

2007

Business & Human Rights Law: Diverging Trends in the United States and France

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Recommended Citation

Triponel, Anna. "Business & Human Rights Law: Diverging Trends in the United States and France." American University International Law Review 23, no.5 (2007): 855-913.

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BUSINESS & HUMAN RIGHTS LAW: DIVERGING TRENDS IN THE UNITED STATES AND FRANCE

ANNA TRIPONEL *

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INTRODUCTION

The application of human rights standards to the activities of transnational corporations has become an increasingly prominent debate in the international law and business arenas.¹ Companies have long been subject to government regulation in areas such as workers' rights, consumer protection, and the environment. The novelty however "is the degree to which . . . expectations [for corporations] are being recast in human rights terms, and the degree to which new human rights claims are being advanced in relation to the private sector."²

1. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Prot. of Human Rights, *Economic, Social, and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 20, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), <http://www.globalpolicy.org/socecon/tncs/2003/08ecosonorms.pdf> [hereinafter *U.N. Norms*] (defining a transnational corporation as "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively"); see also OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, BUSINESS AND HUMAN RIGHTS: A PROGRESS REPORT 15, available at <http://www.ohchr.org/Documents/Publications/BusinessHRen.pdf> (last visited Apr. 9, 2008); Official Website of Business & Human Rights Resource Centre, <http://www.business-humanrights.org/Home> (last visited Apr. 9, 2008); Official Website of The Human Rights & Business Project, <http://www.humanrightsbusiness.org/> (last visited Apr. 9, 2008); Official Website of Business Leaders Initiative on Human Rights, <http://blihr.org/> (last visited Apr. 9, 2008); Official Website of Amnesty Int'l USA, <http://www.amnestyusa.org/index.html> (follow "Our Issues: Business and Human Rights") (last visited Apr. 9, 2008); Official Website of Int'l Council on Human Rights Pol'y: Business and Human Rights, <http://www.ichrp.org/index.html> (follow "English" hyperlink) (last visited Apr. 9, 2008); Corporate Accountability, <http://www.corporate-accountability.org/eng/> (last visited Apr. 9, 2008).

2. INT'L COUNCIL ON HUMAN RIGHTS POL'Y, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INT'L LEGAL OBLIGATIONS OF COMPANIES

In March 2007, the debate evolved significantly as U.N. Special Representative John Ruggie presented his report "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts" to the United Nations Human Rights Council.³ Ruggie emphasized the urgency of developing practical solutions and highlighted that "no single silver bullet can resolve the business and human rights challenge."⁴ As the international community moves forward in elaborating a framework for accountability for corporate acts, it will be crucial that this framework reflect the existing differences between legal systems in applying human rights law to corporations' operations.

The debate over human rights standards for businesses particularly affects Europe and the United States, where the majority of the transnational corporations are incorporated.⁵ Furthermore, with the United States and France predicted to be among the top three developed countries for foreign direct investment, the study of the application of human rights law to transnational corporations headquartered in their territories becomes all the more relevant.⁶

The emergence of international human rights law is a relatively recent phenomenon, and the consideration that business should

1 (2002), available at http://www.ichrp.org/files/reports/7/107_-_Business_and_Human_Rights_-_Main_Report.pdf [hereinafter BEYOND VOLUNTARISM].

3. See generally U.N. Human Rights Council, *Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) (prepared by John Ruggie, Special Representative of the Secretary-General) [hereinafter Ruggie Report].

4. *Id.* ¶ 24.

5. See ECOSOC, *Day of General Discussion: Globalization and Its Impact on the Enjoyment of Economic and Social Rights* (Arts. 6, 7, & 8), ¶ 2, U.N. Doc. E/C.12/1998/7 (Apr. 24, 1998) (prepared by Alejandro Teitelbaum) (describing the prevalence of U.S.-based multinational corporations in "export processing zones"). But see U.N. Conference on Trade and Dev., Division on Investment, Technology and Enterprise Dev., *Transnational Corporations*, UNCTAD/ITE/IIT/2004/9 (Dec. 2004) (prepared by Alan Rugman & Alain Verbeke) (noting that, although France is home to several of the most "transnationalized" corporations, the United States is actually home to none, given that U.S. corporations dedicate a large portion of their business to the domestic market).

