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The Human Rights Triangle:
Transnational Corporations, International Human Law and Regional
Cooperation in the Context of Development

Jason Owen Snyder
PhD Candidate, International Human Rights Law

Supervised by: Professor Vinodh Jaichand
Irish Centre for Human Rights
Faculty of Law
National University of Ireland, Galway

August 2012
Dedication and Acknowledgements

This thesis is dedicated to Stuart Price and Lowell Cross. Although no longer with us, their memory continues to provide me with the motivation and persistence to succeed.

Many thanks to Professor Vinodh Jaichand for his continuous support throughout the research and writing of this thesis, and to my colleagues at the Irish Centre for Human Rights for their ongoing contributions to human rights protection across the globe.

This thesis would not have been possible without continued support from my parents, brother, extended family and friends. Thank you for always encouraging me to strive for my best.

Finally, to my wife, Camila, who believes in me even when I cannot see the forest for the trees. Te amo.
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<tr>
<td>ACP</td>
<td>African, Caribbean and Pacific Group of States</td>
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<td>AFTA</td>
<td>ASEAN Free Trade Agreement</td>
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<td>AICHR</td>
<td>ASEAN Intergovernmental Commission on Human Rights</td>
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<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<tr>
<td>ATCA</td>
<td>Alien Tort Claims Act</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<tr>
<td>CAT</td>
<td>Committee Against Torture</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<tr>
<td>CERD</td>
<td>Committee on the Elimination of Racial Discrimination</td>
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<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>EC</td>
<td>European Community</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<tr>
<td>EFTA</td>
<td>European Free Trade Agreement</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>EZLN</td>
<td>Zapatista National Liberation Army</td>
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<td>FDI</td>
<td>Foreign Direct Investment</td>
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<td>FITA</td>
<td>Federation of International Trade Associations</td>
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<tr>
<td>FTA</td>
<td>Free Trade Agreement</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>GSP</td>
<td>Generalized System of Preferences</td>
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<td>HACAN</td>
<td>Heathrow Association for the Control of Aircraft Noise</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>IDA</td>
<td>International Development Association</td>
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<td>Abbreviation</td>
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<tr>
<td>IFI</td>
<td>International Financial Institution</td>
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<td>International Labor Organization</td>
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<td>IBD</td>
<td>International Bank of Reconstruction and Development</td>
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<td>IGO</td>
<td>International Governmental Organization</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>ITGLWF</td>
<td>International Textile, Garment and Leather Workers’ Federation</td>
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<tr>
<td>MENA</td>
<td>Middle East North Africa</td>
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<tr>
<td>Mercosur</td>
<td>Southern Common Market</td>
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<td>MIGA</td>
<td>Multinational Investment Guarantee Agency</td>
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<td>MDG</td>
<td>Millennium Development Goals</td>
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<td>MNC</td>
<td>Multinational Corporation</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>NCP</td>
<td>National Contact Points</td>
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<td>NGO</td>
<td>Non-governmental organization</td>
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<td>NNPC</td>
<td>Nigerian National Petroleum Company</td>
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<td>OAS</td>
<td>Organization of American States</td>
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<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>OCP</td>
<td>Occupational Culture Profile (OCP)</td>
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<td>OP</td>
<td>Optional Protocol</td>
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<td>PGC</td>
<td>Principle of Generic Consistency</td>
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<td>PRSP</td>
<td>Poverty Reduction Strategy Paper</td>
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<td>PTA</td>
<td>Preferential Trade Agreement</td>
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<td>RBA</td>
<td>Rights-based Approach</td>
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<td>RICO</td>
<td>Racketeer Influenced and Corrupt Organizations</td>
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<td>RTA</td>
<td>Regional Trade Agreement</td>
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<td>SAP</td>
<td>Structural Adjustment Program</td>
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<td>SLORC</td>
<td>State Law and Order Restoration Council</td>
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<td>SPDC</td>
<td>Shell Petroleum Development Corporation</td>
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<tr>
<td>TIFA</td>
<td>Trade and Investment Framework Agreement</td>
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<td>TNC</td>
<td>Transnational Corporation</td>
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<td>TOR</td>
<td>Terms of Reference</td>
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Abbreviations

TVPA  Torture Victim Protection Act
UDHR  Universal Declaration of Human Rights
UN    United Nations
UNASUR Union of South American Nations
UNDP  United National Development Programme
UNECa United Nations Economic Commission for Africa
UNIDROIT International Institute for the Unification of Private Law
WBG   World Bank Group
WTO   World Trade Organization

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Doe v. Unocal (1997) US District Court, California, 963 F.Supp. 880

Doe v. Unocal Corp. (2001) 9th Circuit, 395 F. 3d 932


Filartiga v. Peña-Irala (1980) 2nd Circuit, 630 F2d 876

Flores v. BP (2008) UK High Court, Claim No. HQ08X00328

Foresti et al v. Republic of South Africa (2010) ICSID Case No. ARB (AF)/07/1


Hilao v. Estate of Marcos (1996) 9th Circuit, 103 F.3d 767, 773


Ken Wiwa v. Royal Dutch Petroleum Co. 2nd Circuit, 226 F.3d 88
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<td>European Court of Human Rights, Application no. 16798/90</td>
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<td>Lubicon Lake Band v. Canada (1990)</td>
<td>HRC Communication No. 167/1984</td>
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<td>High Court, 6 CLR 194</td>
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<td>Mayagna (Sumo) Awas Tingni Community v. Nicaragua (2001)</td>
<td>Inter-Am. Ct. H.R., (Ser. C) No. 79</td>
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<td>Ocean Sun Line Special Shipping Co. v. Fay (1988)</td>
<td>High Court, 165 CLR 197</td>
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<td>Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic (ICSID Case No. ARB/03/17)</td>
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<tr>
<td>Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic (ICSID Case No. ARB/03/19)</td>
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"In a world of interconnected threats and opportunities, it is in each country’s self-interest that all of these challenges are addressed effectively. Hence, the cause of larger freedom can only be advanced by broad, deep and sustained global cooperation among states. The world needs strong and capable States, effective partnership with civil society and the private sector, and agile and effective regional and global intergovernmental institutions to mobilize and coordinate collective action.”—Kofi Annan

Introduction

According to the Universal Declaration of Human Rights (UDHR), “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care.” The UDHR subsequently states, “Everyone is entitled to a social and international order in which rights and freedoms set forth in this Declaration can be fully realized.” An essential component of achieving the full realization of all human rights is the advancement of the right to development and the relevant State and non-state actors responsible for its implementation. What remains in the contemporary discourse is a proper mechanism by which to incorporate non-state actors as a facilitator of increasing human rights protection. Following their inception at the end of World War II, the United Nations (UN) and the Bretton Woods system sought the protection of fundamental human rights and global financial stability, respectively, through increased peace and economic liberalization. In fact, it was not until March 2011 that a formal approach to universal human rights, taking into consideration the role of “specialized organs of society” was formally presented with respect to business and human rights.

3 Ibid Article 28
4 The Guiding Principles by Ruggie is an important contribution as the recommendations, the culmination of ten years of work dedicated to the issue, provide a reasonable advancement that recognizes the complexities of non-state actors and human rights. It should be noted that Ruggie’s final report noted multinational corporations as specialized organs of society. See Ruggie, J. (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework for consideration by the Human Rights Council. UN Doc
Introduction

We have seen regional and international human rights bodies and non-profit organizations advance the implementation of social and cultural rights while the issues of economic rights are left to international financial institutions through the use of structural adjustment programs to promote liberalization, and civil and political rights. By creating a division with regard to human rights responsibility, we are not able to fully realize all human rights in society. Since the Cold War, human rights, particularly economic, social and cultural rights remain highly politicized. A vital component to the effective implementation and protection of economic, social and cultural rights are non-state actors, particularly transnational corporations (TNCs), which exercise control over national infrastructures and financial resources often greater than many Nation States.

We have seen an increase in the role of non-state actors in areas traditionally reserved for Nation States, including ownership of natural resources and the administration of utilities such as water. But the human rights legal framework has responded slowly to include legal obligations of such entities with respect to human rights, particularly when compared to the advancement of international financial and trade norms. As the principal actors in international law are Nation States, the system is, by definition, not able to directly address the issues of non-state actors and human rights through traditional top-down mechanisms. This interdisciplinary research contributes to the ongoing discourse between development and human rights, particularly economic,

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7 The use of the term transnational corporations, or TNCs, throughout this dissertation is merely the preference of this researcher. Other authors prefer to use multinational corporations (MNCs). Regardless of the term, the discussion includes a non-state, for profit, actor that conducts operations beyond the restraints of national borders.
8 The use of the term 'top-down' refers to the largely centralized human rights regime. Just as the decentralization of responsibilities and resources can have positive impacts for individual countries with respect to human rights, so too is it relevant to the international human rights mechanisms.
social and cultural rights, by focusing on alternative methods of reining in transnational corporations through regional cooperation and enforcement working in accord with the UN institutions and objectives.

As pointed out by Amartya Sen, development is much more than the mere increase in GDP or income; it is the expansion of substantive freedoms for all members of society. Simply put, development is the means by which human rights can truly be enjoyed. While such an enjoyment of human rights may lead to increased economic growth, the growth itself is not the ultimate objective. The practice of the right to development (sometimes as the “right” to exploit resources) and human rights are essential components, and one cannot be fully realized without the other.

It is from this perspective that we approach the issue of transnational corporations and development within the international human rights regime, particularly within the scope of economic, social and cultural rights. This research focuses on the context of development, since it is within this environment that we can more easily see the impacts of non-state actors on human rights, and the plausible options that exist to improve human rights at the regional and national level. Of particular concern is the protection of economic, social and cultural rights for indigenous groups located in the operational scope of transnational corporations’ project areas.

The right to development has more often been justified via other rights, such as self-determination, due to a lack of clear mechanisms specifically addressing

---

11 It should be noted that the term ‘self-determination’ is often found within the discourse of the right to development. The General Assembly has identified the term as being a vital inclusion in the right to development. Article I, para. 2 of the Declaration on the Right to Development states: “The human right to development also implies the full realization of the right of peoples to self-determination...” Thus, the use of the term ‘right to development’ or ‘right to development via self-determination’ or self-determination within the exercising of the right to development or the process of exercising the said right all include the spirit of the international consensus on defining such terms. As stated in the Declaration’s Annex, “Development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair
the roles of both State and non-state actors in its implementation. Although the use of the right to development via self-determination has contributed to addressing the gap within the international human rights framework, most concerns have been directed to civil and political rights, leaving violations against collective rights much more difficult to address. As the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has not yet entered into force, complaints regarding the right to development have been made possible under the auspices of “self-determination,” allowing at least some progress to be made in its current place within the international legal discourse.

Martin Scheinin classifies this justification for the right to development as the “operationalization of the economic or resource dimension of self-determination” which is fundamental to the right to development. Creating a philosophical foundation for the right to development, Amartya Sen goes further to argue that free agency is a constitutive part of such a right. Freedom and development are so interconnected that one cannot truly thrive without the other. Capabilities theory, developed by Sen, offers great insight into the importance of freedom as the fundamental component of development. Human rights set the rules that remove oppression from the equation. As Sengupta points out, the right to development is the means and the end of human rights. This freedom allows us to exercise our agency for the purpose of distributing benefits resulting therefrom....” Additionally, the Declaration acknowledges “the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development....” UN. (1986). Declaration on the Right to Development (A/RES/41/128). Accessed 27 December 2011 at http://www.un.org/documents/ga/res/41/a41r128.htm

In addition the term is no longer limited to the confines of political borders and, according to Merriam-Webster Dictionary, can be defined as “free choice of one’s own acts or states without external compulsion.”

---

of expanding our capacities or development. We can also say that human rights violations contribute to capacity deprivation, much in the same way that Sen described poverty.  

Alan Gewirth’s Principle of Generic Consistency, arguing that the fundamental rights of freedom and well-being, provides a bridge between Scheinin and Sen by showing that the right to development and human rights are both necessary goods. Subsequently, we are able to make claims to such as those rights fundamentally required to exercise human agency and, in return live a life of dignity. From this step, we are able to progress the right to development’s inclusion as vital to human rights protection. According to Gewirth’s ethical rationalism, every agent must act in accordance with his or her own and all other agents’ generic rights to freedom and well-being. By accepting that rational agents require freedom and well-being as necessary components to living a life of dignity, it is one’s duty not to interfere with the freedom and well-being of others as they cannot live their life with such interference. In the context of human rights in developing countries, the application of Gewirth’s reasoning allows us to justify the advancement of economic, social and cultural rights as well as accountability for State and non-state actors. As transnational corporations benefit from the natural resources of a country, other stakeholders should also receive benefits from such operations, reinforcing a rights-based approach to development (RBA).

Following the theoretical justification for the right to development, we will discuss the legal precedents regarding the right to development from a variety of national and international court decisions, including regional human rights

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18 It should be noted that the right to development is fundamental to the human rights discourse. A rights-based approach to development is a concept that ensures that human rights values are the ultimate determining factor when carrying out the right to development and subsequent development projects.
Introduction

courts. Regionalization is an important theme throughout this research and provides the most significant means by which to tighten the gap between international human rights norms and local compliance with regard to human rights implementation by transnational corporations. While traditionally regionalization has been defined in contrast to globalization, this perspective has been challenged by contemporary advances. Of particular interest are three perspectives on regionalization provided by Schulz et al. These perspectives challenge the State-centric notions of the contemporary human rights regime. First of all, and more traditionally, regionalization refers to the decentralization of a central power or administration as a result of failures or additional attempts to get local and closer to the people. Secondly, regionalization can refer to areas of several States that share ethnic, cultural or geographic characteristics to increase cooperation. Such trans-border entities are imbedded in local institutions, and represent a commitment by the people to further increase collaboration regardless of centralized policies. Lastly, the term regionalization refers to multi-state cooperation and governance (for example, ASEAN, EU). In this context, regionalization is being discussed as a process by which countries with similar histories, cultures and interests come together to create a formal institution.

With respect to human rights, the internationally accepted norms that have manifested within the contemporary globalized world can be more effectively realized or fulfilled and enforced through regional systems, which provide a


20 The term regionalism is used throughout this research in several contexts. Although the context may shift when discussing the term regionalism, the varied uses are valid and demonstrated through contemporary contributions on the term as cited. The discourse has advanced beyond the confines of the traditional use of the term and such advances are represented as a theme throughout this research.


22 For example, conservation areas such as those of the South African Development Community. Accessed 24 January 2012 at http://www.sadc.int/fanr/naturalresources/transfrontier/index.php
more contextual response to violations of international human rights norms.\textsuperscript{23} Although the right to development and the process of development are distinct concepts, the process of development and the realization of the right to development rely heavily on human rights. This research advances the discourse on corporations and human rights while strengthening regional capacity; ensuring that international human rights standards serve as the foundation for all development activities rather than working as conflicting interests.\textsuperscript{24} Development cannot be achieved without human rights protection; and human rights cannot truly be realized without development. The values and goals of the two themes are complementary and strive to achieve similar goals: advancing quality of life.

The right to development is not merely a philosophical discussion. There are several cases under the International Covenant on Civil and Political Rights (ICCPR) that highlight some issues with the right to development, particularly \textit{Mikmaq v. Canada} and \textit{Mahuika et al. v. New Zealand}. In the Mikmaq Case, the Mikmaq Tribe claimed that they had been deprived of their right to self-determination by the Canadian government’s implementation of policies that are “destructive of the family life” of the tribe. While the case sought to open the door to future claims regarding Article 1 of the ICCPR, the Human Rights Committee (HRC), in agreement with the Canadian government, ruled the claim inadmissible, citing the author’s lack of proper authority to represent the Mikmaq Tribe and the failure to show that his rights, as an individual, had been restricted.\textsuperscript{25} Although no breach was ultimately found, this case highlights the

\begin{itemize}
\item[\textsuperscript{25}] “Human Rights Committee observes that the author has not proven that he is authorized to act as a representative on behalf of the Mikmaq tribal society. In addition, the author has failed to advance any pertinent facts supporting his claim that he is personally a victim of a violation of any rights contained in the Covenant.” \textit{Mikmaq v. Canada}, Communication No. 78/1980, views adopted on 29 July 1984, paragraph: 8.2: U.N. Doc. Supp. No. 40 (A/39/40).
\end{itemize}
importance of self-determination and the right to development as essential components of economic, social and cultural rights. In *Mahuika et al. v. New Zealand*, claims were made under Article 27 of the ICCPR, arguing the right to self-determination as the foundation to the right to development. The Human Rights Committee interpreted the relationship between Article 1 and Article 27 of the ICCPR as being interdependent, thereby bridging the gap between human rights and development. Although the interdependence of the two Articles was recognized in *Lubicon Lake Band v. Canada*, the *Mahuika* case resulted in the formal recognition of the relevance of self-determination (Article 1) in interpreting Article 27.

While the right to development has been discussed in UN human rights bodies, perhaps the greatest legal advancements towards confirming the right to development have been made in regional human rights courts. The American Convention on Human Rights and the African Charter of Human and Peoples’ Rights all include the right to development, confirmed in several landmark cases. For example, in the Inter-American Court of Human Rights, *Mayagna*

---


27 Sen (1999) classifies expanding freedoms as both the *primary end and the principal means* of development (p. 26).

28 “Although initially couched in terms of alleged breaches of the provisions of Article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under Article 27. The Committee recognizes that the rights protected by Article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong,” as stated in Paragraph 32.2. *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990). Although the Committee agreed with Canada that violations to the right of self-determination was an individual right, they did agree that other articles could be cited as being violated.

29 *Apirana Mahuika et al. v. New Zealand*, supra.

30 It should be noted that although the European Convention on Human Rights does not explicitly mention the *Right to Development*, there have been several cases that visit the issue within EU countries. It is important to note the Cotonou Agreement (2nd Revision) and the recognition that development cannot take place without a secure environment. This provides further insight into the EU's position on security and provides a bridge between Article 5 (Right to Liberty and Security) and the Right to Development. The Cotonou Agreement. Accessed 3 January 2012 at http://ec.europa.eu/europeaid/where/ACP/overview/cotonou-agreement/index_en.htm
Introduction

(Sumo) Awas Tingni community v. Nicaragua\(^{21}\) serves as a foundation for defending the right to development as an essential component of the rights discourse. In the Awas Tingni case, the Inter-American Court of Human Rights’ decision further strengthened earlier comments by the Inter-American Commission on Human Rights that self-determination regarding traditional lands is fundamental to development and protected under the Inter-American Convention on Human Rights.\(^{32}\) This case is significant because it is the first time that the Inter-American Court issued a judgment in favor of the rights of indigenous peoples to their ancestral land, promoting the development of their distinct political, economic, social and cultural identities consistent with the UN Human Rights Committee’s views on Article 27 of the ICCPR.\(^{33}\) The European Human Rights Court’s ruling in the Alta River Dam Case provides a foundation that future cases could rely upon, particularly with regard to protecting individual rights in the context of indigenous communities. Other cases that visited the development discourse are López Ostra v. Spain\(^{34}\) and Hatton et al. v. United Kingdom\(^{35}\) strengthening the role of the government to ensure that mechanisms are in place to maintain the integrity of the environment for its citizens via assessments and complaint mechanisms.

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It should be noted that although there is no specific section on the Right to Development, the ‘Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights’ (Protocol of San Salvador) includes the spirit of the right to development (and explicit mentions within the preamble) in the various articles relating to the Rights to Health, Food, Education, Benefits of Culture and Formation and Protection of Family. Entered into force 16 November 1999. Accessed 3 January 2012 at http://www.oas.org/juridico/english/treaties/aL52.html


Introduction

Unlike the European and American Human Rights Conventions, the African Charter on Human and Peoples’ Rights (hereafter African Charter) explicitly protects individual human rights as well as collective rights. Article 21\(^{36}\) of the African Charter refers to the economic dimension of self-determination, as argued by Scheinin\(^{37}\) and reflect appeals to the ICCPR, while Article 22 explicitly outlines the right to development.\(^{38}\) In *Center for Economic and Social Rights (on behalf of the Ogoni People) v. Nigeria*,\(^{39}\) the African Commission confirmed the right to development as well as recognizing the ability of private actors to violate human rights.\(^{40}\) This case is vital in establishing the role of private actors, such as transnational corporations, and their subsequent obligations under the proposed regional contracts later in this research. With the right to development and human rights so deeply intertwined, we must now move on to advocating for a rights-based approach to development, ensuring that the rights protection is not sacrificed in the process, particularly at the hands of private actors. If we are to strengthen the international rights regime, we must begin to focus on all institutions, not merely States, and their role in protecting and promoting human rights. As outlined in Ruggie’s “Protect, Respect and Remedy

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\(^{36}\) “The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.”


\(^{38}\) “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.” Paragraph 1; “States shall have the duty, individually or collectively, to ensure the exercise of the right to development.” Paragraph 2.


The discussion regarding development by the African Commission more than satisfies the discussion for development as is introduced in this research. Additional rulings by the Commission, such as *Endoris (African Commission Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Accessed 17 January 2012 at http://www.achpr.org/english/Decison_Communication/Kenya/Comm.%202076-03.pdf, further enshrine the right to development as an inseparable component of the human rights discourse.
Framework, Ruggie's contribution to include both State and non-state actors as having the duty to protect human rights within their spheres of influence. In order to do this, we must be able to implement and enforce international norms from local to global fully and effectively.

Following World War II, the international community collaborated to create human rights protections and global financial stability to prevent a repeat of the atrocities and economic depressions across the world. The post-World War II operations mainly sought to 1) restructure the global financial system to ensure stability, reducing the occurrence of similar economic depressions which led to the previous two world wars, and 2) intervene in international conflicts to promote peace, ensuring that basic rights and freedoms are internationally recognized and protected. This culminated in the creation of the UN, whose mission focused on international peace and human rights, and the Bretton Woods institutions, aimed at integrating and stabilizing global financial markets. Despite the conception of these institutions in the same political

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41 Ruggie, J. (2011)
42 Although Ruggie (2011) abandoned 'sphere of influence' language, engaging State responsibility to protect and corporate responsibility to respect human rights "with which they are involved," the spirit of the language is not so different. While Ruggie's groundbreaking work focuses on the contemporary circumstances of Business and Human rights, under a State-centric system, this research advocates the advancement of international norms with regard to corporations via non-traditional approaches such as internal corporate value change and an emphasis on regionalization (while maintaining the integrity of international norms).
43 "The absence of a high degree of economic collaboration among the leading nations will ... inevitably result in economic warfare that will be but the prelude and instigator of military warfare on an even vaster scale." Comments made by Harry Dexter Whiter, US delegate to Bretton Woods Conference. (1944). See also the Marshall Plan (European Recovery Program). It should be pointed out that one of the purposes of the European economic focus, amongst other policy goals, was to combat the spread of communism. See DeConde, A., Burns, R., and Loegvall, F. (eds.) (2002).
Introduction

context, the international financial norms have been more rapidly adopted and implemented than those of human rights. As Balakrishnan Rajagopal points out the regulation of money and human rights is a post-war phenomenon whose institutions are directly linked.\textsuperscript{46} Suzuki also argues that the main problem of the post-World War II institutional advancements was that the rights discourse was not properly included in the Bretton Woods institutions tasked to promote global financial stability.\textsuperscript{47} That being said, we must look at the role of perhaps the single biggest actors, in terms of influence, as agents of development on the international stage: transnational corporations. Human rights have traditionally been viewed as the sole responsibility of individual States, causing the international treaties to lack the proper enforcement mechanisms found in parallel financial institutions. With globalization and technological advances, this is becoming less relevant. Increases in economic interdependence among global partners have put more emphasis on regional stability (politically, socially and economically), causing states to be more invested in advocating for human rights protection. The paradigm appears to be shifting\textsuperscript{48} from the post-World War II institutional mentality (finances, international concern, human rights, and state sovereignty) to a more collaborative, regional perspective of development, security and rights protection.\textsuperscript{49} Such an interest in regional stability has led to the adoption of more incentive based approaches to encourage states to implement human rights standards and, in turn, economically strengthen the country and regional bloc.\textsuperscript{50}


It should be noted that although this paper was published in 1993, it has been well cited in high impact human rights and international law journals, demonstrating its importance and continued relevance to the discourse.

\textsuperscript{49}Schulz, M., Soderbaum, F., and Ojendal, J. (eds.) (2001).

\textsuperscript{50}Suzuki, Motoshi. (2005), p. 5. See also Drenik, S. (2006) "From Global to Regional Approach to Human Rights Education: The Case of the OSCE," \textit{Human Security Perspectives}, 1 (3). It should also be noted that the terms regional bloc and regional organization are not conflicting terms, but should be distinguished from trade blocs, which are part of a regional structure. As defined by Merriam-Webster, a bloc is "a
The contemporary status of the international human rights legal framework is simply not designed to deal with private actors in a meaningful way. When discussing a human rights legal framework, three important characteristics must be included: standards or substantive rules; procedures to deal with violations; and institutions to enforce such standards.\textsuperscript{51} In order to incorporate non-state actors into international human rights law, they must first be recognized as “participants in” international law.\textsuperscript{52} As Steven Ratner recognizes, corporations are such significant actors in international relations and law that it is only logical that they assume the obligations currently placed on states or individuals.\textsuperscript{53} International law has long recognized the existence of human rights duties on entities other than states. For example, international humanitarian law places duties on rebel groups to respect certain fundamental rights of persons under their control.\textsuperscript{54} States too have accepted the notion of duties of non-state actors through the corpus of international criminal law on human rights atrocities. This has resulted in war crimes, genocide, crimes against humanity, torture, slavery, forced labor, apartheid, and forced disappearances being classified as crimes under international law. Some treaties make an individual criminally responsible only if he was an agent of the state or some other entity controlling territory;\textsuperscript{55} however, others, such as the

\begin{itemize}
  \item combination of persons, groups, or nations forming a unit with a common interest or purpose; a group of nations united by treaty or agreement for mutual support or joint action.” An organization is defined as “the arrangement of related or connected items.”
  \item Within this research, the use of the term trade bloc and regional bloc/organization are used intentionally.
\end{itemize}
slavery treaties, place responsibility on private actors.\textsuperscript{56}

Many authors such as Andrew Clapham, Philip Alston and Sarah Joseph\textsuperscript{57} have delved deeply into the issue of human rights accountability for transnational corporations. While they have contributed much to the discourse on non-state actors in international law, there has been very little advancement in alternative approaches that parallel traditional strategies of improving human rights protection in the realm of non-state actors. The attention towards regional integration and the use of trade blocs as a legal alternative for human rights compliance has become of increased importance in the last decade. Suzuki and Hafner-Burton have advanced the way we approach the issue of human rights accountability by streamlining human rights protection through regional trade mechanisms.\textsuperscript{58} Alternative approaches such as preferential trade agreements with human rights conditions offer a complementary approach to the slower progress of the international community, while reaffirming internationally recognized human rights norms. Just as the use of regional human rights courts have helped to strengthen the right to development, regionalization can also improve human rights protection and provide a mechanism by which to hold non-state actors accountable for violations within the existing international human rights regime.

This research advances regional cooperation by encouraging the adoption of human rights standards by corporations via trade mechanisms and access language to link human rights compliance with economic incentives. Advancing


the view of Hafner-Burton\textsuperscript{59} one step further, this research argues for the use of contracts between regional blocs and corporations, enforced at the national and regional levels, that require human rights compliance and legal liability for any human rights violations. These contracts will be designed independently by regional entities as a means of holding corporations legally accountable for human rights non-compliance and incentivizing rights protection with preferential access to the regional market. What makes this novel is the flexibility of authority based on the capacity of the region and its subsequent members. For regional entities with an existing mandate for dealing with human rights, the contracts would allow for a broader scope for rights protection by amending the charter to include final authority for contract violations. For regional bodies with no human rights mandate, the proposed contracts provide a more robust mechanism to deal with corporate violations by national governments with the subsequent authority resting with the competent entity (for example, Inter-American Human Rights Court) developed to oversee the region-wide contract.

The legal authority could vary between various regional and be subject, but not limited to, private international contract law. For example, implementation within OAS would require an amendment to the charter and ratification by State parties. Within the amendment, agreement would have to be made to clearly define which court would have jurisdiction, such as the Inter-American Court. For an entity such as MERCOSUR, the transition is more complicated due to the fact that there is no human rights authority at the present. Such a change would require the addition of said authority to determine the national and regional capacity to enforce the contracts, and ultimately to require an amendment to the charter. These changes would hypothetically occur in order to set the stage for the proposed contracts. Such an approach is consistent with principles enunciated by Clapham.\textsuperscript{60} Failure to comply not only opens the corporation up to legal liability but also bars the corporation from doing


business in other countries of that regional bloc. This “carrot and stick”
removes the likelihood of a human rights vacuum in which neighboring
countries may lower their standards to attract foreign investments. This
approach is even more relevant as stronger regional institutions are created,
such as the newly created South American Bloc, UNASUR,\textsuperscript{61} that seeks to handle
all regional activities, including development funding and human rights issues.\textsuperscript{62}
The added value of this approach is that it works parallel to the mechanisms at
the local and international level, strengthening the overall international human
rights regime through actual increased human rights protection, not through
mere increases in in the number of ratifications. While Landman empirically
shows that an increase in the ratification of human rights instruments increases
human rights protection, Heyns and Viljoen point to a trend of rhetorical
acknowledgement without proper domestic implementation, which would
ultimately risk weakening the international human rights framework.\textsuperscript{63}

The three main goals of this research are to analyze the current international
human rights framework and the legal status of non-state actors within that
framework, to discuss the right to development and the normative and legal
substance of such a claim, and to develop contemporary strategies encouraging
transnational corporations to adopt human rights obligations in order to
prevent human rights violations (as opposed to simply dealing with violations
after they occur). It must be conceded that the scope of this research primarily
relates to economic, social and cultural rights although. This research goes
beyond the recommendations of Ruggie’s respect framework to incentivizing
human rights protection by corporations by connecting market access to
compliance. Through the use of regional contracts, the ability for corporations

\textsuperscript{61} See the Founding Constitution of UNASUR (Spanish). Accessed 12 April 2011 at
will be Discussed in Quito.” 30 May. Accessed 8 June 2012 at
http://www.mmrree.gob.ec/eng/2012/bol0596.asp
Press. For a contrary view of this, See Heyns, C., and Viljoen, F. (2001) “The Impact of
to operate within a region would require the contractual recognition of liability should human rights violations be committed within the corporation's sphere of influence. Non-compliance in a single country could lead to a regional ban. This concept bridges the gap between human rights theory and practice and advances the human rights discourse pertaining to non-State actors. With these proposed positive duties, State obligations are unchanged. The addition of regional contracts is a mechanism that recognizes the increased role of non-State actors within the ever-globalizing world.

Several questions are visited throughout this dissertation: What is the role of TNCs within the contemporary human rights framework? What standards, legally binding and non-binding, visit the theme of TNCs and human rights? What role do TNCs play in development? How, if possible, can human rights standards become part of the corporate structure? What alternative methods, compatible with the current international structure, can be used to increase human rights?
"Freedoms are not only the primary ends of development, they are also among its principal means... Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states." — Amartya Sen

1. Human Rights and the Right to Development

1.1 Right to Development via Self Determination

While human rights in development may be “inescapable,” it is by no means brought into practice by words alone. Equally so, the existence of hard international law does not necessarily yield human rights protection. What the existing international law does do is provide formal complaint procedures through various International Covenants as a means of implementation; through this process persons may make claims against rights infringements by the state, particularly the right to self determination in the context of development. These complaint procedures serve as an additional recourse for

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64 Sen, A. (1999), p. 10 and p. 3 respectively.
65 It is important to note that the discourse on the right to development via self-determination does not seek to reargue the existence to the right to self-determination but to re-establish that the right to development implies the right to self-determination, as agreed in the definition of development in the Declaration on the Right to Development. The discussion also identifies the weakness of the international human rights system, which requires that the right to development be justified via self-determination to bring complaints relating to civil and political rights. A direct appeal to economic, social and cultural rights is not available due to the fact that the Optional Protocol to the ICESCR has yet to enter into force.
67 Four of the six core human rights documents outline formal complaint procedures. These include: The International Covenant on Civil and Political Rights; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; The International Convention on the Elimination of All Forms of Racial Discrimination; and The Convention on the Elimination of All Forms of Discrimination against Women.
68 The Right to Development is a key concept in this research and, as such, follows the definition as stated in Article 1 of the Declaration on the Right to Development (1986). As this thesis promotes a human rights based approach to development this research adopts the following definition, which is consistent with the development goals within international law: “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human
Human rights violations but do not lessen the need for preventative measures to reduce the number of violations that occur. In fact, through some case law regarding civil and political rights, we are able to make the argument that development and the actors involved in its process also have a place in international human rights law. The realization of development, via self-determination in all respects, is an essential condition of guaranteeing human rights. By analyzing several fundamental court rulings and comments by the Human Rights Committee and other bodies, we are able to make the case that there is a right to development, both theoretically and in practice via the two principal Covenants of international human rights law and via the right to self-determination. Additionally, this right applies to individuals exercising their rights as well as individuals acting in accord with others (for example, indigenous and minority groups).

To date, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) has not been ratified by a sufficient number of State parties to make it part of the corpus of international human rights law, although there are a number of State signatories. With sufficient ratification, the OP-ICESCR will codify the complaint procedures and investigative mechanisms for violations to economic, social and cultural rights, allowing individuals and groups to make claims against the state for such infringements. It is this ratification that will give further support to bridging the gap, at least in terms of binding international law, between development and human rights with traditional actors in international law. Such obligations would allow indigenous groups, such as Chile’s Mapuche


70 Optional Protocol (A/RES/63/117). As of March 2012, there are 42 signatories and 8 state parties (Argentina, Bolivia, Bosnia, Congo, Ecuador, El Salvador, Mongolia and Slovakia, Spain). There are more now! Update.

population,\textsuperscript{72} to make direct appeals to social, economic and cultural rights via Article 1, paragraph 2 of the ICESR\textsuperscript{73} rather than appealing to the International Covenant on Civil and Political Rights (ICCPR) alone. The body of jurisprudence that will result from such an approach will confirm that all rights are indivisible, inter-dependent, and interrelated. Following the trends set with ratification and implementation of the ICCPR, and its two optional protocols, the adoption of ICESCR's Optional Protocol should strengthen the protection of economic, social and cultural rights.\textsuperscript{74} The limitation, however, is that democratic and interdependent countries are more likely to implement human rights provisions that protect civil and political rights. Countries that are the most flagrant violators will most likely continue to violate human rights and ratify fewer human rights treaties, the exception being countries with high numbers of NGOs.\textsuperscript{75}

This is where regional human rights mechanisms are expected to fill the gap between the international obligations and domestic implementation of human rights by States. Heyns and Viljoen argue that mere ratification of human rights treaties does not yield an actual decrease in violations, and could lead to a worsening of rights protection. Although ratification does provide a first step, it is not a silver bullet for resolving systematic rights violations.\textsuperscript{76} Regional mechanisms may be able to ameliorate the situation relating to human rights transgressions arising from a lack of ratification or ratification without meaningful implementation of multilateral international treaties. In the case of

\begin{itemize}
\item \textsuperscript{72} Chile's largest indigenous population continues to struggle for territorial lands against lumber companies. The group’s claims were recently heard before CERD in August 2009 (CERD/C/CHL/15-18)
\item \textsuperscript{73} Article 2, para. 1 states, "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."
\item \textsuperscript{74} Landman empirically shows that the continued growth of the international human rights regime has led to increased ratification by states, yielding increased global human rights protection –particularly in the realm of civil and political rights. The study shows that treaty participation precedes an improvement in rights protection rather than "anticipatory adaptation." See Landman, T. (2005), p. 162-164.
\item \textsuperscript{75} Landman, T. (2005), p. 168.
\item \textsuperscript{76} Heyns, C., and Viljoen, F. (2001), p. 483-535.
\end{itemize}
the Mapuche, Chile (which signed OP-ICESCR but has not yet ratified it) would be obliged to defend their actions regarding Mapuche in accordance with international obligations once the optional protocol entered into force. The regional authority of the Inter-American Court of Human Rights and UNASUR complements this additional international commitment, creating a robust framework of protection for this type of case.  

One may ask how the regional mechanisms would avoid the problem of ratification that plagues the international human rights regime. Due to the structure and nature of regional mechanisms, there are two main ways in which the international issues of ratification would be reduced at the regional level. First of all, the significantly lower number of state actors within a particular regional bloc allows for a more precise discourse with regard to proposed instruments that need ratification. Simply put, there are fewer parties involved, which reduces the number of possible competing interests involved with the ratification of an instrument on a regional level. Secondly, since regional blocs are, by definition, made up of countries, which share common culture, language or interests, there is a higher impact with negotiating and adopting instruments to be implemented by regional members. This is not to say that ratification can be avoided, as regional bodies also require such formal mechanisms. The advantages of a more regional centric approach to ensuring human rights protection by private entities provides for more culturally relevant and contextually accurate responses to violations. There are stronger connections within regional members. Even though competition is still present, there are interests more closely aligned to advance the region that are less apparent at the global level. The pressures associated with meaningful implementation are also stronger within a regional framework where more localized pressure can be used to hold member countries accountable.


79 It should be noted that while these arguments can be made for the international mechanisms, it is proposed that there is less solidarity within the global framework
While most cases have largely cited civil and political rights, a large section of international human rights law does, in fact, cover development as part of the human rights framework. The appeal to “self-determination” in both the ICESCR and the ICCPR encompasses the spirit of development and provides a foundation for furthering the right to development within the human rights regime. The existence of a common article in both Covenants confirms the common foundation and interrelated nature of human rights and the right to development. The ICESCR provides stronger language for promoting the notion that the natural wealth of a country be used for the development of its people.

Although non-binding, the UN Declaration on the Right to Development (1986) uses similar language of self-determination and sovereignty over natural wealth, further embedding the concept of development into the international human rights framework. It makes the argument that the right to development is present in international law via “self-determination,” which is clarified in various declarations, allowing pre-existing monitoring and

than found within the regional framework. This could be for a variety of reasons, but certainly includes cultural cohesiveness and local (as in closer than global level) pressures that are less concentrated at the broader level. Whereas Professor De Feyter advocates the localization of human rights as a means of advancing the global human rights regime, this approach focuses on the regionalization of human rights, which serves as an intermediary between the local and global as a transitional approach to advancing human rights protection, particularly with regard to non-state accountability to human rights norms. See De Feyter, K. (2007) "Localising human rights." In W. Benedek, K. De Feyter and F. Marrella (eds.) Economic Globalisation and Human Rights, Cambridge, Cambridge University Press, p. 67.

80 Article 1, para. 1 of the ICESCR states that, “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

81 Article 1, para. 1 of the ICCPR states that, “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

82 Article 1, para. 2 states that, “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

83 Article 1, para. 2 states, “The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”
complaint procedures to be used to strengthen human rights claims. This perspective permits the move from imperfect to perfect obligations. Currently, violations of the right to development must be argued under the auspices of the right to self-determination. Once the OP-ICESCR enters into force, the right to development can be legally argued as a violation of economic, social and cultural rights by a State Party to the Committee on Economic, Social and Cultural Rights. Through the pursuance of the right to development within existing human rights norms, particularly with regard to ESCR, we are able to justify duties to State parties to not only refrain from interference but to actively ensure that human rights obligations are met. As noted by the High-Level Task Force on the Implementation of the Right to Development in 2010, “[T]he right to development is the responsibility of States acting collectively in global and regional partnerships.”84 Ruggie’s “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”85 is consistent with the aforementioned perspective although it does not go far enough with regard to corporate accountability. That being said, such an approach can also be expanded to include bilateral and regional contracts, which include human rights considerations for corporate actors. Such an approach will recognize the role of States as the primary duty-bearers while acknowledging the limitations, and innovative benefits, to reining in non-state actors to truly advance the human rights discourse. The relevance of the right to development and the proposed legal mechanisms to ensure corporate human rights accountability is fundamental to this research. It is the context of development that we are able to most clearly see the impact of corporations with regard to the protection of economic, social and cultural rights.

