I.G. Farben*, the *Media Case* acknowledged the reality that corporate entities can commit acts of genocide.

C. The International Criminal Court and Jurisdiction Over Legal Persons

The Rome Statute establishing the International Criminal Court (ICC) reflects international experiences with the Rwanda and Yugoslav tribunals.⁶⁹ The drafters of the

⁶⁵ Nahimana, *supra* note 62, at 318.

⁶⁶ Nahimana, “the mastermind of RTLM, . . . set in motion the communications weaponry that fought the ‘war of media, words, newspapers and radio stations’ he described . . . as a complement to bullets.” *Id.* at 321. “RTLM was Nahimana’s weapon of choice, which he used to instigate the killing of Tutsi civilians.” *Id.* at 323.

⁶⁷ *Id.* at 165.

⁶⁸ *Id.* at 320-21.

⁶⁹ Nowhere is this more clearly demonstrated than in the statute’s definition of crimes against humanity. Crimes Against Humanity, in Article 7 of the Rome Treaty, include: murder, extermination, and the deportation or forcible transfer of populations, torture, rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization, persecution on the basis of political and other grounds, and enforced disappearances of persons. ICC Statute, *supra* note 56, art. 7(1). Crimes against humanity are no longer linked to armed conflict but, to come within the court’s jurisdiction, the criminal acts must have been committed “as part of a widespread or systematic attack directed against any civilian population.” *Id.* The term “directed against any civilian population” means “a course of conduct involving the multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack.” *Id.* art. 7(2)(a). Similarly, Article 8 of the Rome Statute clarifies the acts which will be considered War Crimes under international law. The listed acts include grave breaches of the 1949 Geneva Conventions and the two Additional Protocols. Building on *Tadic*, these war crimes provisions apply explicitly to international and non-international armed conflict. For an analysis of the elements of crimes against humanity, see Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT’L L.J. 73 (2004); Simon Chesterman, *An Altogether Different Order: Defining The Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT’L L. 307 (2000).

Treaty of Rome seriously considered granting the ICC jurisdiction over TNEs and other legal persons. Until its final draft, the Treaty included paragraphs 5 and 6 of Article 23, which imposed liability on legal persons. The original language of Draft Article 23 provided in relevant part:

- (5) [The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.
- (6) The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.]⁷⁰

From the beginning, this language was controversial.⁷¹ After weeks of negotiation, the last and most developed draft of this section of draft Article 23 was circulated.⁷² This draft tied juridical person liability much more explicitly to the culpability of natural persons acting on behalf of the juridical person, stating:

- (5) Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute. Charges may be filed

⁷⁰ *Draft Statute for the International Criminal Court*, U.N. GAOR, at 49, U.N. Doc. A/CONF.183/2/Add.1 (1998) (citations omitted), available at <http://www.un.org/law/icc/docs.htm> (last visited Jan. 27, 2004).

⁷¹

There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favor its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favor the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.

Id. n.3.

⁷² *Working Paper on Article 23, Paragraphs 5 and 6*, U.N. GAOR, U.N. Doc. A/Conf.183/C.1/WGPP/L.5/Rev.2 (1998).

by the Prosecutor against a juridical person, and the Court may render a judgment over a juridical person for the crime charged if:

- a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and
- b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and
- c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and
- d) The natural person has been convicted of the crime charged.

For the purpose of this Statute, ‘juridical person’ means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of a State as a non-profit organization.

6. The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural person and the juridical person may be tried jointly. If convicted, the juridical person may incur the penalties referred to in article 76.⁷³

⁷³ The relevant part of Article 76 (Penalties applicable to legal persons) states:

A legal person shall incur one or more of the following penalties:

- (i) fines;
- [(ii) dissolution;]
- [(iii) prohibition, for such period as determined by the Court, of the exercise of activities of any kind;]
- [(iv) closure, for such a period as determined by the Court, of the premises used for the commission of the crime;]
- [(v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;] [and]
- [(vi) appropriate forms of reparation.]