6. See Press Release, U.N. Conference on Trade and Dev., New Take-Off Predicted for FDI, UNCTAD/PRESS/PR/2004/005 (Apr. 13, 2004), available at <http://www.cgitoronto.ca/UNCTADonFDI.htm>.

respect certain fundamental rights even more so. Before the Second World War, international law maintained that the way governments treated their citizens was a matter shielded by national sovereignty and therefore did not concern any other government.⁷ After the atrocities committed during the Second World War, however, the concept of international human rights emerged and the conduct of governments toward their own citizens became a concern of international law.⁸ The United Nations was thus created in 1945 to "achieve international cooperation in . . . promoting and encouraging respect for human rights"⁹ and committed itself to promoting "universal respect for, and observance of, human rights,"¹⁰ a purpose which member states agreed to help achieve.¹¹

The international texts enumerating human rights have subsequently multiplied. The first international document to set forth a list of human rights—from civil and political rights to economic and social rights—was the Universal Declaration of Human Rights of 1948 ("UDHR").¹² Subsequent binding treaties have been agreed upon by states, such as the International Covenant on Civil and Political Rights ("ICCPR")¹³ and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") of December 16,

7. See D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 470 (3d ed. 1983) (noting that international law regarded human rights violations by individuals as "being within the jurisdiction of sovereign states"); see also LOUIS HENKIN ET AL., *HUMAN RIGHTS* 73 (1999) (asserting that, prior to the 1930s, "how a state treated its own inhabitants was not a matter of legitimate international concern").

8. Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 *FORDHAM INT'L L.J.* 1963, 1963 (1996) (stating that the establishment of the U.N. Charter and the Nuremberg trials erased the notion that the protection of human rights "lay within the exclusive jurisdiction of the sovereign state" instead of with the international community at large).

9. U.N. Charter art. 1, ¶ 3.

10. *Id.* art. 55(c).

11. *Id.* art. 56.

12. See generally Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

13. International Covenant on Civil and Political Rights pmbl, art I, *opened for signature* Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (establishing that all people have certain civil and political rights, such as the right to self-determination).

1966.¹⁴ Other human rights conventions include the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”)¹⁵ of 1966; the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”)¹⁶ of 1979; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁷ of 1984. The United States and France are parties to the majority of these human rights conventions.¹⁸ Regional inter-governmental organizations have also adopted human rights treaties. France, for example, is party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe in 1950.¹⁹

14. International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (establishing that all people have the right to determine their own political status and pursue their own economic, social, and cultural development).

15. International Convention on the Elimination on All Forms of Racial Discrimination art. 1, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter Race Convention] (defining the term “racial discrimination” as “any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose of nullifying or impairing the recognition, enjoyment or exercise, of human rights and fundamental freedoms”).

16. Convention on the Elimination of All Forms of Discrimination Against Women art. 2, Dec. 18, 1981, 1249 U.N.T.S. 13 [hereinafter CEDAW] (stating that member states have an obligation to eliminate the discrimination against women by granting constitutional equality, adopting anti-discrimination legislation, and taking appropriate enforcement measures against any party that discriminates against women).

17. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT] (stating that member states should take necessary measures to establish jurisdiction over torture violations when the offense occurs in its jurisdiction, when the alleged offender is a national of a member state, or when the victim is a national of a member state).

18. OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, STATUS OF RATIFICATION OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11 (2004), *available at* <http://www.unhchr.ch/pdf/report.pdf> (stating that France is a party to ten out of thirteen of the major human rights convention and the United States is a party to eight out of thirteen of the major human rights conventions).

19. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 1-20, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR] (describing the basic rights and freedoms that member states must grant any person in their jurisdictions). The granted rights include the right to life, liberty, and security of person. *Id.* art. 5. The granted freedoms include freedom from slavery and involuntary servitude. *Id.* arts. 2-4.