Despite the potential of establishing the relationship between self-determination and development in the existent human rights framework, there


are some procedural restrictions. Arguably the most notable restriction is the first Optional Protocol to the ICCPR’s (ICCPR-OP1) individual complaints procedure, which limits collective action against rights violations. However, even this restriction has been by-passed by the HRC’s use of Article 27\textsuperscript{86} of the ICCPR, which focuses on minorities and culture. One shortcoming of the HRC has been its reluctance to clearly define “self-determination” in Article 1 with the same clarity as the Committee on the Elimination of Racial Discrimination:

In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.\textsuperscript{87}

Of particular importance is the affirmation that the right to development implies a country’s control over its natural resources as well as the protection and promotion of the rights stated in the ICESCR and the ICCPR. Although there is an implicit right to development via self-determination, it is also important to establish the right to development itself.\textsuperscript{88}

\textsuperscript{86} Article 27 states that, “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

\textsuperscript{87} CERD General Recommendation No. 21: Right to self-determination (23 August 1996), para. 4.

1.2 Justifications for the Right to Development

The inter-governmental institutions from which the contemporary human rights framework was born are based on post-WWII power relations and liberal values. While international cooperation is on the rise — more due to political pressures than to legal advancements — such institutions remain committed to state sovereignty as the backbone of international law.\(^{89}\) While there is a legal foundation by which to argue for the right to development within the human rights regime, it is also essential to look at the foundations of such an appeal. Although human rights law creates mechanisms by which to seek accountability once violations have occurred, such norms do not ensure human rights protection solely out of their mere existence.

Furthermore, the pursuit of the right to development without a consideration of the impact of non-state actors, who occupy a grey area of international law, diminishes the impact of such mechanisms. For this reason, we must examine the various dimensions of human rights in order to strengthen the foundation for the underlying principles of international human rights law and how those principles relate to rights protection in an increasingly privatized world.

Human rights are internationally recognized norms that aim to protect peoples from “political, legal and social abuses.”\(^{90}\) Similar to other norms, the human rights discourse is accompanied by a philosophical discourse on their nature and substance. A mere legal debate does not always yield advances in our understanding of human rights. A legal approach has its limitations because the

\(^{89}\) A fundamental issue involving human rights accountability resides in the UN’s implementation of human rights principles in international law without redefining its notion of sovereignty. States must voluntarily commit to international obligations; however, they may decide to include reservations to limit the extent of their implementation. See Freeman, M. (2004) *Human Rights*. Cambridge: Polity Press, p. 34, 43. Although it could be argued that multi-lateral treaties reduce the “State-centric” nature of the international system, this author observes a trend in which States are aware of certain contemporary realities that require a diminishing of sovereignty and are willing to make the necessary modifications. For example, reducing sovereignty to gain trade benefits. This highlights the importance of why international human rights law must also begin to recognize the contemporary realities and progress accordingly to include private actors within the rights discourse in a legally meaningful way.

Human Rights and the Right to Development

citing of the letter of the law often neglects harsh social realities. Although a philosophical approach of human rights does not immediately increase human rights protections on the ground, it does allow us to identify the weaknesses of the discourse to further strengthen the international human rights regime. For the purposes of this dissertation, we must determine whether the implementation of the right to development within the human rights framework is consistent with the decisions handed down by various human rights bodies as well as the prescribed ideals of human rights. Does the inclusion of the right to development in human rights hinder the protection of human rights on the prescriptive level?

We can draw upon Alan Gewirth’s Principle of Generic Consistency (PGC), which states that as productive agents, we have rights (freedom and well-being), and must be free to exercise these rights while refraining from interfering with the ability of others to do the same: “Act in accord with the generic rights of your recipients as well as of yourself.” These generic rights, freedom and well being, are the foundation of other human rights, including the right to development. Generally, the argument states that as an active agent I require certain rights to exercise my agency. As an active (or potential) moral agent, I must also recognize that others also require the fundamental goods of freedom and well-being. The duty that falls on me and other agents is to refrain from interfering with one’s freedom and well-being (rights). In some

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95 Jack Donnelly also follows the notion that human rights are, in a sense, drawn from morality. The main difference is that Gewirth offers that human rights are not simply abstract moral ideals. “Agency or action is the common subject of all morality and practice.”
96 When discussing agency, the PGC is used mainly with individuals and groups; however, it is equally effective and consistent when applied to institutions (i.e. World Bank, corporations). See Gewirth, A. (1978), p. 272.
cases, we must actively assist others in attaining these fundamental goods.\footnote{Welfare would be an example of this. The state intervenes to allow individuals or groups that otherwise would not have the resources to do so, due to inequality of opportunity, develop their skills.}

The discussion of active rights is highly relevant to the discourse on business and human rights. Although Ruggie’s Framework states that corporations must merely respect human rights (that is, negative rights that correspond merely to the duty to refrain from interfering with or violating human rights), Gewirth’s theory goes the extra step and requires active obligations on agents.\footnote{Gewirth, A. (1996), p. 32. It should be noted that Gewirth’s theory does not explicitly deal with corporations; however, agency, as defined, can be applied to individuals, corporations and communities without contradiction.} The application of his theory as the fundamental lens of this research allows us not only to argue the obligations of corporations with regard to human rights under the proposed contracts, but also to make a better case for economic, social and cultural rights protection.

The application of this thinking would probably be along these lines. If I accept such principles as a mechanism, I thereby challenge my own rational existence should I claim that one person or group does not have an equal claim to the fundamental rights of freedom and well-being. We must first begin with the formula of rights: “A has a right to X against B by virtue of Y.”\footnote{In Gewirth’s formula, A represents the right holder; X, the particular right; B representing the Duty-bearer; and Y serving as the justification for the right.} As an active, prospective or potential agent,\footnote{Although Gewirth did not apply his theory in great deal to corporations, the PGC and its classification on agency can be applied.} A has the right to freedom and well-being (and the derived human rights). B has the duty to ensure that the rights of A are not infringed upon. This includes both positive and negative rights.\footnote{Simply, positive rights in the sense that the duty-bearer must act to ensure that the right is secured; and negative rights in the sense that the duty-bearer completes its obligation by merely refraining from interference with the rights. See Gewirth, A. (1996), p. 32.} The dialectical argument provides an interesting contribution to the rights discourse, particularly in the area of economic, social and cultural rights. Gewirth specifically notes that the PGC is particularly focused on economic and social rights due to the “severe problems throughout the world” that are the
result of a lack of protection for said rights. Economic, social and cultural rights are just as important as political and civil rights in that all are required to truly exercise freedom and well-being, the fundamental components of successful action.\textsuperscript{102}

With regard to the discourse between private actors and human rights obligations, the PGC provides a consistent justification for resolving disputes of responsibility. Just as individuals have requirements for successful action (freedom and well-being), so too do corporations and other private actors. Most corporations require market stability and autonomy by which to conduct business and satisfy shareholder expectations. Although the specific needs differ between individuals and corporations, the fundamental components of freedom and well-being are fundamental for both types of rational actors, whether they be individuals or groups of individuals. Just as a corporation has the right to prosper by its proprietary operations, individuals and communities also have the same expectation. Extractive corporate operations, and policies that restrict the enjoyment of rights prevent individuals and communities from enjoying freedom and well-being. As previously stated, it is against rationality for one agent to recognize the need to exercise agency while restricting those same needs for other agents. Although it could be argued that corporations are not rational at all,\textsuperscript{103} it is very clear that such entities have certain fundamental needs just as do individuals, albeit with varying scopes. Gewirth's justification on the rights discourse, however, has been met with heavy criticism by thinkers such as Robert Nozick,\textsuperscript{104} Douglas Husak,\textsuperscript{105} and, most notably, Alasdair MacIntyre.\textsuperscript{106} Nozick attacks Gewirth's theory claiming that it is merely a "utilitarianism of rights " (that is, human rights are utilitarian rather than fundamental and universal). This critique is a misrepresentation of what is

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clearly a rational basis for the universal goods that allow us to exercise our agency: freedom and well-being. Using the PGC, we are able to rise above the critique of utilitarianism. Much like Kant’s consequentialism, the PGC does not state that the generic rights of freedom and well-being are good because they maximize happiness. While freely exercising our human agency would seem to have the side-effect of happiness, it is not good for this reason alone. They are good because they are fundamental to living our lives.

While attempts have been made to rectify tensions between consequentialism and utilitarianism, it is important to note that PGC has its emphasis on rights as universal. If human rights are going to be grounded in utilitarian principles, it seems that we leave ourselves vulnerable for justifying a scenario that yields more happiness via the absence of rights protection. Just as we can say that there is a “culture of human rights” due to the expansion of international human rights law and high country ratification rates, perhaps, for the sake of argument, we can also imagine a world where the antithesis resides: absence of human rights protection yields more happiness. In the realm of the right to development, we can see that perhaps governments and majority populations might not be maximizing their happiness when they are forced to recognize minority cultural rights, for example. However, in the long term everyone’s rights are strengthened by such recognition and protection. The governing principle behind this, however, is not maximizing happiness but rather increasing the universal freedoms that we enjoy by being humans (and have been recognized via international covenants). As rational beings, we seek things that allow us more easily to exercise our agency. The utilitarian principles dictate that happiness (or satisfaction of preferences) is the end which we should all pursue; however, with a foundation in a more rational absolute overarching theory, such as ethical rationalism, we are able to say that even though happiness is maximized, we are not promoting universal human rights.

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Moving to a more specific attack against the PGC, Douglas Husak used Gewirth’s argument to show that there are no such things as human rights of any kind. Husak makes the distinction between humans and persons with regard to agency arguing that under PGC, persons without the any capacity for agency (for example, severely mentally handicapped or persons in a vegetative state) would be considered non-persons and left without rights.\(^{109}\) Throughout history, we have seen human rights being violated on the grounds that one group is less human than another group (for example, slavery) by divine design. The universality of human rights is what makes it distinct from other attempts at prescribing rights to society while neglecting those seen as lesser so (for example, European explorers’ discovery of the “New World” and treatment of indigenous populations).\(^{110}\) PGC is applicable to all persons (humans), active or perspective, regardless of their mental capacity. The fundamental rights apply to everyone equally.\(^{111}\)

The discourse between MacIntyre and Gewirth is of significance due to its focus on goods and rights, and the general struggle of philosophers to argue rationally for the existence of universal rights. Although MacIntyre was a staunch opponent of Gewirth, he noted that his Principle of Generic Consistency was perhaps the best attempt at a theory and justification for universal human rights, should such a concept exist. Particularly in the rights discourse, MacIntyre has been a stiff opponent of universality. His justification for a lack of universal rights is based on a premise that since no language had a word for right until around 1400, universal human rights cannot exist.\(^{112}\) If this were true, there would be no ancient duty to not steal, which implies the right to private property.\(^{113}\) Perhaps even more telling is the Magna Carta, with its

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inclusion of many rights that remain fundamental to this day. Habeas corpus, for example, is implicit in Article 39:

No man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.\textsuperscript{114}

Although the Magna Carta was not a modern human rights document in terms of universal rights for all, it is regarded by some as a legal document to incorporate rights into a binding agreement between a government, King John, and its people subsequently becoming an important component of the modern rights discourse in England.\textsuperscript{115} As Michael Freeman points out, the Magna Carta was a precursor to modern human rights texts and provided certain rights beyond the ruling class, which later provided legitimacy for claims of a more complete set of rights.\textsuperscript{116} In the 16\textsuperscript{th} Century, Hugo Grotius further bridged the gap between the Magna Carta and what would become the contemporary rights language through \textit{ius}, the concept of both having rights and respecting the rights of others,\textsuperscript{117} a notion consistent with Gewirth’s Principle of Generic Consistency.

MacIntyre challenges the existence of human rights, and Gewirth’s justification on several levels. With respect to the fundamental aspect of Gewirth’s argument, the PGC, MacIntyre challenges the jump from \textit{generic goods} to \textit{generic rights}, saying “Freedom and well-being are necessary goods; therefore, I have rights to freedom and well-being.”\textsuperscript{118} The need or want for something, according to MacIntyre, does not necessarily yield a right. Furthermore, he

\begin{footnotesize}
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\item \textsuperscript{114} Accessed 20 October 2009 at http://www.fordham.edu/halsall/source/magnacarta.html
\item \textsuperscript{115} It should also be pointed out that the “Cyrus Cylinder,” which predates the Magna Carta, has also been described by some as the first human rights charter. Accessed 11 August 2012 at http://www.britishmuseum.org/explore/highlights/highlight_objects/me/c/cyrus_cylinder.asp
\item \textsuperscript{116} Freeman, M. (2004), p. 168.
\item \textsuperscript{117} \textit{Ibid.}, p 18.
\item \textsuperscript{118} Gewirth, A. (1978), p. 64.
\end{itemize}
\end{footnotesize}
claims that such claims presuppose social norms and have no place in the
discussion of requirements of rational agency (freedom and well-being).119
Those in opposition to Gewirth have gone to such lengths as to claim that
human rights are no more real than witches and unicorns.120 As Freeman points
out, the fallacy of MacIntyre’s argument is that it perceives human rights as
“things that we could have” just as we have limbs or material possessions.
Rather than being superstitions, human rights are actually just claims derived
from moral and legal rules.121 Gewirth proposes—consistent with the modern
international human rights framework—that rights exist for all persons and
are a fundamental component of increasing one’s quality of life. This relativism
takes us to the point that human rights are only important to societies that
deem them necessary and good. MacIntyre sums this up with an economic
analogy: “The making of a claim to a right would be like presenting a check for
payment in a social order that lacked the institution of money.”122

While relativism is a legitimate critique when discussing justifications for
human rights, universalism is enshrined in both hard and customary
international law, representing a general consensus on the issue.123 From a
philosophical perspective, it is certainly less deliberative to state that rights are
relatively based on the society in which one resides. In practice, however, it
seems much closer to reality that there exists a set of universal goods that may
be exercised differently based on the culture.124 In terms of the right to
development, it would seem difficult for anyone, including MacIntyre, to
effectively argue against the right to self-determination without creating a
straw man that classifies rights as material objects. If we are to think of rights
as something that we can stumble upon at the end of a rainbow, and put in our
pockets, then it would seem that MacIntyre has effectively wounded the
argument for the existence of universal human rights. However, this is not the
rights framework that has been expanded since 1948. Human rights, according

120 Ibid., p. 69.
122 Ibid., p. 67.
124 Ibid., p. 27.
to Gewirth’s theory, are necessary for moral action.

Gewirth’s response\textsuperscript{125} to MacIntyre’s criticism begins with the absurdity of the comparison between unicorns and rights. Rights are “normative entities” and have “empirical correlates” (such as social recognition and legal enforcement). Unicorns, however, have no “empirical correlates” to hint at their existence. In other words, we cannot see unicorns or witches but we, as humanity, have certainly seen actions that violate human rights (for example, murder, torture and disappearances in Chile during Pinochet dictatorship) and a subsequent foundation for promoting the protection of such rights. Quantitatively, there are also clear examples of human rights norms being socially accepted across cultures (for example, universal suffrage), leading to a more substantial international human rights regime. Landman has empirically shown that the acceptance of such norms, via state party ratification, has indeed led to an increase in human rights protection. Other research shows that states that have ratified the core human rights covenants are more likely to ratify future human rights instruments, although Heyns and Viljoen are critical of this view in that ratification does not necessarily yield increased human rights protection at the national level.\textsuperscript{126}

While the step from Gewirth’s necessary goods to fundamental human rights has been criticized, it is based on the claim that human agency requires certain conditions. Without these conditions, a person (or group) is not able to exercise their agency. If freedom and well-being are the necessary conditions by which an agent may act, it follows that the agent has a right to such conditions. In the context of the right to development, certain requirements are needed to enjoy the full realization of human rights. As Amartya Sen points out, free agency is a


\textsuperscript{126} See Landman, T. (2005). Although Landman shows an increase in human rights protection due to increased ratification, Heyns and Viljoen do not, however reach the same conclusion. They argue that mere ratification is nothing without meaningful implementation of international human rights instruments. While ratification numbers may be rapidly increasing, human rights violations are not decreasing at the same rate. See Heyns, C., and Viljoen,F. (2001), p. 483-535.
“constitutive part of development.” Freedom and development are so intertwined that one cannot thrive without the other. Without the ability to make decisions that one feels are the best to advance one’s capabilities we can never truly realize human rights. As Gewirth supports, an absence of oppression within the lives of individuals and groups advance their dignity and ability to determine the direction of the future. Freedom is the most integral of parts in the discussion of development, as outlined by Professor Sen. This also rings true with the right to development and economic, social and cultural rights.

The capabilities theory, developed by Sen, offers great insight as to the importance of freedom as the fundamental component of development. Serving as the foundation of the human development index, we can see that the relevance in the rights discourse cannot be overlooked. As humans share various capabilities, the meaning of a good life is the freedom to exercise those capabilities. Human rights, if you will, set the rules that remove oppression from the equation. This freedom allows us, as members of the global community, to exercise our agency for the purpose of expanding our capacities or development. We can also say that human rights violations contribute to capacity deprivation, much in the same way that Sen described poverty. Removing the barriers to the full realization of human rights, including the right to development, allows us to live a life of dignity. Just as certain conditions are necessary for exercising human agency, a certain environment is also required for the full realization of human rights. Such a condition is strengthened through the right to development. Without “self-determination,” as described in the core human rights instruments, human rights, including the right to development, cannot fully be recognized.

While one may semantically critique the use of freedom and well-being, they remain true to the spirit of fundamental human rights laid out in Article 1 of the

128 Ibid, p. 87.
UDHR\textsuperscript{129} and in the core of international human rights covenants.\textsuperscript{130} This foundation for human rights consists of two fundamental strengths;\textsuperscript{131} universality and generally agreed upon premises. The argument set forth applies to all humans as “actual, prospective, or potential agents.”\textsuperscript{132} Such an assertion sets the foundation of universal human rights, applying to all human beings regardless of their mental or physical state (for example, persons in a vegetative state remain protected by rights). Christine Korsgaard affirms the assumption of universality in the realm of ethical rationalism by expanding on Kant. She argues that ethics is actually based on practical reasoning, allowing it to be objective and universal,\textsuperscript{133} which is consistent with international human rights. Such a stance removes any necessary appeal to metaphysical assumptions. The argument may also prove helpful in justifying accountability of non-state entities (such as TNCs as agents of development). The fundamental premises that are presented also shape an argument that is generally accepted.

Using Gewirth’s PGC and the fundamental rights of \textit{freedom and well-being}, it is maintained that development and human rights are both necessary goods, and, subsequently, we are able to make claims that such rights are fundamentally required to exercise human agency. While Gewirth did not directly visit the issue of development, it is consistent with both his theory and the preexisting international human rights framework. From this step, we are able to progress to the argument of development’s inclusion as vital to human rights. Development cannot be achieved without human rights protection, and human rights cannot truly be realised without development.\textsuperscript{134} The values and goals of the two themes are complementary and strive to achieve the goal of increasing

\textsuperscript{129} “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Accessed 15 August 2009 at http://www.un.org/en/documents/udhr/index.shtml#a1

\textsuperscript{130} Particularly the emphasis on "self-determination" in both the ICCPR and ICESCR (Article 1, para. 1)


\textsuperscript{132} Gewirth, A. (1978, p. 64).


the quality of life.

Since Aristotle, thinkers have debated about what it means to live a “good life.” Their discussions on what means we ought to pursue to achieve the ultimate good remains a relevant topic in the rights discourse. Development is a means in the sense that one’s fundamental human rights cannot be fully exercised in its absence. Development has also been classified as an end in the sense that if sustainable development is achieved, it would follow that such an event would be accompanied by human rights protection. Human rights protection cultivates an environment in which persons may act freely for so long as they do not infringe on the rights of others, increasing the quality of life for everyone. With freedom and well being as a strong foundation, we can advocate for human rights, especially the right to development, as having a vital role in fostering sustainable economic and social growth.

While the principles of economic development and human rights are complementary and necessary, the next step is to apply the right to development discourse as human rights in the context of development via a Rights Based Approach (RBA) that considers both State and non-State activities and subsequent obligation. Although it seems plausible that implementing human rights into developmental projects would be a productive, institutional barriers would certainly accompany such a transition. Just because something is good does not make it easily implementable. Since human rights cannot truly be realized without identifying the right to development as an integral

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The definitions of development, sustainable development, and human development are not conflicting terms. It is the perspective of this research that the terms are consistent and reinforce the consensus of a human rights based approaches to development.

necessary component, it is important that we do not dilute or sacrifice human rights to make them applicable in the realm of developmental projects. We are able to remain true to both the normative spirit and letter of international human rights law in the quest for increased human rights protection.

1.3 Legal Decisions Regarding the Right to Development

The case law regarding the right to development under the ICCPR — and reports by the Covenant’s monitoring body, the Human Rights Committee (HRC) — provides a significant enhancement to the claim that development is part of, and a necessary component to, international human rights protection. The first instance of the HRC examining claims of State party violations of Article 1 was with Mikmaq v. Canada.137 In that claim, the Mikmaq Tribe had been deprived of its right to self-determination due to the Canadian government’s implementation of policies that were “destructive of the family life” of the tribe. Making the jump between individual rights and collective rights, the Committee followed a 1998 ruling by the Canadian Supreme Court regarding the separation of Quebec. In that ruling the court acknowledged that a state might contain more than one ‘peoples.’138 The ruling acknowledged that all peoples (for example, distinct indigenous groups) within the state borders have the right to self-determination, as noted in Articles 1(1) and 1(2) of the ICCPR that articulates the economic component of development, set out the free use of a country’s “natural wealth and resources” by its peoples with regard to indigenous communities. Although the Court affirmed the right to self-determination, which continues to be used by the HRC in subsequent reports, it ruled that the Quebec secession was a political issue rather than an appeal grounded in international law.139

137 “Human Rights Committee observes that the author has not proven that he is authorized to act as a representative on behalf of the Mikmaq tribal society. In addition, the author has failed to advance any pertinent facts supporting his claim that he is personally a victim of a violation of any rights contained in the Covenant.” Mikmaq v. Canada, supra.
139 ... “in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire...”
Although the First Optional Protocol of the International Covenant on Civil and Political Rights (OP1-ICCPR) states that cases may not be brought directly under Article 1, Article 27 has proved to be substantial in bringing forth cases involving violations to a people’s right to self-determination, the foundation to the right to development. One of the most progressive decisions deals with New Zealand and the Maori indigenous population’s access to territorial lands. The Maoris claimed that the Treaty of Waitangi (Fisheries Claims) Settlement Act deprived them of their fishing resources, denied them their right to freely determine their political status, and interfered with their right to freely pursue their economic, social and cultural development. It submitted that the Settlement Act of 1992 was in breach of the State party’s obligations under the Treaty of Waitangi. The Maoris maintained that the right to self-determination under Article 1 of the ICCPR was only realized when people had access to and control over their resources. Referring to Mahuika et al. v. New Zealand, the HRC interpreted the relationship between Article 1 and Article 27 of the ICCPR as being interdependent, bridging the gap between human rights and development. Although the Committee recognized the interdependence of the two Articles in Lubicon Lake Band v. Canada, the Mahuika Case resulted in the formal recognition of the relevance of self-determination (Article 1) in interpreting Article 27.

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140 Sen (1999) classifies expanding freedoms as both the primary end and the principal means of development (p. 36).
142 Apirana Mahuika et al. v. New Zealand, supra. Para. 9.3 of the Committee’s observations states that “In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community.”
143 Lubicon Lake Band v. Canada, supra. Paragraph 32.2 states that, “Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.”
144 Apirana Mahuika et al. v. New Zealand, supra.
In 2002, the HRC discussed a case regarding Article 25 of the ICCPR, allowing elaboration on the HRC’s Mahuika decision that Article 1 has an impact on the interpretation of other articles. Marie-Hélène Gillot claimed that a 1998 referendum held in New Caledonia included criteria which violated Articles 25 and 26 of the ICCPR. In paragraph 13.4, the HRC reiterated the importance of Article 1 as a lens to interpret other claims:

Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, it may interpret Article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take Article 1 into account in the interpretation of Article 25 of the Covenant.

The use of Article 1 in a claim regarding the right to suffrage and prohibition of discrimination allowed an indirect application of Article 1, and strengthened the jurisprudence on the right of self-determination. Although the Committee ruled that no violation of Article 25 occurred in Marie-Hélène Gillot’s complaint against France, the continued reliance on Article 1 had positive implications, the greatest being the strengthening of the right to development, via self-determination, in human rights law. These cases reflect the consensus of the international community on the extent to which the right to development is a fundamental part of the human rights discourse, linking economic, social and

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146 “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.”
cultural rights with civil and political rights.\textsuperscript{149} What remains to be seen is how the right to development can be upheld as a fundamental human right without appealing to self-determination under the ICCPR. There will certainly be changes with the adoption of additional legal mechanisms, such as the Optional Protocol to the ICESCR, that establishes a complaint mechanism to better address collective rights violations; however additional approaches may also prove successful in filling such gaps.

While the aforementioned cases reference the core international human rights covenants, regional human rights mechanisms also play a vital role in grounding development in the current human rights framework. These mechanisms will prove vital to this research’s proposed contracts between regional institutions and private actors. The following paragraphs deal with the human rights mechanisms of the Americas, Europe and Africa, and subsequent cases heard before their respective human rights courts. These cases highlight the effectiveness of regional mechanisms to protect and promote international human rights through a more localized system. By transitioning to a more regional focus to human rights protection, we can more effectively and efficiently respond to systematic violations committed by State and non-state actors. This is made possible by the increased regional integration that continues to gain momentum in both trade and human rights protection. The robust regional human rights mechanisms, those currently in place, such as OAS, as well as those recently created, such as UNASUR’s proposed human rights body, provide a solid foundation by which to address the role of human rights principles within the right and process of development.\textsuperscript{150} As noted by the United Nations’ High Level Task Force on the Implementation of the Right to Development:

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In addition to the human rights norms and these principles, there are at least\end{flushright}


two other aspects that are central in the conceptualization of the right to development and the policy framework that it supports. The first of these is the emphasis on the notion of the indivisibility of human rights - civil and political, as well as economic, social and cultural - and the second is the importance of international cooperation in the implementation of the right to development. The universal acceptance and the legal commitment of States to respect, protect and fulfill human rights and the recognition of the indivisibility of human rights, intrinsic to the notion of the right to development, create the framework for bringing greater coherence, coordination and cooperation to the development process. The right to development emphasizes an international environment that facilitates development through a supportive and non-discriminatory trade regime, access to technology and capital, more participatory decision-making concerning the rules governing the process of economic globalization and, where required, adequate development assistance to developing countries. It requires the obstacles impeding the full realization of the right to development to be identified and addressed.

Examining the work of Vandenhole, including the larger work of the High Level Task Force, on the issue of human rights law and the right to development, it is paramount that the regional human rights mechanisms be considered as a powerful tool for realizing the right to development and their ability to more better adapt to issues that traditionally afflict the international human rights regime at the global level due to the common values and cultures that bind the regional members. The regional institutions that are currently in place provide an excellent opportunity to develop innovative strategies, which take into account local characteristics that encourage sustainable development and human rights protection by both State and non-state actors.

1.4 Regional Mechanisms

Americas

The American Convention on Human Rights (Pact of San José) was adopted in San José, Costa Rica, in 1969, and came into force after the eleventh ratification on 18 July 1978. The objective of the Convention was to strengthen rights protection in the region. Although the Convention itself relies on only political and civil rights, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador) was opened for signatures on 17 November 1988. This additional protocol advanced the Inter-American human rights system by including protection of so-called “second-generation rights.” The protocol, which came into effect on 16 November 1999, fortified the states’ duty to protect the right to work, the right to health, the right to food, and the right to education, all fundamental for the full realization of the right to development.

In the landmark decision of Velásquez Rodríguez v. Honduras (1988), the Inter-American Court of Human Rights ruled on political disappearances to the extent of visiting the controversial theme of private persons and their role in human rights violations, which relates to the more general discussion of corporate legal accountability. Although the case itself did not visit the explicit issue on the right to development, the decision delved into the issue of “due diligence” with regard to private actors and human rights violations.

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154 Paragraph 172 of the Court’s ruling states that, “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.” The African Charter’s human rights commission reiterated this decision case in their ruling of The Center for Economic and Social Rights (on behalf of the Ogoni People) v. Nigeria People v. Nigeria: “The Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized, it would be in clear violation of its obligations to protect the human rights of its citizens,” para. 57.

something of interest for the discourse of providing alternative remedies for rights protection from corporate violations within the context of development. Manfredo Velasquez, a student at the National Autonomous University of Honduras, was secretly detained and tortured by the National Office of Investigations (DNI) and the Armed Forces of Honduras on 12 September 1981 for allegedly committing political crimes. The Commission submitted the case on the grounds that violations had occurred with respect to Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty).

The government of Honduras requested that the case not be heard due to the fact that all “domestic remedies had not been exhausted.” The government argued that the National Office of Investigations, the group that allegedly kidnapped Mr. Rodríguez, had no knowledge of his whereabouts, adding that intelligence reports suggested that he was among “Salvadoran guerrilla groups.” This was certainly not the first instance of disappeared persons being linked to guerrilla groups during military regimes in Latin America as a form of justification for systematic disappearances (for example, Pinochet dictatorship in Chile from 1973 to 1990).

It should be noted that this case dealt with State responsibility to deal with private actors violating human rights.

Throughout this research, emphasis is put on ensuring human rights protection for corporations operating in developing countries. Such a focus is taken for several reasons. One is able to more clearly see the influence of external influences, particularly the presence of private and international development institutions. In addition, the condition of development provides a more malleable context by which to implement innovative alternatives to traditional methods of human rights protection. As development often includes lesser-established internal institutions, we are able to see results (both positive and negative) of initiatives. For this research, developing countries also seem to be the predominate locations for extractive operations which rely largely on private enterprise for implementation. Such a setting provides for real world possibilities of implementing the alternative solutions proposed in this research. This author has worked with corporate energy conglomerates in Hawaii to ensure cultural rights are protected amidst corporate energy projects in a way that promotes the private sector without sacrificing ESC rights.

Velásquez Rodríguez v. Honduras, supra, paragraph 5.

Ibid.

According to the Chilean Truth and Reconciliation Report (Rettig Report), 2,270 persons were killed or disappeared during military rule. In 2005, The National Commission on Political Imprisonment and Torture Report, known as the Valech
As the Velásquez Rodríguez case continued before the court, several witnesses against the government also unexpectedly could not be contacted and were later found dead. Despite such occurrences, the court eventually found that the government of Honduras had carried out systematic arrests and torture of political dissidents, suspending the right to due process.\footnote{Velásquez Rodríguez v. Honduras, supra, 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), paragraph 82: "The Commission presented testimony and documentary evidence to show that there were many kidnappings and disappearances in Honduras from 1981 to 1984 and that those acts were attributable to the Armed Forces of Honduras, which was able to rely at least on the tolerance of the Government."} The case ruled unanimously against Honduras, stating that the following had been proven: “1) a practice of disappearances carried out or tolerated by Honduran officials existed between 1981 and 1984; 2) Manfredo Velásquez disappeared at the hands of or with the acquiescence of those officials within the framework of that practice; and 3) the Government of Honduras failed to guarantee the human rights affected by that practice.”\footnote{Velásquez Rodríguez v. Honduras, supra, paragraph 148.} This case illustrates the capacity of regional institutions to handle human rights violations. The relevance to the right to development is that the State, as the primary actor in international law, has an obligation to protect human rights, via legal commitments, within its territory.\footnote{See U.N. Human Rights Comm., General Comment No. 23(50): The Rights of Minorities (Art. 27), para. 6.1, UN Doc. CCPR/C/21/Rev.1/Add.5 (6 April 1994).} The importance of this case to this research is, first of all, to demonstrate the capacity of regional mechanisms to handle the proposed contracts which will be discussed later in the work. Secondly, this case discusses private actors and their ability to violate human rights. As this research deals with the protection of human rights by non-State actors, the Velásquez Rodríguez case contributes to the progression of the discourse in a secondary manner. The next step is the use of regional mechanisms to promote State obligations in the enforcement of economic, social and cultural rights and the right to development, allowing for a more localized response to “second” and “third generations” rights violations.
Following the Honduras case, the regional human rights court established its presence in the area of social, economic and cultural development regarding a collective rights claim against Nicaragua. It was the first case in which an international tribunal with legally binding authority found a government in violation of the collective land rights of an indigenous group. In *Mayagna (Sumo) Awas Tingni community v. Nicaragua,* the Inter-American Court set a precedent for the rights of indigenous peoples in international law by ruling that Nicaragua had violated the rights of the Mayagna community of Awas Tingni. The government of Nicaragua granted a logging concession within the community’s traditional territory without the community's consent, ignoring requests by the Awas Tingni community to clearly mark their traditional territory. The Court found that the right to property, detailed in Article 21 in the Inter-American Convention on Human Rights, protected the traditional land tenure of indigenous peoples. The Inter-American Commission on Human Rights relied heavily on Article 27 of the ICCPR, while the Court relied almost entirely on Article 21 and Article 25 (Right to judicial protection). Although the judgment cited the violations of Articles 21 and 25, the Court made it clear that the right to development can be achieved within the current human rights framework. Even though the case was decided in 2001, the Awas Tingni’s

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163 Article 33 of the Inter-American Convention on Human Rights, adopted 22 November 1969, established the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights to monitor State party obligations.

164 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* supra.

165 Paragraph 140 of the Court’s ruling: “Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.” By confirming the plaintiff’s right to the land, the Court re-enforced the spirit of the right to development by linking the sustainability of the culture to the right to traditional lands and natural resources. This decision also reinforces the notion of freedom and well-being, as defined by Gewirth, as the fundamental ideals within the right to development.

See Kingsbury, B. (2001) “Reconciling Five Competing Conceptual Structures of...
lands were not officially handed over by the government of Nicaragua until December 2008. Despite issues of implementation, the Court’s decision further strengthened the view that self-determination is fundamental to the right to development and protected by the ICCPR and ICESCR via common Article 1(2). As Sengupta has pointed out, the right to development is the means and the end of human rights. The Mayagna decision affirms the interrelatedness of the international covenants as well as the ability for regional mechanisms to provide a binding decision on human rights violations. This is vital to enforcing contracts proposed by this research as a means of filling the gap of international human rights law regarding TNC accountability.

Europe
Perhaps one of the most advanced of the regional human rights systems is the European Convention on Human Rights provided under the Convention for the Protection of Human Rights and Fundamental Freedoms signed in 1950 under the authority of the Council of Europe. The Convention established the European Court of Human Rights, which has served to further elaborate the Convention’s commitment to the right to development via Article 8 (Right to private life, family and home) and the larger contribution to strengthening the


166 Article 1, para. 1 and 2 of the ICCPR and ICESCR state “1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.” Accessed 27 December 2011 at http://www2.ohchr.org/english/law/ccpr.htm and http://www2.ohchr.org/english/law/cescr.htm


168 It should be noted that the reference to Awas Tingni, rather than the cases that followed concerning indigenous rights, was to reflect the institutional recognition of rights of native populations and the regional body’s ability to handle issues of human rights violations committed by both State and private entities. The institutional capacity to implement and enforce human rights principles is the key to each of the cases presented here. Although the international legal aspects are certainly crucial, this research advocates for parallel and alternative approaches to increasing human rights protection. One such way is through contractual agreements between national/regional institutions and multinational corporations.

169 ETS 5; 213 UNTS 221
fundamental principles expressed in the Universal Declaration of Human Rights (UDHR). The European Union’s commitment to achieving sustainable development and advancing the right to development was reaffirmed by the Permanent Delegation to the UN.

Under the European Convention on Human Rights, three landmark cases reinforce the right to develop under the auspices of environmental protection using Articles 8 (Right to private life, family and home) and 9 (Right to religion, individually or in the context of community). In the 1982 Alta River Dam Case (G and E v. Norway), the Sami people, an indigenous community, claimed that their rights as a community were violated after the government submitted a plan to create a dam and hydroelectric plant. The resulting artificial lake would flood the Máze village. The Sami people claimed that the government’s plan would result in the destruction of the indigenous land and interruption of reindeer and salmon populations, explicitly violating their right to private life, family and home. Although unsuccessful in its complaint, the case led to many long-term gains for the Sami people. In 1990, Norway recognized the Sami people as an indigenous community following the country’s adoption of ILO Convention 169. In 2005, the Finmark Act created a protected territory

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173 Entered into force 5 September 1991. Article 7, para. 1 states: “The peoples concerned shall have the right to decide their own priorities for the process of
for the Sami people, providing unrestricted use of traditional lands to maintain the communities’ customary lifestyle. This case is crucial to the larger context of the right to development as the reasoning provides a foundation upon which future cases could rely, particularly with regard to protecting individual rights in the context of indigenous communities under Article 8 of the European Convention on Human Rights.

In López Ostra v. Spain (1994), Mrs. López Ostra filed a complaint with the European Human Rights Commission after a Spanish court ruled that although the operation of a leather factory could unquestionably cause a nuisance due to smells, fumes and noise, it did not constitute a serious risk to the health of the families living in its vicinity. The decision noted that while such instances impaired their quality of life, it was not enough to infringe the fundamental rights claimed. Mrs. Ostra and her family lived close to a leather factory that received many complaints from community residents. Following reports from the Environmental and Nature Agency that the plant was in fact causing contamination, regional authorities ordered the plant to cease all operations except for treatment activities. Mrs. Ostra’s appeal stated that the ongoing operations were “an unlawful interference with her home and her peaceful enjoyment of it, a violation of her right to choose freely her place of residence, attacks on her physical and psychological integrity, and infringements of her liberty and her safety” under Spain’s constitution. In an appeal, Mrs. Ostra claimed a violation of Articles 3 (Right against inhuman treatment) and 8 (Right to private life, family and home). The European Human Rights Court ruled unanimously that Article 8 had been violated, stating that although the municipality was responsible for allowing the plant to operate, the Spanish government was subsidizing the plant, making it a culpable party. As

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174. Human Rights and the Right to Development


López Ostra v. Spain, supra.
the location was near a residential neighborhood, the Court ruled that the state did not balance economic stability with the protection of individual rights.