Draft Statute for the International Criminal Court, supra note 70, at 121-22 (citations omitted).

These penalties shall be enforced in accordance with the provisions of article 99.⁷⁴

When, despite intense negotiations, it became clear that consensus could not be reached in the time remaining at the drafting convention, France, the language's primary sponsor, withdrew the proposal.⁷⁵ As a result, the final version of the Rome Statute granted the ICC jurisdiction over only natural persons.⁷⁶ According to Clapham, this rejection was not due to any fundamental opposition to the principle of legal person liability, but was instead attributable to a lack of time to resolve differing traditions of corporate liability.⁷⁷ The fact that ICC jurisdiction does not extend to legal persons should not blind us to existing and emerging possibilities to assert international criminal jurisdiction under international law.

II. THE NEED TO HOLD TNES ACCOUNTABLE

The Universal Declaration of Human rights boldly declares: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁷⁸ There are no limitations or qualifications suggesting that only states or natural persons, rather than all "organs of society," are capable of violating this right. The prohibition is tied to the nature of the criminal action, not the identity of the actor. In the last few decades,

⁷⁴ The relevant portion of Article 99 (Enforcement of fines and forfeiture measures), states that "The provisions of this article shall apply to legal persons." *Id.* at 155.

⁷⁵ For a discussion of the nuances of the statutory drafting process by an eyewitness and participant, see Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Convention on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

⁷⁶ ICC Statute, *supra* note 56, art. 25(1) ("The court shall have jurisdiction over natural persons pursuant to this Statute.").

⁷⁷ Clapham, *supra* note 75, at 157-158.

⁷⁸ UDHR, *supra* note 23, art. 5.

there has been a growing recognition of corporate involvement in violations of *jus cogens* norms. Civil society has issued repeated calls to “follow the money” and bring corporate actors within the human rights and humanitarian law fold.

Perceiving the need for a check on TNE activities is one thing, taking effective action is another. The international community has struggled with the appropriate response. Left floundering without remedy, desperate victims increasingly resort to the United States’ Alien Tort Claims Act in hopes of redress. The many corporate codes and guidelines drafted in the last decades reflect the growing consensus that TNE behavior must be constrained if we are to prevent and address atrocities. While tort suits and corporate guidelines have their place, they are simply not up to the momentous task that has fallen to them. They carry neither the unambiguous moral condemnation of criminal sanctions, nor the credible threat of punishment. The protection scheme cobbled together from these poor tools is hopelessly inadequate. The weakness of these existing responses to corporate atrocities only highlights the urgent need for definitive international criminal standards.

A. Civil Liability: Role of the Alien Tort Claims Act

Until 1980, the Alien Tort Claims Act (ATCA) was a little-known American law. Adopted in 1789, during the first session of the United States Congress, the act promptly fell into obscurity, where it remained for the next 200 years. The ATCA authorizes federal court jurisdiction for “any civil action by an alien for a tort only, committed in

violation of the law of nations or a treaty of the United States.”⁷⁹ In 1980, this short, obscure statute was catapulted into the limelight when the family of Joelito Filartiga, a Paraguayan who died under torture, successfully used the ATCA to sue Joelito’s torturer, Norberto Peña-Irala, for violation of the law of nations.⁸⁰ This case proved to be a watershed. In the years since *Filartiga*, the ATCA has provided federal court jurisdiction for lawsuits from victims of international human rights violations seeking to vindicate their rights under international law.⁸¹

After the Second Circuit, in *Kadic v. Karadzic*, held that international norms subject to ATCA jurisdiction apply equally to private actors and to government officials,⁸² plaintiffs began filing ATCA cases against corporations. The first such case was against Unocal Corporation, alleging that the company was liable for abuses committed by the Burmese government in furtherance of the joint venture building of the

⁷⁹ 28 U.S.C. § 1350 (1948). This language differs slightly from the original 1789 version of the statute, but not in any substantive fashion. The original statute read: “[The district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 304 n.13 (S.D.N.Y. 2003). In 1992, Congress added the Torture Victims Protection Act (TVPA) to the ATCA, Pub. L. No. 102-256, 106 Stat. 73 (Mar. 12, 1992).