These international and regional human rights conventions state that member countries bound to the U.N. Charter have the obligation to uphold human rights law.²⁰ The United States and France are thus the primary actors in ensuring the fulfillment of human rights, although the ways in which they address these duties differ.

Nevertheless, the power held by states is declining as “the globali[z]ation of the world economy offers unprecedented opportunities to business.”²¹ The dramatic increase in corporations’ wealth, power, influence and responsibility over the last twenty years²² explains why corporations, especially transnational corporations (“TNCs”), are increasingly expected to respect human rights law directly.

There are three key reasons for the emergence of a direct responsibility for corporations. First, TNCs are extremely influential with national governments²³ and can use their influence to make governments implement more competitive national policies, which are often less conducive to the realization of human rights for local communities.²⁴ Conversely, this influence means that TNCs are “in a

20. 1 OPPENHEIM’S INTERNATIONAL LAW 998-1004 (Sir Robert Jennings & Arthur Watts eds., 9th ed. 1992) (explaining how the United Nations was unsuccessful in persuading its members to adopt the International Bill of Human Rights Charter as of the early 1990s). In recent years, progress has been made in the adoption and application of the Charter. *Id.* at 998-99.

21. PETER FRANKENTAL & FRANCES HOUSE, HUMAN RIGHTS—IS IT ANY OF YOUR BUSINESS? 5 (2000), available at <http://www.iblf.org/docs/IsItYourBusiness.pdf>.

22. See, e.g., Official Website of Global Policy Forum, Tables and Charts on Social & Economic Policy: Comparison of Revenues Among States and TNCs (May 10, 2000), <http://www.globalpolicy.org/socecon/tncs/tncstat2.htm> (stating that only seven nations have greater annual incomes than General Motors). The tables also show that several American, Asian, and European corporations have incomes comparable to wealthy states. *Id.*

23. Tania Voon, *Multinational Enterprises and State Sovereignty Under International Law*, 21 ADEL. L. REV. 219, 234-41 (1999) (discussing how multinational enterprises use foreign direct investment to wield tremendous influence over host states).

24. Daniel Aguirre, *Multinational Corporations and the Realization of Economic, Social and Cultural Rights*, 35 CAL. W. INT’L L.J. 53, 53-54 (2004) (describing how corporations can use their influence to negatively impact the development of economic, social, and cultural rights in a host nation). The development of these rights is central to the stabilization and development of the host nations’ communities. *Id.*

unique position to promote change and persuade governments to abide by their human rights obligations.”²⁵ Second, states are no longer the sole violators of human rights law: TNCs can also violate human rights.²⁶ Third, states increasingly contract out their functions to private actors, which should not absolve a government of human rights enforcement responsibilities.²⁷ These factors encourage commentators to question “whether a human rights system premised on state responsibility to respect human rights can be effective in a globalized world.”²⁸

A number of trends, representing both similarities and discrepancies, have emerged in the United States and France in response to the search for a framework for international corporate accountability. Part I will analyze the American and French methods for applying human rights law to corporations. Both the United States and France remain the primary actors to ensure respect of the human rights potentially affected by TNC activities. However, corporate social responsibility movements have influenced American and French government regulation differently. Furthermore, the ways in which the two states are held accountable for failing to ensure that corporate activities comply with human rights standards diverge. Part II will assess the direct application of international human rights law to American and French companies. American and French companies have different approaches to codes of conduct, although

25. *Id.* at 64; see BEYOND VOLUNTARISM, *supra* note 2, at 53 (explaining how the human rights records of businesses must be closely examined). As more public functions are privatized, there is a great risk that states can outsource their human rights obligations to businesses that may or may not fulfill those responsibilities.

26. Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT’L L. 1, 7-9 (2003).

27. See Aguirre, *supra* note 24, at 57-64; BEYOND VOLUNTARISM, *supra* note 2, at 26, 34-37, 53 (explaining that businesses can fulfill traditional state functions such as providing security, food, health care, education, and housing); see also *Costello-Roberts v. United Kingdom*, ECHR (1993), Series A., Vol. 247-C, ¶ 27 (noting that a state remains liable for violations of human rights, such as the right to education, even if it has delegated authority to private entities to perform governmental functions).