In Hatton and Others v. United Kingdom (2001), the European Court of Human Rights found there to be a violation of Article 8 (Respect for private and family life) of the European Convention on Human Rights although the ruling was later overturned in 2003.176 Eight UK nationals and members of the Heathrow Association for the Control of Aircraft Noise (HACAN), a member of the Heathrow Airport Consultative Committee, argued that the noise levels from Heathrow flights caused great discomfort and a decrease in the quality of life. Many residents were forced to wear ear protection inside their home due to negligence of airport officials to alternate runways. The dissenting opinion not only called for the importance of reading the European Convention with contemporary considerations (that is, international law is flexible depending on the existing issues at hand) but also the role of non-legally binding norms in clarifying principles regarding protected rights.177 Following the implementation of a “noise quota,” residents noticed an increase in noise during late night-early morning hours. The applicants stated that the noise pollution interfered “with their right to respect for their private and family lives and their homes, guaranteed by Article 8 [of the European Convention on Human Rights].”178 The Court ruled in accordance with the Ostra case that the government has the duty to balance individual rights with the economic interest of the country. Although the operation of Heathrow airport was vital to the country, both in terms of travel and cargo, the State had the obligation to seek the economic interests without violating fundamental human rights, particularly Article 8 of the Convention. Despite the overturning of the 2001

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176 Hatton et al v. United Kingdom, supra.
177 2003 Ruling, Dissenting Opinion, p. 41. Reference was made to the fact that during the creation of the ECHR, environmental protection was not discussed in the context of human rights. That being said, the spirit of the Convention does encompass such rights. Accessed 30 March 2011 at http://www.minorityrights.org/download.php?id=221
ruling, the judgment outlined the role of human rights assessments with regard to government projects, a fundamental component for reducing human rights violations by both governmental and non-governmental operations.179

Africa

Other legal precedents involving the right to development have been decided under the authority of the African Charter on Human and Peoples’ Rights (African Charter),180 which includes the standard safeguarding of individual human rights as well as an emphasis on peoples’ rights. Articles 21-24 of the African Charter are relevant to the discussion of development and collective rights. Article 21 refers to the economic dimension of self-determination181 as seen in the ICCPR, while Article 22 explicitly outlines the right to development182 while the two International Covenants (ICCPR and ICESCR) and relevant Committee observations simply reference the spirit of the right to development within the discussion of self-determination. Articles 23 and 24 of the Charter protect the right to peace and security and a satisfactory environment “favorable to their development.” While other international charters protect development more abstractly, the African Charter clearly states

179 Although the 2001 ruling noted the importance of human rights assessments within the realm of development projects with environmental implications, the general spirit of the Court’s comments also has implications with regard to the general argument for a rights-based approach to development. “In the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country was not sufficient to outweigh the rights of others. States were required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which would, in reality, strike the right balance, should precede the relevant project.” The use of environmental and social impact assessments is also advocated in Special Rapporteur John Ruggie’s report on the UN “Protect, Respect and Remedy” Framework. Accessed 21 May 2012 at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (p. 17).
181 Paragraph 3: “The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.”
182 Paragraph 1: “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.” Paragraph 2: “States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”
the right to development and the rights of peoples less ambiguously. The use of such Articles is clearly represented in *The Social and Economic Rights Action Center and the Center for Economic and Social Rights (on behalf of the Ogoni People) v. Nigeria* that was decided by the African Commission of Human and Peoples’ Rights in October 2001. The case has also proved fundamental in recognizing the ability of corporate actors to affect the human rights realities:

The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoni land. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.

This case involved the Nigerian government's direct involvement in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC). The plaintiffs claimed that these operations had caused environmental degradation and health problems resulting from contamination of the Ogoni People’s land. Additionally, the oil consortium exploited oil reserves in Ogoniland with complete disregard for the health and environment of the local communities by disposing of toxic wastes into the surrounding land and waterways. While the Commission found that the Nigerian government violated Articles 2, 4, 14, 16, 18 (1), 21 and 24 of the African Charter, Articles 21 and 24 are the most relevant with regard to the

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184 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, supra. Although this statement recognizes the state’s ultimate obligation to protect human rights, the comments are productive to the discourse in that they recognize the ability for private actors to negatively impact the human rights of those within project zones.

185 Rights to non-discrimination; life; property; health; family; use of wealth and natural resources; and environment favorable to development, respectively.
right development. In the *Ogoni* ruling, the Commission cited two landmark cases, both decided in regional human rights courts: *Velásquez Rodríguez v. Honduras*\(^{186}\) as well as *X and Y v. Netherlands*\(^{187}\) regarding the State’s duty to protect its citizens via legislation and enforcement, including damaging acts carried out by private parties.\(^{188}\)

Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velásquez Rodríguez v. Honduras*. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the State is further emphasised in the practice of the European Court of Human Rights, in *X and Y v. Netherlands*. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not

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\(^{186}\) The Inter-American Court of Human Rights stated that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized, it is a blatant violation of its obligations to protect the human rights of its citizens.

\(^{187}\) The European Court of Human Rights pronounced that there was a state obligation to ensure that any other private person does not interfere with the enjoyment of an individual’s rights. In *X and Y v. Netherlands* (1985), the father of a mentally handicapped daughter filed a complaint against the Netherlands claiming that Articles 3, 8, 13 and 14 of the Convention were violated after authorities ignored allegations of rape against the child. The European Court ruled Article 8 had been violated (Right to private life, family and home), upholding the Convention’s emphasis on family. Article 8 was later used to include protection of particular lifestyles of minority groups, creating a stronger argument for development rights under the European Convention on Human Rights. Accessed 30 March 2011 at http://www.juridischeuitspraken.nl/19850326EHRMXenYtegenNederland.pdf

interfered with by any other private person.189

In the Ogoni Case, the African Commission recognized that collective development depends on other human rights, particularly the right to a satisfactory environment and the right to health. The Nigerian government violated, inter alia, the right of “all peoples” to “a general satisfactory environment favorable to their development”190 in accord with corporate actors.

The African Charter provides a more explicit view on the right to development compared to other legally binding conventions and, in conjunction with HRC observations, creates legal precedents in protecting that right. After reviewing several landmark cases under the regional human rights frameworks of the Americas, Europe and Africa we are able to see a trend in the evolving role of development within international law as well as the capacity of regional instruments. The right to development as a vital part of the human rights framework is well defined in existing literature, albeit lacking with regard to the role of non-state entities. Article 24 of the African Charter clearly states, “All peoples shall have the right to a general satisfactory environment favourable to their development.”191

The inclusion of the right (and process) to development calls for a change with regard to development practices. By building on the strong regional integration that continues on a global scale, the adoption of a rights-based approach (as opposed to a charity-based approach) allows us to make the connection fully between the theory and practice of human rights and the right to development. If development and human rights are inseparable, considerations must be given as to how to best implement human rights in the context of development, which includes how to best handle human rights protection by private actors.

190 Article 24, African Charter on Human and Peoples’ Rights [ACHPR]
1.5 Rights-based Approach to Development

In the Declaration on the Right to Development (1986),\textsuperscript{192} the UN sought to further strengthen the connection between the right to development and the human rights principles outlined in the UDHR and other legal instruments.\textsuperscript{193} Although declarations are not legally binding,\textsuperscript{194} they do provide a more in-depth understanding as to the relationship between development and human rights. While human rights and the process of development are distinguishable, they are inseparable and neither can be fully realized without the other, according to a leading thinker on the subject.\textsuperscript{195}

Mary Robinson succinctly stated that:

> Poverty eradication without empowerment is unsustainable. Social integration without minority rights is unimaginable. Gender equality without women's rights is illusory. Full employment without worker's rights may be no more than a promise of sweatshops, exploitation and slavery. The logic of human rights in development is inescapable.\textsuperscript{196}

Those words bolstered ongoing efforts to implement a human rights approach as the foundation for all development activities, both public and private. According to the Office of the High Commissioner for Human Rights (OHCHR), a


Human rights-based approach is a normative framework based on internationally recognized human rights standards that seek to identify and address unjust practices with the process of human development operations.\textsuperscript{197} Within such an approach policies and operations are guided by obligations under international law which identify rights holders and place accountability on the duty bearers (for example, the State, development agency or private sector). Hamm characters a RBA to development as the recognition of the legal responsibilities of States, pursuant to their human rights treaty obligations, with regard to development operations and development policy.\textsuperscript{198} A human rights-based approach is a fundamental departure from the traditionally adopted needs-based (or charity-based) approach and demands that attention be paid to marginalized groups. While the traditional approaches focuses on such marginalized groups, the a RBA introduces rights and responsibilities to all members of society with the final goal being a higher level of human rights realization throughout the development process.\textsuperscript{199} Now that human rights are seen as more than a mere complementary addition to the development discourse, but additionally as the foundation,\textsuperscript{200} the process by which development goals are achieved is just as important as the end result.\textsuperscript{201} A RBA provides a reference point for States and development agencies on the content of human rights obligations, and provides a foundation for ensuring the continuity of internationally recognized principles within local and regional policies.\textsuperscript{202} Development involves many more components beyond gross

\textsuperscript{202} Hamm, B. (2001), p. 1012.
human rights and the right to development

domestic product (GDP) or income; it involves the expansion of substantive freedoms for all members of society through sound structural reforms.203

It is important to understand the differences between needs-based and RBA, recognizing the structural problems that lead to human rights violations within the context of development rather than merely treating the symptoms. Since 1999, for example, CARE has implemented a RBA in its global poverty reduction and good governance initiatives. Of particular interest is the stress put on accountability and the ability to produce quantitative results as to the effectiveness of development operations under a RBA. Implementing a rights-based approach gives practitioners a whole new set of data to analyze to ensure human rights indicators accurately represent the realities in human rights protection both in and outside the context of development.204

Hansen and Sano have identified several fundamental elements of a RBA, consistent with ongoing UN initiatives.205 First, the grounding of development within clearly defined principles, such as international human rights law, fosters just and sustainable development. Second, a RBA to development focuses on (legal) accountability by identifying rights holders and the subsequent responsibility of duty bearers. The emphasis on rights allows equitable development policies and operations to creating a culture of rights protection within institutions. Finally, a RBA removes any parallel political or economic interests by basing the decision making process within human rights legal standards. This approach mainstreams human rights into development and provides protection from short-term considerations that would ultimately be in conflict with advancing human rights.206

As Uvin points out, a RBA allows practitioners to realize the potential of the rights discourse as a tool for fundamentally changing the structural dimensions behind violations and the conditions that allow poverty and discrimination to flourish.\textsuperscript{207} One of the most distinguishing factors of a RBA, as opposed to a charity or needs-based approach, is the emphasis on accountability mechanisms. Implementing a RBA, by both governmental (for example, States or UN agencies) and non-governmental entities (for example, human rights organizations or the private sector)\textsuperscript{208} provides the fundamental basis for institutional change, which empowers individuals and groups through reforms that enshrine fundamental human rights at the local level. This is in contrast to the traditional top-down approaches that have yielded less than stellar results regarding human rights protection and sustainable development (for example, need-based aid).\textsuperscript{209} According to the 2001 UNDP Human Development Report, some of the implications of implementing human rights considerations within the development process are that they provide a basis by which to create independent assessments of human rights. Such implementation aligns national laws, as well as regional policies, with international human rights standards, promotes the full realization of human rights norms, strengthens local, regional and international human rights mechanisms and organizations, and creates an economically stable environment which enables human rights to flourish.\textsuperscript{210} A RBA does not merely deal with the role of States within the process of development. Non-state actors, such as transnational corporations, also have an important role to play in the protection and promotion of human rights. A RBA is focused on protecting individuals and groups against abuses of power. By fostering an environment that enables persons to enjoy their rights, the

\textsuperscript{207} Uvin, P. (2004), p. 130.

It is also important to note that the report identifies the private sector as also having responsibilities in creating a rights-enabling economic environment (p. 116).
quality of life improves while manifesting sustainable development by sacrificing neither prosperity nor human rights protection in the process.\textsuperscript{211}

This research focuses on the role of non-state actors, particularly transnational corporations (TNCs), and methods on better providing enforcement and/or encouragement for such entities to implement rights-based approaches within their sphere of influence as participants in international law.\textsuperscript{212} As “agents of development,” TNCs have a duty to “facilitate the rights-holders’ realization of human rights.”\textsuperscript{213} Following two decades of rapid economic globalization, the need for legal remedies to ensure human rights accountability of non-state actors with a State-centric system is of great concern.

The inclusion of corporations into the human rights legal framework is not without criticisms. Some argue, as Andreassen claims, that since corporations are not able to ratify human rights treaties they cannot be bound by obligations under international human rights law.\textsuperscript{214} However, much literature has emerged concerning the legal status of corporations and their corresponding human rights obligations. The unique status of TNCs in the globalized world yields barriers to their meaningful implementation of human rights norms. However, the context of development provides a logical place to advance the discussion on what ways private actors can be introduced to the human rights accountability via non-traditional mechanisms. Corporations are a key component in the full realization of human rights, and provide much of the catalyst in developing countries as these countries become further integrated into the global market. States and international financial institutions complement the inclusion of the private sector in order to strengthen the

overall commitment to encouraging and achieving sustainable economic growth while reducing poverty.\textsuperscript{215} Switching from a needs-based approach to a RBA is not a matter of mere acceptance. There are legitimate barriers\textsuperscript{216} that must be addressed before effective implementation can take place and usher in the subsequent increases in rights protection.

\textit{Institutional Barriers}

Despite discussion\textsuperscript{217} that a RBA to development would provide a positive, more sustainable foundation by which projects could more effectively be implemented, various institutional barriers—both national and international—must be overcome to achieve such a goal. One important step in bridging the gap is the discussion about what values guide the human rights framework and how such values figure into the context of development, both State and non-state actors alike. As Marks observes, the right to development has been part of the human rights debate for decades despite little practical use in development planning and implementation.\textsuperscript{218} Bunn maintains that there are six obstacles with regard to fully realizing the right to development. These are insufficient aid, structural adjustment programs, TNC activities, unilateral coercion, unfair trade practices, and some negative aspects of globalization.\textsuperscript{219} We have previously discussed that the guiding principles of human rights and the right to development are intimately related and seek similar objectives. The involved

\footnotesize{\begin{itemize}
\item \textsuperscript{215}International Monetary Fund. Accessed 7 February 2012 at http://www.imf.org/external/about.htm
\end{itemize}}
institutions, particularly TNCs and IFIs, are also quite intertwined. On a philosophical level, maintaining a complementary rather than competing status more accurately expands upon the foundations of human rights and development. This facilitates the realization of the right to development, which leads to the access and enjoyment of the development process. Remaining consistent with both international law and the spirit in which the international human rights framework was founded, we can highlight this interconnectedness to achieve rights protection and sustainable development. While rights based approaches may be altered to achieve better results in varying contexts (for example, a RBA to the financial sector would be implemented differently than in the education or logging sectors), the fundamental objective remains the pursuit of sustainable development projects with human rights acting as the operational and normative backbone.220

Twomey maintains that each state must choose which RBA is best for their particular context.221 Taking into consideration that all approaches have human rights as their basis, some methodologies are better than others, depending on the scope of a particular project or effected group. Hatton and Others v. United Kingdom222 shows us that human rights assessments are vital, particularly with regard to development projects with environmental implications. The question remains as to what principles govern such an approach. In cases where rights are in conflict with one another, what can be done to ensure that overall human rights protection is strengthened while development is pursued? To take from the Hatton decision, the context of the project and the persons who are at risk must be carefully examined in order to determine what type of assessment can provide the best analysis of rights

222 Hatton et al v. United Kingdom, supra
Regardless of the chosen method (that is, whether there is a focus on civil, political, economic, social or cultural rights), implementing an effective RBA requires an assessment of the current human rights impact regarding current projects (that is, taking account of the full spectrum of human rights, the range of affected groups, their specific context and stated objective) and adjusting those approaches through the sphere of responsibility and influence for the State. In addition to state responsibility, the scope of non-State accountability, particularly TNC's as agents of development, must be analyzed to a greater extent to ensure fundamental human rights are not violated by non-state entities acting in traditional state roles (for example, infrastructure projects, health care or utilities management).

Keeping in mind these fundamental requirements of any RBA to development, it is vital that we visit the various institutional barriers that accompany any change of this magnitude. It should be noted that this research does not promote the implementation of a RBA for a handful of development institutions. The case is made that all developmental endeavors, from their inception, should be guided by a RBA, ensuring that progress is made across the board, including State and non-state actors. With that being said, there are some general criticisms for such an adoption. Two common criticisms regarding human rights in general are that of cultural imperialism and operationalization. As a RBA relies on human rights as its philosophical and legal foundation, it is vital that such criticisms be discussed. Since its inception, universal human rights have been criticized for merely being another form of imperialism, forcing

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223 Ibid
western ideals on the rest of the world. Critics note that universalism is merely an “ideological disguise” for cultural imperialism. The argument of cultural relativism, first coined in anthropology, simply states that “there are or can be no value judgments that are true, that is, objectively justifiable, independent of specific cultures.” On a philosophical level, cultural relativism states that moral right and wrong varies from different societies and, by definition, cannot be universal. This criticism by cultural relativists seeks to undermine the claim of universalists that rights (at least one) are universal and transcend political and cultural boundaries. While the claim has caused universalists to better articulate their position, relativist claims seem to lead down a path that most would find difficult to accept. In the age of slavery, for example, it would make most feel uneasy to state that acts are accepted insofar as they are permitted by the traditions or customs of the society in which they are performed. Today, it is overwhelmingly accepted that slavery is repulsive in any form at any time. Because of such instances throughout human history, scholars developed a theory by which to encompass the universality of rights.

While the institutionalization of international human rights may have been advocated and advanced by Western powers, that does not mean that they are automatically irrelevant in non-Western societies. The fallacy of origin allows us to move beyond relativist critiques. Just because a set of ideas was developed primarily in one context reflects little of its ability of “subsequent

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230 It should be noted that the use of the term "cultural relativism" first appeared in the journal American Anthropologist in 1948. The term was coined by Franz Boaz in 1888 as part of an overarching theory that human beliefs and actions should be interpreted via one’s particular culture. The term proved to be quite popular among anthropologists following Boaz’s death in 1942.
232 On a philosophical level, should there be even one universal right the cultural relativist argument is without justification. If there is no universal standard that objectively guides right and wrong, then there is nothing a relativist can argue if a dictator decides to systematically murder his people. Contrary to relativist arguments, there are fundamental ideas of right and wrong that are not confined to political or cultural boundaries. That is to say, such ideas and/or beliefs transcend culture.
validity” in other contexts.\textsuperscript{233} It would seem that universal human rights are best implemented locally. This perspective supports the increased use of regional mechanisms as a means of providing a cultural context to the implementation of international norms. This is both generally accepted and consistent with universality. A common misconception is that universality means that we must implement the same framework regardless of context. It is accepted among international human rights institutions that the values of universal human rights, in order to be effective, must be interpreted based on cultural context.\textsuperscript{234} In the context of the right to development, this ensures that appropriate procedures are put in place that are respectful of local customs while ensuring that human rights standards are maintained during the process of development.\textsuperscript{235} This includes allowing local populations to have control of their own natural resources to ensure that their development goals are in line with their values rather than external influences that may pursue profit at the cost of human rights protection and sustainable growth.\textsuperscript{236}

Although there are always difficulties involved in large-scale institutional change, they do not constitute a sufficient reason by which to abandon human rights as the guiding principles of development. Institutionally, there may be conflicts regarding the implementation of certain rights laid out in the human rights framework. This could lead to tensions when trying to implement certain development projects. Next is the issue of operationalization, which is perhaps


the largest barrier with regard to a RBA to development.\textsuperscript{237} The move from the abstract principles laid out in the UDHR and other human rights instruments to specific guidelines for development projects is no easy task. While certain bodies, such as the United Nations Development Program (UNDP) and the Office of the High Commissioner for Human Rights (OHCHR) have done much to advance the discourse of development operations via human rights principles,\textsuperscript{238} much work remains. In order to implement RBAs to development, support must be given at all levels – from UN agencies to international financial organizations to state parties. As noted by William O’Neill and Vegard Bye, the biggest issue regarding implementation rests in agencies not truly understanding what incorporating human rights actually entails.\textsuperscript{239} The first barrier to a fully functional RBA to development is getting all UN agencies and contractors on the same page. Clear steps to implementation are especially important for those working in country. Regional and country specific offices need additional training regarding the implications of human rights and the right to development to shorten the gap between theory and practice. Persons working in the field need concrete methodologies and case studies. As with any organization, it is difficult to change the way large institutions implement new guidelines. Resistance is normal in any high-level change such as the universal implementation of human rights principles, particularly when discussing private actors and international financial institutions.\textsuperscript{240} The OHCHR must do more to encourage and lead the way towards the adoption of a RBA to


\textsuperscript{238} For example, HURIST. “HURIST, a joint programme of UNDP and OHCHR, supports the implementation of UNDP’s policy on human rights.” Accessed 25 November 2009 at \url{http://www.undp.org/governance/programmes/hurist.htm}

\textsuperscript{239} “Some were puzzled, noting that they believed their work had always incorporated human rights so they did not understand what all this talk about “mainstreaming” and “integrating rights” really meant.” See O’Neill, W., and Bye, V. (2002) “From High Principles to Operational Practice: Strengthening OHCHR Capacity to Support UN Country Teams to Integrate Human Rights in Development Programming.” Commissioned by OHCHR, p. 5.

Human Rights and the Right to Development

development, showing that a RBA is vital to the realization of the mission of all UN agencies. As O’Neill and Bye point out, the OHCHR must lead the way in assisting UN agencies on human rights implementation into their traditional roles. Organizations, such as the Danish Institute for Human Rights, have developed robust compliance and assessment tools for use by governmental and private sector institutions to ensure human rights are respected and risks are highlighted before projects commence. Human rights, on a rhetorical level, have been accepted across the UN as a fundamental objective and reason for its existence; however, practical implementation remains the shortfall to the UN “mainstreaming” of human rights.241

Data sets that support the underlying human rights principles are fundamental to reinforcing the human rights regime with policies that yield results on the ground. In terms of quantifying human rights, much work has been done by scholars such as Todd Landman242 (HR protection and treaty ratification), and Rodwan Abouharb and David Cingranelli243 (Impact of Structural Adjustment Programs (SAPs) on Human Rights protection). Although the international community has demonstrated their acceptance of human rights norms, a more accurate representation to the extent that their protection is given by including aspects of various treaties disregarded by the country’s ratification.245 One major issue involved with codifying human rights protection, particularly when discussing the right to development, is the role of Economic, Social and Cultural rights (ESCR). As previously noted in this chapter, many of the legal cases involving development as a human right cited indigenous claims to traditional land and culture. One of the difficulties with ESCR is finding proper indicators that truly paint an accurate human rights picture. That being said,

244 For further discussion on the negative impact of Structural Adjustment Programs, See Bunn, I. (1999) , p. 1425-1467.
implementing a RBA to development requires that assessments be carried out where at-risk groups can be identified. As more assessment tools are implemented, practitioners will have a better idea of best practices regarding the effective implementation of rights based approaches.

**Political Barriers**

Moving away from organizational limitations and adaptation, let us assume that the issue of operationalization has been overcome and development agencies have put forth their support into implementing a RBA to development. The UN agencies have clearly stated mandates concerning human rights implementation in all activities and contractors are on-board. Although the abstract principles have been more clearly defined in a practical manner by which clear objectives can be mapped out for individual agencies and outside organizations, there remains one last hurdle to effective implementation: political will. The political barriers that accompany the international human rights framework must be navigated with caution in order to successfully bridge the gap between principles and tangible applications. We could have the unanimous support for the clearest stated legally binding human rights treaties, along with agency and contractor compliance to implementation, and remain stagnant due to a lack of political will. There are several reasons for this. First, the UN is founded on the principle of state sovereignty. The practical significance of this, historically, is that a State can cite state sovereignty as a defense for not implementing various aspects of international law, including international human rights, despite having obligations *erga omnes*. Although

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246 Despite being overturned, in *Hatton and Others v. United Kingdom* (2001) the Court stated that rights assessments conducted before, during and after UK governmental projects would identify any tensions between the project and protecting the rights outlined in the European Charter.

247 *Belgium v. Spain* (1970) (Barcelona Traction Case). International Court of Justice Judgment (Second Phase), 5 February 1970. Accessed 11 May 2011 at http://www.icj-cij.org/docket/files/50/5389.pdf The concept of *erga omnes* denotes legal obligations on all states to conform to international law. It was first recognized in the above case as “...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*...
this is a huge barrier to the full realization of human rights, alternative approaches allow us to strengthen accountability under the current international framework, recognizing certain gaps between legal norms and actual adherence.

By emphasizing regionalization, we are able to bridge the gap between local atrocities and international human rights norms with the goal of increasing human rights protection. As noted by Professor De Feyter, “Human rights can be made more locally relevant by interpreting existing global norms in the light of needs identified by community organizations, and by developing human rights further, particularly at the local and regional levels in the light of these same needs.”248 This approach can be broadened to include other non-governmental entities, such as transnational corporations, and their role in strengthening human rights protection in regional operations. The politics residing in the shadows of the philosophy and legal framework of universal human rights is a consequence of its post-World War II inception. The power relations today are much the same as when the United States (US) pushed human rights on the agenda in 1945.249 The system and the subsequent human rights standards served a vital political necessity put forth as an alternate approach to maintaining power beyond traditional military coercion. According to Tony Evans, “Social and political control is not maintained solely through the

...Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character." An example of a right erga omnes is the “right of peoples to self-determination” identified by the International Court of Justice.


The post-World War II power relations are most apparent within the Security Council and its permanent members. Although the end of the Cold War led to a shift in international power relations, the international institutions have not reflected such global shifts.
threat of military coercion but rather through a system of formal and informal norms and rules that legitimate and shape the actions of weaker states.”

Within the context of development, human rights language provides a solid foundation for countries to seek sustainable development without sacrificing their internationally recognized rights. Antonio Gramsci has written much on this phenomenon, and he classifies hegemony as needing a common social-moral language to maintain its stance in the world. The highest level of hegemony is found with the hegemonic power’s values that are accepted as common sense. Such an acceptance should be strived for within the rights discourse.

The UN Charter refers to human rights seven times and calls for the creation of the Commission on Human Rights. The drafting of the UDHR was completed after 18 months of deliberations, a reflection of the thick political tensions that continue to manifest in the more than 60 years of the UN’s existence. The UDHR paved the philosophical path for the international human rights framework, including the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child, the Convention on the Rights of All Migrant Workers and Members of Their Families, and the Convention of the Rights of Persons with Disabilities.

However, human rights violations occur each and every day. Why is there such a gap between theory and practice? At least two possibilities seem plausible: The first proposes that the international community’s enthusiasm for setting human rights standards is not matched with the motivation needed to truly and

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effectively implement international standards. The other suggestion is that the system which was so enthusiastically created, although slowly changing its organizational perspective, remains more concerned with “post-violation redress” rather than preventative actions which eliminate the fundamental causes of human rights violations.  

Before the full realization of human rights is possible, post-World War II and Cold War sentiments must be left behind to truly accommodate the changing views on international relations within the UN community. Without across the board respect for international law to provide a more equal system in which global consensus wins out, there can truly be no assurance of change. For example, looking at the on-going US embargo against Cuba allows insight into the tension that exists between power politics and international consensus. In 2009, the UN General Assembly voted for the 18th consecutive year to condemn the ongoing embargo. The non-binding resolution was met with only three “no” votes, coming from the US, Israel and Palau. Very rarely does such international consensus occur, particularly on such highly politicized issues. While the issue of power relations may seem mundane, it is important to go back to the basics to ensure that international human rights are implemented in the most effective fashion.

While it can be said that much progress has been made with regard to the international human rights framework, particularly in the area of international law and a general willingness of countries to at least adopt human rights language in their domestic and international endeavors, much work remains to fully establish rights in the development discourse to ensure that one group of rights is not sacrificed for the sake of another. This chapter touched on some of the issues regarding the justification and implementation of the right to development, as a human right, as well as the structural problems that inhibit strengthening overall rights protection. In order to achieve the full realization

of human rights, the right to development and its processes must be perceived as both fundamental and universal, accepting that neither can be realized without the other. As proposed earlier in the chapter, there is plenty of justification in human rights theory as well as legal precedent to secure a right to development. Although this takes us part of the way towards compliance, there must be a conscious effort to combat the politicization that often accompanies the rights dialogue. International financial and development institutions play a vital role in this process. The next chapter will visit the history of the Bretton Woods institutions and how they fit in to the larger picture of human rights accountability considering both regimes grew out of the same post-war socio-political climate.
“Unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition, with war...if we could get a freer flow of trade...freer in the sense of fewer discriminations and obstructions...so that one country would not be deadly jealous of another and the living standards of all countries might rise, thereby eliminating the economic dissatisfaction that breeds war, we might have a reasonable chance of lasting peace.”—Cordell Hull

2. Human Rights and Bretton Woods

2.1 A Common Beginning

With the official outbreak of World War II on 1 September 1939, the United States and the United Kingdom began laying out a post-war global financial system to ensure international economic stability and development. The prioritization of such economic preservation came after lessons learned during World War I and the consequences of competitive devaluations due to a lack of international norms to ensure market continuity.

To seek the prevention of another global financial crisis, 44 allied countries agreed to meet in the Mount Washington Hotel in Bretton Woods, New Hampshire, for the United Nations Monetary and Financial Conference. With Harry Dexter White acting as the US delegate, the planners created the International Monetary Fund (IMF) and the International Bank of Reconstruction and Development (IBRD). The original Bretton Woods institutions became operational in 1945 and now include the International

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260 Creation of IBRD. Accessed 7 February 2012 at http://go.worldbank.org/W01PGBIFM0
Finance Corporation (IFC) and World Trade Organization (WTO). The main objective of the agreement was to adopt monetary policy that fixed the exchange rate of a country’s currency with a predetermined value of gold. Although the system was abandoned in 1971 by the US government’s termination of gold backing of currency, the legacy of the Bretton Woods Agreement remains alive with the World Bank Group, World Trade Organization and the International Monetary Fund. The calculated embracing of such international financial norms leads us to ask why such swift adoption is not so prevalent regarding international human rights norms. How can these two global occurrences be so different, in terms of progress and compliance, despite being conceived in the exact global socio-political climate? Despite both systems remaining largely centralized, trends have developed towards a more decentralized approach to internationally recognized norms. On the human rights side, the adoption of various regional charters (in Africa, Europe, and the Americas) has allowed for more localized responses to traditional approaches of international human rights norms protection. In

262 The Bretton Woods Conference ended with the creation of a set of institutions that sought to stabilize commercial and financial relations following WWII: International Monetary Fund (IMF), International Bank for Reconstruction and Development (IBRD) and the General Agreement on Tariffs and Trade (GATT). With the removal of the gold standard, currency became backed by a mere promise by the governments to honor currency values. The GATT 47 agreement, modified in 1994, sought to normalize international trade and is now part of the WTO framework. Accessed 22 March 2011 at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm The IBRD, along with the International Development Association (IDA), International Financial Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA) and International Centre for Settlement of Investment Disputes (ICSID) make up the World Bank Group (WBG). The IMF remains an autonomous intergovernmental organization with the responsibility of overseeing the global financial system via the liberalization of economic policies and stabilization of exchange rates. Accessed 22 March 2011 at http://www.imf.org/external/about.htm
terms of international finance, regional blocs, such as the EU, have challenged the historical dominance of the Bretton Woods institution’s centralized approach allowing for the streamlining of fiscal policy in response to local crises. In the realm of human rights, regionalization has allowed international norms to be more complementary and efficiently implemented and protected.

The founding principles behind the adoption of Bretton Woods sought to establish an international system that was able to regulate global finance while taking into account the institutional nuances at the national level.

The goal...was to establish a framework for economic cooperation and development that would lead to a more stable and prosperous global economy. While this goal remains central to both institutions, their work is constantly evolving in response to new economic developments and challenges.264

Similarly, the human rights framework includes a set of internationally adopted processes, norms and institutions that, in theory, function within each country’s particular political and legal system.265 One statement from experts advocates that “A more effective international regime is needed to devise international standards and to monitor their implementation and enforcement.”266 This statement is true for economic stability as well as human rights protection. Just as Bretton Woods sought to remedy financial instability and injustice, the human rights regime was advanced to repair past injustice267 and create a foundation that would allow future generations to enjoy and pursue a more dignified life via established universal rights (and corresponding mechanisms for responding to violations).268

Charter came into force with international co-operation as one central objective.269

As Balakrishnan Rajagopal points out, the regulation of money and international human rights are post-war phenomena270 whose institutions are directly linked by their historical context.271 The post-World War II operations mainly sought to 1) restructure the global financial system to ensure stability, reduce the occurrence of similar economic depressions which led to the previous two world wars;272 and 2) more actively engage international conflicts to promote peace, ensuring that basic rights and freedoms are internationally recognized and protected.273 While the two World Wars caused much international hardship, some of today’s conflicts are largely handled via regional bodies such as NATO.274 Although not replacing the global institutions where norms are generated, regional blocs allow for faster, more contextual solutions to ongoing financial, social and political tensions.275 As observed by Suzuki, the main problem of the post-World War II institutional advancements was that the rights discourse was not properly included in the Bretton Woods institutions tasked to promote global financial stability.276 Rights were seen as

269 Charter of the United Nations, Article 1, paragraph 3: “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...”


272 "The absence of a high degree of economic collaboration among the leading nations will ... inevitably result in economic warfare that will be but the prelude and instigator of military warfare on an even vaster scale." Comments made by Harry Dexter Whiter, US delegate to Bretton Woods Conference. (1944).


the sole responsibility of individual governments, causing the international treaties to lack the proper enforcement mechanisms found in the parallel financial restructuring. With economic globalization and technological advances, this is becoming less true. Increases in economic interdependence among global partners have put more emphasis on regional stability (politically, socially and economically), causing states to have more invested in advocating for human rights protection. The paradigm is shifting\textsuperscript{277} from the post-World War II institutional mentality to a more collaborative, regional perspective of development, security and rights protection in the view of some experts. Focusing on regional stability can promote the adoption of more incentive based approaches, such as connecting market access with human rights compliance, to encourage states to implement human rights standards and, in turn, economically strengthen the country and regional bloc.\textsuperscript{278}

### 2.2 Decentralization and Regional Integration

In the discussion of the similar global context in which both the international financial system and international human rights were developed, a great deal can be taken from the difference between varying regional monetary integration systems. Just as finance is undergoing regionalization, so too is the human rights system. With the progression of the European financial model, insight is gained on the parallel difficulties, advances and benefits that accompany the decentralization\textsuperscript{279} of the international human rights regime.\textsuperscript{280} That is to say, there appears to be a trend towards a more regional-centric approach with regard to international relations.

\textsuperscript{280} Although Lundberg (2004) discussing decentralization from country to country, his model also holds promise when looking at the human rights framework as a whole. The regionalization, that is to say decentralization, of the international human rights regime, could provide a more sustainable and effective mechanism for increased protection and accountability.
Surveying the framework of international financial systems and regional trade agreements could prove promising in strengthening human rights protection while advancing sustainable development at the regional and local levels. Regional responses to regional issues promote internationally recognized norms through contextually appropriate mechanisms. By putting more emphasis on regional human rights mechanisms, violations are more effectively addressed. A look at regional monetary policy provides an appropriate example of how a more regional-centric human rights regime could more accurately address issues of protecting and enforcing international standards.

**Foreign Trade and Regionalization**

Although regional strategies may not be incorporated in all sectors, there has been a shift in support of regionalization in a variety of policy areas. Recently, for example, there have been global advances in shifting from protectionism to a more emancipated approach to foreign trade, opening the door to development and non-traditional methods for ensuring human rights compliance. According to Antonio Ortiz-Mena, there are three main reasons for this policy shift in the Americas. First of all, both developing and

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281 Although international norms, such as human rights, are adopted by a number of nations, it is important to recognize that the actual implementation and protection of such norms is better suited for regional and local mechanisms, reserving international mechanisms for the most extreme cases that cannot be handled at the regional level. By promoting an international system that recognizes the cultural differences in policy implementation, the more efficiently and effectively human rights advocacy and responses to human rights violations can occur. This approach allows us to work in accord with the current international structure but simply giving regional mechanisms the ability to apply cultural contextual solutions as the first wave of defense for human rights protection.


developed countries have come to realize that expanding trade is one means of attracting foreign direct investment (FDI). Although there is a debate concerning FDI’s impact for low-income countries, the change in perception (pro-FDI) has changed the rules of trade. Secondly, the General Agreement on Tariffs and Trade (GATT 1947), now part of the WTO framework, has remained relatively weak in terms of driving and regulating global trade, leading to abuse of its primary mechanisms. Lastly, increased cooperation between regional partners—which will be visited in more detail below—has led to the use of previously untapped trade channels, particularly in the Southern hemisphere. Although up for debate, this research proposes that the aforementioned circumstances can contribute to improving human rights standards if binding human rights expectations are included within regional contracts.

Within the scope of influence of Bretton Woods institutions, there are quite a few reasons why stronger regional blocs should be seen as progress towards increased development and, subsequently, human rights compliance (if such standards are written into the trade agreement). First of all, GATT is becoming more and more irrelevant, leaving a large space for regional trading to fill the vacuum. GATT free-trade rules have been incredibly unsuccessful in combating barriers, such as import quotas, even with the supplemental additions adopted in the Marrakech Agreement. The below diagram visually

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demonstrates how the original GATT-1947 framework has been implemented within the larger WTO framework. This is important as it provides us with a direct connection between contemporary trade mechanisms and the original Bretton Woods system. The proposed contracts advocated in this research strengthen the overall trade regime by providing a human-rights based mechanism that promotes non-State accountability through trade and market access, potentially strengthening regional and global trade and human rights recognition.

Regional blocs address the alleviation of such obstacles. Secondly, trading blocs are extremely useful in lowering national tariffs and barriers. Although the internal politics may sometimes be harsh, the benefits are bountiful. Involvement also allows governments to add human rights mechanisms within trade agreements, connecting compliance with benefits. Finally, the data points to huge increases in trade once agreements are in place. This is incredibly important for developing countries seeking access to the global market. With the example of the regionalization of international trade and monetary policy we are able to see the benefits of a strong regional system as a way to more effectively combat financial crises and bolster development. Regionally implemented mechanisms allow for a much more calculated and culturally contextual response to human rights violations, better ensuring that the internationally established principles are properly enforced. By using regional blocs to complement the existing international human rights legal framework, we are able to approach the issue of sustainable development and human rights protection in a more adaptive manner. This method provides an added dimension to the international human rights framework as well as advancing development goals of specialized international organizations.

288 One example is Mexico and its involvement with NAFTA. The reorganization of the Mexican economy led to an uprising by the Zapatista National Liberation Army (EZLN) which captured several cities after the signing of NAFTA.
Trade Instruments and Human Rights Protection

With the sovereign right of states to enter into agreements with other states, there are several economic tools that can be used to tie economic development with human rights compliance. First, there is a Trade and Investment Framework Agreement (TIFA). This agreement allows countries to create a framework for expanding trade and alleviate any unresolved issues between the parties. TIFAs are an important first step in opening up trade between countries and blocs (for example, US-ASEAN TIFA) and, more importantly, often pave the way towards Preferential Trading Agreements (PTAs) and Free Trade Agreements (FTAs).

As many economies remain relatively stagnant, many countries see PTAs and FTAs as a way to stimulate fiscal growth. PTAs and FTAs allow for signatory countries to eliminate tariffs and quotas on most products and services traded among them. These types of agreements are found at stage two of economic integration and are adopted if the proposed parties have complementary economies. These agreements streamline trade between signatory countries and bypass much of the bureaucracy of the World Trade Organization (WTO). As mechanisms, such trade pacts demonstrate great potential for better ensuring the implementation of human rights standards via developmental incentives and continued trade relations. As shown by

295 Hafner-Burton, E. (2009). For example, the US required countries to pass national legislation to protect worker and child rights to maintain trade agreements in Chile
Hathaway, the issues of democratic institutions and human rights recognition are more easily pressed with bilateral investment trade agreements (BITs) or regional trade agreements.296 The positive aspect of regional blocs is that they promote stability, an important component for developing countries and international organizations alike. After considering FITAs, PTAs, FTAs and BITs, Customs unions present another form of effective economic organization. Customs unions are trade blocs that include a free trade area with a common external tariff. An example of a customs union is the European Economic Area (EEA). Countries are required to meet certain standards before being able to participate, making it a notable tool in promoting human rights compliance.

Similar to trade and finance, the regional model has also been adopted within the human rights world and has shown to be effective in adapting international norms in local contexts.297 One of the advantages of this approach is that human rights can be more easily incorporated into the existing regional economic structure, complementing international human rights law while increasing a country’s socio-economic reality. The use of trade agreements allows parties to tie funding by means of performance, and can be used to complement the international law specific to human rights protection.298

(2003); Singapore (2003); Australia (2004); Morocco (2004); and Bahrain (2004). Under these trade agreements, any party, including the US, could be fined for violating the aforementioned categories of rights.


297 Regional Human Rights Treaties include: African Charter on Human and People’s Rights; American Convention on Human Rights; Arab Charter on Human Rights; European Convention for the Protection of Human Rights and Fundamental Freedoms; and additional protocols for several of the aforementioned.