⁸⁰ *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). Peña-Irala, who lived in New York when the lawsuit was filed, had been the Inspector General of Police in Asuncion, Paraguay at the time of Filartiga’s death.

⁸¹ See, e.g., *In re Estate of Ferdinand E. Marcos*, 978 F.2d 493 (9th Cir. 1992); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

⁸² See, e.g., *Kadic*, 70 F.3d at 242-43. *Kadic* involved claims of gross Human Rights abuses including genocide, torture and war crimes against Radovan Karadzic, leader of the self-proclaimed and unrecognized Bosnian Serb “Republic of Srpska” located within Bosnia-Herzegovina. The *Kadic* court ruled that the international prohibition against genocide applies to all actors, including private citizens. In particular, the court noted that Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951, for the United States, Feb. 23, 1989), prohibits genocide regardless of whether committed by public officials or private individuals. *Id.*

Yadona pipeline.⁸³ Similar suits were filed against a host of other companies, with mixed success. Although recovery has been rare, the cases draw attention to human rights violations and to TNE complicity with violations of international law.

At the same time, the Nuremberg prosecutions became the foundation for a series of ATCA lawsuits demanding reparations from Volkswagen, Bosch, Bayer, I.G. Farben and a lengthy list of other companies accused of profiting through use of slave labor during World War II.⁸⁴ These cases prompted the German government to establish the “Remembrance, Responsibility and the Future” German Slave Labor Fund, a \$7.5 billion fund jointly funded by the implicated firms and the German government. This fund intended to provide modest payments to victims of the Nazi regime, including slave laborers, in exchange for legal peace for German industry. A similar fund of \$1.25 billion was established to settle claims against Swiss banks for unjust enrichment at the expense

⁸³ *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part by Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *vacated by Doe v. Unocal Corp.*, 2003 WL 359787 (9th Cir. Feb. 14, 2003) (granting en banc review). When the Supreme Court granted certiorari in *United States v. Alvarez-Machain*, 124 S. Ct. 821 (2003), the 9th Circuit stayed *Doe v. Unocal Corp.* pending that decision. The Supreme Court decided *Alvarez-Machain* on June 29, 2004. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). On December 12, 2004, the day before the scheduled rehearing en banc, the parties issued a joint statement announcing that Unocal would pay unspecified moneys to settle the lawsuit. William Baue, Unocal Alien Tort Claims Act Settlement Boosts Corporate Accountability, INSTITUTIONAL INVESTOR, at <http://www.institutionalshareowner.com/article.mpl?sfArticleId=1591>.

⁸⁴ *In re Nazi Era Cases against German Defendants*, 198 F.R.D. 429 (D.N.J. 2000). There are numerous web resources providing information about the corporations involved in these lawsuits and settlements. See *Financial Compensation for Nazi Slave Laborers*, at http://www.religioustolerance.org/fin_nazi.htm (last visited Jan. 27, 2004); *German Firms That Used Slave or Forced Labor During the Nazi Era* (Jan. 27, 2000), at <http://www.us-israel.org/jsource/Holocaust/germancos.html>. For a complete list of Holocaust litigation, including slave labor claims see Michael J. Bazylar, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601 (1999) and Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000).

of Nazi victims.⁸⁵ Together with other ATCA cases, these Nazi-era claims, and more importantly, their settlements, have begun to establish a baseline of civil accountability for corporate crimes that violate international human rights and humanitarian law.

This past term, in *Alvarez-Machain*, the Supreme Court refused an invitation to wholly eviscerate the ATCA.⁸⁶ By a 6-3 vote, the Court ruled that the ATCA permits federal district courts to hear private causes of action for a narrow category of torts committed in violation of the law of nations.⁸⁷ The Bush administration had argued vociferously that ATCA cases must be dismissed as interfering with foreign policy.⁸⁸ The *Alvarez-Machain* court did not wholly adopt this proposition, but did recommend that

⁸⁵ See *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000); *In re Austrian and German Bank Holocaust Litigation*, 80 F. Supp. 2d 164 (S.D.N.Y. 2000); see generally Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325 (1998).