28. Julie Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, 37 J. MARSHALL L. REV. 1205, 1207-14 (2004); see also Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT’L & COMP. L. REV. 273, 274 (2002).

both are affected by the path toward binding obligations on corporations. In addition, these companies bear diverging risks of lawsuits in American and French tribunals, although both states are concerned by the emergence of the concept of corporate complicity in human rights abuse.

I. AMERICAN AND FRENCH METHODS FOR APPLYING HUMAN RIGHTS LAW TO CORPORATIONS

A. PRIMARY ACTORS IN ENSURING COMPANIES COMPLY WITH HUMAN RIGHTS

1. *States As Primary Actors*

States are the primary actors in promoting and protecting human rights.²⁹ The United Nations reaffirmed this responsibility in the U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.³⁰

As U.N. members, the United States and France therefore have the duty to comply with international human rights standards with regard to individuals living in these countries. They can choose to do this in various ways, such as guaranteeing certain rights to citizens in their national constitutions or by passing certain laws protecting their citizens.³¹

However, the ways in which the United States and France address their international obligation of respecting human rights differ.

29. Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 153 (1997) (discussing that in addition to states, the primary actors in protecting human rights are intergovernmental organizations such as the United Nations).

30. *U.N. Norms*, *supra* note 1, ¶ 1 (giving states the affirmative duty to be the primary protectors and promoters of human rights).

31. Erin Elizabeth Macek, Note, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*, 11 MINN. J. GLOBAL TRADE 101, 102 (2002) (discussing that governments have guaranteed rights to citizens by passing anti-discrimination laws, granting asylum to refugees, providing social assistance programs such as health and unemployment insurance, and guaranteeing to citizens the freedom of expression).

France is a monist country: once a human rights treaty is ratified, it is directly applicable to domestic proceedings.³² In the United States, however, treaties can be either self-executing or non-self-executing, a distinction that narrows the direct application of treaties.³³ Moreover, the U.S. government tends to declare human rights conventions as non-self-executing, meaning that they have no force of law without implementing legislation.³⁴

In complying with their primary duty of protecting human rights, France and the United States have had to alter the actors they regulate. Increasingly, these countries are obliged to ensure protection of their citizens' human rights from actions of private actors—including harmful acts by corporations. Indeed, international human rights law has traditionally “sought to protect individuals principally against abuse of state power by public officials.”³⁵ However, “this distinction between public authorities and private actors is breaking down.”³⁶

France and the United States have a general obligation to respect, fulfill and protect human rights, and they therefore must prevent corporations from violating human rights.³⁷ In addition, certain specific provisions in treaties, explicitly or through interpretation, require that these states regulate corporate activities.³⁸

First, private actors have been deemed a necessary target of a state's human rights regulation. For example, the U.N. committee monitoring the ICCPR has construed some of that covenant's provisions “as imposing obligations on states to stop or prevent abuses by private actors.”³⁹ The state, for example, has the duty to

32. 1958 CONST. art. 55 (Fr.).

33. M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts*, 10 ANN. SURV. INT'L & COMP. L. 27, 28 (2004).

34. Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347, 348-49 (2000).

35. BEYOND VOLUNTARISM, *supra* note 2, at 46.

36. *Id.*

37. *Id.*; see also Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 102 (1993).

38. BEYOND VOLUNTARISM, *supra* note 2, at 46.

39. *Id.* at 48 n.125 (“The *travaux préparatoire* (or preparatory documents summarizing [sic] the drafting discussions) of this treaty suggest that a majority of

protect the right to privacy, which can be violated by “natural or legal persons.”⁴⁰ Furthermore, to respect the right to life, states parties must “take measures . . . to prevent and punish deprivation of life by criminal acts,”⁴¹ which thereby includes regulating corporations. The U.N. committee monitoring the ICESCR has also noted that a state must regulate corporations in order to respect the rights listed in that treaty.⁴² Finally, the Maastricht Guidelines of 1997 on Violations of Economic, Social and Cultural Rights conclude that the “obligation to protect includes the State’s responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights.”⁴³ Indeed, the Maastricht guidelines declare that “[s]tates are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.”⁴⁴

Second, certain conventions explicitly obligate the state to regulate companies. The CEDAW, for example, obligates states to “take all

states saw the treaty as protecting human life against ‘unwarranted actions by public authorities as well as by private persons.’”).