Human Rights and Bretton Woods Institutions

Although there are instruments within international human rights law,299 large gaps remain regarding compliance. It is the perspective of this research that such gaps are best handled via regional blocs and preferential contracts.300 Hafner-Barton has quantitatively demonstrated this trend change, particularly by Western countries, to be an important advancement in international human rights via contemporary approaches to trade.301

Trade Agreements and Human Rights Performance

The EU and US have gone to great lengths to strengthen the requirements of other countries seeking to maintain preferential trade benefits. The Cotonou Agreement (2000), for example, came into force in 2003 to replace the Lomé Convention (1975). The agreement serves as the basis for trade and development between the EC and the African, Caribbean and Pacific Group of States (ACP), primarily seeking to eradicate poverty302 and promoting justice.303

299 Enforcement mechanisms are included in the CESCR, CCPR and CCPR-OP1. Due to the vagueness of some of the language of the CESCR, it is even more difficult to enforce than the CCPR. Resolution 1503 of the Economic and Social Council allows individuals and NGOs to file complaints against a state for violations of their recognized Economic, Social and Cultural Rights as defined in the CESCR. However, numerous complaints must be received to initiate a formal investigation. If a state has ratified CCPR-OP1, its citizens can bring forth complaints, which are reviewed by the Human Rights Committee (though the Committee’s decisions are not legally binding). The improved complaint procedure by the Human Rights Council, established by Human Rights Council Resolution 5/1, is not radically different from the former 1503. It has the same scope as the old procedure and will address “consistent patterns of gross and reliably attested violations of all human rights and fundamental freedoms.” Despite its own shortcomings, the new complaint procedure has improved on a few of the 1503 procedures. With regard to transparency, the new procedure provides for the author of a complaint to be informed at various stages in the process, including when a communication is registered, if the complaint is inadmissible, if it will be considered or will remain pending, and, of course, notification of the final outcome. There are also provisions focused on ensuring that the period between the transmission of a complaint to the State concerned and consideration by the Council does not exceed 24 months. Accessed 11 August 2012 at http://www.ohchr.org/EN/HRBodies/HRC/Pages/Complaint.aspx


302 The Cotonou Agreement. (2000) Article 1: “The partnership shall be centered on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.”

The particularly interesting addition to the Cotonou Agreement is that it puts a stronger emphasis on the political dimension of trade and development. According to the agreement, the partnership is based on three main pillars: “development cooperation, economic and trade cooperation and political components.”

Equally intriguing is the explicit inclusion of non-state actors, such as corporations, in ensuring the advancement of sustainable development while respecting international human rights. The agreement explicitly ties the political obligations towards human rights protection as the foundation of the trade partnership. While European trade agreements tend to emphasize political and civil rights as the gauge of whether or not a country may continue to receive full benefits as a signatory of a partnership, the US tends to focus more on labor and children’s rights. The North American Commission on Labor Cooperation allows organized labor to publicize any labor violations in the US, Canada and Mexico. Equally effective is the Generalized System of Preferences (GSP) and the African Growth and Opportunity Act which allow for

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Ibid. Article 9, para. 1 and 2: “1. Cooperation shall be directed towards sustainable development centered on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights. Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.

2. The Parties refer to their international obligations and commitments concerning respect for human rights. They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. Human rights are universal, indivisible and inter-related. The Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural. In this context, the Parties reaffirm the equality of men and women.

Trade agreements with Canada and Mexico (1994); Jordan (2001; Chile (2004); Singapore (2004); Australia (2005); Bahrain (2006); Morocco (2006); Costa Rica, the Dominican Republic, El Salvador, Honduras, and Nicaragua (2006); Oman (2009); and Peru (2009) all contain language dealing with labor and child rights as a condition of maintaining trade privileges. Accessed 19 March 2010 at http://www.ustr.gov/trade-agreements/free-trade-agreements

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the suspension of goods from developing countries if labor standards are not respected.\textsuperscript{308}

Although such standards have advanced in the past two decades, there exists one important exception: China.\textsuperscript{309} Despite continued public demands on linking US-China trade relations to human rights, the US has yet to implement any changes in policy towards the Asian economic giant. Without a preferential trade agreement, China is bound only by the loose GATT rules. Article XX (e), for example, only allows for trade restrictions concerning goods produced by forced prison labor.\textsuperscript{310} There is no rule allowing the ban of products produced in countries with poor human rights records.

One additional possibility, albeit unlikely, is that the WTO Appellate Body may choose to interpret various rules, such as Article XX (protect public morals) or Article XX (human health and safety), so as to accommodate fundamental concerns of the rights for WTO members.\textsuperscript{311} Although many US trade agreements do include language of labor and child rights, it does not mean that such standards are legally tied to upholding trade relations. As Alston points out, since the 1994 NAFTA labor side agreement to uphold worker’s rights, there has not been one example of a government launching a case against the other in terms of labor violations.\textsuperscript{312} This complacency leaves the governments seemingly uninterested in changing the labor agreement to allow individuals to petition an international tribunal. Rhetorical support for rights can also be found in the US-Chile FTA (2004), which states that the two countries will “strive to ensure” that national law is consistent with the ILO Declaration on

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\textsuperscript{310} Ibid., p. 190

\textsuperscript{311} Ibid., p. 190


Why would the US and China, two of the world’s largest markets, ever decide to include human rights in preferential trade treaties? One large influence may lie in internal pressure. Western NGOs and labor unions play a large role in shaping the views of country leaders as well as advocating to the general public to push for policy changes.\footnote{Andreopoulos, G., Arat, Z., and Juviler, P. (eds.) Non-State Actors in the Human Rights Universe, Conclusions: p. 335. Bloomfield, CT: Kumarian Press.} For this reason, it is vital to understand how norms are adopted. We can turn to Finnemore and Sikkink\footnote{Finnemore, M., and Sikkink, K. (1998) “International Norm Dynamics and Political Change.” International Organization 52 (4), p. 887-917. See also Risse, T., and Sikkink, K. (1999) “The Socialization of International Human Rights Norms into Domestic Practices,” in Risse, Ropp and Sikkink (eds) The Power of Human Rights: International Norms and Domestic Change. Cambridge: Cambridge University Press, p. 1-38.} to see how such norms have been internationalized in such a relatively short time. Such policy changes are a result of norm entrepreneurs, people with strong ideas about appropriate behavior in a community. Relevant to this research, the scope of the community is global, including state actors, as well as international governmental and non-governmental institutions. The norm entrepreneurs initiate first step towards the internalization of norms. This is known as norm emergence. The key to bringing about effective change is to have a norm entrepreneur with an organizational platform (such as Red Cross, Amnesty International, and Norwegian Refugee Council). It is difficult to refer to their motivations without reference to “empathy,” “altruism” and “ideational commitment.” The mechanism used most during this stage is persuasion: direct lobbying to government officials or via appeals to the general public.\footnote{Ibid, p. 898.}

Once such norms have been recognized, and seen as useful, they are adopted by states and international organizations (for example, the UN) where they gain more legitimacy and international acceptance through socialization,
institutionalization and practical application. Since 1948, with the adoption of fundamental declarations such as the UDHR, emerging norms have been institutionalized mainly in international law, rules of multilateral organization and bilateral policies. While NGOs must use persuasion, international organizations are often able to coerce states into norm compliance (particularly smaller developing states) due to their larger resources and expertise. Before the second state is reached (norm cascading), Finnemore and Sikkink observe a tipping point that allows the norm(s) to advance towards international consensus and implementation.\textsuperscript{317}

Although there has been empirical research to support the prevalence of norm cascading, there is no theoretical foundation on how and why such cascading occurs. The authors propose that socialization is the main component of states rapidly adopting and implementing norms. As norms begin to be adopted, countries are more likely to embrace such standards based on their identity as a member of the international community. In the early stages of compliance, there are two variables that play a vital role: the number of countries that adopt, and the influence of the countries that adopt. Once enough states, or several influential states, endorse the new norms (for example, economic, social and cultural rights), political citizenship for the international community is redefined.\textsuperscript{318} The actions of other countries, set the tone on how other countries will act—even if the reasons are unknown. Following suit fulfills a psychological need to be part of the group.\textsuperscript{319}


As Ramirez, Shanahan and Soysal show in the case of universal suffrage, there came a point in the international community in which enough countries passed universal suffrage legislation that it became unpopular to discriminate based on gender.\textsuperscript{320} After 1930, the number of countries allowing women to vote sharply increased, moving towards a global standard by 1970 when 95 percent of the world adopted universal suffrage as the gold standard.\textsuperscript{321} Once norms are seen as legitimate and are adopted by more and more states, such standards must be implemented into the domestic legal system. Although the \textit{norm cascade} was motivated by legitimacy and reputation, the internalization of such norms is a product of conformity.\textsuperscript{322} Once the standards have been introduced into a country’s domestic system, bureaucratic, legal and professional mechanisms will work to ensure that obligations are met as a result of the international commitments. As Axelrod notes, inscribing norms in laws provides enforcement, respect and clarity to a standard that has already gained momentum.\textsuperscript{323}

Equally susceptible to these mechanisms is the proliferation of human rights standards. An overwhelming majority of the international community has agreed that human rights are universal and should be part of the international norms. The principle of socialization has ensured that countries have accepted the values associated with human rights. That being said, the framework remains largely absent of a truly effective enforcement mechanism. As Watson proclaims: “The International regime of human rights, if such a thing is to exist,

\textsuperscript{320} For a general discussion on the importance of reputation (e.g. signaling principle) as a mechanism of norm acceptance, See Axelrod, R. (1980) "An Evolutionary Approach to Norms." \textit{American Political Science Review} 80 (4), p. 1107.


\textsuperscript{323} The example is given of Freedom of Speech. A legal system can only protect certain norms if there is established support for it in the community. Freedom of Speech cannot be legally maintained if people are not willing to defend such a right. See Axelrod, R. (1980) “An Evolutionary Approach to Norms.” \textit{American Political Science Review} 80 (4), p. 1107.
is notable for its consistent lack of effective enforcement."³²⁴ One contemporary method of coerced adoption of human rights norms is via trade partners. The inclusion of human rights standards in trade agreements³²⁵ proves to be a useful example of norm cascading where few, but powerful, countries begin to set international standards.³²⁶ Thanks to such influence, the US Trade Act of 2002³²⁷ required that all future trade agreements negotiated under the Act, which has now expired, must include international rights protections, such as worker’s rights and the rights of children. In Europe, a Council decision imposed a similar requirement in 1995 that remains in force to ensure human rights are a fundamental component of any preferential trade agreement.³²⁸

Most PTAs create shared obligations between countries and can have a positive impact on human rights protection. For example, Hafner-Burton found that 82 per cent of countries with preferential trade agreements with the EU improve their protection of physical integrity rights. For the US, implementation of such standards is not as burdensome as it might be for less democratic states. The economic gain for the US and the EU may only make up a small percentage of overall trade when signing on new trade partners; however, access to the two gigantic markets is sure to have positive implications for a small economy. This advantage allows for human rights mechanisms to be introduced into trade agreements; however, it does not ensure compliance without consequences for

³²⁵ Hafner-Burton, E. (2009), p. 147-154. Several instances in which human rights standards have been included in preferential trade agreements and have improved physical integrity rights are: US-Oman, US-Chile, EU-Slovakia (prior to joining EU), EU-Turkey, Mauritania (via Cotonou Agreement), EU-Togo (via consultations of Article 366a of Lomé Agreement), EU-Ivory Coast (via consultations of Article 366a of Lomé IV agreement). Lomé Agreement text accessed 15 May 2012 at http://archive.idea.int/lome/lomdoc/lomeiv.html#Article282
non-compliance (for example, trade restrictions). According to Carla Hills, former US Trade Representative under US President Bush (2000-2008),

..even on the small agreements like [the] Jordan [Free Trade Agreement], there are benefits, because Jordan is much more likely to adopt reforms as a result of that agreement, to move their reforms forward. Their liberalization is locked in, and they move forward. They’ve opened up their economy, and as a result, they have created some 40,000 jobs. And their exports have gone up. So there is something positive. Put it in... on the ledger sheet as things political instead of economic, but it’s economic to that country.329

The PTAs serve as a relatively new tool in international political economy, using financially motivated incentives to achieve political liberalization and, if planned correctly, increase human rights protection. There is a general consensus concerning the idea that more democratic governments generally do a better job at protecting fundamental human rights.330 Taking the idea a step further, there is quantitative research showing countries that ratify more human rights treaties tend to have better human rights records than those who have not ratified.331 While ratification has some correlation on human rights compliance, Hathaway has shown that such ratifying countries also suffer from high levels of noncompliance in regard to human rights treaty obligations.332 As more and more countries ratify human rights instruments, there is additional pressure for others to formally confirm their commitment to human rights to the international community. Often, however, that peer pressure leads to countries ratifying treaties for the public relations benefits rather than their intent (or ability) to truly allocate the necessary resources to fulfill their

obligations. Landman has quantitatively shown that initial ratification begins slowly but experiences a quick jump once the treaty receives the required number of parties to become activated. Additionally, we see that new democracies are quick to adopt human rights treaties, such as the Convention on the Rights of the Child (CRC), with few reservations, as they are interested in long-term stability to ensure future generations of leaders are clear on their international commitments consistent with democratic values.\(^{333}\) Recognizing the strong regional trade relationships and advancing regional human rights mechanisms, Suzuki conducts case studies on three systems regarding the incorporation of human rights into existing regional economic structures, taking into consideration the effective use of international treaty obligations and trade agreements.\(^{334}\) This classification is crucial to advancing the proposed contract framework to be discussed later as a means of promoting corporate human rights accountability.

**Hybrid System Classification for Regional Cooperation**

A hard law hybrid system is a system that allows states, or regional blocs, to include legal clauses that suspend benefits of a trade agreement for signatories violating an included human rights protocol within that treaty.\(^ {335}\) This system differs from a non-hybrid system in that there is clear language that disqualifies benefits for member countries that violate human rights, or any other standards described in a regional organization’s binding agreements. The best example of this system can be found in the Southern Common Market (MERCOSUR), a regional trade agreement (RTA) that includes both permanent


\(^{334}\) Suzuki, Motoshi. (2005).

\(^{335}\) *Ibid* p. 9. Hybrid refers to a system that integrates economic arrangements with democratic or human rights provisions is referred to as a "hybrid system. According to Suzuki’s classifications, a hard-law hybrid system legally prescribes a suspension of integration benefits for states that breach human rights. However, sustaining the conditionality of integration benefit provision requires political will that may include external devices.
members (Argentina, Brazil, Paraguay, Uruguay and Venezuela) and associate members (Bolivia, Chile, Colombia, Ecuador and Peru). MERCOSUR was founded in 1991 with the Treaty of Asuncion for the purpose of promoting free trade and movement of goods, culture and currency. In 1995, negotiations began between the European Community (EC) and MERCOSUR in the hope of freeing up trade between the two regional blocs. Along with continued talks came the understanding that if democracy was not maintained, it would be impossible to advance towards a trade agreement. The democratic priority was tested in April 1996 with an attempted coup on Paraguayan President, Juan Carlos Wasmosy. In response, the Organization of American States (OAS) firmly denounced the military’s attempt at destabilizing the new government while MERCOSUR threatened to suspend the country from the trade bloc if democracy was not maintained. Such a move would have destroyed Paraguay's economy, which receives a third of its foreign trade via MERCOSUR. As a result of this controversy, a democratic clause was added to the “Treaty of Asuncion” in June 1996.

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336 17 June 2006, Venezuela signed a membership agreement, however, this must be ratified by Paraguay's parliament.
339 Ushuaia Protocol on Democratic Commitment in the Southern Common Market, the Republic of Bolivia and the Republic of Chile.” Accessed 27 December 2011 at http://untreaty.un.org/unts/144078_158780/20/3/9923.pdf. Following the attempted coup, a ‘democracy clause’ was added as a fundamental condition to the MERCOSUR agreement. The clause was subsequently added as a protocol adopted by all State parties. While the OAS denouncement of the attempted coup had no legal ramifications it did have significant symbolic significance on the region’s determination to maintain democratic institutions after decades of dictatorships, leading to explicit instruments being put in place. See Dexter B. (2002) “Is there a Democratic Norm in the Americas?: An Analysis of the Organization of American States.” Global Governance 8 (3), p. 365-381.
In 1998, the “Treaty of Ushuaia” established the importance of democratic institutions within the MERCOSUR trade bloc. Article 1 of the Treaty states that, “Fully functioning democratic institutions are an indispensable condition for development of the process of integration between the States Parties to this Protocol.” If a state party should experience a “breakdown in democracy,” consultations would occur. Should the talks be unsuccessful, an array of actions could take place from the “suspension of the right to participate in various bodies of the respective integration processes to suspension of the rights and obligations deriving from those processes.” Although democracies often commit human rights atrocities (for example, the US policy of extraordinary rendition under President George W. Bush), the institution itself provides the best foundation by which to protect human rights and promote economic activity. While the EC-MERCOSUR FTA was a huge step in tying trade with democracy within the trade bloc, the human rights leap was not accomplished until 1999, when the agreement came into force. Article 1 of the Agreement clearly states that “Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights inspires the domestic and external policies of the Parties and constitutes an essential element of this Agreement.” With this agreement, human rights became explicitly linked to open trade relations between the two blocs,

342 “Ushuaia Protocol on Democratic Commitment in the Southern Common Market, the Republic of Bolivia and the Republic of Chile.” Supra
343 “Ushuaia Protocol on Democratic Commitment in the Southern Common Market, the Republic of Bolivia and the Republic of Chile,” supra, Article 5.
confirming that human rights is a cornerstone of democratic society and must be respected in order to maintain continuity of goods exchange.\textsuperscript{347}

The hybrid system shows great promise in more effectively imposing human rights standards via bilateral and regional trade agreements. With blocs such as MERCOSUR, OAS and the EU, more regions are becoming subject to democracy and human rights clauses that mandate the suspension of benefits if such principles are violated. From a realist perspective, these clauses force the actors to choose between the high cost of maintaining repression or the gains of human rights implementation and the resulting development benefits.\textsuperscript{348}

Studying 177 states between 1972 and 2002, Hafner-Burton showed that although ‘soft’ human rights standards\textsuperscript{349} show no influence in a State’s behavior, there is a correlation between trade agreements with legally binding human rights standards and improvement in human rights behavior.\textsuperscript{350} While the research is strong, Suzuki points out that “internal normative foundations” could also explain this phenomenon.\textsuperscript{351} There remains the possibility that the correlation between human rights compliance and external hybrid systems could be due to the fact that countries with better human rights records can more easily adopt such systems.

\textit{Non-hybrid System with Liberal States}

A second system that is quite common is a non-hybrid system\textsuperscript{352} made up of liberal states. The idea is that, if the states are liberal, one would think that

\textsuperscript{347} It should be noted that while the trade agreement required parties to promote democracy and human rights, as defined by the UDHR, the agreement did not bind MERCOSUR to European human rights commitments.


\textsuperscript{349} Soft standards in terms of a treaty merely mention human rights or democratic principles rather than making such compliance conditional to the continuity of the agreement.

\textsuperscript{350} Hafner-Burton, E. (2005), p. 593-629.

\textsuperscript{351} Suzuki, Motoshi. (2005), p. 2.

\textsuperscript{352} \textit{Ibid} p. 9. A non-hybrid system does not establish any formal linkages to human rights or democracy. There is no stated political expectation that current or future NAFTA members maintain any minimum levels of human rights protection as a condition of their good standing in or admission into the NAFTA system. There are two types of non-hybrid systems introduced by Suzuki, those with non-liberal states and
democratic and human rights standards would be a given. For this arrangement, the North American Free Trade Agreement (NAFTA) deserves some attention due to the fact that it is one of the largest trade blocs in the world. With Canada, Mexico and the US as the member states, it seems reasonable to think that human rights would take some priority in the trade agreement. The reality is not so. The NAFTA text does not include any formal expectation that any current or future member uphold any level of human rights protection. It does, however, place emphasis on workers’ rights that can be viewed as a very weak link between trade and human rights.\textsuperscript{353} The North American Agreement on Labor Cooperation, or the “Labor Side Agreement,” states that each party is to enforce its domestic labor laws. In extreme cases of minimum wage, child labor and workplace safety violations, it is possible that a party could incur trade sanctions.\textsuperscript{354} Although there are no hard standards in place to link human right performance with trade incentives, Canada and the US have maintained an active interest in Mexico’s human rights record. Regardless of whether Mexico has an active interest in the human rights records of Canada and the US, they are financially motivated to adhere to the labor standards to maintain free trade relations. Although less true in the US, Canadian constituents have actively influenced their government to play a more visible role in human rights compliance in Mexico. The public discontent in Canada was a result of the 1994 uprising by the Zapatista National Liberation Army (EZLN) who captured several towns in Southern Mexico following demanding that Mexico respect indigenous rights in NAFTA.\textsuperscript{355}

As a result of this internationally publicized event, the Canadian government was forced to take a more active role on human rights in Mexico, which it had

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\item \textsuperscript{353} The Preamble of the NAFTA text between Canada, Mexico and the USA rhetorically mentions the protection, enhancement and enforcement of basic workers’ rights.
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previously neglected in favor of trade objectives. On the Mexican side, then President Salinas was quite clear during NAFTA negotiations that Canada and the US shall play no part in domestic affairs.\textsuperscript{356} Canada strongly believed that economic openness would lead to political openness, thereby creating strong democratic institutions that would promote human rights. Despite this passive foreign policy, strong public influence\textsuperscript{357} in Canada sparked a foreign policy change in 1996 when Lloyd Axworthy became the country’s Foreign Minister. Axworthy became more outspoken regarding trade, democracy and human rights, causing the Canadian government to support several human rights initiatives in Mexico. In addition to human rights projects, Canada also increased its support for civil society in Mexico in preparation for the 2000 Presidential elections. Axworthy also sent a parliamentary delegation to Chiapas following a series of political assassinations.\textsuperscript{358}

With the tension rising in 1999, the Canadian public urged further intervention. Claiming that Mexico was merely in a transition period, Axworthy decided not to pursue the issue at the UN level. Instead, a mission was sent with the single objective of furthering business agreements between Canada and Mexico. The belief was that Mexico’s President Fox could lead the country towards human rights compliance. As a liberal country, Canada was pressured into implementing a progressive plan for encouraging human rights compliance. Due to a lack of explicit statutes, Canada was unable to withdraw from the trade agreement based solely on Mexico’s poor human rights record. Canada was forced to pursue a more diplomatic means to appease the Canadian populace through the appointment of Axworthy as Foreign Minister. The monitoring and


civil society projects funded by the Canadian government aided indirectly in improving Mexico’s commitment to human rights and increasing public awareness on NAFTA’s implications.  

We can see that it is more difficult to introduce human rights principles in trade when there is no direct linkage between performance and incentives as shown with the hybrid system’s use of legal mechanisms. Had it not been for public pressure, it is likely that no additional action would have been taken to resolve the poor human rights performance by Mexico so long as the trade agreement remained lucrative for both Canada and the US. More recently, Mexico’s President Calderon revealed the introduction of a new Latin American/Caribbean bloc, which will exclude the US and Canada, at a February 2010 summit. Perhaps changes will be made to ensure that the human rights gaps of NAFTA are not reintroduced into this proposed bloc, taking more from MERCOSUR. At a fundamental level, the formal disregard for Mexico’s human rights record for the sake of importing cheaper consumer goods into Canada and the US presents an uncomfortable essence of neo-colonialism. The danger of supporting contemporary economic imperialism is more prevalent without the explicit inclusion of incentives based on human rights performance. By including such measures, in a legally binding agreement, all parties can receive benefits from trading partners rather than reverting to the one-sided consequences of colonialism. It becomes a collaborative relationship rather than enforcing a system in which only one party benefits.

**Non-hybrid System with Non-liberal States**

We have seen the difficulties with implementing human rights standards without the inclusion of legal human rights performance clauses in trade agreements, even when dealing with liberal and open states. Now we will

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361 In the previous example regarding NAFTA, the only reason Canada exerted resources into increasing the human rights performance of Mexico was because of
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examine the implications of a non-hybrid system, such as NAFTA, between countries that are not liberal democracies;\textsuperscript{362} Association of Southeast Asian Nations (ASEAN) Free Trade Area (AFTA).\textsuperscript{363} Although significantly smaller than NAFTA and the EU, AFTA member states have maintained steady economic development and provide an interesting institutional contrast to other regional blocs. In terms of human rights, the AFTA agreement does not contain any reference to human rights standards; however, the Terms of Reference (TOR)\textsuperscript{364} for the ASEAN Intergovernmental Commission on Human Rights (AICHR) entered into force on October 2009.\textsuperscript{365} Despite the fundamental inclusion of these general guiding principles many remain skeptical at its ability to have a true impact in the region since the human rights terms of reference are not yet approached as priority initiatives.\textsuperscript{366}

Looking back before the 2009 TOR, the regional bloc was forced to deal with its first major crisis without any legal leverage regarding governmental actions contrary to human rights: Myanmar (then Burma) and the 1988 democratic protests (8-8-88 Uprising)\textsuperscript{367} against the ruling military junta. Killing thousands of demonstrators, pro-government forces quashed the uprising, and

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\item \textsuperscript{362} A non-hybrid system with non-liberal states refers to states with weak normative foundations. See Suzuki, Motoshi. (2005), p. 7.
\item \textsuperscript{363} AFTA was agreed upon in January 1992 and officially came into force January 1993, marking the beginning of a 15-year development initiative to total elimination of import duties by 2015 for the six original ASEAN members and 2018 for subsequent members. Accessed 12 January 2010 at http://www.aseansec.org/12375.htm
\item \textsuperscript{364} “TOR of the ASEAN Intergovernmental Commission on Human Rights.” Accessed 12 February 2010 at http://www.aseansec.org/DOC-TOR-AHRB.pdf
\item \textsuperscript{366} Although the AICHR’s TOR have entered into force, adoption of the human rights framework is rendered nearly useless by Article 2 of the ASEAN Charter: “a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States; b) non-interference in the internal affairs of ASEAN Member States; c) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion.” The main purpose of the AICHR is to act as an intergovernmental consultant, leaving ASEAN without any human rights mechanism with sanctioning powers.
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further isolated the country from the rest of the world. The failed coup led to the formation of the State Law and Order Restoration Council (SLORC), which declared martial law the following year. Following the crackdown, the SLORC promised elections in 1990. Despite the opposition winning by a majority (392 of 485 seats), the results were annulled and the military continued its rule. Although Western governments unilaterally imposed many sanctions to protest the anti-democratic policies and systematic violations of fundamental human rights, ASEAN members, India and China provided the junta with enough economic benefits to counteract any sanctions. ASEAN not only supported Myanmar, but the country was admitted as a full member of the regional bloc in 1997. The EU, US and Canada went so far as to ban any new investments in the country as well as halting bilateral military assistance and General System of Preference privileges.

While the West remains critical of the military government of Myanmar, ASEAN members have chosen a more constructive strategy of engagement, proposing that sanctions would advance a change in the country’s current policies. The strategy is very similar to the approach taken by Canada to Mexican repression of its indigenous population in the context of NAFTA, namely, that the promotion of economic openness would eventually lead to democratic institutions. From a realist perspective, some scholars suggest that the main reason for the inclusion of Myanmar was to limit the threat of Chinese influence in the region following the junta’s continued reliance on military supplies. While this sentiment was shared among several ASEAN members, Thailand and the Philippines feared that admittance would be seen as supporting the

368 The SLORC was renamed the State Peace and Development Council (SPDC) in 1992.
370 Ibid., p. 119.
repressive policies and negatively impact the bloc’s international standing. As a result the bodies’ policy of non-interference was slightly altered to allow limited engagement.\textsuperscript{373} This move had very little impact on the military government as it strictly interpreted the ASEAN Charter’s article on national sovereignty and non-interference, denying that any change in policy had occurred within ASEAN.

The principle of non-interference in the internal affairs of the member states is enshrined in the 1967 Bangkok Declaration, which established ASEAN. It’s also in the Treaty of Amity and Cooperation, which is the basic agreement for all members. And it’s a principle of international law. To re-evaluate this concept would now mean attacking the foundation of the association.\textsuperscript{374}

Since its inception, the foundation of the UN has rested upon the concept of state sovereignty. Regional blocs also cite sovereignty as being fundamental to advancing international collaboration; however, such blocs must also look at whether or not sovereignty issues undermine regional stability and development in the long term. Just as the UN holds a vote to place sanctions on a country for actions contrary to the founding principles of the organization, ASEAN must be firm with Myanmar that state sovereignty is an important concept but is not without limitations. Until Myanmar is given an ultimatum from regional partners, it is not likely that Western sanctions will do much to encourage a regime change within the country.\textsuperscript{375} In fact, the junta interpreted its accession as a public image boost to maintain its repressive policies.\textsuperscript{376}


\textsuperscript{375} It should be noted that although sanctions led to some changes within the government to appear more transparent and democratic, such as the release of Aung San Suu Kyi, it is still business as usual with respect to oppression, particularly against minorities within the country. See Associated Press (2012) “Human rights group says Myanmar forces failed to halt violence and targeted Muslim Rohingya.” 31 July 2012 The Washington Post. Accessed 11 August 2012 at http://wapo.st/MQVgJE

Suzuki points out that the cooperation of ASEAN was seen as a sign of weakness by Myanmar, causing the junta to continue business as usual with its authoritarian policies. To date, the ongoing ASEAN policy towards Myanmar undermines the region’s human rights mechanism, which was already weakened due to a lack of enforcement powers. The ASEAN structure does not allow room for connecting human rights with trade at the present. Myanmar has signed numerous deals with China and India, causing the sanctions of the West to have little or no impact of promoting compliance. There is essentially no reason for the military junta to give up power in favor of democracy due to ongoing support from China and India, reinforced by a regional bloc with no meaningful human rights enforcement mechanism.

With the analysis of the three different systems, Suzuki proposes that a hybrid system with external commitments serves as the strongest enforcement of international human rights law related to trade agreements. Connecting human rights standards with development incentives allows countries to enjoy benefits from compliance. In the case of MERCOSUR, member states did not have the normative standards to remove Paraguay from membership. The agreement with the EU encouraged the MERCOSUR countries to pressure Paraguay in preserving democratic institutions, risking collective loss should the agreement be terminated. In the case of NAFTA, the lack of a human rights clause in the agreement forced Canada to take different measures to improve Mexico’s human rights compliance, particularly in Chiapas. On the other end of the

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379 Although both countries have free trade agreements with the regional organization, India and China are not part of ASEAN. India is part of the South Asian Association for Regional Cooperation (SAARC). China has expressed interest in SAARC either via membership or plus one framework, although a 2010 attempt at joining was blocked by India. See "India blocks China SAARC membership." Published 27 April 2012. Indian Council on Global Relations. Accessed 17 January 2012 at http://www.gatewayhouse.in/publication/gateway-house-affiliated/asia-briefing/india-blocks-china-saarc-membership
spectrum, ASEAN’s acceptance of Myanmar reinforced the repressive behavior of the government. Without any clauses to promote human rights, the ASEAN members offered Myanmar full benefits of membership without demanding some type of commitment towards reducing the authoritarian policies. Although Western governments have introduced harsh sanctions, Myanmar has no incentive to change its government with the continued support (or lack of criticism) of ASEAN members.

The adoption of a hybrid system, with external legal commitments better ensures compliance as regions have an incentive to promote and maintain international human rights standards as globalization spreads, or risk losing benefits as a whole due to a single state’s actions.\textsuperscript{382} Even though a hybrid system made up of weak states does not decrease human rights violations, the external commitments (for example, with the EU) promote the proliferation of strong normative standards within a regional bloc.\textsuperscript{383} As Matthew Barrier puts it: “The gradual geographical expansion of trade blocs will lead to a multilateral acceptance of core investment rules.”\textsuperscript{384} If this is the case, it also seems that this model would increase other types of standards, such as human rights, by introducing compliance as the underlying prerequisite for receiving signatory preferences. As a result of compliance, developing countries are given streamlined access to the world economy, and the ability to develop sustainably, while increasing human rights protection.\textsuperscript{385} Joining human rights with trade benefits is the proverbial carrot and stick, and allows for an additional strategy to be applied toward the full realization of human rights compatible with the international human rights regime.

\textsuperscript{383} Hafner-Burton, E. (2005), p. 593-629.
Although regional trading blocs have much to offer, particularly with their inclusion of human rights standards, progress towards regional cooperation is not without criticism. Joseph Brand characterizes the increase of protectionist regional blocs as analogous to the historical empires of the past. According to Branch, this structure will inevitably lead to "regional hegemony disguised as free trade" between the American, European and Asian trading blocs. In a 1991 Federal Reserve Symposium, many government officials and economists, led by Paul Volcker (former Chairman of the US Economic Recovery Advisory Board, 2009-2011), voiced their criticisms of regional trading blocs. They argued that regionalization puts too much pressure on the existing GATT free trade, leaving the world without an overarching free trade structure outside the three large trading blocs (Americas, Europe, Asia). As pointed out earlier, the GATT system is constantly being abused by member states, with or without an increase in regionalization, furthering the notion that the contemporary Bretton Woods institutions cannot effectively position themselves. Secondly, strengthening regional blocs might actually increase trade barriers by creating higher duties on non-member nations. Any such restrictions could ultimately hurt the poorest countries in the world, prohibiting them from development. Finally, by restricting goods from outside the regional bloc, trade may go from the best producer in the world to a lesser efficient producer residing in the bloc.

389 An example of this is given by Brand: the Lomé Convention. Higher cost/lower quality bananas from the African, Caribbean and Pacific Group of States (ACP) are given preference in Europe rather than the lower cost/higher quality bananas from Central America. See Brand, J. (1992), p. 169. It should also be pointed out that prior to the Lomé Convention, similar trade cooperation existed between ACP countries (although not formally known as ACP Group) and the EU (then EEC) since 1957. Preferences existed prior to the Lomé Convention. See “Cooperation Before Lomé.” Accessed 16 April 2010 at http://ec.europa.eu/development/geographical/lomegen_en.cfm
The criticisms seem directed at one primary fear: the concentration of trade by three hegemonic regional blocs. Interestingly enough, there already exists a concentration of trade super-powers, particularly the US and EU. This has less to do with regional blocs and more to do with the ability of the US and EU to broker bilateral trade agreements due to its large market. Perhaps the criticisms are a sign of fear towards strong regional blocs. The international trade and financial structures created by Western powers following World War II are being challenged by regional integration. More recently, UN members have voiced their concerns over a vote allowing the EU to vote as a bloc rather than as individual countries, possibly threatening the voice of smaller members and less powerful regional blocs.

2.3 Contemporary Impact of Bretton Woods Institutions

Although the Bretton Woods institutions were conceived to combat fundamental global issues that sought to destabilize the modern world, their impact on developing countries has led to much criticism, particularly in the realm of economic, social and cultural rights. The international financial institutions (IFIs) have managed to support and implement policies that are counter-productive to the sought after objectives such as the Millennium Development Goals (MDG) established in 2000 and human rights. The Bretton Woods institutions were developed under the same global context as

390 One way to remain relevant amidst the increased regionalization is to more actively pursue economic stability through human rights based initiatives, such as implementing human rights norms as a fundamental component of global trade and monetary policy.


392 The Bretton Woods Institutions include the International Monetary Fund, International Bank for Reconstruction and Development, International Finance Corporation (both now under World Bank Group) and the World Trade Organization. Soon after the creation of the Bretton Woods Institutions, the General Agreement on Tariffs and Trade was also negotiation (now included in World Trade Organization).

393 2MDGs include: Eradicate extreme poverty and hunger; Achieve universal primary education; Promote gender equality and empower women; Reduce child mortality; Improve maternal health; Combat HIV/AIDS, malaria and other diseases; Ensure environmental sustainability; Develop a Global Partnership for Development

the early international human rights institutions. To date, however, the specialized institutions have done more to hinder than to advance the rights discourse. Global economic problems are “inextricably” linked to human rights remedies. This is due to the fact that human rights were seen as political by the Bretton Woods institutions; therefore, the financial institutions saw no reason to adopt any policies pertaining to such issues. With increased attention on economic, social and cultural rights, it seems apparent that the international financial institutions need to restructure their objectives and policies. Although the agreement behind the Bretton Woods institutions sought interference with national policies as least as possible, there is no mandate that legally obligates them to refrain from including human rights in their practices. On the contrary, such institutions should be active in promoting human rights as all aspects of development are related. Such a realization is due to an understanding that human rights violations are linked to structural problems (for example, unsustainable economic development or market instability). Ibrahim Shihata argues that the international financial institutions, as agencies of the UN, are obligated to ensure they comply with their mandated functions, particularly with regard to economic development, without becoming ‘politically entangled’ with the aid recipient. One large area of controversy lies within Structural Adjustment Programs and their negative impact on the improvement of the standard of living in lesser-developed countries.

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Structural Adjustment Programs

In 1979, the US, UK, France, Japan and Germany sought to reduce the impact of a global debt crisis; however, by 1983, increased debt by developing countries led to an economic catastrophe. As a response, the IMF and World Bank set out a set of conditions to guide borrowers towards a particular economic configuration: Structural Adjustment Programs (SAPs). The SAPs sought to create “market economy nations” by deregulating domestic goods markets, liberalizing trade, removing employee work standards, and centralizing market policy for the developing countries. The policy’s legacy remains a burden to this day due its purely financial motivations, neglecting the human rights component as being political. SAPs began as the IMF and World Bank’s remedy for broken economies, citing capitalism as the foundation of stronger countries due to its focus on the creation of wealth rather than mere redistribution as in the planned economies of the Eastern bloc. The IMF and World Bank adopted policies seeking to create wealth that will trickle down to the poorest of the population via economic growth. The imposed SAPs became the undisputed framework for development until the mid-90s. In 1995, the World Summit for Social Development convened in Copenhagen to outline the standards of sustainable developmental policies by which to govern the IFIs. The Copenhagen Declaration (1995) recognized the interconnectedness of development and human rights: sustainable development cannot occur without the promotion of human rights. State parties went so far as to commit to ensuring that SAPs include social development, not merely economic, objectives.

The Declaration outlined 10 commitments including a commitment to (4) “promote social integration based on the enhancement and protection of all human rights;” and (8) “ensure that structural adjustment programmes include social development goals.”
405 Although not explicitly included, these commitments should also hold true Sectoral Adjustment Loans (SECALs) that focus on a particular sector rather than the complete national economy.
As the IFIs have sought to liberalize the global economy, their policies have consistently undercut worker’s rights. Gemma Adaba points out that the financial sector is quick to support macroeconomic policies and structural reforms to promote trade and increased competition. However, they rarely include social and environmental standards that are fundamental components to development.\textsuperscript{406} Despite being rhetorical proponents\textsuperscript{407} of economic, social and cultural rights, many IMF and World Bank projects intensify human rights problems within countries receiving development loans.\textsuperscript{408} Problems resulting from IFI projects include increases in international debt, hindering the democratic process, and devaluation of labor; exacerbation of poverty; increasing burdens on women and children; displacement of workers and families; reliance on imports; destruction of environment and natural resources; destabilization of health and education services; and growth of external debt.\textsuperscript{409} According to Hinds, the policies adopted under the SAPs are not only counterproductive to the goals of the UN and its specialized agencies, but also represent direct violations of international law.\textsuperscript{410} Beyond the scope of international law, SAPs suffer from poor performance records, mainly for two reasons: false promises and rigidity.\textsuperscript{411}

\textsuperscript{407} “through its support of primary education, health care and nutrition, sanitation, housing, and the environment, the Bank has helped hundreds of millions of people attain crucial economic and social rights.” See World Bank. (2000) \textit{Project Appraisal Document: Chad-Cameroon Petroleum Development and Pipeline Project}.
Developing countries are led to believe that once the program is in place, the economic, social and cultural realities will be transformed. The reality is that the development agencies are disguising political adjustment behind an economic framework.\textsuperscript{412} According to the Articles of Agreement, the World Bank is limited to economic considerations alone. Countries are under the impression that once liberalization and deregulation are sought, the path to development will soon follow. The approach by international financial institutions to implement structural adjustment programs is a failed attempt at a \textit{one-size-fits-all} solution to development, denying socio-political realities. Rather than focusing on institutionalization, the programs should take into account the beneficiaries of development, and the protection of human rights under international law.\textsuperscript{413} Restructuring international financial practices towards development, using human rights considerations as their foundation, would be more economically viable, and would reduce human rights violations.