⁸⁶ *Sosa*, 124 S. Ct. 2739.

⁸⁷ *Id.* at 2761. The defense arguments, joined by numerous corporate amici and the Department of Justice, had prominently featured an earlier concurring opinion by Judge Bork that the ATCA provided only jurisdiction and not an independent cause of action. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810-16 (Bork, J., concurring). Such an interpretation would have eviscerated human rights application of the ATCA. Despite judicial near unanimity rejecting this interpretation of the ATCA, corporate defendants in other ATCA cases have extensively argued for Judge Bork's interpretation. See e.g., Supplemental Brief of Defendants-Appellees, *Doe v. Unocal Corp.*, filed April 23, 2003, available at http://www.unocal.com/myanmar/enbanc_brief.pdf (last visited Jan. 27, 2004); Brief for the United States of America as Amicus Curiae, May 8, 2003, available at <http://www.unocal.com/myanmar/doj.pdf> (last visited Jan. 27, 2004). However, the *Alvarez-Machain* court's rejection of this interpretation appears to have put this particular controversy to rest.

⁸⁸ See, e.g., Brief for the United States of America as Amicus Curiae in Support of Appellees, *Alvarez-Machain v. United States*, 107 F.3d 696 (9th Cir. 1996); Brief for the United States in Support of Petition for Writ of Certiorari, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004); Brief for the United States as Respondent Supporting Petitioner, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). The Bush Administration had made this argument in other ATCA cases as well. See, *inter alia*, Brief for the United States of America as Amicus Curiae, *Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002) (No. 00-56603); *Nat'l Coalition Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997) (reprinting a letter to the court from the Department of Justice asserting this position). By contrast, the Departments of Justice and State filed amicus briefs in *Filartiga* endorsing use of the ATCA to sue for violations of international law. See Memorandum for the United States as Amicus Curiae, *Filartiga v. Peña-Irala*, 680 F.2d 876 (1980) (79-6090); see also Brief of the United States Supporting Jurisdiction, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). For a critique of the current Bush administration's stance, see Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts To Limit Human Rights*

courts be “particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”⁸⁹ That raises the potential that the ATCA will be reduced to a mechanism available only where there is no risk of embarrassing state relations.⁹⁰ The United States cannot single-handedly use its national law to enforce international norms without raising questions about whether ATCA cases are selective proceedings favoring U.S. domestic policies.⁹¹

Even putting these questions of international legitimacy to one side, the ATCA cannot fill the international law void left by failure to extend criminal accountability to TNEs. While ATCA actions have symbolic value, they hardly qualify as an effective means to deter and punish massive human rights violations. A civil award carries nothing like the moral weight of criminal law, and few ATCA claimants actually receive compensation, even after a favorable judgment.⁹² Moreover, ATCA claims are limited to those situations in which there has not only been an egregious human rights violation, but where the perpetrator is subject to personal jurisdiction within the United States, and the

Litigation, 17 HARV. HUM. RTS. J. 169 (2004).

⁸⁹ *Sosa*, 124 S. Ct. at 2763.

⁹⁰ The scholarly debate on the scope of the ATCA is voluminous. For an expansive reading of the ATCA, see Richard B. Lillich, *International Human Rights Law in US Courts*, 2 J. TRANSNAT'L L. & POL'Y 1 (1993); Beth Stephens, *Corporate Liability: Enforcing Human Rights Litigation through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401 (2001); Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002); Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539 (1997). But see Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001); Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, 24 HASTINGS INT'L & COMP. L. REV. 361 (2001).

⁹¹ See Jaques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A “Sinical” Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473 (2002) (exploring though ultimately rejecting the contention that ATCA cases against Chinese officials interfere with foreign affairs).