40. Office of the U.N. High Comm’r for Human Rights, *General Comment No. 16: The Right to Respect Privacy, Family, Home, Correspondence, and Protection of Honour and Reputation (Art. 17)*, (32d Sess., 1988), reprinted in *Compilation of General Observations and Recommendations Adopted by General Bodies Created in Virtue Treaty on Human Rights* (2004), U.N. Doc. HRI/GEN/1/Rev.7, ¶ 1 (asserting that every person has a right to be protected against arbitrary or unlawful interference with his home, family, and correspondences); see also BEYOND VOLUNTARISM, *supra* note 2, at 48.

41. Office of the U.N. High Comm’r for Human Rights, *General Comment No. 6: The Right to Life (Art. 6)*, (16th Sess., 1982), reprinted in *Compilation of General Observations and Recommendations Adopted by General Bodies Created in Virtue Treaty on Human Rights* (2004), U.N. Doc. HRI/GEN/1/Rev.7, ¶ 3; see also BEYOND VOLUNTARISM, *supra* note 2, at 48.

42. U.N. Comm’n on Econ., Social. & Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, 12th Sess., 1999, reprinted in *Compilation of General Observations and Recommendations Adopted by General Bodies Created in Virtue Treaty on Human Rights* (2004), U.N.Doc. E/C.12/1999/5, ¶27 [hereinafter *Comment 12*] (advising that “[s]tate parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food”).

43. *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RIGHTS Q. 691, 698 (1998).

44. *Id.*

appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”⁴⁵ This convention has been interpreted to mean that a state must also assume responsibility for private acts of violence against women, including those of a company.⁴⁶ Similarly, the CERD requires states to “prohibit and bring to an end . . . racial discrimination by any persons, group or organization.”⁴⁷ The U.N. committee in charge of monitoring this treaty stressed the importance of regulating private institutions by stating that “to the extent that private institutions influence the exercise of rights or the availability of opportunities, the state party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.”⁴⁸ The Convention on the Rights of the Child also includes a duty for states to regulate private institutions that care for children.⁴⁹

Finally, regional courts have confirmed that states must ensure that companies adhere to human rights. The European Court of Human Rights (“ECHR”) found, for example, that Italy failed to inform citizens of the risks posed by a corporation—a chemical factory—and in failing to do so, violated their right to respect for private and family life.⁵⁰

France, the United States, and other states must assume responsibility for regulating corporate compliance with human rights

45. See CEDAW, *supra* note 16, art. 2(e).

46. See U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Woman*, (11th Sess., 1992), U.N. Doc. A/47/38, ¶ 9 (recommending that states interpret CEDAW as giving states responsibility for private acts of violence against women).

47. See Race Convention, *supra* note 15, art. 2(1)(d).

48. OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, *GENERAL COMMENT NO. 20: NON-DISCRIMINATORY IMPLEMENTATION OF RIGHTS AND FREEDOMS (ART. 5)*, (48TH SESS., 1996), REPRINTED IN COMPILATION OF GENERAL OBSERVATIONS AND RECOMMENDATIONS ADOPTED BY GENERAL BODIES CREATED IN VIRTUE TREATY ON HUMAN RIGHTS (2004), U.N. DOC. HRI/GEN/1/REV.7, ¶ 5.

49. See Convention on the Rights of the Child, G.A. Res. 44/25, arts. 3, 19, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter *Rights of the Child*] (giving states the affirmative duty to compel private child care providers to protect children by implementing laws and regulations that ensure child safety).

50. See European Court of Human Rights, *Guerra v. Italy*, Reports of Judgments and Decisions 1998-I, No. 64 (19 Feb. 1998), ¶ 58 (asserting that states not only have the responsibility to abstain from interference with the rights of private or family life, but also have an affirmative duty to prevent such violations).

within their respective borders. Professors Orentlicher and Gelatt explain that state responsibility for the protection of human rights ensures adequate protection and respects national sovereignty.⁵¹ Regulating TNCs activities in a foreign country, in contrast, is a duty that belongs to the host state.