In 1989, the United Nations Economic Commission for Africa (UNECA) issued a report citing three fundamental changes that must be made in order to make SAPs functional in Africa:\textsuperscript{414} 1) SAPs must be country specific; 2) those involved in development assistance must be held accountable to the people intending to receive the benefits; and 3) the people inside the country must be able to participate in the process in order to identify problem areas and solutions in each stage of preparation and implementation. This allows for local solutions to be addressed rather than a “cookie-cutter” approach to development that disregards important cultural differences. Skogly identifies two examples in which these shortfalls have had serious consequences for the people who expect to receive benefits.\textsuperscript{415} In Zambia, the adjustment from domestic to cash


crop production led to the deterioration of nutrition standards, whereas Senegal experienced reductions in health and education due to privatization.416

With much criticism regarding SAPs, what can be done to ensure human rights do not continue to be neglected? SAPs negatively impact economic, social and cultural rights. Skogly417 identifies several examples regarding the right to food,418 right to work419, right to education420 and the right to health;421 while Sadasivam demonstrates the program’s shortcomings with regard to the human rights of women.422 Just as the UNECA report stated, the population of the country that is receiving aid should have some say in the process. In order for people to participate, they must have access to the information, including the terms of the agreement reached between the international institutions and the national government that have, historically, increased economic and social hardships.423 Also, who has the obligation to ensure that the information reaches the public? Is it the government or the development institutions? One interesting scenario regarding the right to expression and information deals with the newspapers. Let us assume that the information concerning the SAP is available to the public. If the SAP includes reducing or banning subsidies for newspaper production, a monopoly could form, reducing the free flow of information.

418 UDHR, Article 25 and ICESCR, Article 11.
419 Article 1(2) of the International Labour Organisation (ILO) Employment Policy Convention of 1964 (No. 122); Article 23 of the Universal Declaration, Articles 6 and 7 of the ICESCR and Article 15 of the African Charter of Human and Peoples’ Rights
420 Article 26 of the UDHR; Articles 13 and 14 of the ICESCR; and Article 17 of the African Charter.
421 UDHR, Article 25; ICESCR Article 12; and Article 16 of the African Charter. It should be noted that the ICESCR and African Charter state that the right to assistance while sick is guaranteed, not the right to free healthcare.
Although the right to food is fundamental, its protection can greatly deteriorate as a result of adjustment programs. Due to subsidy bans, food prices can increase drastically, along with decreased nutritional standards due to cash cropping, as experienced in Zambia. While some parts of the society will not have any problem modifying their spending habits to accommodate food costs, the poorest segment of the population, which already devotes the majority of income to food, will be unable to cope. Worker’s rights also seem to dissipate under SAPs in Africa. The ultimate goal of a SAP is to attract foreign direct investment (FDI) and increase trade; however, the result of this liberalization process is devastating to worker rights. Fewer government regulation puts the power in the hands of the employer and leads to the increased abuse of workers. Abouharb and Cingranelli have statistically shown that the longer a country is under an IMF or World Bank SAP, the weaker the protections are for workers.

As if decreased protection of worker’s rights or the right to food were not enough to demonize the continuation of one-size fits all solutions, the right to

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This is included to show that regardless of the name (for example, Structural Adjustment Programs, Enhance Structural Adjustment or Poverty Reduction) the policies of the development institutions do not yield the paraded results, particularly with regard to human rights, as they seek national, regional and international stability to encourage private investment. See also Arumugam, Rajenthiran (2006) “An Overview of Foreign Direct Investment: Legal Rudiments In ASEAN”, Regional Outlook, 2006/2007, Institute of South East Asian Studies, p. 81-84.

education is also diminished. Education remains a fundamental foundation for any society to ensure that it is cultivating productive future generations. It is even more vital for developing countries where educational standards may be below international standards. International law clearly states that primary education shall be free and accessible to all. The reality is that adjustment programs usually tend to involve education cuts, causing schools to implement fees to maintain its curriculum. As the price of education increases, race or gender discrimination may follow. For example, in a country where males are valued more than females, boys may be sent to school while the girls are forced to stay home in more “traditional” roles. Even though there should be no gender discrimination, perhaps a family only has enough money to pay the fees for one child. Unfortunately, the mandated modifications often lead to “de facto” discrimination towards certain segments of the society. These are just brief glances at the misguided attempt to implement generic programs that ultimately diminish economic, social and cultural rights protection and sustainable development rather than encouraging financial institutions and private actors to collaborate and reinforce international norms that promote stability and human rights.

An unhealthy society is certainly not able to perform at its best during the development process. Proper nutrition and education are two important components of the health, with responsibility falling on the national government to ensure that its obligations are being met. As adjustment may lead to budget cuts in the health sector, the State must remain committed to supplying medical services to all of its population. According to the ICESCR, the national government must ensure: “the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; access to the minimum essential food which is nutritionally adequate and safe; access to shelter, housing and sanitation and an adequate supply of safe drinking water; the provision of essential drugs; and equitable distribution of all health facilities, goods and services.”

remains a government obligation even if there is a non-governmental entity providing health services, such as an international corporation. Skolgy maintains:

To the extent that this supplements already existing basic health care for the population, this is fine. However, it is important to keep in mind that the Government has the primary responsibility for the implementation of the right to health, and that the health care provided through non-governmental institutions cannot relieve the Government of this primary responsibility.\footnote{Skolgy, S. (1994) "Human Rights and Economic Efficiency: The Relationship between Social Cost of Adjustment and Human Rights Protection." \textit{Hum. Rts. Dev. Y.B.}, p. 64.}

Traditional interpretations of international law are clear that the State has the responsibility to protect human rights even if non-state actors are providing fundamental services.\footnote{UN Office of the High Commissioner for Human Rights (2008) "Claiming the Millennium Development Goals: A Human Rights Approach." New York: United Nations, p.15} International law specifically affirms the obligation of States to ensure that rights are protected. What seems to be lacking is a general motivation on the part of the IFIs and their members to make human rights protection a fundamental component of its strategy. If the goal is sustainable development, human rights can assist in this objective despite historical tensions between IFIs and the rights discourse regarding the latter being too political and outside of the former’s influence. Consideration for human rights within specialized international organizations, if implemented early on in the adjustment process, would have astonishing effects for developing countries.\footnote{Dias, J. (1989) "Influencing the Policies of the World Bank and the International Monetary Fund." In Lars Adam Rehof and Claus Gulmann (eds.) \textit{Human rights in Domestic Law and Development Assistance Policies of the Nordic Countries} 61-62. Originally published Dordrecht, Netherlands. Reprinted by Kluwer Academic Publishers (USA), p. 53-68.} Adding human rights to development programs would not only lead to more effective development efforts but also advance economic, social and cultural rights as mutually supporting civil and political rights. Respect for international norms by specialized development agencies and private non-state actors, would also induce States to better fulfill their obligations, leading to an overall...
improvement for human rights around the world.\textsuperscript{431} As stated at the 1993 Vienna World Conference on Human Rights, “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”\textsuperscript{432} Even by looking at the issue from a purely economic standpoint, disregarding any ethical considerations, the policies that are in place are counterproductive to market stability and development.

\textit{Poverty Reduction Strategy Papers}

As a response to the criticism of the SAPs, the World Bank and IMF developed Poverty Reduction Strategy Papers (PRSP) in 2001.\textsuperscript{433} The overarching goal of the new policy was to provide an alternative to the top-down approach of SAPs by allowing more stakeholder involvement in the design and implementation of development initiatives funded by World Bank and IMF loans. This approach provides increased domestic ownership to improve the effectiveness of strategic initiatives and emphasizes public and private partnerships to increase the long-term project effectiveness. Furthermore, PRSPs allow governments the opportunity to plan their strategy and reforms based on a rational and quantitatively achievable approach.\textsuperscript{434} In theory, such an approach is designed to allow each country to develop a plan that is most relevant to their specific circumstances, rather than forcing a one-size-fits-all framework of SAPs, which forced countries into privatization and harsh land reforms as conditions.\textsuperscript{435}

\textsuperscript{434} Grindle, M. (2002) “Good Enough Governance: Poverty Reduction and Reform in Developing Countries.” World Bank Poverty Reduction Group. Grindle points out that although creative approaches are welcomed, the development of indicators that accurately demonstrate increased transparency and reform are lacking.
\textsuperscript{435} George, S. (1990) \textit{A Fate Worse Than Debt.} New York: Grove Weidenfeld, p. 143, 187, 235.
Albeit a positive advancement from structural adjustment, PRSPs are not without criticisms. As Craig and Porter point out, PRSPs have come to represent the larger architecture of conditionalities governing the engagement of sovereign governments with global finance, that they superintend extraparliamentary technocratic decision making, that they bind all localities with a national program of pre-defined ends.436

While PRSPs allow more domestic input, the result of shifting local social norms to those consistent with the World Bank and IMF remains. The question is how much does a society have to give up in order to pull itself from the grips of poverty. This may be an unintended result of globalization or a fundamental flaw with the approach of the PRSPs. Such a tension between local and global norms is another reason for the development of a more localized approach to development and human rights accountability advocated in this research. Furthermore, it has been stated that PRSPs, like its predecessor, deteriorates the self-determination of aspiring developing countries.437 The stated objectives of PRSPs are quite commendable; however, bridging the gap between what governments propose and the social realities of development remains a challenging limitation of programs such as these.438 Perhaps the perceived benefits of PRSPs and subsequent civic engagement are more glamorous than the actual results of such initiative.

Although criticisms remain with respect to poverty reduction strategies as merely the next generation of the political conditionality of SAPs, aiming more towards market liberalization than true development and poverty reduction, the World Bank has sought advancements to foster increased accountability

Human Rights and Bretton Woods Institutions

and transparency through its Inspection Panel, created in 1993. Since its inception, the Inspection Panel has acted as a “bottom up” complaint mechanism for communities that have suffered or may suffer due to a World Bank funded project. A unique component of the World Bank Inspection Panel as a quasi-judicial supervisory body is that it allows individuals and groups to complain directly to the World Bank. According to Roos, however, there may be two conflicting mandates with regard to the Inspection Panel and the World Bank institutions as a whole: helping developing countries maximize their resources while ensuring majority groups do not advance while minority groups pay the consequences.

Although this research is quite critical on the role of the World Bank and other international organizations, the creation of the Inspection Panel in 1993 does signal recognition, in part, of the importance on increasing transparency with regard to development projects. What continues to be lacking is a holistic acceptance of the relevance of human rights in all aspects and for all actors of the development process. In an international system that provides few opportunities in finding international financial and development organizations accountable, the Inspection Panel has shown to be a step in the right direction, albeit not without its own institutional barriers. While the Inspection Panel could be truly meaningful, it is quite limited in its ability to bring forth accountability so long as immunity remains on the table. As De Feyter has proposed, one action by the World Bank should be to waive its immunity and recognize its role as an autonomous actor in international relations and that its

actions (or lack thereof) have implications on the human rights realities of those within its project areas.\textsuperscript{442} In addition to the Inspection Panel, the World Bank Group also includes the International Centre for the Settlement of Investment Disputes (ICSID), which has settled 235 disputes as of May 28, 2012.\textsuperscript{443} The ICSID provides an additional mechanism to settle concerns between two parties. With 158 parties to the ICSID Convention, its reach stretches across regional boundaries and allows for resolution of international investment obligations, often weighing public interest concerns\textsuperscript{444} into the ad-hoc tribunal’s decision-making process. Although the ICSID relieves the burden of domestic courts and is relevant to the discussion on the right to development due to the nature of the institutions and operations involved, it does not provide the same level of assurances for human rights protection such as the explicit inclusion of human rights contract language. Although human rights considerations may play a role in the tribunal, such as with the right to water,\textsuperscript{445} the institution has little or no way of providing a foundation by which to prevent human rights violations. It also bars the review of its decisions by any domestic court.\textsuperscript{446}

In order to allow the interdependency of development and rights to effectively prosper, the Bretton Woods institutions must convert their rhetorical commitment into concrete reforms of their mechanisms, paying particular attention to economic, social and cultural rights. Incorporating a rights-based approach within the international financial framework, and the subsequent corporate actors, complements the current trend of regional integration and trade agreements. Such agreements have also shown promise in increasing

\textsuperscript{445} Suez, Sociedad General de Aguas de Barcelona S.A., and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic (ICSID Case No. ARB/03/17)
\textsuperscript{446} See also Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. Argentine Republic (ICSID Case No. ARB/03/19). Both cases are currently pending.
\textsuperscript{446} Article 53 (1) of the ICSID Convention removes the possibility of external remedy.
While institutional growing pains are part of the process, compliance with human rights obligations yields stability that in turn allows development activities to commence on a firm, sustainable foundation towards fulfilling a fundamental goal leading to an increase in the standard of living for member countries. By recognizing the contexts and justifications under which the international financial and human rights institutions were founded, we can further defend human rights violations even in the name of economic liberalization and development.

Discussion on the common historical context in which both human rights and other international norms, such as international finance norms, is ineffective without considering the contemporary status of the world’s wealthiest and most powerful entities: transnational corporations. Although the World Bank and other Bretton Woods institutions are responsible for lending and development policies, corporations (TNCs) are also important actors in stimulating foreign direct investment and advancing development activities. Even though the international human rights legal framework primarily deals with States, the primary actors in international relations, corporations, have also become an important component to the rights discourse.

The next chapter will visit a fundamental aspect of realizing human rights and the right to development, the private sector. Living in an economically

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447 Hafner-Burton, E. (2009), p. 86. The trend of implementing human rights standards into free trade agreements has been on the rise since the 1980’s beginning primarily with unilateral agreements. In 1990, the European Community negotiated a treaty with Argentina which included human rights as a fundamental principle of economic cooperation.


globalized world, it is often the private sector that is able to adapt quickly to regulatory changes due to a more streamlined bureaucracy.\textsuperscript{450} One particular private sector entity that could greatly advance the rights protection discourse is the transnational corporation.\textsuperscript{451} It has traditionally been proposed that transnational corporations could not be included into the discussion due to their history of human rights violations and profit-based objectives, along with a lack of certainty regarding their place within international law. Although meeting shareholder goals remains the ultimate priority for TNCs, their ability to quickly implement international norms (for example, international financial norms) can be used to bring human rights principles into their fundamental operations leading to an overall strengthening of rights protection. The globalization of human rights can be advanced in a way that complements ongoing regional and international human rights mechanisms while meeting shareholders’ objectives and maintaining stakeholder confidence. By dedicating resources towards corporate human rights accountability, through both internal mechanisms as well as through regional cooperation, the likelihood of the full realization of human rights becomes attainable. While the international human rights framework has made great strides in obtaining increased protection it has been notoriously inept in the prevention of human rights violations by private actors in a legally meaningful way. The lack of clarity regarding the legal accountability of corporations in human rights may be a result of the international legal system that we have developed; however, this does not remove the remaining urgency to solve the problem. An ideal system would produce mechanisms that prevent human rights violations by all organs of society.

The context of TNCs in the rights discourse is vital to advancing the discussion on the full realization of human rights, particularly with regard to

\textsuperscript{450} Potter, P. (2009) "Responsible Corporate Governance: Coordinating Efficiency and Justice." International Association for Philosophy of Law and Social Philosophy (IVR) World Congress, Beijing, China, 15-19 September.

\textsuperscript{451} For example, the protection the freedom of assembly can be strengthened by a corporation through the providing open public space without limited access for community members to gather as a part of an overall project.
accountability as in the context of development. What are the obligations of TNCs within the human rights legal framework? How can they be used to advance human rights? Also, are these types of institutions immune to the barriers of implementation that plague governmental organizations? While TNC compliance is certainly not a substitute for State human rights responsibilities, they maintain a large sphere of influence that, if used appropriately, may prove to be a worthy ally in truly increasing rights protection. One issue that plagues State responsibility for human rights standards is a lack of effective implementation following treaty ratification. In seeking rights implementation by corporations, it is important to learn from the gaps involved with State adoption of human rights. With the creation of the modern international framework adopted following World War II, the noble objectives of human rights protection have been overshadowed by a quest for economic expansion. How is it that international political structures and financial mechanisms have come into competition with one another rather than recognizing the unique and parallel history of their existence? Before the international human rights regime can advance, a fundamental emphasis must be placed on where the divergence began between promoting human rights and ensuring economic stability across the globe.

The pretentious appeal to human rights by international financial institutions remains a serious burden to advancing the rights discourse. Policies, such as SAPs, have plagued developing countries since their inception. Institutions, such as the World Bank, claim that decades of lending have secured rights for millions while poverty remains rampant. TNCs occupy a unique position by which they not only seamlessly operate between and beyond political borders but also heavily impact the direction of governmental policies through influence and foreign direct investment. Rather than corporations being the biggest threat to human rights, perhaps they are an institution suited to ensure their

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effective implementation within their realm of operations. In the age of globalization, it may be that corporations offer an effective and promising route towards the actual full realization of human rights even though there appear to be tensions between international investment law and human rights. Such a change requires an openness of not only corporate actors but also a shift in human rights scholars and practitioners.
The growing power of transnational corporations and their extension of power through privatization, deregulation and the rolling back of the State also mean that it is now time to develop binding legal norms that hold corporations to human rights standards and circumscribe potential abuses of their position of power.—Jean Ziegler

3. Human Rights and Transnational Corporations

3.1 In Context: Transnational Corporations in the Human Rights Discourse

As key players in the world of development, particularly amidst continued globalization and privatization, transnational corporations (TNCs) represent a necessary component to promoting human rights in all areas of society within the private actor’s sphere of influence. As “agents of development,” TNCs have accumulated vast resources and power as international players; however, they are not bound by the same standards on human rights as States in the traditional sense, despite performing many fundamental tasks in the public sphere relating to infrastructure such as healthcare, education, or utilities.

What are the responsibilities of TNCs as defined, directly or indirectly, in international law? Although profit is the fundamental motive for corporations, the practice of implementing human rights norms in the economic enterprise has the potential for greater economic yield as the corporation’s reputation is enhanced as being socially responsible in its society, in spite of the fact that


human rights are often set aside for economic reasons, there exists a comparative advantage for TNCs to promote internationally recognized human rights, particularly with regard to the transfer of traditional State responsibilities such as education.

Many states have sought to relinquish their traditional roles citing the private sector as more efficient. While there may be less bureaucratic red tape involved with private entities, there is also less oversight and transparency and they are driven by the motive of profit. The calls for privatization reduce the argument to mere numbers rather than considering the overall human rights implications of such a restructuring. Despite the fact that international law is State-centric in its structure, careful considerations should be given to ensure accountability for private entities performing State functions. As Barrett and Jaichand point out, privatization severely limits human rights protections due to a lack of liability in international human rights law.

The discourse concerning oppressive and destructive corporate practices has existed throughout history, from Cicero’s writings concerning immoral business practices to the medieval church’s statements on wage labor to boycotts over slave and child labor. Contemporary debates on the role of businesses in human rights can be traced back to the Nuremberg trials following World War II, the most well-known case being U.S. v. Krauch, et al. (1948). The charges

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Although they did not visit the issue of non-state actor liability, the Tokyo trials did help shape understanding of contemporary duties of states to their citizens and to the international community at large (along with the UN system and instruments).
against the German chemical conglomerate included plunder, slavery, and complicity in aggression and mass murder. For the first time, a court found executives liable for such atrocious crimes. There are numerous examples of corporations or their executives being held financially accountable for their role in gross human rights violations; however, there exists a large gap in international law pertaining to the duties of private entities to prevent human rights violations in their own operations. This chapter will look at the responsibility of TNCs, not only as “agents of development” but also as “organs of society” and the possibilities of incorporating corporate accountability into the existing international human rights legal framework. Along with issues of jurisdiction, TNCs are also sheltered by their status as legal persons in the eyes of the law without any corresponding obligations under international law. Recently, the legal personality of corporations has been at the center of debate about establishing the legal justification for human rights accountability for non-state actors.

### 3.2 Legal Advances

Since its inception, international human rights law has been focused on protecting people from abuses of State power. If corporations are held accountable at all, it is the State’s responsibility to remedy such matters. The State’s ability to handle corporate violations is particularly complicated with regard to developing countries whose economic resources are not fit to battle corporate giants, and may not wish to deter corporations from doing business in their country. To the advantage of TNCs, developing countries compete to provide the best benefits—usually to the detriment of its population—as a means of attracting foreign investment. When discussing a human rights legal

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It should be noted that despite setting the principle that non-state actors may be held liable for violations of international law, such as war crimes, those found guilty served between only 1.5 and 8 years including time served.

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For cases confirming state responsibility for non-state actions: Inter-American Court of HR, Velasquez Rodriguez v. Honduras (1988); European Court of Human Rights, Costello-Roberts v. UK (1993)
framework, three important aspects must be included, which are 1) standards or substantive rules, 2) procedures to deal with compliance and violations, and 3) institutions to enforce such standards or rules.\textsuperscript{464} In order to incorporate non-state actors into international human rights law, they must first be recognized as “participants in” international law.\textsuperscript{465} The post-World War II era has seen a change in conferring international legal personality on non-state actors, such as international organizations.\textsuperscript{466} In fact, there is nothing that prohibits the granting of such legal personality to corporations.\textsuperscript{467} Individual persons, for example, have been given international legal personality via individual complaint mechanisms found in international human rights covenants.\textsuperscript{468} Rosalyn Higgins makes the very intriguing argument that the fundamental nature of international law is that of norms that respond to the “needs of the system” rather than merely a set of fixed rules. Opposite to the positivists’ view that individuals do not bear rights and duties under international law, Higgins proposes that participants—not subjects and objects—are the actors in international law (such as individuals, states, IGOs, TNCs).\textsuperscript{469} Using this model of international law, we are able to create a framework to integrate corporations into human rights law by claiming that

\textsuperscript{466} The ICJ confirmed that states can confer international legal personality in international organizations in \textit{Reparation for Injuries Suffered in the Service of the United Nations} (1949). The decision has implications for non-state actors as well. “Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is ‘a super-State’, whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.” Advisory Opinion Accessed 2 May 2010 at http://www.icj-cij.org/docket/files/4/1835.pdf
\textsuperscript{467} Kinley, D., and Tadaki, J. (2004), p. 945.
\textsuperscript{468} Four of the six core human rights treaties contain complaint mechanisms: International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; International Convention on the Elimination of All Forms of Racial Discrimination; and Convention on the Elimination of All Forms of Discrimination against Women. The Optional Protocol to the Covenant on Economic, Social and Cultural Rights contains such a mechanism; however, it has yet to come into force.
legal status is not relevant in regard to their legal rights and duties.\textsuperscript{470} Although this advances the theoretical argument for TNC inclusion, there exists a large practical hurdle in adopting this perspective of international law. States, the traditional actors in international law, may not wish to permit such accommodations for corporations in fear that such a move would dilute the historical dominance of the nation-state on the international stage.\textsuperscript{471} That being said, it is impossible to deny the influence that TNCs have in the age of globalization and development—in many cases with more resources than some States themselves.\textsuperscript{472}

Within the international human rights legal framework, States have an obligation to promote the human rights of its population and protect them from third party violations. With the privatization of fundamental services, such as water, the lines between public-private responsibilities are being blurred regarding accountability.\textsuperscript{473} Rather than the State directly violating one’s human right to water, it creates the conditions that allow private companies to violate such a right by neglecting to create or enforce laws designed to ensure access to water.\textsuperscript{474}

The need to make corporations legally responsible internationally is vital; however, this is not the same as advocating for an equal role of States and TNCs on the international stage.\textsuperscript{475} The International Court of Justice (ICJ) noted in the \textit{Reparations Case} that, “The subjects of the law in any legal system are not

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\item \textsuperscript{470} Muchlinski, P. (2001) “Human Rights and Multinationals: Is there a problem?” \textit{International Affairs} (77) 1, p. 41. The author points out that positive legal duties to promote human rights can be found in international agreements that directly relate to TNCs.
\item \textsuperscript{471} Kinley, D., and Tadaki, J. (2004), p. 945.
\item \textsuperscript{473} Barrett, D., and Jaichand, V. (2007), p. 545.
\item \textsuperscript{474} Rosemann, N. (2004) “The Human Right to Water Under the Conditions of Trade Liberalisation and Privatisation.” Friedrick Ebert Foundation. Accessed 17 March 2011 at http://library.fes.de/pdf-files/iez/01949.pdf The author argues that by treating the right to water as a human right (as water is a basic requirement to life), rather than a human need, those who make the decisions on access to water are able to be held legally accountable.
\item \textsuperscript{475} Muchlinski, P. (2001), p. 45.
\end{itemize}
\end{footnotesize}
necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community." Voon argues that limited rights, such as the rights to sue and be sued, proclaim rights, accept legal responsibility in courts and provide international legal personality without the ability to form international organizations. This allowance would create a foundation of human rights duties via international law as well as maintain State dominance on the international stage. Kinley and Tadaki also point out that TNCs currently have legal rights under foreign investment law and responsibilities in some multilateral conventions and the ability to protect their rights in World Bank disputes under international law. It is not much of a stretch to incorporate TNCs into the existing international human rights legal framework with both rights and obligations; however, thus far the political will to do so remains inadequate.

Despite the lack of political will, we can look at the current scope of TNC duties within international human rights law. There are a variety of treaties, customary law and codes of conduct that create a sense of accountability yet

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483 The voluntary codes of conduct often referred to as ‘soft-law’ are not legally binding. While they shed no light on creating legally binding human rights accountability for TNCs, they do offer a normative contribution to the discourse, as well as a mechanism to which TNCs can adhere.

In Kaskey v. Nike 119 Cal.Rptr.2d 296 (2002), the Court found Nike to be in violation of California’s consumer protection laws (California Business and Professional Code § 17200) and the Federal Trade Commission Act of 1914 (15 U.S.C. §§ 41-58) for claiming that its factories in Asia met labor standards. The Court found the statements
lack direct accountability and enforcement power. This becomes tricky when dealing with TNCs that may have been involved with human rights violations outside the home State’s jurisdiction. Historically, States have been indirectly liable for the actions of non-state actors within its jurisdiction. The problem of jurisdiction has been relieved somewhat thanks to the contraction of *forum non-conveniens*, allowing domestic courts to settle disputes of alleged human rights violations. According to Kinley and Tadaki, the relaxation of this doctrine shows international recognition of the dilemma regarding human rights and TNCs. One widely used piece of extraterritorial legislation for combating human rights abuses is the US Alien Tort Claims Act (ATCA) of 1789 that allows district courts “to have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Despite serving as effective tools that reach all parts of the globe, ATCA and other similar legislations are by no means satisfactory solutions for dealing with human rights violations by transnational corporations in the long term.

**Alien Tort Claims Act of 1789 (ATCA)**

The highest profile cases against TNCs have been argued under the ATCA, beginning with *Doe v. Unocal, et. al* (1997). This case opened up the legal gates to allow TNCs to be held accountable for human rights atrocities committed with its State partners. In 1997, a group of local Burmese

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484 This doctrine has typically been used to the advantage of corporations by stating that a more just decision could be reached in another court.


486 Australian Crimes Act of 1914; US Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970; Torture Victim Protection Act (TVPA) of 1991


villagers launched a civil action against, among others, Unocal and its parent company, Union Oil Company of California, citing gross human rights violations, including forced labor and forced migration, during the construction of the Yadana gas pipeline in Burma (Myanmar). The Unocal Case is a firm example of State action, an important criterion determining liability, as the company was directly responsible for working with military forces in security operations during construction of the pipeline.

Despite advances in the case law against private actors, the ATCA provides only part of the equation to achieving human rights accountability, provided that the violation qualifies as a tort. One fundamental problem regarding the ATCA is that it does not allow complaints concerning economic, social and cultural rights. A reason for this is the strict interpretation of violations that fall under the “law of nations.” Although human rights standards have been argued to constitute *jus cogens* norms, or more broadly, part of customary law, Sarah Joseph notes the fine line of ATCA applicability. Certain human rights breaches, such as torture, sexual assault, war crimes and crimes against humanity, slavery and forced labor only apply if they are systematic or prolonged. Other abuses, such as cultural genocide, terrorism and forced prison labor or

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490 The human rights violations committed by the national army and private companies and the subsequent legal actions taken by locals are depicted in the 2006 documentary, *Total Denial*. Accessed 30 June 2010 at http://www.totaldenialfilm.com/
494 A U.S. Court did hear a case regarding terrorism. However, the split court led to a narrow interpretation of the ATCA which stated terrorism did not violate the “law of nations.” See *Tel-Oren v. Libyan Arab Republic* (1984) 726 F. 2d 774. Court of Appeals, Dist. of Columbia. Accessed 12 May 2010 at http://scholar.google.com/scholar_case?case=2472562080683506761&hl=en&as_sdt=2002&as_vis=1
environmental degradation are not included. While a TNC will be held liable as a direct accomplice under the ATCA, it is not a given that a TNC will be held liable for benefiting from a State’s human rights abuses.\textsuperscript{495}

Another limitation of the ATCA is that it does not cover any human rights violations committed by TNCs acting alone or without state resources. The idea of “State action” is fundamental in activating ATCA. This is partly due to the fact that the majority of customary human rights norms apply to State action, requiring a sufficient connection to be made in order to hold TNCs culpable. The U.S. Courts have historically used domestic tests for determining liability for civil rights violations committed under the “color of law” to establish “state action” under an ATCA claim. These include joint action, an intertwined relationship, State encouragement, public function performed or proximate cause.\textsuperscript{496} Public function refers to a TNC exercising traditional State powers\textsuperscript{497} while State encouragement exists when the private entity’s actions are compelled by the State. In the context of an Alien Torts Claim, these two tests arise when there are claims of a government connection to a private party’s, such as TNC’s, actions. The intertwined relationship or symbiotic relationship\textsuperscript{498} test arises when there is a direct connection between public and private entities that their actions cannot be distinguished. This denotes an ongoing relationship over time as opposed to the joint action test, which could refer to a single event in which abuses occurred. Finally, proximate cause arises when a private entity controls the State’s carrying out of human rights abuses.

\textsuperscript{495} Bigio v. Coca-Cola (2000) 239 F.3d 440. U.S. Court of Appeals, Second Circuit. “A private party does not act under color of law simply by purchasing property from the government.” The purchase of expropriated land from Egypt, although economically benefited Coca-Cola, was not the same as being an accomplice to violations. Accessed 12 May 2010 at http://scholar.google.com/scholar_case?case=1437726685048264361&hl=en&as_sdt=2&as_vis=1&oi=scholarr


Each of these five tests holds the key to activating the ATCA; however, meeting a test’s requirements does not guarantee the court will find the private actor liable for human rights violations.

As mentioned earlier, *forum non-conveniens* remains (although somewhat contracted) a legal hurdle when bringing forth complaints against TNCs. The principle allows discretion to a court to refuse to hear the case if, in the interest of justice and all the parties, another forum is more appropriate. The rule allows companies to avoid liability in their home states for foreign violations and provides parent companies protection against abuses by subcontractors and subsidiary companies. While it has been used to protect private corporations, Kinley and Tadaki note a trend developing in the Australian, U.K. and U.S. Courts to focus on outcomes rather than “procedural pedantry.”

Australia historically followed the English doctrine that allowed a stay if the proceedings would cause injustice to the defendant (for example, oppressive or vexatious litigation and abuse of process or court) and a change in forum would not cause injustice to the plaintiff. In 1987, England and many other Commonwealth members adopted the “Spiliada Rule,” which required the court to identify the more appropriate forum for the proceedings. Yet another advancement to *forum non-conveniens* came with the Australian High Court’s decision in *Oceanic Sun* case to reject the use of the “Spiliada Rule.” However, they did so in a very indecisive manner, leading to a somewhat confused Australian system in regard to *forum non-conveniens*.

Regardless of which test is used (clearly inappropriate test; clearly more appropriate forum test; or the Spiliada test) there is a contraction of the rule in

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the West. Although controversial, the U.S. Courts sought a “fourth way” in *Aguinda v, Texaco Inc.*\(^{504}\) In its decision, the Court determined that any decision against Chevron Texaco in Ecuadorian Courts would be enforceable in the United States. The decision has received much criticism due to its imprecise principles and apparent judicial imperialism,\(^{505}\) a common attack levied against the ATCA by business groups, such as USA-Engage.\(^{506}\) Nonetheless, it is a tool that has been used, both successfully and unsuccessfully,\(^{507}\) for combating a non-state human rights violation which qualifies as a tort.

While the future of the ATCA could be in jeopardy due to judicial reinterpretations, questions concerning its constitutionality and possible legislative amendments, there are other recourses by which corporations may be held accountability for their actions regarding human rights. According to Joseph, the most appropriate and complete replacement of the ATCA, in the event of its diffusion, is U.S. Code 28, Section 128.\(^{508}\) Known as the Federal Question, this Section states, “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”\(^{509}\) Although challenges on constitutionality are possible, the Second, Fifth, Ninth and Eleventh Appellate Courts have been fairly consistent in affirming that the ATCA is constitutional, appropriately interprets the law of nations,\(^{510}\) and creates causes of action\(^{511}\) and that it is applicable for actions

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\(^{506}\) Set on removing barriers to global trade, USA-Engage (http://www.usaengage.org) has led the attack against the ATCA. In collaboration with the National Foreign Trade Council (NFTC), business groups submitted an *amicus* brief in the Unocal trial.

\(^{507}\) Such an unsuccessful case was *Kiobel v. Royal Dutch Petroleum Co.* (2010, 2nd Circuit) in which the Second Circuit rejected the proposition that corporations may be held liable for violations on international law via the ATCA.


\(^{510}\) U.S. courts have determined ATCA violations are to include crimes against humanity, war crimes, genocide, torture, rape, and summary executions.

\(^{511}\) Although some extraterritorial legislation explicitly creates cause of action (e.g., TVPA) the ATCA statute does not include such wording. Therefore, the Courts have inferred that cause of action is created by the legislation. See Kochan, D. (1998)
taking place outside U.S. territory.\textsuperscript{512} These inferences have been challenged by several U.S. Department of Justice briefs\textsuperscript{513} stating that the fundamental reasoning behind the strength of the ATCA, grounded in \textit{Filártiga v. Peña-Irala} (1980),\textsuperscript{514} is against the \textit{intent} of the United States in regard to its international treaty obligations.

The varying opinions concerning the \textit{Filártiga} interpretation are not isolated to the political realm. Legal scholars are also torn on the extent to which the ATCA is relevant.\textsuperscript{515} For some, the \textit{Filártiga} decision is known as the “\textit{Brown v. Board of Education} for international human rights law,”\textsuperscript{516} creating the legal basis for nearly three decades of litigation such as the \textit{Unocal} case. To others, a strict interpretation is preferred, as prescribed by Judge Bork (726 F 2d 774) of the D.C. Circuit Court in 1984. This perspective calls for the limiting of the ATCA to the law of nations as existing in 1789, rather than the more contemporary interpretations of other Circuit decisions, if the statute provides causes of action. Regardless of the contemporary debates, the predominant approach


\textsuperscript{514} 630 F2d 876 (US Second Court of Appeals). Accessed 1 July 2010 at http://openjurist.org/630/f2d/876/filartiga-v-pena-irala

The DOJ briefs against the \textit{Filártiga} approach cited that since the United States was not a party to various human rights treaties the \textit{intent} was not to be bound by the obligations of the relevant agreements, domestically or internationally.


\textsuperscript{516} \textit{Ibid.}, p. 687.
supports the contemporary interpretation of the Filártiga case.\textsuperscript{517} Although the ATCA is the most cited extraterritorial statute used in seeking reparations for international human rights violations, it is not the sole path.

Below, we will discuss the role of two additional U.S. regulations, the Torture Victim Protection Act (TVPA) and the Racketeer Influenced and Corrupt Organizations Act (RICO), which play complementary roles in strengthening international human rights law with regard to non-state actors. The question may be posed as to how such domestic legislation can advance international human rights at large. It is the perspective of this research that the power of the ATCA and RICO is not so much that it is part of domestic law but that it has been used, quite strategically due to limits of international law, to bring cases against corporations without the need for violations to have occurred within the United States. Such statutes cannot fix the problem; however, they can be used to fill in the gaps of international human rights law until the necessary changes are implemented to truly advance the discourse with regard to human rights accountability for private actors.

\textit{Torture Victim Protection Act (TVPA)}

Another piece of extraterritorial legislation that has shown to be effective in civil cases involving corporate human rights accountability, albeit in very specific circumstances,\textsuperscript{518} is the Torture Victim Protection Act (TVPA) of 1991, which was signed into law in 1992 by then President George H. W. Bush as a complement to the ATCA.\textsuperscript{519} Although the TVPA covers a smaller section of human rights violations than the ATCA, torture and extra-judicial killings, it does allow for both aliens and U.S. citizens to bring forth complaints against

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\textsuperscript{518} U.S. courts have determined the TVPA to be applicable action against any person, acting under “actual or apparent authority or color of law, of any foreign nation,” that subjects an individual to torture or extra-judicial killing. Accessed 25 June 2010 at http://www.law.cornell.edu/uscode/uscode28/usc_sec_28_00001350----000-notes.html
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individuals “under actual or apparent authority, or color of law, of any foreign nation” consistent with the Foreign Assistance Act of 1961.\textsuperscript{520}

Although the TVPA is essentially an extension of the ATCA, pertaining to civil liability, there are fundamental distinctions between the two Acts. While both legislations aid the United States in carrying out its international treaty obligations, the TVPA has a much narrower scope. First of all, the TVPA includes an explicit statute of limitations (10 years), unlike the ATCA.\textsuperscript{521} Taking this fact into consideration, the US Ninth Circuit Court of Appeals decided in \textit{Papa v. US} (2001) that the ATCA should also be bound by the 10-year statute of as the TVPA is the “most closely analogous federal statute of limitations.”\textsuperscript{522} This reasoning was seen as a breakthrough for those seeking to bring complaints under the ATCA, which had previously been bound by California’s one-year statute of limitations for personal damages.

Another distinction between the two extraterritorial human rights legislations is the explicit wording concerning local remedies. In order to file a complaint under the TVPA, the plaintiff must exhaust all of the local remedies concerning the alleged violations.\textsuperscript{523} The issue of domestic remedies was visited in \textit{Estate of Rodriguez v. Drummond} (2003).\textsuperscript{524} The case involved the alleged wrongful death of three Columbian labor leaders at the hands of Drummond Ltd., a subsidiary of Drummond Company. The Court found that the defendants had the obligation of proving that the plaintiffs had not adequately exhausted all domestic remedies.\textsuperscript{525} Initially, the Court found that the plaintiffs’ pursuance of domestic solutions in Colombia would have led to persecution, following the general consensus in international law that also requires the exhaustion of

\begin{itemize}
  \item \textsuperscript{520} Accessed 30 June 2010 at http://www.usaid.gov/policy/ads/faa.pdf
  \item \textsuperscript{521} Section 2 (c) of the TVPA states: “Statute of Limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.”
  \item \textsuperscript{522} See \textit{Papa v. US} (281 F.3d 1004) citing \textit{North Star Steel Co.}, 515 U.S. at 35, 115 S.Ct. 1927. See also \textit{Hilao v. Estate of Marcos}, supra.
  \item \textsuperscript{523} Section 2 (b) states: “Exhaustion of Remedies. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”
  \item \textsuperscript{524} Accessed 30 June 2010 at http://www.iradvocates.org/Drummond%20Decision.pdf
  \item \textsuperscript{525} 256 F Supp 2d 1250 (WD Al 2003), 1267
\end{itemize}
existing local processes before it advances to the international level (as in OP-ICCPR). This ruling, however, was overturned with the appellate court stating that the children of the victims had no legal standing under the TVPA. In *Locarno Baloco, et al. v. Drummond Company, Inc.*\(^ {526}\) the 11\(^ {th} \) Circuit decided that the previous decision had been made prematurely and ruled that there was indeed legal standing to proceed with the TVPA claim, confirming that all local remedies in Colombia had been exhausted.