⁹² See generally TORTURE AS TORT (Craig Scott ed., 2001).

plaintiff can overcome standing, statute of limitations and *forum non conveniens* objections. These procedural hurdles, which have blocked a full hearing of most reported ATCA cases,⁹³ underscore the need for a multilateral and consistent mechanism for bringing corporate perpetrators to account.

B. Codes, Compacts and Other Soft Law

The proliferation of these soft law instruments is a poignant reminder of the desperate need for corporate accountability in an ever more globalized world. Many of the codes and guidelines governing corporate conduct explicitly state that legal persons have a duty not to engage in war crimes, crimes against humanity, genocide, or torture. The United Nation's Global Compact,⁹⁴ the ILO Declaration,⁹⁵ the OECD's Guidelines for Multinational Enterprises⁹⁶ and the recent UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights⁹⁷ are but a few of the most notable.

⁹³ Phillip I. Blumberg, *Asserting Human Rights against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493 (Supp. 2002).

⁹⁴ The Global Compact website states in its overview: "The Global Compact is not a regulatory instrument – it does not "police", enforce or measure the behavior or actions of companies." The Global Compact, What is the Global Compact, at <http://www.unglobalcompact.org/Portal/> (last visited Jan. 27, 2004).

⁹⁵ International Labour Organization, ILO Declaration on Fundamental Principles and Rights at Work (June 1998), at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN.

⁹⁶ OECD Guidelines for Multinational Enterprises (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

⁹⁷ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. ESCOR Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter U.N. Norms]. Marking a sharp departure from the Global Compact, the Norms might provide for some oversight and could impose an obligation to pay reparations for failure to comply with its provisions. The Norms were adopted unanimously by the UN Subcommittee in 2003 and sent to the UN Commission on Human

These soft law instruments highlight the varied roles TNEs and other legal persons can play in war crimes and human rights abuses. The Global Compact, in particular, reaffirms that the Universal Declaration applies to corporate entities as well as to governments.⁹⁸ The recent UN Norms on the Responsibilities of Transnational Corporations go even further in recognizing that TNEs can commit or participate in human rights abuses. Paragraph 18 of the Norms are an explicit prohibition: “[TNEs] shall not engage in nor benefit from war crimes, crimes against humanity . . . [and] other violations of human rights and humanitarian law. . . .”⁹⁹

International recognition of this problem has unfortunately not translated into any effective responses. Private codes frequently amount to little more than vague statements of principles. They generally include no complaint mechanism, and provide no grounds for legal redress. While these soft law initiatives may be admirable, they are wholly aspirational – with no power to compel compliance or punish transgressors. Adherence to basic human rights norms is too important to be left solely to voluntary compliance – it must be mandatory for “all organs of society.” Voluntary instruments can and do serve an important purpose, but only if built on a bedrock of hard law protecting core rights.¹⁰⁰

Rights. They are now subject of a year-long consultative process under the auspices of the UN High Commissioner for Human Rights.

⁹⁸ See The Global Compact, Guide to the Global Compact: A Practical Understanding of the Vision and Ten Principles, Human Rights Principle 1, *available at* <http://www.unglobalcompact.org/content/AboutTheGC/TheNinePrinciples/thenine.htm> (last visited Jan. 27, 2004).

⁹⁹ U.N. Norms, *supra* note 97, at 4. The U.N. Norms use the term Transnational Corporation, or TNC. For consistency sake, I have changed the reference to TNE.

¹⁰⁰ See Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT’L & COMP. L. REV. 429 (2004); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001); see also INTERNATIONAL COUNCIL ON

C. Existing Criminal Responsibility for Corporations under International Law

Having explored the strengths and weaknesses of the United States' ATCA and various soft law instruments as solutions to corporate human rights violations, we return to our starting point – international criminal law. International law is already moving in this direction. Bassiouni asserts a growing consensus around the principle of criminal responsibility for legal entities, including penalties of damages, seizure and forfeiture of assets.¹⁰¹ Of course, in the domestic law in the corporate homes of most TNEs, financiers of criminal enterprises are routinely held responsible for complicity in criminal activity.