The United States and France can usually only affect the fulfillment of human rights for individuals living in other states by pressuring these other states to comply with human rights.⁵² The United States, for example, has “used human rights practices as a basic indicator of [its] willingness to maintain political, economic and cultural relations with other nations.”⁵³ Nevertheless, it can be problematic to expect countries where American and French TNCs operate to regulate the TNCs’ activities. Some countries are less likely to ensure that TNCs within their territory adhere to human rights principles as they themselves do not have a good human rights record.⁵⁴ Moreover, “[i]ntense competition among developing countries for foreign investment,’ combined with multinational corporations’ search for countries that offer them the lowest costs . . . operate as powerful disincentives for underdeveloped countries to impose stringent requirements on foreign investors.”⁵⁵

The United States and France can, therefore, choose to regulate their companies’ overseas operations to ensure their adherence to international human rights.⁵⁶ Indeed, extraterritorial regulation has

51. See Orentlicher & Gelatt, *supra* note 37, at 103.

52. Frey, *supra* note 29, at 155-56 (arguing that states often use various aspects of bilateral diplomacy in order to pressure other states to improve their human rights records).

53. See *id.* (pointing out that the United States prohibits economic aid to countries engaged in consistent patterns of gross violations of internationally recognized rights).

54. See Bureau of Democracy, Human Rights, and Labor, U.S. State Dep’t, Country Reports on Human Rights Practices—2004 (Feb. 28, 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004> (detailing human rights experiences in countries around the world).

55. Orentlicher & Gelatt, *supra* note 37, at 103; see also Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 674-75 (1992) (noting that multinational corporations often seek out investment opportunities in developing states that do not significantly regulate business).

56. See Orentlicher & Gelatt, *supra* note 37, at 103-04 (arguing that governments of developed states should be responsible for regulating domestically

emerged as “an inevitable concomitant of, and appropriate response to, the growing influence of non-state actors in countries other than their national state.”⁵⁷ In the United States, the nationality principle,⁵⁸ which applies to juridical as well as natural persons,⁵⁹ enables it to regulate corporations’ activities abroad. The U.S. Congress has used this principle to enact laws regulating the overseas conduct of U.S. corporations, such as to prohibit these companies from complying with the Arab boycott of Israel and engaging in corrupt practices.⁶⁰ As for France, international mandatory rules called “*Lois de police*” enable the application of French law to corporate activities abroad.⁶¹ Indeed, these laws are considered so important for the country that their extraterritorial application is necessary.⁶² Therefore, France and the United States are primary actors in ensuring that companies within their boundaries and abroad comply with international human rights law.

2. Human Rights Affected by Business Activity

International human rights norms that a state shall respect, fulfill, and protect are those agreed upon by the international community in

based corporations to ensure compliance with international human right norms given the hesitance of some developing countries to regulate multinational corporations).

57. *Id.* at 105.

58. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 402(2) (1987) (stating that that “a state has jurisdiction to prescribe law with respect to the activities, interests, status, or relations of its nationals outside as well as within its territory”).

59. See *id.* § 402 cmt. (e) (specifying that “the nationality of a corporation . . . is that of the state under whose law it is organized”).

60. See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 980-1001 (2d ed. 1987).

61. See Joined Cases C-369/96 and C-374/96, *Arblade v. Leloup*, E.C.R. I-8453, ¶ 30 (using “public order legislation” to refer to French equivalent of “*lois de police*” and defining them as “national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State”).

62. See PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC tbd (7th ed. 2002). Examples of “*Loi de police*” include certain laws concerning workers and consumers, which therefore apply to corporate activities abroad.

the UDHR and subsequent treaties.⁶³ Therefore, France and the United States, as members of the international community and as parties to many of these treaties, must respect the same international human rights, even if their methods of compliance differ. The U.N. Global Compact and U.N. Norms, although non-binding documents, provide guidance as to which rights states should target when regulating corporate activities.⁶⁴ Both documents assert the need to respect human rights in general and enumerate particular human rights upon which corporate activity should focus.⁶⁵

First, the treaties require France and the United States to regulate workers' rights.⁶⁶ International human rights agreements target four particular labor rights: freedom of association and the right to collective bargaining;⁶⁷ the abolition of forced or compulsory labor;⁶⁸

63. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 982-83 (2d ed. 1987) (detailing the various sources of human rights in international law).