Despite the TVPA being a modern supplement to the ATCA, it also suffers from an important limitation that affects its ability to combat human rights violations by TNCs, namely, State action.\(^ {527}\) Like the ATCA, there is simply no room for complaints against occurrences of torture and extra-judicial killings by private entities if the State action test is not met. Although the TVPA accounts for less high profile cases as the ATCA, it is nonetheless an effective tool in the limited circumstances in which it is applicable. At the very least, the TVPA and the subsequent court decisions provide healthy additions to the literature to establish the extent of private accountability to international human rights norms. As noted by the World Organization Against Torture,\(^ {528}\) there is a connection between torture and economic, social and cultural rights that is often overlooked or incorrectly categorized. In some cases economic, social and cultural rights have been denied so forcefully that it constitutes cruel, inhuman and degrading treatment. For example, in 2002 the Committee Against Torture found that forced evictions of Roma in the former Yugoslavia by private individuals violated the Convention Against Torture.\(^ {529}\) It has also been shown that social inequalities can be identified as a root cause of torture, closing the gap between torture and protection of economic, social and cultural rights

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\(^{528}\) Accessed 13 March 2012 at http://www.omct.org/escr/about/disrespect-lead-to-violence/

through the multidimensional impacts of State officials, private actors and development institutions.  

Racketeer Influenced and Corrupt Organizations Statute (RICO)

Although the ATCA remains the most popular means by which to hold non-state actors accountable, there have also been several cases brought forth under the Racketeer Influenced and Corrupt Organizations (RICO) Statute of 1970. RICO is most notable for its use in cracking down on organized crime but has more recently been used as a foundation by which complaints of international human rights violations can be brought to litigation. As demonstrated by Kinley and Tidaki, however, RICO can only be used indirectly when bringing complaints of human rights violations. Complaints under RICO are only valid if the human rights violations are a result of racketeering and corporate corruption, a burden that rests with the plaintiff. RICO provides criminal and civil remedies, unlike the ATCA, making it an important piece in the discourse concerning legal liability for human rights violations. In regard to this research, RICO provides a legal path to hold corporations accountable as their actions often include systematic intimidation, forced migration and assassinations for the purpose of extracting wealth from a particular area. As in Doe v. Unocal (2002) and Wiwa v. Royal-Dutch Shell, RICO provides an interesting basis for criminal and civil proceedings, casting a more general definition of what it means to be involved in criminal activity, including white-collar activities. In Doe v. Unocal (2002) the Court dismissed the RICO violation claims by the plaintiff citing a lack of subject matter jurisdiction. Although this portion of the case was dropped, it is important to look at the argument for including a RICO

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531 U.S. Code, Title 18, §1962 (c) (2010) states that: “It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” http://www.law.cornell.edu/uscode/18/usc_sec_18_00001962----000.html
533 395 F. 3d 932 (9th Circuit 2002)
534 226 F.3d 88 (2d Circuit 2000)
claim against Unocal. The plaintiffs claimed that Unocal and others violated 18 U.S.C. § 1962 (c) and (d) which states:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Additionally, the statute states that it is illegal for “any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.”535 The Doe plaintiffs argued that the Unocal “conspired in a pattern of extortion”536 consistent with the Hobbs Act,537 one of the cited definitions of racketeering activity under RICO. According to the Court, the plaintiffs were not able to meet either the effects test538 or the conduct test539 to establish subject matter justification in a RICO case.

The conduct test establishes jurisdiction for foreign injury due to domestic conduct. On the other hand, the effects test establishes jurisdiction for domestic injury due to foreign conduct.540 In the Doe Case, the Court decided that the technical and financial support given to Myanmar directly caused injury or loss. Conversely, there was an absence of specific facts that the conduct in Myanmar did directly cause injury or loss in the United States.541 This case shows that

535 US Code, Title 18, §1962 (c), (d). Accessed 8 September 2010 at http://www.law.cornell.edu/uscode/18/uscs_sec_18_00001962----000-.html
537 18 U.S.C. § 1951 (a) states: “Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both. Accessed 8 September 2010 at http://www.law.cornell.edu/uscode/18/1951.html
540 See also Joseph, S. (2004), p. 79.
while RICO casts a large net on holding corporate enterprises accountable, either the conduct or effect test must be met before jurisdiction is granted. We can look to *Wiwa V. Royal-Dutch Shell* (2000) as an example of the type of claim recognized as meeting one of the two required tests to determine subject matter jurisdiction for alleged RICO violations.

*The Wiwa Case*

Several Nigerian citizens brought forth claims that the Royal Dutch Petroleum Company and Shell Transport and Trading Company recruited Nigerian police and military forces to suppress the Ogoni People’s movement against oil excavation on traditional Ogoni land by contaminating the lands to the point that the people’s livelihoods could not be maintained. The facts of the case state that weapons were allocated to Nigerian officials for use in attacking Ogoni villages and to remove opposition through rape, illegal detention, torture and assassinations. Among those assassinated was Ken Saro-Wiwa, the leader of the Movement for the Survival of the Ogoni People. Saro-Wiwa and John Kpuinen were convicted of murder and sentenced to death by hanging by a special tribunal following a case in which witnesses were bribed and family members were beaten. While the case also activated under the ATCA and the TVPA, the RICO statute is of particular interest in this section. The Plaintiffs alleged that the extortion and murder carried out by Nigerian authorities, via Royal Dutch/Shell requests, caused excessive damage to the businesses and property of the Plaintiffs. Owens Wiwa, doctor and brother of Ken Wiwa, was forced to leave his medical practice and flee to Canada. A Jane Doe plaintiff claimed that her crops were destroyed by the collaboration between Nigerian authorities and Royal Dutch/Shell, in addition to being beaten and shot by the Defendants.

In order to activate RICO, the injury must be caused by an act described in the statute. After witnessing the events leading to the death of his brother, Wiwa

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feared for his life due to his opposition to the Defendants' activities. He was forced to flee, and consequently abandon his business, due to the actions committed by the Defendants, satisfying the “predicate cause.” Jane Doe’s injuries to her business were also seen as a direct result of the RICO violations, satisfying the prerequisites of bringing forth such a complaint. The Plaintiffs proved enterprise, prescribed acts violated, a pattern of racketeering and commercial loss leading the Second Circuit Court to dismiss the Defendant’s claims that the case should be thrown out due to lack of standing. An enterprise is defined as “a group of persons associated together for a common purpose of engaging in a course of conduct.” RICO in particular describes such an enterprise as including “any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” In this particular case, the enterprise consisted of Shell Nigeria, Willbros West Africa, Inc. and the Nigerian authorities. Since the three entities were separate and held legal personality, this condition was met. The second requirement, predicate offense, is defined as “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, ... which is chargeable under State law and punishable by imprisonment for more than one year” and "any act which is indictable under" the Hobbs Act. The third requirement, proof of a pattern of racketeering activity, is to establish that each member of the enterprise has committed at least two predicate acts. In this particular case, the predicate crimes were the use of bribes by the Defendants in return for false testimonies and extortion, in the form of threats to Owens Wiwa that led him to abandon his business in Nigeria. Other crimes include murder, arson and Hobbs Act violations. The Plaintiffs showed that these acts were not only related but that they also began in 1990, demonstrating a continued pattern of activity. A final key component of a RICO

546 18 U.S.C § 1961 (5) states that, “A pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.” Accessed 13 September 2010 at http://www.law.cornell.edu/uscode/18/1961.html
claim is showing that some type of commercial influence was attained via the criminal activities. According to the Plaintiffs in the Wiwa Case, the racketeering acts were used as a means of exporting cheap oil to the U.S. market.\footnote{According to the original civil complaint, half of the oil produced in Nigeria is exported to the U.S. Since the oil was extracted through exploitation of Ogoni land without compensation, the defendants gained an unfair market advantage in that they could offer much lower prices for the product. See 96 Civ. 8386. Accessed 17 September 2010 at http://ccrjustice.org/files/11.8.96%20%20Wiwa%20Complaint.pdf} As the stated obligation of the RICO Statute is to preserve the integrity of the market, the manipulation of the oil prices sealed the Court’s opinion that the motion to dismiss the claim was without standing. Using the effects test, the Court held that the RICO Statute had been violated.

The Wiwa Case is a good example of how RICO can be used to seek criminal and civil remedies to extraterritorial human rights violations. Although Shell settled right before the 2009 hearing\footnote{Mouawad, J. (8 June 2009) "Shell to Pay $15.5 Million to Settle Nigerian Case." New York Times. Accessed 17 September 2010 at http://www.nytimes.com/2009/06/09/business/global/09shell.html?_r=2&partner=rss&emc=rss} the case is vital in viewing the necessary legal standards by which to bring forth a RICO case. The Wiwa and Doe cases highlight the thin line that separates a prosecutable RICO claim involving breaches in international human laws standards from a dismissed claim due to lack of subject matter jurisdiction. One interesting theme that arose during this author’s analysis of these two cases was the considerably open nature of claiming a RICO violation. While the broad standards are in place, the statute leaves quite a bit of room for the courts to determine if a RICO claim has standing. In 2004, an interesting piece of research was published concerning extraterritorial jurisdiction under RICO and whether or not violations of national law activate the statute.\footnote{Engle, E. (2004) “Extraterritorial Jurisdiction: Can RICO Protect Human Rights? A Computer Analysis of a Semi-Determinate Legal Question.” Journal of High Technology Law 3 (1), p. 1-28.} Engle’s analysis and accompanying computer model seeks to clarify the situations in which RICO can be activated involving international human rights violations. One issue involving a lack of clarity is due to the fact that the Courts have yet to decide which test is best
suited for RICO: the effects test, the conduct test or a hybrid test. The computer model created based on Engle’s research allows one to answer a series of questions; in return, the results show the extent to which a defendant is liable under RICO. The interesting aspect of this model is that it allows the user to see a variety of cases and facts in order to better understand and realize the potential of RICO as a tool for prosecuting human rights violations. This program allows practitioners to see the possible results of a particular complaint based on previous court decisions.

This research could pave the way to a more accessible method for people to determine if they have a RICO claim, thereby leveling the playing field for combating violations of international human rights law. Additionally, as decisions are added to the model, both students and human rights practitioners can have a clearer idea on how RICO claims are made. This is fairly new research that requires further investigation; however, it shows great promise in creating equal access to the law and international mechanisms in place for holding private actors accountable for human rights violations.550

The use of RICO is of value because it can apply to any corporation. As previously noted, RICO requires illegal acts to be committed by enterprises. In Cedric Kushner Promotions Ltd. v. King (2001),551 Justice Brayer states:

> The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. The Court can find nothing in RICO that requires more “separateness” than that.

As Joseph points out, the separate legal personality that has largely been used as a tool for avoiding liability can, under RICO, be used to constitute the

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“enterprises” required to activate the statute.\textsuperscript{552} The ATCA, and other extraterritorial legislation, such as TVPA, and RICO, have flaws, which certainly diminish the scope of bringing forth complaints, particularly with respect to economic, social and cultural rights.\textsuperscript{553} However, the litigation can be helpful in further facilitating the use of all relevant tools to hold private actors accountable for their actions and deter them from continuing to commit human rights violations.\textsuperscript{554} The legal decisions based on extraterritorial legislation can also help frame the discourse and extent of legal human rights obligations, and the subsequent consequences for violations, for future international agreements and contributions to customary law pertaining to rights protection.

\textit{Universal Declaration of Human Rights}

Moving outside the realm of extraterritorial jurisdiction, the 1948 Universal Declaration of Human Rights (UDHR)\textsuperscript{555} is a great source for seeking accountability within international human rights law.\textsuperscript{556} The preamble states that “every individual and organ of society”\textsuperscript{557} is responsible for promoting the human rights provisions. Despite the State-centric nature of international law and the structure of the UN,\textsuperscript{558} it can be argued that TNCs, by the horizontal application of human rights, are subject to international human rights

\textsuperscript{556} For an overview of why the UDHR is legally binding, Accessed 21 September 2010 http://www.udhr.org/history/question.htm
It has been suggested by some critics that the provisions of the UDHR have reached the standard of customary international law. Directly, non-governmental entities are bound by customary international law not to commit war crimes, crimes against humanity, genocide and piracy. Bodies such as the International Criminal Court (ICC) have jurisdiction over specified matters, namely war crimes, crimes against humanity, crimes of aggression and genocide. Functionally, the UDHR is the foundation of numerous international, legally binding covenants and national legislation and, although contested by some, meets the standard of customary international law. As Hannum points out, the principles found in the UDHR act as an important common denominator between States in regard to human rights norms; it has provided the foundation for the international human rights framework and continues to function as a guide to contemporary issues. This section will analyze the references to the UDHR in both international and national theatres to further the discourse on whether or not this founding document occupies a space in customary international law.

On 9 December 1948, just one day before the official adoption of the UDHR, Eleanor Roosevelt addressed the U.N. General Assembly. During her speech she visited the status and expectation of the overwhelmingly popular document:

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559 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra. Accessed 13 May 2010 at http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html

See also Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980). Here the court emphasized the importance of the UDHR and even acknowledged the fact that some legal scholars recognized the declaration as meeting the standards of customary law. See also UN Global Compact. Accessed 2 April 2012 at http://www.unglobalcompact.org/aboutthegc/thetenprinciples/humanrights.html


In giving our approval to the Declaration today it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a Declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.563

Although the position was very clear during its adoption, the UDHR revolutionized international law and became utilized more than the 1948 General Assembly could have ever imagined. The contemporary understanding is that the UDHR, in part, constitutes customary international law.564 In USA v. Iran (1980), for example, the International Court of Justice ruled that certain actions, such as deprivation of freedom and subjection to hardship went against the principles of the Charter of the UN as well as the UDHR.565 For a practice to be considered part of customary international law it must meet two conditions: (1) constitute an identifiable state practice and (2) State belief that the law obliges such a practice (opinio juris).566 Since the Montreal Statement of the Assembly for Human Rights567 and the Proclamation of Teheran,568 some legal

567 Statement by a group of experts regarding the legal status of the UDHR. Adopted 27 March 1968. The Declaration “constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become part of customary international law.” Statement reprinted in the Journal of the International Commission of Jurists, p. 94, 95.
568 “The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international
scholars have proclaimed that the Declaration has reached this status in international law.  

569 Scholars such as Louis Sohn argued that the Declaration is not only an authoritative interpretation of the UN Charter, but also a legally binding document pertaining to internationally recognized human rights standards.  

570 Of particular interest is the opinion of John Humphrey, a principal author of the UDHR, who states that the document clarifies the ambiguous language of the UN Charter regarding international human rights standards. It was originally designed to set forth the principles which could later be implemented into future Covenants; however, the document has far surpassed the original expectations and remains cited by some legal scholars as constituting customary international law while others hold the view that some of the rights cited in the UDHR, like the right not to be subjected to torture, but not the document as a whole, may have reached the status of customary international law.  

572 To determine whether or not a practice constitutes customary law, attention must be given to a variety of sources such as press statements, policy papers, legal opinions by state counsel, executive orders, national statutes, court decisions, resolutions, patterns of treaty ratification, etc.  

573 That being said, if a State is a persistent objector to a norm, it may avoid being bound by customary


572 Jaichand, V. and Suksi, M p.31-2

law if it has consistently rejected the norm.\textsuperscript{574} To this extent it is incorrect to state that the UDHR as a document is part of customary international law as many countries reject the protection of socio-economic rights as rights articulated in the UDHR. That, however, does not prevent them from citing the document in their own cause. The United States, for example, cited the UDHR as justification for its claim that the Soviet Union violated the UN Charter by prohibiting Russian wives to leave the territory with their foreign spouses. The Resolution claimed an Article 55(c)\textsuperscript{575} violation of the Charter,\textsuperscript{576} pointing to Articles 13 and 16\textsuperscript{577} of the UDHR as validation of the infringement. The other post-WWII super power, USSR, supported resolutions with similar foundations in the Declaration, dealing primarily with discrimination and apartheid. For instance, UN Resolution 365 (1950)\textsuperscript{578} identified South Africa’s discrimination of peoples with Indian descent as conflicting with Resolution 217\textsuperscript{579} and the adoption of the UDHR. In 1961, the General Assembly voted on resolutions concerning continued discrimination of peoples with Indo-Pakistan origin and apartheid policies, each citing violations of both the Charter and UDHR.\textsuperscript{580} Since its inception, the UDHR has played an integral role on the international stage, no doubt due in part to the quick adoption and the expedient use by global powers such as the United States and USSR.

\textsuperscript{575} Article 55 (c) of the Charter states that the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Accessed 27 September 2010 at http://www.un.org/en/documents/charter/chapter9.shtml
\textsuperscript{577} UDHR (1948) Article 13 states that, “(1) Everyone has the right to freedom of movement and residence within the borders of each state and (2) Everyone has the right to leave any country, including his own, and to return to his country.” Article 16 states that, “(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution; (2) Marriage shall be entered into only with the free and full consent of the intending spouses; and (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”
Although General Assembly resolutions alone do not constitute State practice, they do work in accord with other state actions that may lead to customary international law in time. The *Filartiga* decision encompasses, in part, the “New Haven” view, developed by Myres McDougal and Harold Lasswell. This view proposes that international law is more of a decision-making process by which standards are applied that promote the interests and normative values of the global community (for example, prevention of torture). The *Filartiga* Court also appealed to more traditional doctrines such as incorporating international law into national law and *hostis humani generis*, leading to a generally well-accepted justification for its decision. Although traditional legal doctrines were cited, the decision was largely based on UN General Assembly Resolutions, which the Court classified as an “authoritative source” of international law due to the Charter’s ambiguous human rights language. Of particular interest are Resolutions 217A (UDHR), and Resolution 2625 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations). The Second Circuit Court was clear that the Resolutions constitute international law, most notably due to the unclear wording of the Charter with regard to human rights. The Second Circuit reached this opinion with the help of leading legal scholars who unanimously agreed that torture clearly violated the law of nations.

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585 Accessed 27 September 2010 at
586 630 F.2d 876 (2nd Circuit, 1980), para. 24: “The General Assembly has declared that the Charter precepts embodied in this Universal Declaration ‘constitute basic principles of international law.’”
Although Filartiga led to a landmark decision that set the tone for U.S. Courts to hear international human rights violation cases, such as torture, not all courts accepted the high opinion of General Assembly Resolutions as international law.\textsuperscript{588} Equally true were the opinions of legal scholars following the Second Circuits decision. Following Filartiga, a surge of legal commentary questioned the Court’s justification and its implications on U.S. subject matter jurisdiction and international law as a whole. For some scholars, the UDHR has reached the status of a global \textit{Magna Carta} due to its sustained presence in international agreements, national constitutions and court decisions, such as \textit{Filartiga}.\textsuperscript{589} Although the Court maintained the traditional sources of international law, its decision showcased a more progressive view of international law with its recognition of “multilateral State action” (such as initial adoption and subsequent unanimous reaffirmation of the UDHR and other G.A. Resolutions).\textsuperscript{590} More so, the case highlighted a shift concerning customary international law. According to Blum, the \textit{Filartiga} decision closely resembles the role of customary international law in the late 18\textsuperscript{th} century when §1350\textsuperscript{591} was enacted.\textsuperscript{592} The case provided an alternative to the doctrine of non-interference in matters involving States and their citizens. The Court acknowledged the importance of norms that transcend political boundaries, such as freedom from torture.

Though a groundbreaking decision, some scholars criticize it, particularly with regard to the Court’s classification that the prevention of torture is common state practice. Rusk, for example, proposes that we need only to look at the U.S. State Department’s Human Rights Reports to see that the abstention from

\begin{thebibliography}{9}
\bibitem{Accessed} Accessed 12 October 2010 at http://www.law.cornell.edu/uscode/html/uscode28/usc_sec_28_00001350---000-.html
\end{thebibliography}
torture is not a common state practice. According to a 1977 survey of national constitutions, only fifty-five member states prohibit torture. State practice seems to show us that torture is, in fact, quite common. The Court, however, chose to look at a cross-section of the "civilized" community of nations to support their decision. The Filartiga Court's decision is also based on the inclusion of the UDHR as the guiding document of the Charter with regard to human rights clarification.

Mr. Rusk, during his time at the Department of State, participated in drafting the U.S. position on the UDHR. He contends that no consultations were held with the relevant committees and there was no expectation among UN members that this would eventually become part of customary international law. Additionally, the Court did not seem to consult the reservations outlined by the U.S. concerning fundamental human rights treaties. Rusk goes so far as to say that the case will not constitute a landmark decision nor develop international law in any significant way; however, the reality is that Filartiga established a more progressive approach to the organic nature of international law. The fact that torture was the only explicit violation addressed does not take away from the case's significance. It provides a framework by which other human rights violations can be addressed within the U.S. legal system concerning continuously evolving international norms. Various legal scholars have argued the status of the UDHR as customary international law, although not

595 Rusk points to Uganda, North Korea, Iran and Vietnam and USSR as examples of "uncivilized" states that disprove the Court's premise that the prohibition of torture is common practice. See Rusk, D. (1981), p. 313, 314.
596 While Europe has solid jurisprudence on the issue, the United States is home to more Fortune 500 companies than any other country in the world. According to 2010 statistics, there are around 139 Fortune 500 companies in the United States. Of the five most profitable companies in the world, two are from the US. Additionally, the majority of corporate accountability cases have been argued under the auspices of U.S. law. Accessed 17 March 2011 at http://money.cnn.com/magazines/fortune/global500/2010/ and http://money.cnn.com/magazines/fortune/global500/2010/countries/US.html
unanimously agreed upon. The existence of violations to such customary law does not negate its status in the writings of some critics. What the violations do substantiate, however, particularly regarding breaches by transnational corporations, is that an alternative approach is needed to more effectively ensure rights protections by private actors. Although the duty of States to ensure that both State and non-state actors do not violate the rights declared, the practical realities, such as contemporary shortcomings of international human rights law with respect to TNCS, hinder full implementation. Fostering initiatives within regional mechanisms that parallel (but do not duplicate) efforts at the United Nations level can fill such gaps of implementation. Providing a trade incentive to better policing of non-state actors is a legitimate proposal to increase human rights protection.

3.3 Non-legal Contributions

While non-binding international law instruments lack enforceability, they are by no means useless. Though the term “soft law” may not be the most appropriate labeling, it does have some part to play in the international human rights regime, particularly in guiding the expectations regarding TNC accountability. If, one day, an explicit set of TNC human rights responsibilities is to be created within the international human rights legal framework, such “soft” standards will be influential to its wording and effect.597 The normative

597 The UDHR—once considered a mere set of guidelines—has reached the status of international customary law according to many scholars and legal decisions. Guiding principles should be considered as a part of the human rights framework despite lacking an immediate binding nature. Additionally, they offer a transitional foundation until international human rights law is able to adjust to considering the issue of private accountability in a State-centric system. Some authors, such as Klabbers, see serious issues with the concept of ‘soft law,’ particularly that it is without theoretical or practical justification. See Klabbers, J. (1996) ‘The Redundancy of Soft Law’, *Nordic Journal of International Law* 65, p. 167-182. This thesis strongly disagrees with this analysis. While there can be a semantic discussion regarding the use of the term ‘soft law,’ Klabbers restricts the argument to state practice. The reason codes of conduct are needed with regard to non-state actors is that there is an absence of law relating to the issue of criminal accountability for human rights violations. Perhaps a more appropriate distinction between hard law and soft law is *lex lata* and *lex ferenda*. Soft law, or codes of conduct, provides a foundation for future law regarding TNCS and human rights. A violation is merely one step of the process. Klabbers’ attack on ‘soft law’ regarding State actors identifies a legitimate area that must be addressed; however, the argument is not able to hold its own with regard to non-state actors since
standards, such as the revised OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, serve as codes of conduct for private actors and for operating within domestic governments that adhere to the OECD Declaration. Although unsuccessful in obtaining the necessary support, the Draft “UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” also sought to provide a guide for bridging the distance between international expectations and corporate operations, recognizing the grey area that they occupy in contemporary society. The continued development of non-binding norms provides a framework by which States may implement the standards into their national systems and regional trade agreements to further strengthen international human rights protection.

In general there are several issues that any Code of Conduct must visit if it is going to be effective. First of all, a complaints and appeals mechanism must be present with a clearly defined process. Such mechanisms are a fundamental step for “advocacy and capacity building” and fulfillment of the rights to bridge the gap between the top-down nature of the international human rights regime and the bottom-up approach of voluntary standard setting. Secondly, there is a constant tension concerning the level of reporting involved with complaints and resolutions. The third important aspect of the codes of conduct international law remains focused on States as the primary actors. He is true in his analysis that the overall system is weakened without having a single “international order.” That being said, soft law has its place by advancing norms that have not yet been included in legal mechanisms, such as legal accountability of human rights violations by non-state actors.

is content. The mere listing of human rights standards for rhetorical purposes
serves no function in advancing the rights discourse with respect to non-state
actors. Any code must include reasonable objectives and lay out the steps by
which to achieve such standards within the mission of the TNC in the long term.

Types of Guidelines

According to Wawryk, there are four types of codes of conduct that may be used
when discussing TNC compliance to human rights standards: 603 public
international; 604 private internal; industry association; and NGO-developed. 605

Each type of conduct code has its own set of drawbacks; however, they can be
quite effective as a first step to building a stronger connection between TNCs
and the full realization of human rights.

Public international codes of conduct are perhaps the most well-known types
and include the OECD Guidelines for Multinational Enterprises606 as well as the
International Labor Organization’s Tripartite Declaration of Principles
Concerning Multinational Enterprises and Social Policy (MNE Declaration). 607

The OECD Guidelines are completely voluntary 608 and provide guidelines on
how TNCs should operate both in their home country and abroad. The OECD
Guidelines were originally designed for member countries only; however,

603 Wawryk, A. (2003) "Regulating Transnational Corporations through Corporate
Codes of Conduct," in Transnational Corporations and Human Rights. Scott Pegg and

604 Although public international codes of conduct may be implemented in a treaty or
other international instrument, this section is concerned with voluntary codes of
conduct that are not legally binding.

605 It should be noted that the Sullivan Principles (1977) and the MacBride Principles
(1984) contributed greatly to the discourse on corporate conduct. Although arguably
successful in their specific contexts, South Africa and Northern Ireland respectively,
they do not deal with the value changes that are necessary to meaningfully implement
human rights norms in everyday operations.


608 “The Guidelines are recommendations jointly addressed by governments to
multinational enterprises. They provide principles and standards of good practice
consistent with applicable laws. Observance of the Guidelines by enterprises is
voluntary and not legally enforceable.” Accessed 29 May 2012 at
adoption was later opened up to all countries\textsuperscript{609} as a means of getting more parties on board with the standards. While the Guidelines make numerous references to human rights and the UDHR, it explicitly states that governments are the primary duty-bearers\textsuperscript{610}. That being said, those who voluntarily adopt the guidelines are “encouraged” to respect human rights and abide by the standards and international obligations by the host countries. At first glance, the OECD Guidelines are incredibly vague and leave a lot of room for TNCs to interpret their actual obligations. There are, however, some positive aspects involved in the drafting and implementation. First of all, the voluntary nature of the guidelines makes it a much more attractive endeavor for both countries and corporations. The need for special committees and lengthy negotiations is essentially absent from this scenario, unlike that of a legally binding agreement. Another advantage of this particular set of guidelines is that it applies to TNCs when both at home and abroad, offering a more level playing field when operating in certain countries. The Guidelines do include complaint mechanisms, annual reporting and in-country contacts (National Contact Points or NCPs)\textsuperscript{611} to allow countries and other interested parties access to information and status updates.

In the 2002 Annual Report, the OECD identified the paradigm shift towards the efficient use of its NCPs throughout the world in dealing with breaches to its guidelines. Of particular interest is the International Textile, Garment and Leather Workers’ Federation’s (ITGLWF) complaint to South Korea’s NCP\textsuperscript{612} citing infringements to the OECD Guidelines during operations in Guatemala. The complaint claimed that the South Korean companies were, among other things, inciting violence, bribery and threatening union workers in their Guatemalan factories.\textsuperscript{613} Upon further investigation, the Korean NCP


\textsuperscript{612} Vice-Minister of Commerce, Industry and Energy

\textsuperscript{613} Clapham, A. (2006), p. 204.
discovered several violations of Chapter IV of the Guidelines (Employment and Industrial Relations). Following recommendations by the NCP, the Korean company agreed that there were several issues of concern and, as a result, distributed a cartoon form of Guatemalan labor rights so that even illiterate workers would be informed of their working rights. There are several instances such as this that highlight the potential of the OECD Guidelines. The framework includes a complaint mechanism that encourages communication between parties in hopes of creating a corporate culture of compliance. Although there is no real sanction component for companies that do breach the standards, the complaint mechanism does offer an outlet for interested parties to formally submit their grievances. The ongoing use of National Contact Points by the 42 adhering governments continues to show promise in promoting Ruggie’s Guiding Principles.

Similar to the OECD Guidelines, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy are also recommendations and are not legally binding. The Declaration was adopted in 1977 and sought to create a set of standards for governments, TNCs and workers’ organizations. This agreement includes more actors than the OECD Guidelines and serves as an articulation of existing principles and international human rights standards, some of which are either part of existing treaties or

\[618\] Paragraph 8 of the Agreement’s General Policies states: “All the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards. They should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organization and its principles according to which freedom of expression and association are essential to sustained progress.” Accessed 14 October at
can be considered customary international law.\textsuperscript{619} Despite the specific reference to human rights in paragraph 8 of the Declaration, the majority of the document focuses on international labor standards such as the freedom of association, right to collective bargaining, elimination of forced and child labor, and an end to discrimination.\textsuperscript{620} Although the ILO declarations have strengthened the economic, social and cultural rights, it is vital that legally binding conventions explicitly entertain the notion of transnational corporations and human rights. The Declaration includes a dimension not found in the OECD Guidelines. It not only seeks to prevent violations of international standards, but also encourages proactive steps such as improving standards and employment opportunities for citizens in developing countries.\textsuperscript{621} The achievement of the ILO Agreement is that it includes very realistic standards, backed by international principles, under the realization that it is not merely the responsibility of the State or TNC to create an environment in which rights flourish. Rather, it is a rights culture that must be adopted and nurtured by the community of workers to the same degree. As Clapham points out, the inclusion of human rights standards into labor standards represents a positive advancement to the protection of human rights.\textsuperscript{622} Unfortunately, the complaint mechanism is not as robust as required, particularly with respect to TNCs that operate in developing countries that either may not abide by ILO Conventions or merely neglect reporting.

The second type of conduct code is one that is implemented privately within a company. A private internal code of conduct is a statement defining the corporation’s ethics policy by which to guide the employees and


Numerous corporations, such as Nike and Starbucks, have incorporated such statements to provide the public and host governments with a glimpse of the general policy direction of the company and its operations. There are several advantages to this type of code. First of all, there are no negotiations with outside entities, streamlining the adoption and implementation of a set of standards. Once implemented, the standards can be used as a huge boost in a company's public image, reassuring consumers and shareholders of the business's ethical personality. This could lead to an increase in profit margins and the possibility of preferential contracts with the host government. Although this type of conduct code is fast, cost-effective and good for the public image, it is not without its disadvantages. From a corporate perspective, the implementation of these standards could lead to an unfair competitive advantage for those companies that choose to disregard the implementation of such standards. In this respect, the OECD and ILO Guidelines stand apart in that they provide an equal playing field for all business and governments involved.

In terms of compliance, there is very little to ensure that the code of conduct is being followed to its full extent without a watchdog or a legally enforceable (and plausible) carrot. While some corporations report on their progress to gain positive publicity, it is safe to presume that they might not be so forthcoming about retrogression regarding human rights standards. Self-policing is by no means the ideal situation. If the codes of conduct are going to truly be effective, they must be accompanied by independent monitoring and, if possible, legal backing. For those companies that want to market their positive track record there is Global Reporting Initiative, a non-profit organization aimed at helping corporations create social and environmental

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reports. Of all the types of voluntary standards, this is by far the quickest and most cost-effective for a TNC.

A third type of conduct code is one that is implemented industry-wide (for example, U.S. Apparel Industry Partnership Initiative). One of the benefits of an industry association code is that it can be mandatory, ensuring that no company has a competitive advantage. In order to participate in the association a company must adhere to the association's standards. This can be achieved via additions in the association's by-laws. One of the most extensive examples of industry codes of conduct is Responsible Care. This self-regulating code of conduct goes far beyond legal requirements and seeks to improve "performance, communication and accountability" of the chemistry industry. Codes of conduct are cost-effective, can be easily adopted and can improve the public image of a particular industry.

Whereas private internal codes suffer from a lack of monitoring, programs such as Responsible Care have an intricate monitoring and self-reporting system that includes community participation and transparency. With one body in charge of creating the standards, there is uniformity that fosters compliance and innovation. Additionally, the introduction of such standards into developing countries can supplement weak legislation with regard to human rights protection. Although Responsible Care has an effective, independent complaint and monitoring system, this is by no means the standard. In large part, industry codes of conduct suffer similar drawbacks as internal codes. An industry association is committed to bolstering its members and, even if compliance is a requirement of membership, companies are very rarely removed from the group. This results in “free-riding” in which some companies

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627 Accessed 14 October 2010 at http://www.globalreporting.org/Home
629 Accessed 14 October 2010 at http://www.responsiblecare.org
disregard implementation but gain the positive public image by being part of the association.633

Another type of code of conduct is one that is drafted by a non-governmental organization for the purpose of corporate adoption. The main difference with this type of agreement is that corporations are subject to compliance monitoring following adoption of the standards. Adoption of the principles encourages corporations to be proactive in protecting human rights rather than meeting the legal obligations in the country of operation. Codes such as these can be drafted incredibly quickly and play an important role in filling gaps in the national legislation pertaining to human rights protection.634 As with industry-wide codes of conduct, these standards offer a unified set of values across all participating members and have the benefit of unified monitoring variables. While these codes are very effective once adopted, it is generally more difficult to get corporations on board. Not only are there upfront costs to compliance, the corporation must also allow themselves to be monitored by an outside entity. Although this allows for independent monitoring, some corporations may not be comfortable with acknowledging human rights problems pertaining to their operations. Similar to the industry-wide standard, the NGO code of conduct eliminates unfair competitive advantage within the member groups, although truly effective independent monitoring remains an issue.

As with any corporation, the main objective is to remain profitable, not to promote human rights. Until TNCs realize that human rights protection yields stability and, in turn, lowers costs in the long run, there is not likely to be universal adoption any time soon. Although each of the types of codes of conduct has its limitations, there is something to be said about voluntary adoption. Compliance is difficult to monitor, but the acceptance of human rights principles is certainly a step in the right direction. Adoption of voluntary bottom-up approaches serves a purpose when one looks at the big picture of

human rights protection. In conjunction with existing international legal mechanisms, we can begin to see a multi-dimensional approach towards the realization of human rights. There is no easy way to eliminate human rights violations. By developing local to global concepts, we can attack the issue of TNC accountability in a way that advances the human rights discourse while developing a sustainable human rights culture. If TNCs are going to be held accountable for human rights violations, the framework and values that exist in both soft and hard law, as discussed throughout this chapter, will certainly play an important role in advancing international law as a means of incorporating non-state actors into the human rights legal framework.

Protect, Respect and Remedy

A work such as this cannot escape the groundbreaking research of John Ruggie, Special Representative of the Secretary-General, on the issue of human rights and transnational corporations and other business enterprises. In March 2011, Ruggie presented his report on implementing the United Nations’ “Protect, Respect and Remedy” Framework regarding business and human rights. Since 2005, Ruggie has contributed enormously to the development of a framework bridging the gap between human rights and corporate accountability. The framework functions on the premise that States are the ultimate duty-bearers with regard to human rights protection, above third-party violators such as corporations. Even so, corporations, “as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights,” are responsible and expected to act with “due diligence” to ensure that rights are not violated in the pursuit of their operational and financial objectives. To bridge the gap between due

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637 Regarding corporations, State obligations include legislating human rights standards, ensuring proper oversight of corporate practices (particularly involving public-private partnerships) and commercial transactions with government funds.
diligence and State responsibility, Ruggie proposes expanding access to remedies for those negatively impacted by business operations, such as complaint mechanisms and increased community involvement, to reduce rights violations. Ruggie proposes that States begin by working to develop their operating policies and corporate actions to first and foremost not negatively impact human rights. By promoting human rights first within government-owned or financed corporations, as a fundamental criterion of public-private partnerships, corporate human rights expectations will begin to proliferate. Focusing on their impact areas, States can more effectively promote human rights within the context of business. It is the perspective of this thesis that the effective adoption of human rights standards by non-state actors is vital to strengthening of the international human rights protection. Ruggie’s framework advocates that private actors respect human rights but do so without an in-depth analysis of the internal processes that must occur within the organizational structure to effectively implement such changes. Effective change can only occur if the external pressures are accompanied by internal value changes.

Numerous non-binding attempts have sought to harness the influence of TNCs to ensure human rights accountability. However, TNCs have largely been more effective in evading such voluntary obligations than adhering to them. Departing from the “Norms on Transnational Corporations and Other Business Enterprises” and its goal of holding TNCs accountable directly under international law, Ruggie’s “Protect, Respect and Remedy” Framework seeks to provide a State-led renaissance to provide corporations with the environment in which they can properly reduce their negative footprint with regard to human rights. Rather than disregard human rights considerations, Ruggie’s framework promotes a corporation’s responsibility of due diligence to identify

640 This research supports the adoption of Schwartz’s Value Change Theory as the way in which such human rights may effectively be implemented into existing organizational structures. Although this work is focused on incorporating human rights principles into TNCs, value change can also be applied to IFIs and regional organizations alike.
and address human rights issues in a meaningful and collaborative way.\textsuperscript{641} Of particular importance is the focus on diverse yet effective judicial and non-judicial mechanisms by which to address human rights grievances.\textsuperscript{642} While this research encourages the full implementation of Ruggie’s framework, limitations remain due to the fundamental premise that States, and only States, are bound by the obligations of international human rights law. There remains a need for an intermediary approach that truly creates a “carrot and stick” scenario for corporations in which the consequences of human rights violations provides incentive to actively protect human rights within their sphere of influence. It is this area in which this thesis contributes. The contemporary human rights framework has many instruments at its disposal; however, it lacks a proper incentive mechanism for private actors.

International trade, monetary and finance law, however, are quite robust and effectively implemented in a way that gives clear incentives for compliance: access to new markets and preferential tariffs. IFIs referee this arena with superficial attempts at incorporating human rights considerations. The economic component of development is vital and has fundamental human rights implications. Development and human rights are intertwined and neither can be realized without the other. Nor can the relationship between development institutions and private actors be ignored. Bretton Woods Institutions are also directly engaged in the human rights discourse regardless of whether or not they see it as political engagement. The nexus, the human rights triangle if you will, is the overlapping of duties between localized mechanisms, private actors and human rights norms within the context of development.

Despite the recognition in the Nuremberg Trials that non-state actors can, in fact, violate human rights, the formal international legal mechanisms have been slow to find the rightful position of TNCs within international human rights law. There have been landmark cases regarding corporate liability, which have led to

\textsuperscript{642} Ibid, p. 24.
large financial settlements. The difficulty remains finding the proper status of TNCs within the international human rights framework designed exclusively for State actors. In order to protect human rights, the internationally recognized norms must be consistently enforceable across all actors, increasing protection rather than merely seeking reparations following gross violations. The human rights regime has positively advanced since its inception; however, fundamental considerations have been left behind concerning non-state actors. If the goal of the rights discourse truly is the full realization of human rights, we must go back to the drawing board in terms of the most effective strategies to ensure rights protection.