TNEs are already treated as actors with rights under some international regimes and responsibilities under others.¹⁰² For example, Article 2(14) of the Basel Convention specifically defines “person” for purposes of its criminal prohibitions as “any natural or legal person.”¹⁰³ Similarly, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions specifies that state parties must ensure that the Convention’s provisions are applicable to legal persons.¹⁰⁴ The Council of Europe’s Criminal Law Convention on Corruption requires parties to adopt the legislative

HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (2002), available at www.ichrp.org/ac/excerpts/41.pdf.

¹⁰¹ M. Cherif Bassiouni, *International Criminal Law and Human Rights*, in 1 INTERNATIONAL CRIMINAL LAW 19 (Bassiouni ed., 1998).

¹⁰² Under NAFTA, for example, private investors have the right to bring the NAFTA states to binding international arbitration. North American Free Trade Agreement, Dec. 17, 1992, arts. 1115-1138 reprinted in 32 I.L.M. 605, 642-49 (1993).

¹⁰³ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, available at <http://www.basel.int/text/con-e.htm> (last visited Jan. 27, 2004).

¹⁰⁴ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. II, available at http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html. Although the Convention does acknowledge the possibility that a state might not recognize criminal liability for legal persons, in which case the state is to impose other sanctions. *Id.* art. III(2).

measures necessary to ensure that legal persons can be held liable for the criminal offenses committed on their behalf.¹⁰⁵

Article 2 of the International Convention for the Suppression of the Financing of Terrorism¹⁰⁶ prohibits “any person” from directly or indirectly providing or collecting funds with the intention that they should be used, or in the knowledge that they are to be used, in full or in part, in order to carry out an act defined as terrorism. The explicit language of the Convention is not limited to natural persons, and indeed is clearly targeted at the acts of legal persons as well, though the enforcement provisions are tailored to punishing individuals. The convention marks the first time that financing terrorist activities will be considered a crime by international law.¹⁰⁷ Breaking the otherwise usual separation between financing and the international crimes that are a result of that financing, Article 13 of the Convention requires parties to regard the financing of terrorism as a full criminal act and not merely a fiscal offense.¹⁰⁸

Finally, two security council resolutions (one predating, the other post-dating, 9/11) make it clear that although the term terrorist is limited to natural persons, those participating in funding terrorist activities, and therefore subject to the provisions of the

¹⁰⁵ Criminal Law Convention on Corruption, art. 18(a), CETS No. 173, Jan. 27, 1999, *available at* <http://conventions.coe.int/treaty/en/Treaties/Html/173.htm>.

¹⁰⁶ International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. GAOR 6th Comm., 54th Sess., Agenda Item 160, at 3, U.N. Doc. A/RES/54/109 (2000).

¹⁰⁷ The council on Foreign Relations report on Terror Financing concluded that it is Al Qaeda’s viable financial network that permits it to pose a grave ongoing threat to the United States. COUNCIL ON FOREIGN RELATIONS, TERRORIST FINANCING (2002), *available at* http://www.cfr.org/pdf/Terrorist_Financing_TF.pdf.

¹⁰⁸ *International Convention for the Suppression of the Financing of Terrorism*, *supra* note 106, at 8.

treaty, include legal persons.¹⁰⁹ Similarly, President Bush's executive order on Terrorism Financing applies equally to natural and legal persons.¹¹⁰

CONCLUSION

Along with the ever increasing concentration of economic power in the hands of TNEs has come a pressing need to develop legal checks sufficient to deter their participation in international crimes. The international community may finally be taking the first tentative steps toward holding legal persons criminally liable under general principles of international law. The furor over "blood diamonds" and the role that control of natural resources have played in conflicts in Sudan, Congo and Sierra Leone has given this task a new urgency. Sierra Leone War Crimes Prosecutor David Crane has eloquently articulated the need to bring the financiers of bloody conflicts giving rise to human rights and humanitarian violations within the scope of international law. He has repeatedly emphasized the economic forces driving and supporting many atrocities and

¹⁰⁹ S.C. Res. 1267, U.N. SCOR, U.N. Doc. S/RES/1267 (1999); S.C. Res. 1373, U.N. SCOR, U.N. Doc. S/RES/1373 (2001). In particular, the latter resolution obligates jurisdictions to:

[f]reeze without delay funds and other financial assets . . . of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.