64. See Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 356 (2006) (arguing that the U.N. Norms greatest strength is its creation of a framework for states to follow when regulating transnational corporations). See BEYOND VOLUNTARISM, *supra* note 2, at 20-43, for a detailed discussion on the human rights guaranteed by international law.

65. See Official Website of U.N. Global Compact, About the Global Compact: The Ten Principles, Principles 1-2, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Apr. 19, 2008) [hereinafter Global Compact] (asking companies to "support and respect the protection of internationally proclaimed human rights" and ensure "they are not complicit in human rights abuses"); see also *U.N. Norms*, *supra* note 1, ¶ 1 (placing a general obligation on transnational companies "to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law"). The Norms then focus on specific rights by obligating transnational corporations "to respect economic, social and cultural rights as well as civil and political rights and contribute to their realization." *Id.* ¶ 12.

66. See Global Compact, *supra* note 65 (placing emphasis on labor rights by devoting more sections to labor standards than any other area); *U.N. Norms*, *supra* note 1, ¶¶ 5-9 (devoting one out of six sections to labor rights).

67. See Global Compact, *supra* note 65, Principle 3 (noting that constructive dialogue achieved through the guarantees of freedom of association and the right to collective bargaining will help workers and employers understand each other's points of view); see also *U.N. Norms*, *supra* note 1, ¶ 9 (requiring transnational corporations to recognize freedom of association and the right to collective bargaining of their workers); UDHR, *supra* note 12, arts. 20, 23(4) (granting the rights of freedom of association and membership in trade unions to everyone);

the abolition of child labor;⁶⁹ and the elimination of discrimination in employment and occupation.⁷⁰ The International Labor Organization

ICESCR, *supra* note 14, art. 8(1) (calling upon state parties to recognize their citizens' right to join trade unions, subject only to national security interests or necessities of public order and protection of the rights of others); ICCPR, *supra* note 13, arts. 21, 22 (obligating state parties to recognize the rights of peaceful assembly and freedom of association, which includes the right "to form and join trade unions"). *See generally* Convention Concerning Freedom of Association and Protection of the Right to Organise (No. 87), July 9, 1948, 68 U.N.T.S. 17, *reprinted in* International Labour Organisation, *International Labour Conventions and Recommendations: 1919-1951*, at 527 (1996) (outlining general principles governing workers' freedom of association and right to organize); Convention on the Right to Organize and Bargain Collectively (No. 98), July 1, 1949, 96 U.N.T.S. 257, *reprinted in* International Labour Organisation, *International Labour Conventions and Recommendations: 1919-1951*, at 639 (1996) (specifying steps member states should take to ensure effective implementation of workers' right to organize).

68. *See* Global Compact, *supra* note 65, Principle 4 (prohibiting businesses from using compulsory labor in their operations); *see also* U.N. Norms, *supra* note 1, ¶ 5 (forbidding transnational corporations from the use of forced and compulsory labor as stipulated in relevant international and national laws); UDHR, *supra* note 12, art. 4 (prohibiting slavery and servitude and banning slave trade); ICCPR, *supra* note 13, art. 8 (prohibiting slavery and involuntary servitude and limiting use of compulsory labor to compliance with court order, military service, emergency situations, and normal civil obligations); Convention Concerning Forced or Compulsory Labour (No. 29), June 28, 1930, 39 U.N.T.S. 55, *reprinted in* International Labour Organisation, *International Labour Conventions and Recommendations: 1919-1951*, at 143 (1996) (requiring states to suppress any use of compulsory labor); Convention Concerning Abolition of Forced Labour (No. 105), June 25, 1957, 320 U.N.T.S. 291, 294-95, *reprinted in* International Labour Organisation, *International Labour Conventions and Recommendations: 1952-1976*, at 88-89 (1996) (specifying that economic development is among the prohibited purposes of forced or compulsory labor).