If traditional interpretations of international human rights law and its mechanisms are inept at providing enforceable means of holding TNCs accountable, how will the human rights regime handle the ongoing transformations within the corporate world? As noted in The Economist, public companies have had difficulty in recent times and have been challenged by alternative corporate structures.\textsuperscript{643} If international human rights law has not, to date, developed ways of incentivizing human rights accountability, it is sure to have an even more difficult time adapting in the future. For this reason it is vital to provide innovative solutions that fill the gap in international human rights law rather than merely react to changes in the ever-evolving global market. For example, 67 percent of corporate leadership now views sustainability as a key to competitive success, up from 55 percent in 2010.\textsuperscript{644} As corporate social responsibility appears to be making headway\textsuperscript{645} with promoting sustainability, the human rights discourse could gain a larger momentum in the quest to hold corporations accountable more effectively.

Kramer has heavily researched the connection between competitive advantage and corporate responsibility, particularly with regard to supply chain and external social issues, such as human rights, that have an impact in locales of operations. Within this research, this locale is regional, with each individual

\textsuperscript{643} The Economist (2012)”The Public Company: The Big Engine that Couldn’t,” May 19-25, p. 27-30.
\textsuperscript{644} The Economist (2012)”Good Business; nice beaches,” May 19-25, p. 76.
country enforcing the regional human rights contracts proposed. Although continued implementation is needed to reach critical mass for corporate social responsibility, it is now understood that there are economic advantages to upholding standards, such as human rights, throughout the organization’s operations, undercutting previous discussions that such CSR inhibits competitiveness. This research incentivizes such CSR with regional market access while human rights abusers will be held legally accountable for noncompliance under the proposed mechanism. Human rights protection could certainly contribute to this growing movement and provide insights. Just as corporate responsibility has evolved, so too must the human rights discourse adopt new solutions to old problems with regard to corporate actors.

The next chapter looks at an alternative way to bridge the gap between safeguarding human rights and achieving corporate objectives, taking into consideration contemporary advancements in regional cooperation and capacity as well as the gap in traditional interpretations of international law. One politician summarized the contemporary status of corporations within the realm of human rights in the following way:

The business community cares about intellectual property and so they insist on it being protected...but when it gets to labor rights and environmental concerns and human rights, the proponents of trade and many in the business community don’t care. They don’t think it should be part of trade negotiations because, frankly, they don’t care about those things. [Including labor rights and environmental concerns and human rights provisions at the core of trade agreements], just as there were for intellectual property [in NAFTA], [would] cause the better enforcement of national laws on labor rights, environmental concerns and human rights.646

“Corporations were given the rights of immortal persons. But then special kinds of persons, persons who had no moral conscience. These are a special kind of persons, which are designed by law, to be concerned only for their stockholders. And not, say, what are sometimes called their stakeholders, like the community or the work force or whatever.”—Noam Chomsky647

4. Fulfillment of Human Rights Standards by Transnational Corporations

4.1 Bridging the Human Rights Implementation Gap

Although human rights protection would certainly benefit from the unanimous, legally accountable adoption of internationally recognized norms by transnational corporations, there are some fundamental assumptions that are made which beg the question as to whether or not such inclusion into the current international human rights framework, in the traditional sense, is achievable for non-state actors. Many frameworks and assessments assume that corporations can merely make the switch towards human rights accountability without considering the internal processes that must take place to ensure effective implementation; not mere rhetoric. There has been a shift in expectations with corporate social responsibility, straying away from Friedman’s one-dimensional neoclassical corporate goal of maximizing profit.648 Just as an individual must adapt to changing societal norms, non-state actors (such as corporations) must also decide whether or not complying with certain human rights standards is compatible within the culture of the institution and its objectives. We have previously discussed the legal precedents regarding the position of TNCs within international law. Although there are examples of holding TNCs financially accountable for human rights violations, such entities are not held accountable at the same level as states. In order to truly include TNCs into the human rights framework there must be an asserted effort within the organization to conform to such standards, holding themselves liable for any shortcomings. This must be complimented by

continued external pressure to ensure that compliance is carried out to a greater extent than it had during the era of voluntary codes of conduct.

This chapter will look at the process of value change as a fundamental component to advancing the discourse between TNCs and human rights accountability, particularly with regard to development and the advancement of economic, cultural and social rights. Just as numerous states have dealt with structural and policy changes in order to meet their international human rights commitments, private corporations must also assess ways to reduce their negative impact on rights protection in their countries of operation. By applying the theoretical frameworks of Schwartz and Goodwin to the issue of human rights accountability and non-state actors, we are able to gain valuable insight into the internal processes by which organizations, with a fixed set of values, can move towards fulfilling values that conform to international standards without sacrificing their identity or projected goals.

This adaptation provides an important insight into the conflicting values that may exist and how such barriers can be overcome by organizations to conform to the consensus of the international community on the promotion and protection of human rights. This approach applies concepts in cross-cultural psychology, particularly value change and adjustment to change theory, to advance the dialogue of non-state actors and accountability without diluting the global, regional and local human rights mechanisms currently in place. The goal here is to provide a supplemental process that can works parallel to the international human rights regime in order to guide the influence of TNCs towards protecting human rights while pursuing their industry objectives.

As previously discussed, there are numerous voluntary codes of conduct related to TNCs and human rights. Despite the intentional manner in which corporations have adopted such norms, albeit many times for public relations

purposes, they remain optional and legally non-binding. The proliferation of international human rights standards requires us to seek new ways to advance TNC accountability with the pursuance of legally binding methods that achieve the desired goal of human rights accountability without admitting non-state actors into the same status of international law as States. This chapter seeks to provide such a transitional step towards the full recognition of human rights through the introduction of bilateral contracts between TNCs, or industry associations, and regional governmental organizations (for example, the Organization of American States). By realization, this research refers to the effective implementation of human rights within the corporate structure and the overall advancement of international human rights by non-state actors. First, we must look at the theoretical foundation associated with non-state actors and value change via Schwartz’s Theory of Basic Human Values. This will involve the adaptation of several theories from cross-cultural psychology that deal with individuals and value change to organizations.

4.2 Interdisciplinary Contribution of Social Psychology to Human Rights

As Doise points out, the 20th century was marked by positive advancements in the protection of human rights as well as continued systematic violations. We have seen from Heyns and Viljoen that a large gap exists between the rhetoric and true implementation of human rights standards on the national level. Just as this rings true in the realm of fulfilling international obligations, such gaps influence the way that we perceive and adapt new values in our everyday lives as individuals and groups. This discussion looks at human rights and the processes of socialization that occur, individually and collectively, shaping how we adopt and pursue particular norms. Of significant importance is how this relates to the ability of corporate cultures to change and apply new

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values, such as human rights. Human rights, as social representations,\textsuperscript{654} represent a large degree of international consensus; however, their full implementation and protection remains subject to the political objectives\textsuperscript{655} of the international community.

In a 35-country study, Doise \textit{et al.} interviewed students to determine their perception of the Universal Declaration of Human Rights (UDHR), and what acts would constitute violations of the included rights. He asked each interviewee to state whether or not a particular action was a violation of human rights in five general scenarios: acceptability of government initiatives (for example, wiretapping); individuals’ acts; government inquiries for basis of employment (for example, religion or health) and immigration (for example, political affiliation); social regulations (for example, mandatory vaccinations); and a set of true/false statements regarding open-ended scenarios.\textsuperscript{656} These question sets were developed to test common cross-cultural understandings of human rights principles in a variety of national and cultural contexts. The results of the study showed a consensus in violations on the right to due process, right to life and physical integrity, right to freedom of expression, right against discrimination, and the right to education.

An independent research project developed by Spini,\textsuperscript{657} a co-author in the 35-country study (separated by region: Eastern Europe, Western Europe, Latin

\footnotesize{\textsuperscript{654} Social representations are defined as a “system of values, ideas and practices with a twofold function: first, to establish an order which will enable individuals to orientate themselves in their material and social world and to master it; and secondly, to enable communication to take place among the members of a community by providing them with a code for social exchange and a code for naming and classifying unambiguously the various aspects of their world and their individual and group history.” See Moscovici, S. (1973). Foreword. In C. Herzlich (ed.), \textit{Health and illness: A social psychological analysis}. London/New York: Academic Press., p. ix–xiv.


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America, Asia and Africa), and later retested by Spini and Doise, used Schwartz’s Value Theory to confirm that there is, in fact, a common understanding of what constitutes a human rights violation and, to a further extent, differences between civil and political rights versus social, economic and cultural rights. The common understanding of human rights across cultural boundaries suggests that there is a foundation by which to encourage change within group cultures, such as a corporation.

Of particular interest are the findings relating to human rights responsibility. Respondents perceive the government as being better at protecting individual civil rights rather than social, economic and cultural rights. Perhaps more insightful is the fact that regional neighbors responded similarly, reflecting a common political history and social perception, furthering this research’s emphasis on regional mechanisms for TNC compliance. For example, individuals from Eastern European countries felt that they had an insignificant role in promoting human rights while Western European respondents were confident in their ability to contribute to human rights protection. African respondents were even more confident than those of Western Europe in their ability to promote human rights and influence government policies regarding rights protection. With regard to government programs, Latin American respondents expected more state contributions than Eastern Europeans. The results of the Spini, Doise and Clémence experiments paint an interesting perspective regarding human rights. While the regions demonstrated cross-cultural consensus on what constitutes a human rights violation, they greatly differed on the issue of self-determination and the perceived human rights responsibilities of the State by its populace.

Green et al. reaffirmed the results of Doise et al. via a 20-country survey investigating how individual and collective attitudes vary across and within

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various countries/regions, also using Schwartz's Value Theory for both individual and cultural value types. The adaption of Green's study is vital in establishing effective assessments as to how human rights standards and initiatives, such as the "Protect, Respect and Remedy" framework, can be fully implemented into corporate frameworks. Like individuals, each corporation has its own proper personality and must be approached in a slightly different manner regarding human rights implementation, making social psychology paramount to the human rights and business discourse for corporations.

**Value Theory**

Schwartz's Value Theory identifies and defines ten distinct personal values that can be found within and across cultures: (1) power (social status and prestige, control or dominance over people and resources); (2) achievement (personal success through demonstrating competence according to social standards); (3) hedonism (pleasure or sensuous gratification for oneself); (4) stimulation (excitement, novelty and challenge in life); (5) self-direction (independent thought and action—choosing, creating, exploring); (6) universalism (understanding, appreciation, tolerance and protection for the welfare of all people and nature); (7) benevolence (preservation and enhancement of the welfare of people with whom one is in frequent personal contact); (8) tradition (respect, commitment, and acceptance of the customs and ideas that traditional culture or religion impose on the self); (9) security (safety, harmony and stability of society, of relationships and of self); and (10) conformity (restraint of actions, inclinations and impulses likely to upset or harm others and violate social expectations or norms).

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661 It is important to note that Green's et al. study included student participants. In order to further confirm the implications of their research, future studies should include a wider socio-economic net to take into account perceptions on individualism and collectivism within extremely impoverished participants.

According to the theory, these ten cross-cultural values are derived from at least one of three universal requirements of humans: biological needs of individuals, coordinated social interaction, and survival of groups.\textsuperscript{663} Value theory is based on six main fundamental conceptions. First of all, values are beliefs that motivate the decisions that we make. For example, if someone values independence he will become concerned if that independence is challenged and, conversely, happy when it is being enjoyed. Values also refer to goals that motivate one to action.\textsuperscript{664} An individual who considers justice to be important will be motivated to achieve goals associated with justice. Thirdly, values are universal in that they are not dependent on particular situations. An individual who values honesty will do both at work and at home. One’s values also play a vital role in shaping one’s perspectives on people, policies and events. Although a person may have tensions between values, they are ordered by their importance to the individual. The final feature of the theory states that any given behavior has implications for multiple values, leading to tradeoffs between the competing beliefs (for example, security versus equality).\textsuperscript{665} Such a framework can be quite beneficial if adapted to the business and human rights discourse for TNCs.


\textsuperscript{664} Schwartz’s defines values based on the work of Feather, who was heavily influenced by Rokeach: Values are “organized summaries of experience that capture the focal, abstracted qualities of past encounters, that have a normative or oughtness quality about them, and that function as criteria or frameworks against which present experience can be tested. But they are not effectively neutral abstract structures. They are tied to our feelings and can function as general motives.” See Feather, N. T. (1982) “Human values and the prediction of action: An expectancy-valence analysis.” In N. T. Feather (ed.), \textit{Expectations and actions: Expectancy-value models in psychology}. Hillsdale, NJ: Erlbaum, p. 275. For the original idea that led to the development of Schwartz’s theory, see Rokeach, M. (1973) \textit{The Nature of Human Values}. New York: Free Press.

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Such values are the basis by which individuals, and groups, justify their actions and evaluate the actions of others.\(^{666}\) Furthermore, the values of an individual or group are affected by similar social structures and play a fundamental role in decision-making and the development of goals. Schwartz also observed that such values are ordered by importance and are often in conflict with one another.\(^{667}\) For example, competing values, such as honesty and wealth, can be found in an individual that has recently opened a business. The competing values determine the individual’s actions. If wealth is more important than honesty, the owner is likely to abuse the relationships with clients in order to make short-term profits. If honesty prevails, however, the decisions will most likely lead to long-term goals in which loyal customers ensure the continuance of the business.

Perhaps one of the most interesting aspects of Schwartz’s value theory is its compatibility across cultures. For a theory to be relevant, it is important that it allows for multicultural considerations, particularly when dealing with “universal” values.\(^{668}\) This is a vital component for adapting the framework to the human rights discourse on an organizational level. If the values described by Schwartz apply only to Western cultures, the theory would not allow us to further the discussion regarding human rights accountability by non-state actors — or at the very least, drastically limit its applicability and legitimacy. The adaptation of this peer reviewed and accepted theory to the realm of human rights is vital for corporate accountability. While legally binding external mechanisms, such as the regional contracts proposed in the research, are paramount, the long-term advancement of human rights must also come from the internal adoption and implementation of human rights values. The variety of subcultures that exist within an organization is no different than the


development of said subcultures within a society. The ability for value change is not limited to individuals and much can be advanced by the adaptation of this area of social psychology for TNCs. Corporate culture is also driven by ethical guidelines or values.

**Universalism**
A Universalist strives for social justice and tolerance for everyone, particularly those in close proximity. This value encourages peace and equality over war and discrimination. As Mayton and Furnham show, the universalism value is a vital component to justifying and judging actions.\(^669\) Regarding this research, the universalism value is the ultimate goal to change a corporation’s behavior and openness to international human rights standards. Without the adoption of universal values, a corporation will lack the motivation and perceived need to adapt its operations to include economic, social and cultural rights into its corporate framework. A large barrier to adopting human rights principles is realizing the actual impact that operations have on the human rights realities of the local community. In the end, this burden rests largely on the human rights community to be better equipped at explaining the implications of a “human rights friendly” organization in easily expressed terms. Human rights have become so politically rhetorical\(^670\) that even companies interested in supporting local culture and development may be wary of being classified as protecting human rights. Many people know of human rights but misunderstand the discourse associated with implementation.

**Benevolence**
Those who have benevolent tendencies are very giving. They enjoy helping others and ensuring general welfare. Schwartz discovered that universalism and benevolence were very closely related and played a large role in motivating an individual. These values are also fundamental in creating a corporate identity that promotes standards, such as human rights, as a fundamental part

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of their business model. This does not necessarily mean that the business will have to sacrifice profit for promoting and protecting human rights within their operational sphere of influence. A contemporary example of such a company is Google. One of the ten founding principles of the multibillion-dollar company is “Don't Be Evil.”\(^{671}\) Although many companies maximize short-term profits through actions contrary to public interests, Google has seen positive results by establishing these ethical guidelines as part of its corporate decision-making processes.\(^{672}\)

Benevolence and Universalism become prioritized when the realization is made that the failure to accept diversity and equality among individuals will lead “to strife and to destruction of the resources on which life depends.”\(^{673}\)

**Tradition**

Traditionalists respect the past and make their decisions based on what is customary. They are conservatives in the strictest sense of the word, seeking to preserve the status quo simply because they have done so for years. This is certainly relevant with regard to human rights considerations and the tendency to simply maintain the status quo. Any change makes them uncomfortable. This value type is perhaps the most dangerous of all values in that decisions are made without any evaluation of their implications. Judgments cannot be made towards actions since the only criterion is tradition. The prioritization of this value within a corporate structure is self-destructive since the organization is unable to adjust to the dynamic changes that occur on a daily basis. It is easy to see how a corporation could easily fall into the vicious cycle of tradition, particularly companies which have seen large profits based on tried and true business practices. Although such a barrier is quite difficult to overcome, the


\(^{672}\) It should be noted that although Google's logo is “Don't Be Evil,” they have had controversy over censoring results and later its decision to retreat from China. Currently, google.cn redirects to Google’s Honk Kong servers in which users may receive uncensored results. The Chinese government has occasionally blocked Google’s services; however, this is less an issue with Google’s practices towards openness and benevolence.

environmental movement has created momentum by showing that companies can be just as profitable by focusing on long-term sustainability. The discourse of TNCs and human rights can learn a great deal from the practices adopted by such a movement. For example, Georgia Pacific Corporation plants five or six trees for every harvested tree in California. If Georgia Pacific chose their traditional practices over complying with the new internal standards, they would eventually run out of trees to meet the demands of their customers. The “green” movement challenged the status quo of the industrial world to think of the long-term consequences of operational decisions. Some corporations, such as Georgia Pacific, decided to alter tradition in certain areas to remain industry leaders while ensuring a better future for the communities in which they operate. This does not mean that the work for environmental justice is over or that it has reached its maximum effectiveness. The environmental movement is merely an example of how corporate values can be changed, albeit sometimes slowly and painfully, in order to promote international norms without sacrificing profitability and other fiduciary responsibilities. Such is equally true with the human rights discourse. Corporate human rights violations will not immediately cease to exist; however, they will be greatly reduced and set the gold standard for best practices by demonstrating that human rights can be institutionally promoted on all levels of corporate activities without weakening shareholder expectations.

**Conformity**

The person who values conformity seeks adherence to clear rules and

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674“We believe sustainability has three dimensions - social, environmental and economic. In making business decisions, Georgia-Pacific tries to find the right balance among the three dimensions. Social dimension - helping make people's lives better through the products we make, support for the communities in which we live and work, maintaining quality work environments, and sourcing responsibly; Environmental dimension - using resources wisely, complying with laws, minimizing the impact of our facilities by operating in a safe, responsible and efficient manner, and reducing the adverse impact of our products in use; Economic dimension - profitability; the cost to customers and consumers to use our products; making products that are preferred in the marketplace; and our community impact through local purchases of goods and services, taxes and other community support.”

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structures. While tradition tends to include more abstract objects, such as cultural customs, conformity entails concrete guidelines (for example, legal regulations). At the individual level, the community in which one resides heavily influences this value. For corporations, however, this is perhaps the most contradictory aspect of their identity. As previously discussed, the modern international financial standards were conceived around the same time as international human rights standards; however, international financial norms have developed at a much faster rate. In principle, it seems contradictory to adhere to one set of international norms while essentially ignoring a different set of norms despite their interrelated nature. The connection must be made that human rights standards also create a stable environment by which corporations are able to prosper financially while encouraging sustainable development and the protection of economic, social and cultural rights.

Security
Along with tradition and conformity, security is part of the conservation classification in that it seeks to maintain the status quo, either on an individual or group level. Those who prioritize security seek health and safety to a larger degree than others, many times due to negative childhood experiences. While one may be anxious about the potential of military force, they welcome the peace of mind that their existence brings. Self-preservation is equally prevalent in TNCs in that their goal, simply put, is to remain relevant in their industry both in market share and revenue. In some instances, such as Unocal in Burma, companies have chosen brute force military protection as the primary means of security.

It is clear that everyone has the right to security; however, there are alternative means by which security and stability can be attained. The implementation of human rights principles as a fundamental component of operations not only creates stability but also removes many of the variables that lead to violence against a corporation. If the company were proactive in performing a cost-

effective human rights impact assessment to determine any problems in the proposal, stability could increase and security concerns could be alleviated (thus lowering operational costs). Town hall-type meetings are also important to disseminate information directly to the community and provide continued discourse between TNCs and local leaders. This removes any misinterpretation or misinformation concerning the corporations and their particular ventures. Initiating and maintaining communication can overcome problems such as displacement, reducing the need for large-scale protection by the state military or private contractors.

In a sense, corporations often create security concerns by overcompensating for perceived security issues. By collaborating and becoming involved in the development of a community, businesses can accomplish their objectives while creating a positive footprint in the country or region of operation—one that fosters sustainable development and human rights protection. There are certainly times in which security is needed; however, it is suggested that such a readjustment on how security is truly achieved and maintained would greatly decrease local disturbances. From an individual level, Mayton and Furnham point out that activism can be fostered by security concerns (for example, if an individual or group feels that the stability of their community is at risk, they are more likely to act in order to remove the source of instability).676

**Power**

Power derives value from social status and prestige. Control and power are actively sought through dominance of others and control over resources. Power is the opposing value of universalism and benevolence. We can say that this value is the general starting point for most corporations with regard to human rights implementation. For the purpose of this analysis, power is directly linked to wealth. Within the human rights case law, many of the businesses being sued for breaches in human rights are Fortune Global 500

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companies. Based on the 2010 list, the top four corporations all hold less than encouraging human rights records. Within this group of four power companies, all of them have been subject to litigation. Generally, the billion dollar revenues—and subsequent political influence—have not been used to improve human rights. Rather than refusing to comply with the internationally recognized standards, companies are gambling their profits on the fact that few cases regarding corporate accountability are adjudicated due to the strict tests required for a case to be heard (such as subject matter jurisdiction) on the basis of human rights violations.

Achievement

For achievement, value comes from setting and achieving goals. The more challenging the objective, the greater the sense of achievement one feels upon its completion. When others have achieved the same thing, however, its status is reduced and higher goals are sought after. Although power conflicts heavily with universalism and benevolence, achievement can be pursued without necessarily compromising one’s commitment to equality and the greater good. Applying this value to the business world is important as it shows that a corporation need not sacrifice its financial and organizational goals in order to support human rights-friendly operations.

Returning to the Google example, we are able to see the positive implications

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See also http://www.hrw.org/en/reports/2007/04/30/discounting


See also Doe v. Exxon Mobil. Accessed 6 April 2011 at http://www.wlf.org/Upload/litigation/briefs/DoevExxonWLFAmicus.pdf (Case currently awaiting decision from US Supreme Court). If the Court upholds the decision, against plaintiffs, it will deal a serious blow to the use of the ATS with regard to corporate accountability for human rights violations,

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that accompany the short- and long-term aspirations with the principle of benevolence acting as the corporate foundation and the satisfaction of shareholder goals, both with regard to public relations and profit. Google is constantly striving for larger market share and sustainable profit growth while remaining focused on its core values. In 2007, Google decided to build a server facility in North Carolina (U.S.) to meet not only its business targets but also to create jobs in a region that saw its main industry, artisan furniture, outsourced, heavily diminishing the worker’s and families’ quality of life. Rather than searching for a place that was simply more cost-effective, Google sought to strengthen the local community by creating over 250 jobs and stimulating the economy with a $600 million investment, thereby reducing their human rights and environmental impact while re-stimulating economic growth and the quality of life in the area.\(^{679}\) Other industries, such as extraction corporations, could implement similar local development projects that increase the quality of life for surrounding communities at a percentage of the costs that arise from legal and settlement fees, all while maintaining their profit projections.

The final three values—hedonism, stimulation and self-direction—are quite similar and, for the purpose of this discussion, revolve around the same self-serving motives. These values are linked to independence, pleasure and indulgence. Just as an individual may pursue self-benefiting goals, a corporation can also be single-minded in its pursuit of profit at whatever costs, including gross human rights violations. While there is a healthy sense of self-direction that can be associated with achievement, pursuit of wealth as an intrinsic good is harmful not only for a corporation but also for the individual employees. Within the human rights discourse, these values simply disregard the existence of other actors. Such a perspective allows one to justify any action as long as it benefits the individual or, in this case, a company. Even the most profit-driven company must accept that it has the right to pursue profit; just as any other

entity has the right to pursue its goals. While this author is not suggesting that corporations and humans act with the same motivations, the adaptation of Schwartz’s Theory to the field of corporate human rights value change does assist in bridging the contemporary gap between corporate actions and human rights accountability. Literature is quite extensive on how corporations should respect human rights; however, there is very little discussion on how human rights considerations are to be implemented. This research suggests a starting point by which to strengthen the discourse of human rights accountability for both State and non-state actors.

Figure 1. The Schwartz Value Circle

680 The argument is made by Alan Gewirth regarding individual human rights in his Principle of Generic Consistency and can be applied to groups and institutions alike. See Gewirth, A. (1978), p. 129.

Adapting Value Theory to Human Rights

Although Schwartz’s universal value theory has been tested on societal issues, such as political activism, no one has sought to adapt the framework to the rights discourse as a means of better understanding how human rights norms can be included into the day-to-day operations and policies of non-state actors, particularly multinational corporations. Mayton and Furnham provide us with an intermediate step in the literature by showing how equality (classified as universalism in Schwartz’s value theory) is an important component to differentiating activists and non-activists.\(^\text{682}\) Surveys, conducted on college students in the United States, United Kingdom, Japan and New Zealand, found that there is a significant relationship between the universalism value type and political behavior.\(^\text{683}\) Furthermore, value types, particularly security and power, were found to negatively impact political activism. Returning to Schwartz’s value theory, we can easily see the conflicts that exist within an individual’s competing values and use such cases to gather insight into the tensions within an organization’s values. The ten value types set out in the theory can be grouped into four larger categories: openness to change, self-enhancement, conservation and self-transcendence.\(^\text{684}\) It is clear from these classifications that there are opposing values (for example, Conservation \(v\). Openness to change and Self-enhancement \(v\). Self-transcendence).\(^\text{685}\)

\(\text{682}\) Mayton, D. M., and Furnham, A. (1994), p. 117-128. It should be noted that the connection between political behavior and political activism as a result of prioritizing values (e.g., freedom and equality) was first empirically studied by Rokeach. See Rokeach, M. (1973) *The Nature of Human Values*. New York: Free Press, and Feather, N.T. (1975) *Values in Education and Society*. New York: Free Press. Schwartz developed the theory by testing Rokeach’s results, leading to a complete value theory recognized as the gold standard in social psychology today.

\(\text{683}\) In this study, political activism was limited to the issue of nuclear weapons during the 1980s. The main research goal was to find out what distinguishes a political activist from non-activists.


\(\text{685}\) The adaptation of Schwartz’s theory requires the following adaptations as it was developed for individuals and groups with similar culture rather than corporations:
On an organizational level, we often hear that higher standards lead to increases in operation costs, creating tension between maximizing profits and adopting human rights principles. According to Ruggie, human rights due diligence allows companies to recognize and remove possible human rights risks upfront rather than putting the project’s future at risk by compounding rights issues, especially relevant within the context of development.686 By having this pre-assessment, corporations can identify the direct issues to divert resources to remedy any at-risk areas.687 By adopting human rights values into the organizational ethos, changes will inevitably occur as human rights considerations become an integral and automatic part of the decision-making process. Just as individuals are motivated by their values, corporations can also readjust their values to meet the profit levels of the shareholders while promoting and protecting fundamental human rights in their global operations.

In Schwartz’s Value Theory, an individual’s values are shaped by the culture in which she or he lives. Continuing with the corporate analogy, we can say that a corporation is also influenced by the global culture in which it operates—a culture that has overwhelmingly demonstrated its inclination for human rights across all levels of society and government. Based on the theory’s cross-cultural applicability, the framework is more likely to provide us with a better understanding of how corporations, regardless of their origin or country of operation, can adapt to reevaluate their values in order to make room for human rights considerations. Although the application of Schwartz’s theory may seem oversimplified in its attempt to better understand values and action,

 Individual = corporation  
 Values = (human rights) values  
 Personality/belief system = corporate identity (within an individual corporation)  
 Culture = international human rights framework and mechanisms (that have been adopted by the majority of the world in which the corporations operate).


it is important to note that the foundation of the theory seeks to unify the wide diversity of interests. As Rokeach proclaimed: “The value concept... [is] able to unify the apparently diverse interests of all the sciences concerned with human behavior.”

It was from this approach that Schwartz, and later social scientists, adapted value theory to demonstrate the ability for change. Such an approach can prove beneficial to profile corporations in order to ensure human rights values are approached and implemented in the most effective way based on the internal organizational structure. It is an important contribution as nearly every attempt to rectify the gap between business and human rights focuses solely on obligations of private actors without providing a process by which to truly encourage change from within the corporate structure. The application of Schwartz’s theory within corporations is not a large jump from its initial adaptation to individuals. Internal corporate values are the result of a corporate culture developed by individuals over time and can be changed to incorporate additional values, such as those within the human rights discourse. Individuals and groups of individuals, after all, run corporations. The human component cannot be overlooked. Additionally, research discussed in this work pertaining to cross-national studies and value change theory emphasizes the importance of incorporating human rights in the context of regional collaboration and corporate accountability.

These conclusions, albeit based on research on human beings, have strong implications to a corporation’s ability to change and implement new values within its culture. Just as individual actions are driven by competing values, organizations (for example, TNCs) are also bound by a set of values within the corporate culture, which influences the ethics and direction in which the entity wishes to proceed.

For the issue of corporate human rights accountability,

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active versus non-active behavior sheds light on why an organization, with its identity and cultural influences, chooses to adapt (or not) to accepted international human rights norms. As discussed earlier, corporations are constantly adapting to changes in international norms, particularly with respect to international trade and financial standards. However, the adoption of human rights standards remains a key hurdle in strengthening the international human rights framework.

Within the bounds of this research, this author’s goal is the proactive and legally meaningful adoption of human rights standards by transnational corporations that holds them legally accountable to grave violations. One method to do this is through an analysis of an organization’s corporate culture to identify the most effective means by which to approach the issue of human rights accountability. For this to occur, an organization must survey its value priorities, similar to those of an individual, in which it reevaluates its goals and rectifies any value conflicts that may arise. The result is a change in behavior that reflects the new value priorities and subsequent goals (for example sustainable business while protecting economic, social and cultural rights).691

Prioritizing universal values, such as equality, can influence one’s actions by yielding a concern for the welfare of others, conflicting thereby with the individual’s own quest for power or achievement. This is of concern to corporations, as they strive for profits in order to remain sustainable and competitive while adhering to relevant international standards. This research proposes that no conflicts exist between profit-making and human rights protection. Although removed in Ruggie’s “Protect, Respect and Remedy” Final


691 Mayton, D. M., and Furnham, A. (1994), p. 117-128. Although this study was primarily focused on antinuclear political activism, there are appropriate similarities with the TNC/human rights debate. Just as groups in the U.S. did not change their behavior to alleviate the threat of nuclear war despite rhetorical support, TNCs have not proactively sought to implement human rights norms into their operations other than the inclusion of voluntary codes of conduct for (primarily) public relations purposes. The study shows the difference between rhetorical support and adjustments that lead to visible changes in behavior.
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Report, this research promotes the approach that corporations are responsible for promoting human rights within their sphere of influence to ensure rights protection across all areas of their operations, including collaborations with contractors.\textsuperscript{692} Taking proactive steps to recognize human rights implications before a project begins not only lowers operation costs and legal liability but also fosters positive public perception. In essence, promoting human rights values within the corporate framework bolsters long-term margins, creating the foundation for long-term stability rather than short-term profit gains. In his “triple bottom line model,” Elkington asserts that corporations are fully capable of effectively supporting human rights, sustainable development and profit through their business operations, satisfying both shareholders and stakeholders.\textsuperscript{693}

\textit{Intraorganizational Value Change}

Schwartz's value theory provides insight into the processes involved with prioritizing values and can provide additional insight within the discourse of human rights accountability by corporations. While the previous discussion outlined the corporate adaptation of Schwartz’s ten values, we will now move on to the structure of value change. Bardi and others propose that when one value increases in priority a conflicting value decreases in importance, regardless of country and language variations. Furthermore, studies have shown that “life-changing” events lead to greater value changes.\textsuperscript{694} In the realm


\textsuperscript{694} Bardi, A., Lee, J., Hofmann-Towfigh, N., and Soutar, G. (2009) “The Structure of Intraindividual Value Change.” \textit{Journal of Personality and Social Psychology} 97 (5), p. 913-929. For this research one ‘life-changing’ event could include a corporation or industry being liable for millions of dollars of reparations from operations that violated human rights standards (or customary international law). Such liability could lead the violating corporation to change its values regarding human rights norms or cause other corporations to change their attitude towards human rights adoption to prevent such litigation being brought forth regarding its own operations.
of this research, value changes within a corporate personality that integrate human rights norms follow the empirically tested value changes of individuals and groups. Such a shift in corporate personality is Intraorganizational value change.

Intraorganizational value change refers to the process of reprioritizing values (in this case, human rights) in a way that allows organizations to incorporate human rights norms as a fundamental component of operational decision-making. As a result, behavioral changes occur in ways that reinforce the new values while decreasing the influence of conflicting values. Understanding these processes is vital to the goal of increasing the promotion and protection of human rights, particularly with regard to corporate accountability. By breaking down the “personality” adjustments that accompany value changes, we are better able to develop new and collaborative strategies to implement human rights standards within corporate structures.

Goodwin’s Adjustment to Change Theory (ACT) looks at how individual and group behaviors and perspectives are modified due to rapid and significant social changes (such as a change in a country’s political system through revolution or changes in policies due to terrorism). Adapting human rights to an established corporate culture represents many of the attributes involved with individuals and groups and can identify any conflicts that exist with regard to competing values. Modifying ACT could allow us to create more robust methods for advancing human rights integration into corporate frameworks. Goodwin outlines three major questions that must be asked while evaluating long-term changes: What am I like? What resources do I have to help me cope with changes? What do I expect to happen as a result of such changes? These

695 Goodwin’s Adjustment to Change Theory accessed 28 February 2011 at http://www.actproject.co.uk/
are all also fundamental considerations with regard to businesses changing their corporate culture to include human rights standards meaningfully.

Although Goodwin’s research does not specifically visit the issue of corporate behavioral changes, his research regarding large groups provides us with a solid foundation by which to advance the discourse. Any large-scale change is going to be a shock, whether the subject is a person, group or organization, and coping requires effective mechanisms. For a corporation, modifying the established culture requires carefully executed phases to remove this shock in order to create a more stable transition. For the adaption to corporations, the three questions are as follows: What is the current corporate culture? This would involve an audit of the corporation’s current values and long-term objectives or strategies. Next, what resources can be tapped to ease the transition? The accompanying uncertainty of the results can be lessened through financial considerations such as a cost-benefit analysis of implementing the new norms. In the realm of human rights, the Arc of Human Rights Priorities developed by the Danish Institute for Human Rights proves to be useful. By using this framework an organization can identify low, medium and high priority areas for human rights implementation; allowing for resources to be appropriately allocated making the necessary operational adjustments. This reduces both the psychological and financial burdens associated with fundamental organizational restructuring, particularly those which include human rights standards. Finally, what is this event like or what results should be expected from implementing these changes? This is fundamental to the process of value change in the early stages of corporate implementation. As more organizations accept their roles in advancing human rights, additional evidence will surface supporting the inclusion of such principles as a fundamental part of the decision-making process. Early adopters will likely face more transitional woes as more members of the organization struggle with the system-wide changes. Few transnational
corporations can be credited with implementing human rights standards to their fullest extent.

For example, early adopters of the “green movement” dealt with the difficulties of replacing decades of unsustainable strategies with more environmentally friendly standards. The environmental movement is a contemporary example of how corporations can adopt new standards within their existing corporate culture. Human rights standards can be equally as effective if steps are taken in the planning process. As companies begin to more readily accept human rights standards as a fundamental component of their business models, they will create an environment in which other companies are pressured into adopting similar policies. Although not widespread, we can see social responsibility becoming part of investment considerations (for example, fair trade, ethical trading, and ethical consumerism). Each of these initiatives deals with balancing human rights norms and shareholder profit goals. The movement is much smaller than, for example, the “green movement;” however, it is a growing market. Perhaps, we can liken this to treaty ratification on the international level. The process initially starts off slowly with only a few states ratifying; however, at a certain point, we see a jump in the rate of ratification.697

Since businesses generally operate on a quantitative level, it is often difficult to see the need to incorporate qualitative considerations, such as economic, social and cultural rights. That being said, increases in stability and public relations, along with the possibility of decreasing operational costs, are legitimate grounds for corporations to begin the process of identifying where they are reasonably able to commit to implementing human rights standards. By evaluating the established values (such as power/profit) with the proposed values (such as universalism/human rights), individuals are able to identify the implications and benefits of implementation. As Goodwin points out, belief drives behavior. If there is a sense of “reward for application,” new values are more likely to be adopted.698 This is even more relevant in corporations that

698 Accessed 28 February 2011 at http://www.actproject.co.uk/
must shift the perspectives of their entire work force in order to achieve full implementation. A corporation with openness to adopt innovative strategies will have an easier time coping with implementing changes while maintaining its core identity. Corporations that implement human rights standards will have an easier time transitioning to inevitable changes in the future and creating a more mature and stable corporate culture.

4.3 Implementation within Organizational Structure

Schwartz's Value Theory, along with its adaptations by Bardi and Goodwin, provides relevant insights into the implementation of human rights standards by corporations and the internal processes that must occur before such value changes lead to behavioral modifications. Implementation, for example, would result in no longer violating economic, social and cultural rights. Schwartz's cross-cultural framework makes value change an appropriate and adaptable system that can supplement the gaps related to human rights considerations by non-state actors. Although more research needs to be conducted specifically targeting corporations, this adaptation reflects a new addition to the TNCs/human rights discourse and cross-cultural psychology that is compatible with the existing international human rights framework. While the implementation of human rights standards by corporations is the ultimate goal, it is certainly not something that can happen overnight.

699 It would serve no practical purpose for the CEO of a corporation to call for the implementation of human rights standards if the person in the field is cynical and suspicious of universal human rights. Similarities can be found between a corporation adopting human rights values and an individual moving to a new culture. There are some values that will remain the same while others will be exchanged for those found in the new culture. Such a process is often accompanied by culture shock, followed by recovery and adjustment. For the purpose of this research, the corporation is entering a community that recognizes human rights standards. While the overall essence of the corporation has not changed, certain modifications are required for the newly accepted values.

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Since the Nuremburg Trials, corporations have been found to be serious violators of international human rights; yet it has been extremely difficult to find a fitting place for them within international human rights law.\(^701\) The truth is that a large gap remains in terms of both holding corporations accountable for previous violations as well as establishing a framework that implements preventative measures to reduce rights infringements. Although Schwartz’s Value Theory primarily deals with individuals, the psychological concepts are also relevant to corporations to provide better insight in how such organizations can include human rights as part of their core values. Borg et al. supplements this gap by implementing the Occupational Culture Profile (OCP) into Schwartz’s framework.\(^702\)

The OCP provides insight into how individuals, and their values, mix with the culture of an institution. Finding the congruence of individual and organizational values allows for higher retention as well as morale, ensuring that the process of organizational culture does not reduce the efficiency and competitiveness of the corporation within its industry. After all, the adoption of human rights into the organizational culture serves to strengthen the human rights protection and the corporation. An ongoing issue within social and organizational psychology is assessing how well a person fits within an organization.\(^703\) Compatible with ongoing initiatives, such as the UN Global Compact, this approach is vital in recruiting leadership to manage the implementation of human rights values within the organizational structure.\(^704\)

In a 2006 joint report by the UN Global Compact and the Business Leaders

\(^703\) Person-Organization (P-O) Fit is defined as “the compatibility between people and organizations that occurs when (a) at least one entity provides what the other needs, (b) they share similar fundamental characteristics, or (c) both.” See Kristof A. (1996) Person-organization fit: An integrative review of its conceptualizations, measurement, and implications. *Personnel Psychology* 49, 1-49.
Initiative on Human Rights, a framework was represented on how to introduce human rights into a standard corporate management structure. The technical guide to human rights implementation includes four main components: realizing the benefits of promoting human rights in the corporate structure; understanding the content and implications of human rights principles; understanding the principles of “sphere of influence” and “avoiding complicity;” and developing and implementing a rights-based approach to business operations. 705 This approach is designed to work in parallel with pre-existing human rights mechanisms to strengthen human rights protection. Although the UN’s “Protect, Respect and Remedy” Framework706 excluded “sphere of influence” this research provides a conduit for recognizing and advancing Ruggie’s contribution while filling in some of the conceptual gaps that remain to ensure the corporate adoption of human rights principles and their subsequent responsibilities. In addition to applicability to corporations, the proposed internal efforts analysis and value change can also be implemented into international financial institutions. Such an addition could prove successful in supplementing internal efforts in the IMF, WTO, IFC, World Bank and the IBRD to truly promote human rights values beyond mere rhetoric. Human Rights scholars such as Professor Koen De Feyter have promoted the concept of self-regulation within international organizations (for example, World Bank) as a means of ensuring accountability for human rights violations.707 This approach, in conjunction with joint responsibility, provides vital advancements to a system plagued by impunity.