Id. at 2.

¹¹⁰ Exec. Order on Terrorist Financing, (Sept. 24, 2001) *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010924-1.html> (See definition of person including entity which is further defined to include corporations and other legal persons).

war crimes, and has advocated bringing these economic actors to account for violations of human rights law.¹¹¹

Similarly, ICC prosecutor Luis Moreno Ocampo has indicated that his office will consider the connections between TNE profiteering in the Congo and massacres and other atrocities committed there.¹¹² Additionally, the panel of experts appointed by the United Nations Security Council to investigate the illegal exploitation of natural resources in the Congo recently proposed sanctions against implicated legal entities that had violated the OECD guidelines, thus turning the soft law guidelines into hard law.¹¹³ The panel concluded in part:

175. By contributing to the revenues of the elite networks, directly or indirectly, those companies and individuals contribute to the ongoing conflict and to human rights abuses. More specifically, those *business* enterprises are in violation of the OECD Guidelines for Multinational Enterprises. Therefore, the Panel recommends that the Security Council consider imposing certain restrictions on a selected number of business enterprises and individuals involved in criminal and illicit exploitation that are identified in this report. The list emphasizes the implication of foreign enterprises as well as nationals of the Democratic Republic of the Congo in the economic exploitation.¹¹⁴

States may be responsible for the conduct of TNEs that involve human rights violations (either as a host state in whose territory the violations occurred or as a home state with an obligation to prevent transgressions). Similarly, individuals may be held

¹¹¹ Crane, *supra* note 1.

¹¹² See Panafrican News Agency Daily Newswire, *ICC to Probe War Crimes in the Democratic Republic of Congo*, June 23, 2004; [War Crimes Court Eyes Blood Diamond Buyers, Reuters \(Sept. 23 2003\)](#); [ICC Targets Blood Diamonds, Other Facets \(Dec. 2003\)](#).

¹¹³ *Final Report*, *supra* note 19. The panel found the private sector to be instrumental in the exploitation of resources and continuation of the war.

¹¹⁴ *Id.* at 32 (emphasis added). For a description of how such prosecutions might occur, see Stephen Kabel, *Our Business is People (Even if it Kills Them): The Contribution of Multinational Enterprises to the*

criminally responsible for corporate acts over which they have knowledge and control. Both are important components of the project to protect core human rights in this ever-more globalized world. The third prong, the direct liability of TNEs themselves, is equally critical if the edifice of international human rights law is to stand.

The growing recognition of corporations as legal persons in domestic and international law supports this claim. TNE criminal liability for violation of non-derogable human rights would serve not only as an important safeguard of those rights but also as a backdrop against which soft law and compacts might be made effective. Because they bring the potential for public censure, the threat of punitive damages and a more fundamental sense of justice, criminal prosecutions are a necessary grounding and counterpoint to soft-law initiatives.

This proposal would take international human rights and humanitarian law principles to their logical and necessary conclusion – that TNEs and other legal persons can be held directly responsible for acts of genocide or crimes against humanity. Without some international legal standards, any response to allegations of corporate war crimes or crimes against humanity will necessarily be *ad hoc*. Moreover, without common international standards, a race to the human rights bottom will be only too likely.¹¹⁵

Conflict in the Democratic Republic of Congo, 12 TUL. J. INT'L & COMP. L. 461 (2004).

¹¹⁵ For a description of what this race might look like, see Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 54-55 (1999).