While there is no direct tension between internal efforts analysis within IFIs and those advocated within regional organizations and private actors, this research primarily deals with the latter. In fact, each of these approaches is

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hindered by the traditional interpretations of international law that obligations rest with sovereign states. As noted by Skogly and others, the contexts in which the World Bank and the IMF exist have little flexibility for reform accountability with respect to individual complaints on its programs.\textsuperscript{708} It is the perspective of this thesis that the institutional barriers and accountability issues regarding private actors can be overcome and enforced via regional mechanisms. This is not to say that efforts at the international level are not warranted. Such efforts are valuable contributions that provide a strong international framework within which alternative measures, such as the one advocated in this research, can even be made possible. An objective of this research is to advance the existing principles of human rights to develop an alternative approach that, first and foremost, seeks to prevent human rights violations while providing a framework to deal with violations as they occur.

Instead of having corporations view human rights principles as something that will increase operating costs and stunt growth through increased regulations, the case can be made that supporting human rights principles actually fosters stable and innovative industry expansion. Promoting human rights in the business sector encourages municipalities to follow suit, increases stability, and allows companies to increase business opportunities in a way that encourages community participation and consumer confidence. In making the case for human rights in business, the corporate adoption of human rights would increase stakeholder relations and shareholder confidence, improve corporate recruiting and morale, and enhance the reputation with the public.\textsuperscript{709} While reputation and shareholder confidence is vital, business growth is also an important component to competition. A corporation affirming human rights principles would attract strong and stable government, union and investor partners, strengthening the company’s position in its particular industry. Instead of being seen as restricting a corporation’s operations, human rights


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can be used as an asset, not only for the business and its partners but also in the strengthening of the international human rights regime.

An important component to the equation is to understand that corporate implementation of human rights principles is not the same as signing an agreement to fight violations across the globe. Human rights adoption does not have to come at the price of profit or shareholder confidence. As Ruggie points out, corporations should respect human rights during the course of their normal operations and policies.\(^{710}\) Business are asked to:

> avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur [as well as to] seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.\(^{711}\)

Changing the organizational culture will encourage compliance with recognized human rights laws and principles in their areas of operation and, when conflicts arise between human rights and their operations, use human rights as the fundamental foundation for operational decisions. For example, if a company has two possible sites to excavate, one uninhabited and the other part of an indigenous site, the company could pursue the former site until a dialogue can be established with the indigenous community regarding alternative solutions or the relocation and care for remains.

Two fundamental concepts with regard to corporations and human rights are the sphere of influence and complicity. Sphere of influence refers to the impact that the corporation has on areas related to its operations. For a corporation, the internal employee structure is a good first step in terms of implementing human rights. After injecting human rights into the corporate culture, it will be

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\(^{711}\) Ibid., p. 14. It should be noted that this perspective is a departure from previous language regarding human rights within the “sphere of influence” exercised by corporate entities. The concept was originally introduced in the UN Global Compact; however Ruggie chose to include impact rather than influence due to a more objective perception in relation to corporations and respecting human rights.
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easier to implement such standards in business agreements with partners, as well as with the community at large. The diagram below shows how corporations should approach their spheres of influence as they implement human rights standards at headquarters before advancing to other aspects of their business operations. Rather than being asked to change the world, corporations can focus on their internal structure to find the most effective way to implement human rights considerations as a fundamental component of operations.

Figure 2. Mapping Corporate Sphere of Influence

Once implementation is realized at the corporate level, some human rights standards will begin to trickle down through the spheres of influence and eventually have a positive impact on individuals and parties that do not necessarily have a business relationship with the corporation. Over time, corporate adoption and implementation will improve human rights protection beyond the operational sphere of influence by reinforcing regional and international human rights mechanisms. Imagine human rights-respecting corporations entering into contractual agreements with contractors, investors and governments without the need to constantly check compliance. The

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ultimate goal is to have self-policing corporations working to respect human rights in their operations and establishing relationships with other entities that are also committed to promoting human rights within their respective business areas.

Despite much work ahead, such a goal is within reach. In the “green movement,” we saw the growing pains with respect to adoption. Many companies initially disregarded the calls for sustainable and environmentally friendly operations as added regulations. Soon after, however, this approach to business operations, particularly in forestry and mining, became the norm, shaping not only company policy but also government policies. Within the rights discourse, we can see the initial impact of a human rights approach to business in a variety of sectors as the number of socially responsible companies is on the rise. Once critical mass is reached, it will become less lucrative to disregard human rights standards within corporate culture and operations.

4.4 Legal Accountability

While corporations quickly adopt international financial and trade standards, human rights standards have yet to become a daily operational concern for most non-state actors. Even if corporations decide to comply with human rights standards and seek to implement such standards as a core component of business operations, it remains a good faith commitment with no legally binding implication for non-compliance. For this reason, it is important to have a transitional step that can close the gap between current business practices and the ultimate objective: the full realization of human rights for both State and non-state actors which reflect contemporary power relations and roles within the globalized world. The fulfillment refers to the implementation of effective and efficient measures that are based on human rights considerations within all organs of society. Success relies not only the legal incorporation of non-state actors within the human rights framework, but also the cultural changes that will be required within both international organizations and corporations, relying on legally binding enforcement and internal implementation. This research proposes an intermediate solution in which
corporations contractually agree to accept legal accountability for any human rights violations that may occur as a result of the business’ operations. In return, the corporation can conduct business within the country or region as listed in the agreement. Clapham has suggested that corporations could enter into contractual agreements with each party to ensure that any violations will be met with reasonable reparations.\textsuperscript{713} We can see some similarities in unintended consequences between this approach and that of preferential trade agreements (PTAs). As previously presented, one contemporary solution to curbing violations is for states to create PTAs that contain human rights protection as a fundamental component to trade relations.\textsuperscript{714} While this author supports PTAs, they constitute a supplementary mechanism within trade policy rather than a solution that prevents corporate human rights violations. As with PTAs, contractual agreements between individual companies and countries can be costly and actually lead to the deterioration of the human rights protections in neighboring countries.\textsuperscript{715} The contracts proposed in this research differ in a variety of fundamental ways.

First of all, corporations would be agreeing to actively adhere to international human rights norms relevant to their sphere of influence. The corporation is not responsible for all human rights violations that occur in the country in which they are operating, like the lack of freedom of expression, but are responsible for ensuring that all components of their business operations are not in conflict with human rights protection. Where the lack of freedom of expression affects labor from organizing, they might have a role to play. Secondly, while PTAs are between countries and/or regional blocs, the proposed contracts are between regional blocs and corporations or industry associations. This is a significantly different approach to advancing human


\textsuperscript{714} The PTA strategy began due to a lack of human rights principles in the General Agreement on Tariffs and Trade (GATT), which remains in force under the World Trade Organization (WTO).

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rights in the private sector, as a corporation’s ability to conduct business will be contingent on satisfying the language of the agreement. Observance of human rights standards will allow the corporations and its subsidiaries and contractors to remain in operation. Non-compliance would trigger one or more mechanisms. The contracts, as with a PTA, have measures that have to be met in order to remain in compliance. Should there be non-compliance, the corporation would have to pay the consequences depending on the severity of the violation and the corporation’s human rights record. This would include fines, publicity and/or legal action. The enforcement mechanism is no different to that of a PTA in that sanctions are introduced. The difference in the proposed contract is that legal accountability is explicit unlike the contemporary nature of international human rights law with respect to private actors. The access to the local and regional market is dependent on not violating human rights. In its fiduciary responsibly to shareholders, the corporation is bound to do what is in its best interest. Access to a vital market, and the subsequent resources and benefits that accompany a corporation’s market access, provides the carrot to decrease human rights violations by corporate actors. The legal authority would be the relevant contract law in the country of operation as well as the international human rights standards of the regional bloc(s). Systematic human rights violations, which would constitute a severe breach of contract, could be met with fines, or reductions in access to the regional market. Whereas to date the corporations use their economic power to escape legal culpability for their actions, this approach provides them with a dose of their own tactics.

Essentially, the contracts provide a way to fill the gap in corporate accountability for human rights violations that the current international system cannot effectively accommodate, or does not have the desire or ability to adapt. Of particular importance is the flexibility that accompanies these types of agreements. Rather than seeking to use a generic model, these contracts allow each regional entity to develop a pact that compliments the specific context and desired complaint mechanism, and allows consideration of the resources available to enforce said contract. Since the regional bloc is able to pull its resources away, the issue of failed compliance due to national law is greatly
The proposed contract removes the rigidity of the international framework and allows the vital principles within human rights agreements to be attainable for States while providing an additional component of legally enforceable compliance a condition of market access.

Let us suppose that Company X, a mining operation, has just signed a contract stating that in order to operate in Chile they must follow the OECD Guidelines. According to the contract, any lapses in compliance will lead to Company X being financially and legally responsible for any violations and any subsequent costs associated with resolving the issues. If non-compliance persists, per the contract, Company X can be banned from operating in Chile in any capacity. There are some serious implications to this type of system. First of all, Company X may find that it is cheaper to pay fines than to implement human rights standards in Chile. Despite a good-will act of contractually agreeing to protect and promote human rights, the company has decided to complete the project as quickly as possible and simply cut its losses. Let us assume, in the most extreme scenario, that Chile bans Company X, and any subcontractors, from operating within the country due to the systematic violation of human rights and environmental standards. Company X now goes to Bolivia, which does not have the luxury of turning away foreign investment. While Chile enjoys a robust legal system to bring forth complaints and a booming modern economy that attracts heavy foreign investment, Bolivia is less developed and more impoverished despite its vast natural resources.

Due to its underdeveloped infrastructure, Bolivia is unable to extract the precious minerals and must attract international corporations to invest and

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For an economic freedom index comparison: Accessed 2 March 2011 at http://www.heritage.org/index/visualize?countries=Chile|Bolivia&src=Ranking
For labor freedoms in both Chile and Bolivia: Accessed 2 March 2011 at http://www.heritage.org/index/visualize?countries=Chile|Bolivia&type=10
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operate within its borders. One way to attract such investment is to reduce the monitoring and enforcement of fundamental labor standards (such as minimum age/wage, working conditions, etc.) despite international commitments. By reducing such regulations, Company X is able to operate for less and without the need to enter into a human rights contract or to conduct human rights impact assessments. After ten years of operating in Bolivia, Company X has extracted the bulk of the minerals and has decided to abandon its operations inside the country. While Company X employed many Bolivians, the majority of money has gone to pay for rising health costs due to contaminated water and erosion from the unregulated mining operations. We have seen instances such as this in the excavation and logging industries throughout the world, particularly in countries that are less developed but rich in natural resources.

Let us use an alternate example of a company in a region in which a contract is not in place. Energy Company X begins research and development into diversifying its portfolio with renewable energy such as tidal, solar and wind. Energy Company X has been given rights to develop their energy products on indigenous community lands by the government. Due to the location of the project, wind energy will provide the maximum return of investment for the company while providing green energy for 100,000 homes. Applying a proposed contract to this scenario could include a variety of components. First of all, the company will be compelled to hire workers from the community provide training to maintain the wind turbines and subsequent stations to connect to the electric grid. In addition, the corporation may have to reinvest a certain percentage of its earnings back into the community and infrastructure. For example, in return for X amount of urban electricity a certain amount of

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719 For example, the timber industry in Brazil: “Brazil banks sued for Amazon deforestation.” Accessed 14 April 2011 at http://www.bbc.co.uk/news/world-latin-america-12944239
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rural electricity would be made available for local consumption.\textsuperscript{720} Most importantly, the corporation will guarantee that there is no short or long-term environmental or cultural damage to the community. This would signify a reduction in the extractive corporate activities we have seen in the past involving the removal fundamental resources and leaving a community to perform the cleanup. As Tully points out,

\begin{quote}
the decline in public development financing for electricity sector investment from such donor institutions entailed greater national reliance upon private sector investment; indeed, this was made an explicit condition for continued lending. The objective of improving electricity access for disadvantaged social groups was effectively dropped in favor of improving energy sector efficiency.\textsuperscript{721}
\end{quote}

Energy Company X receives access to the vital market, and infrastructure development continues despite a lack of State energy resources. In addition, we are ensuring shareholder and stakeholder participation while reinforcing international human rights standards. The State receives the much needed energy development; the community is provided with economic opportunities as well as assurances of cultural sustainability; Energy Company X has access to a new market and an additional project in its portfolio to present to other regional partners. Noncompliance would result in activating the relevant contract mechanisms, which may begin at the national level or go directly to the regional body responsible for handling disputes. Reparations could be seen in the form of financial payments to the community and/or government or, depending on the severity and number of previous breaches, removal of preference treatment or even a regional ban. One benefit of this approach is that shared resources to attract and enforce contracts with the private sector are possible through cooperation that allows countries with lesser economic capacity to still attract foreign investment without having to sacrifice human

\textsuperscript{720} Such an agreement ensures that rural communities do not suffer while urban populations enjoy reduced electric costs as in Bolivia. See Electricity Law No. 1604 (1994) (Bolivia)

rights for minority groups. In addition, this mechanism seeks to prevent human rights violations, not merely to provide post violation recourse, through incentives that traditional human rights enforcement mechanisms cannot provide due to a lack of authority regarding private actors.

This research proposes the use of regional organizations and agreements (for example, AU, EU, OAS, ASEAN, UNASUR, etc.) in order to eliminate the negative human rights consequences associated with unilateral considerations. As regional organizations provide more localized solutions\(^{722}\) to human rights violations, we can look to these institutions to fill the gap between international law and non-state actors while conforming to the UN’s “Protect, Respect and Remedy” Framework\(^{723}\). Just as international financial norms and human rights norms developed following World War II, so too did the push for regional integration. This approach proposes a contractual agreement between corporations, or industry associations, and regional organizations that includes measures relevant to human rights violations and corporate accountability. By entering into agreements with regional organizations, such as UNASUR, we are able to promote and protect human rights across the region without fear of a “human rights vacuum” as described in the Company X thought experiment. The existing regional mechanisms, which in many cases have more explicit references to economic, social and cultural rights, allow the agreements to be made without putting an unnecessary burden on the individual member states regarding enforcement. Moreover, such agreements would allow regions to prosper by providing a stable theatre in which the corporations can operate, ultimately lowering operation costs and creating a collaborative relationship between the community and organization. In return, companies must promote

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\(^{723}\) Ruggie, J. (2011) “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.” A/HRC/17/31. Of particular importance is the three-pillar framework: “The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial.”
and protect human rights at the risk of not only being held legally accountable for any violations, but also at the risk of being barred from conducting business in the entire region (as opposed to a single country in the earlier example).

Although the implementation of these proposed contracts would not make overhauls to the regional entities, it would require ratification by members in order to ensure the blanket acceptance of authority and enforcement of the agreements. Such enforcement would rest within the regional human rights body or in the respective national courts, with an appeal process to a regional authority, such as the Inter-American Court, should the national court not have the capacity or expertise to bring about justice for corporate human rights violations. The flexibility of the proposed contracts provides a localized alternative to the UN system without compromising the continuity of international human rights standards. Despite the need for certain institutional changes, such as ratification of proposed contracts, the actual implementation of the contract system provides a unique opportunity for regional entities to adopt a system of enforcement that best supports their members and resource capacity while maximizing the ability for victims of corporate human rights violations to bring the violators to justice.

This framework creates an environment in which development can occur sustainably, while strengthening human rights standards of the local and regional population and workforce. This approach is not a “magic bullet” by any means. To reach the point at which corporations enter into contractual human rights obligations with regional blocs requires a change in corporate culture to allow human rights standards to be implemented effectively. The initial steps of value change and incorporation of human rights is tedious, and will require an exerted effort from all levels of the employee hierarchy in order to enable rights considerations to prosper and trickle through the corporation's sphere of influence. This approach represents a 360-degree approach for all organs of society to contribute, in their unique ways, to the international human rights framework.
The diagram below represents the process for corporations to protect human rights once the process of value change has concluded, and once behavior has been modified to allow human rights standards to act as the fundamental consideration for operational decisions. From the time that human rights have been introduced into the corporate culture, they are allowed to proliferate, first with management, and then throughout the organization and its partners. This creates a non-state protection regime that increases human rights protection over time without sacrificing primary business objectives.

![Diagram of UN Global Compact Model for Corporate Implementation of Human Rights](image)

Figure 3. UN Global Compact Model for Corporate Implementation of Human Rights

What would this type of agreement need to include? Any type of agreement between the countries and the corporation must explicitly include the standards that will serve as the human rights backbone of the contract. These may include the OECD guidelines, language from international covenants (such as ICSECR), recommendations from governmental (for example, African

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Fulfillment of Human Rights Standards by Transnational Corporations

Charter) and documents from non-governmental (for example, Amnesty International) organizations. The most important aspect of the document is that it be explicit on the rights that it seeks to promote. As with international covenants, some States include reservations upon ratification that seriously reduce their impact. A legally binding agreement must be explicit in terms of its objective yet not too rigid as to create duties beyond the company's capabilities. Another component to such a contract is the creation of a community liaison responsible for disseminating information to the community on project proposals and any outstanding issues regarding human rights compliance. A contract of this nature would be rendered useless if it does not include clear instructions on how assessments are to be conducted and what types of procedures will be used to handle grievances from the corporation, community and local government.

Lastly, a human rights contract between a corporation and regional body cannot be effective without complementing complaint mechanisms with unambiguous consequences for non-compliance. One of the biggest burdens regarding business and human rights is the lack of legally binding consequences for corporations that fail to fulfill their human rights obligations outside financial settlements. Although it has been argued that "every organ of society"725 has a duty to promote and protect human rights, the international regime is not setup to accommodate TNCs in the same way as States. Even within the traditional human rights theatre, frequent human rights-violating States rarely see consequences beyond rhetorical rebukes for the purpose of political posturing.

A formal contract would allow individual states the necessary leverage to ensure corporations are implementing meaningful standards that reduce human rights violations before they happen through pre-project assessments. This framework allows each involved party's goals to prosper: regional stability; national investment; corporate access and profitability; local

development; and the ability for the community to seek its desired social, economic and cultural ends without fear of systematic human rights violations. By allowing everyone a seat at the table with clear objectives and consequences, we are not only strengthening rights protection at the local level but also the entire international human rights regime. The international human rights framework, while robust, lacks the capacity to truly meet the task of preventing human rights violations by TNCs. Since the evolution of international law has failed to adapt to the every-growing quasi-State powers TNCs have managed to acquire, attention should shift focus to the regional movement, which has proved capable of enforcing human rights norms. As regional cooperation continues on the rise, the human rights discourse would benefit greatly from reexamining the best way to ensure human rights accountability developed and approved by the international community.

While this is just one possible addition to the multidimensional discourse on human rights and corporations, it is vital that any proposal be compatible with the international human rights framework currently in existence. Legally binding contracts—which hold corporations accountable for human rights violations resulting, directly or indirectly, from their operations—between corporations or industry-specific associations and regional organizations (for example, EU, OAS, AU) would provide the momentum needed to initiate the changes in corporate culture to further the human rights discourse. If regions required this, there would be no competitive disadvantage for implementing human rights standards and accountability. Instead of kickbacks and closed-door deals, human rights compliance would be the price to enter the market. By

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726 It should be noted that the proposed intermediate step of regional contracts to increase corporate accountability for human rights violations is not the complete solution. Not only will this take time but it will also require an asserted effort by regional groups. For far too long, corporations have had a free pass to do whatever is necessary to complete the project and remain profitable. States must now come together and agree that the millions of dollars invested in return for silence do not justify the billions of dollars of long-term damage to those in the line of fire. Corporations cannot conduct business without the proper permits, etc. Shell, for example, wants to have access to a country’s offshore territory to drill for oil. States also want Shell to invest millions of dollars to have access to such sites. Using human rights standards, in a legally meaningful way, as a negotiating tool will create the type of change required for the full realization of human rights.
implementing this type of mechanism, we can complement ongoing attempts to increase rights protection while keeping the core scope of international human rights law with the State. This supplemental approach compliments other traditional protection initiatives, such as the State’s duty to protect against third parties or legal remedies as in the ATCA and international complaint mechanisms in the OP-ICCPR. By embracing the global trend\textsuperscript{727} towards regionalization,\textsuperscript{728} we can develop a stronger connection between international human rights norms and local realization while supporting sustainable development.

The use of Schwartz’s theory allows us to better understand how values, and behavior, are modified within both individuals and organizations. By taking the time to analyze corporate culture—in a way traditionally used for individual and group values and motivations—we may find that certain trends exist depending on the industry (for example, mining, timber or financial) or region, granting us the opportunity of creating a more robust and contextually relevant agreement for TNCs to better conform to human rights standards. In addition to creating a more defined code of conduct depending on the industry or sphere of influence, we can also change the corporate culture by attracting employees who are better aware of human rights. This will require additional training for both corporations and international institutions in order to fully implement the “Protect, Respect and Remedy” Framework.\textsuperscript{729} The use of value theory as a means of analyzing organizational values and behavior related to human rights represents a new area of cross-cultural psychology and can be further adapted to research identifying which types of institutions are better suited to promote and protect human rights standards as well as which cultures are more likely to adopt and expect adoption from public and private institutions.

\textsuperscript{729} The UN has also had issues with implementing human rights in development activities due to a lack of understanding as to what human rights consists of and what role they have within the context of development.
TNCs cannot sincerely commit to human rights standards until changes have been made within the organizational structure and ethos. Continuing to develop recommendations and business initiatives without “step 1” reflections is futile, and ultimately risks diminishing the effectiveness of the human rights regime. Although the discussion on value theory and, more generally, social psychology, may seem elementary, such considerations have been neglected in previous attempts at directing the resources and influence of non-state actors towards the full realization of human rights in a meaningful way.

The implementation of human rights by States continues to be the primary focus of international law and no less is to be expected when we hold TNCs accountable. The main difference is the legal recognition that TNC’s do impact human rights and should be held directly accountable, not merely vis-à-vis State obligations. Although corporations have been characterized by their adaptability and efficiency, the fact of the matter is that fundamental restructuring is a process. Corporations can no more easily be enticed to respect human rights than States. The difference is that our international system provides stronger mechanisms by which to deal with the systematic violations of the State. Since few are really comfortable in allowing corporations the same status as States at the international level, the quest is to seek out alternative solutions that are, at least, compatible with the regional and international mechanisms currently in place.

By getting back to the basics, we are able to provide non-state actors with the tools to implement human rights standards in their own ways while keeping with the spirit of international human rights. While regional agreements with TNCs could prove successful, fundamental considerations of corporate culture and ideals must be analyzed before effective agreements can be put in place that are legally meaningful and enforceable. The proposed legal mechanisms

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are strengthened through the addition of effective internal implementation. This ensures that the corporate values are in-line with those the human rights discourse seeks to protect. To advance without doing so would create the same rampant problems associated with State human rights obligations in that they are often rhetorically promoted but not implemented to their fullest extent. Having principles or even legally binding treaties are further advanced when there is an intentional motivation to implement human rights standards to their fullest extent. Although not as immediate, the long-term implications of human rights protection, in all aspects of society, are quite promising. Such a realization further strengthens the human rights regime by reinforcing international norms within the corporate framework.
Conclusion

“We're dealing with a fundamental, historical transformation. It will take a generation to work itself out. But it must be worked out. The stakes are too high. What is at stake here is 'sustainable globalization.'” — John Ruggie

5. Conclusion
The nexus between international law, specifically human rights, transnational corporations and regional cooperation is most apparent in the context of development. Although the right to development and the right to the process of development have been justified (largely via self-determination) through national, regional and international legal mechanisms, there remains a gap in places where weak governance allows transnational corporations great leeway in terms of human rights compliance despite strong international standards. The principles regarding human rights and development are, as Sengupta put it, inseparable and indistinguishable as the right to development is both the means and ends of human rights. By incorporating the right to development within the human rights discourse, we are able to proactively strengthen protection and prevent violations in developing countries and beyond.

As transnational corporations are the economic catalyst behind development in the globalizing world, it is vital that the existing standards within international law be matched with effective mechanisms to increase human rights protection at all levels. The difference in traditional development models, and a contemporary gap in international human rights protection, is that corporations have not been legally and economically enticed by human rights compliance. Through the proposed contracts, this

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732 That is to say, the existence of international human rights standards does not mean that such standards will be implemented. The international human rights framework consists of strong, widely recognized standards. Despite this, violations continue either by blatant non-compliance or the fact that the government lacks the resources to properly meet its obligations to the standards.

Conclusion

research advances the human rights discourse by providing a potential legally binding mechanism by which to hold private actors accountable for non-compliance at the national and regional levels. While such an approach is sure to be perceived as an attack on the human rights status quo, the benefits of advancing the human rights regime to accurately reflect contemporary realities, and to make the transition to preventative mechanisms, trumps the conceivable growing pains.

This research advances the field of international human rights law via the proposed contracts but also contributes to a new area of social psychology and human rights with regard to the use of value change to establish human rights norms within corporate culture. Ultimately, this research provides an alternative approach to combating human rights violations by non-state actors through incentives and culture change that are compatible with the current international human rights framework and its constituent mechanisms. The contemporary attempts of development institutions (for example, World Bank) to democratize and liberalize, through structural adjustment programs (SAPs) and Poverty Reduction Strategies, have been largely ineffective and often detrimental to rights protection. SAPs sought to open up markets by deregulating domestic goods markets, liberalizing trade, removing employee work standards, and centralizing market policy for developing countries. The policy’s legacy remains contrary to human rights due to its narrow financial motivations, neglecting the human rights component as being political. Gemma Adaba observes that the financial sector is quick to support macroeconomic policies and structural reforms to promote trade and increased competition. However, they rarely include social and environmental standards (for example, basic labor rights) that are a fundamental component to development. Despite being rhetorical

proponents\textsuperscript{737} of economic, social and cultural rights, the IMF and World Bank policies intensify human rights problems within developing countries.\textsuperscript{738}

Implementing a rights-based approach to development, rather than a charity-based approach, allows us to remove the institutional barriers that lead to the systematic abuse of human rights, thereby resolving the underlying causes of poverty rather than merely treating its symptoms. This is of particular importance regarding countries forced to implement government restructuring, such as SAPs, designed by International Financial Institution known to have an adverse impact on human rights protection.\textsuperscript{739}

The universal adoption of a rights-based approach ensures that all participants, both governmental and non-governmental, are able to work towards sustainable development under the same set of guidelines: human rights. In order to allow the interdependency of development and rights to effectively prosper, the Bretton Woods institutions must complement their rhetorical commitment with concrete institutional reforms, paying particular attention to economic, social and cultural rights as a fundamental component of sustainable growth at the national and international levels.

\textsuperscript{737} “...through its support of primary education, health care and nutrition, sanitation, housing, and the environment, the Bank has helped hundreds of millions of people attain crucial economic and social rights.” See World Bank. (2000) Project Appraisal Document: Chad-Cameroon Petroleum Development and Pipeline Project.


\textsuperscript{739} Abouharb and Cingranelli have statistically shown that the longer a country is under an IMF or World Bank SAP, the weaker the protections are for workers.\textsuperscript{739}

Conclusion

Advancement in economic rights yields stability\textsuperscript{740} which in turn allows development activities to flourish on a firm, sustainable foundation aimed at fulfilling the fundamental goal of increasing the standard of living without compromising fundamental human rights in the process.\textsuperscript{741} By recognizing the similar contexts and justifications in which the contemporary international financial and human rights institutions were founded, we can better defend against human rights violations while truly improving the long-term economic realities in developing countries.

The universal actualization of a rights-based approach across all UN agencies provides an international framework by which all development policies and activities work in accord to ensure human rights protection while attracting foreign aid and investment to support the structural changes necessary to develop sustainably. Despite the passage of more than a decade since the UN Development Group’s call for a rights-based approach throughout all UN agencies,\textsuperscript{742} international financial institutions such as, but not limited to, the IMF and the World Bank, have historically shied away from adopting human rights responsibility by citing it as an internal political matter. Without such meaningful adoption, short-term gains will continue to be at the forefront of poverty reduction and development policies rather than institutional reform. While the adoption of human rights instruments within the UN system can provide guidance and unified principles, this alone will not create the environment necessary to fully realize international


According to the IMF website, “The IMF and the World Bank are institutions in the United Nations system. They share the same goal of raising living standards in their member countries. Their approaches to this goal are complementary, with the IMF focusing on macroeconomic issues and the World Bank concentrating on long-term economic development and poverty reduction.” IMF and World Bank Fact Sheet (2010) Accessed 22 April 2010 at http://www.imf.org/external/np/exr/facts/imfwb.htm

human rights. TNCs have operated for decades in an international framework that is silent on direct corporate accountability. As “agents of development,” corporations have amassed great leverage as international players, but remain immune to international State obligations despite performing many fundamental tasks in the public sphere (for example, healthcare, education, and utilities,). The call is to establish a comparative advantage for TNCs to promote internationally recognized human rights while performing their fiduciary obligations to consumers (through products), states (provision of utilities), and international organizations (in commercial dealings). The international human rights legal framework has been focused on protecting people from abuses of State power. Currently, corporations are held accountable through State's obligations rather which equates to little or no consequences for consistent human rights violations.

By visiting the fundamental questions posed in the introduction, this author has introduced an approach that could assist in filling the gap within international human rights law and properly holds these non-state actors (legally) accountable for human rights violations that occur as a result of their operations. Much emphasis has been put on the fundamental processes involved with incorporating new values into a pre-existing culture. For this thesis, human rights standards serve as the new values while the existing culture is simply the current corporate climate and organizational values.

743 Mullerat, R. (2010), p. 187. See also Diduk, S. (2008). The comparative advantage may vary depending on industry. Such advantages could be increased positive public relations, higher stakeholder and shareholder confidence, increased investment from “responsible investment firms,” increased government contracts due to human rights compliance, access to additional national and regional markets, etc.


Conclusion

The contemporary literature provides very little insight into a fundamental aspect of the discourse on human rights accountability for transnational corporations: How, if at all possible, can corporations introduce fundamental changes to their corporate culture in the form of human rights implementation? What steps, however small, must be taken in order to fully implement and protect human rights while maintaining the financial objectives set by shareholders? It is daunting to realize that despite all of the calls for corporate accountability, little attention is given as to how exactly this happens within the current international legal framework beyond the work of Ruggie. By applying the theoretical frameworks of Schwartz and Goodwin\textsuperscript{746} to the issue of human rights accountability and non-state actors, this research provides advances Ruggie’s insights into the internal processes that fixed value corporations must experience in order to ultimately accept and implement values that conform to international standards without sacrificing their identities or projected goals. This adaptation demonstrates a vital insight into the conflicting values that may exist, and into how such barriers can be overcome by organizations to conform to the consensus of the international community on the promotion and protection of human rights, particularly within the development context where weak governance can foster exploitation.

This approach uses concepts in social psychology, particularly value change and adjustment to change theory, to advance the discourse on non-state actors and accountability without diluting the human rights mechanisms currently in place. The result of this approach is an alternative process that compliments governmental attempts to harness the resources of TNCs towards protecting human rights during their operational pursuits. While the contemporary human rights framework tends to work from afar with standards coming from international treaties, this research advocates a more localized regional approach that seeks to incorporate the private

For Adjustment to Change Theory, visit Goodwin's research site at http://www.actproject.co.uk/
sphere more effectively into the protection and promotion of human rights. Promoting human rights in the business sector encourages municipalities to follow suit, increasing stability and allowing companies to increase business opportunities in a way that encourages community participation and consumer confidence. In making the case for human rights in business, the corporate adoption of human rights would increase stakeholder relations and shareholder confidence, improve corporate recruiting and morale, and enhance the reputation with the public.

Individuals, such as John Ruggie, have worked tirelessly on the issue of corporate inclusion into the human rights framework, particularly with regard to due diligence in addressing complaints as well as proactive measures to recognize human rights tensions before they become more problematic. The UN “Protect, Respect and Remedy” Framework brings us part of the way towards strengthening the international human rights regime regarding businesses; however, fundamental changes must be made within corporate structure to complement advances at the global level to truly strengthen human rights protection. While it is desirable that corporations proactively implement human rights standards throughout their entity's sphere of influence, this research does not seek a utopian solution to the current realities. The meaningful adherence to human rights standards across all members of society, both governmental and non-governmental, remains a barrier to the full realization of human rights.

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748 While Landman has shown that ratification rates for human rights instruments have increased, ratification in itself does not yield human rights protection. As Hafner-Burton, Tsutsui, Heyns, Viljoen have shown that without the meaningful adoption of the treaty components, very little improves with regard to increased human rights protections. The lack of meaningful implementation following ratification continues to reduce the impact of the international human rights framework's ability to increase human rights protection.
Conclusion

For this reason, there needs to be an incentive or motivation for corporations to streamline human rights considerations into their business operations. A plausible advancement in the discourse on TNCs and human rights protection in the context of development rests in the regional integration. Over the past fifty years, we have seen regional blocs address the issues of human rights and financial integration with positive results, exercising enormous influence in combating human rights and revitalizing trade.

Regional blocs have achieved such an unprecedented level of political and financial power that even the EU has recently been granted special rights within the UN, allowing that bloc to represent its individual members in meetings. Although this move was not without controversy, it represents a shift in the State-centric paradigm. There have been global shifts from protectionism to a more emancipated approach to foreign trade, opening the door to development and non-traditional methods for ensuring human rights compliance. Regional human rights mechanisms can be just as effective in addressing regional human rights issues as regional trade blocs have been advancing trade and monetary integration. Such institutions allow for localized solutions for local and regional problems. Determination of initial and ultimate authority are issues that must be addressed by each individual regional entity as all bodies, and its member parties, do not have the same capacity. This flexibility to better consider more localized contexts

Conclusion

is an asset to the idea of regional contracts. However, arriving to the point in which said contracts can be implemented requires additional action within each entity pursuant to their requirements for amending its charter to ensure effective authority and realization.

These regional governmental organizations can alternatively be used to address the issue of transnational corporations and human rights, and without weakening the international human rights regime. Incorporating the proverbial carrot and stick within regional human rights and development mechanisms allows us to shorten the gap between corporate accountability and human rights protection, particularly, but not limited to, economic, social and cultural rights. This research advocates the use of contractual agreements to hold transnational corporations legally accountable for any human rights violations that are a result of their operations (or the operations of a contractor) within the relevant country and/or region. The applicable law depends on the regional bloc in which the agreement was created. For example, the law applicable to contractual obligations in the European Union is Regulation (EC) No 593/2008\(^{751}\) which replaced the Rome Convention from 17 December 2009. For the Organization of American States, contracts are subject to the Inter-American Convention on the Law Applicable to International Contracts.\(^{752}\) Although it has only sixty-three members, the International Institute for the Unification of Private Law (UNIDROIT)\(^{753}\) also provides guidance in matters of norm consistency, particularly with regard to development and international contracts.\(^{754}\)

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Conclusion

Just as a regional bloc can enter into a bilateral agreement with another country or bloc, so too can it develop formal agreements with corporations or industry organizations. By incorporating human rights standards into such agreements, transnational corporations would be motivated to either implement human rights considerations into their operations or be excluded from doing business in the region. This approach eliminates a “human rights vacuum” by removing a corporation’s ability to merely move to a country that has fewer human rights protections than its neighbor. In addition to using the regional market as incentive for human rights compliance, the regional implementation of the agreement provides institutional support for countries that may have less infrastructure or higher poverty levels that limit its ability to handle complaints or legal proceedings regarding corporate infractions.

The important characteristic of this approach is that it works seamlessly with the international human rights framework and does not infringe on the treaty obligations of individual countries. International human rights standards are reinforced while regional and national complaint mechanisms ensure a quicker and more contextually relevant solution to enforcing corporate compliance. Just as the EU’s decentralized banking system allows for swift responses during financial crises to strengthen the region as a whole, this framework may allows for more effective handling of human rights violations committed by corporations or contractors. Such an agreement would look like any other bi-lateral agreement with the addition of clear human rights standards and acceptance of liability by the corporate entity.

The idea of contractual agreements between regional blocs and corporations encourages human rights compliance at the risk of losing access to large, stable markets. For corporations to fully address their role in protecting human rights they must also advance towards the voluntary implementation within their corporate structure. This brings us back to the fundamental issue of whether or not corporations can adopt such norms.
within their existing corporate culture. And, if such transformation is possible, what processes must occur and how? Even regional agreements would require a change in the traditional priorities of transnational corporations maximizing shareholder confidence with little or no consideration of the stakeholders. By adapting value theory to this process, we can gain insight into how such changes can occur over time.

The next step of this study is to further adapt Schwartz’s Value Theory in order to ‘profile’ companies and provide assessments as to how human rights standards could be most efficiently implemented into the existing corporate structure. This author plans to continue research in developing an evaluation that allows corporations or industries to see where their current priorities rest and what fundamental intraorganizational value changes would need to occur to fully implement human rights. Future research stemming from this dissertation involves further use of Value Theory towards developing more specific human rights impact assessments relevant to particular industries (for example, in mining, timber or banking). Adapting Value Theory can also be used to analyze which regional blocs are more adept at implementing bilateral human rights agreements with transnational corporations, advancing comparative law studies and creating new areas of research in cross-cultural psychology.

Taking advantage of the robust regional mechanisms and institutions that are currently in place provides the tools to advance human rights norms as fast as international finance and trade. It is the creative use of all elements of society, including corporations that will ultimately lead to the full realization of human rights. By incentivizing corporations to proactively adopt and protect human rights within their sphere of influence, as a complementary addition to efforts at the international level of the human rights regime, we can create a paradigm shift that will have implications for generations to come. We can create an environment in which all peoples are given the chance to escape poverty and discrimination to live a life with

755 For example, UNASUR, AU, EU, OAS and ASEAN.
dignity and equal access to opportunities. As stated by Maurice Manning, President of the Irish Human Rights Commission, “Voluntarism can never be a substitute for global standards on businesses’ mandatory compliance with human rights.” For this reason, it is vital that the human rights regime incorporate innovative solutions to deal with the ever-changing global landscape.

Private actors continue to use all tools at their disposal to avoid regulations. The regional contracts proposed limits this ability by incentivizing corporate accountability by allowing regional market access for those who do not violate human rights. For those private actors that do violate human rights, and conditions of the contracts, a clear and meaningful legal path is available that is currently missing within contemporary international human rights protection regarding TNCs. The proposal in the research strengthens regional capacity to provide more contextually relevant mechanisms to combat corporate human rights violations that are legally binding and could lead to restricted access to a regional market for those in non-compliance to the human rights standards.

States can regain their leverage with corporations, and withhold their market access until human rights standards are adopted within corporate practices. As long as international human rights law remains focused on States and inept at legally enforcing corporate accountability, it is vital that the human rights discourse also uses all the legal tools and innovation available. The contracts and methods proposed in this research advance the literature within the human rights discourse and presents a plausible advancement towards this reality.

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