69. *See* Global Compact, *supra* note 65, Principle 5 (calling upon businesses to abolish child labor); U.N. Norms, *supra* note 1, ¶ 6 (urging businesses to "respect the rights of children to be protected from economic exploitation"); *see also* ICESCR, *supra* note 14, art. 10(3) (requesting states to protect children from economic exploitation); Rights of the Child, *supra* note 49, art. 32 (directing states to enact legislation establishing the minimum age of employment, hours and work conditions, as well as penalties for violation of child protection laws).

70. *See* Global Compact, *supra* note 65, Principle 6 (defining discrimination in employment and occupation and providing strategies that businesses could employ in order to eliminate such discrimination); U.N. Norms, *supra* note 1, ¶ 2 (obligating businesses to uphold "equality of opportunity and treatment" of individuals, excepting only "children, who may be given greater protection"); *see also* UDHR, *supra* note 12, art. 23(2) (declaring a universal right to "equal pay for equal work"); ICESCR, *supra* note 14, art. 7 (declaring that states parties to the

("ILO") Declaration on Fundamental Principles and Rights at Work affirms the importance of these rights, stating that all ILO members, including the United States and France, are bound by these standards, regardless of whether they have ratified the conventions.⁷¹ The U.N. Norms and the human rights conventions also guarantee additional rights, such as the right to a safe and healthy working environment⁷² and the worker's right to a "remuneration that ensures an adequate standard of living for them and their families."⁷³ Business has a profound impact on all of these rights. According to the International Council on Human Rights, "most multinational corporations refuse formally to support freedom of association and the right to collective bargaining in their codes of conduct."⁷⁴ This can, in turn, have an impact on the protection of other rights because employees cannot defend their rights.⁷⁵

France and the United States need to pay particular attention to the principle of non-discrimination as it applies to workers, consumers,

convention recognize "just and favorable conditions of work" that include equality in pay and promotional opportunities).

71. See International Labor Organization [ILO], Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 86th Sess., June 19, 1998, ¶ 2, 37 I.L.M. 1233, 1237 (declaring that members are bound by ILO's conventions by virtue of their membership in ILO).

72. See *U.N. Norms*, *supra* note 1, ¶ 7 (calling upon businesses to provide "a safe and healthy working environment" in accordance with international standards); see also UDHR, *supra* note 12, art. 23 (proclaiming a right to "just and favorable conditions of work"); ICESCR, *supra* note 14, art. 7(2) (requiring States to enforce people's right to "safe and healthy work conditions"). See generally Convention on Occupational Safety and Health Convention pmbl., June 22, 1981, 1331 U.N.T.S. 279 (establishing principles and guidelines for labor rights enforcement actions on national and organizational levels).

73. See *U.N. Norms*, *supra* note 1, ¶ 8 (requiring corporations to provide adequate compensation to their workers for the work they have performed); see also UDHR, *supra* note 12, arts. 23, 25 (declaring a fundamental right to just compensation and to adequate standards of living); ICESCR, *supra* note 14, art. 7(1) (charging states with enforcing the right to fair wage and living standards).

74. See BEYOND VOLUNTARISM, *supra* note 2, at 30 (citing Kathryn Gordon & Maiko Miyake, *Deciphering Codes of Corporate Conduct* 14, 15 (Organisation for Economic Co-Operation and Development [OECD] Directorate for Fin., Fiscal & Enter. Affairs, Working Paper on International Investment No. 1999/2, 2000)).

75. See BEYOND VOLUNTARISM, *supra* note 2, at 30 (arguing that without unions, workers cannot as effectively assert their rights).

and even communities affected by corporate activity.⁷⁶ In particular, international guidelines prohibit discrimination against women by corporations, which is consistent with human rights treaties,⁷⁷ and also prohibit discrimination in the field of employment.⁷⁸

The U.N. Norms also state that corporations “shall respect . . . civil and political rights” and give examples of the most relevant rights, such as “freedom of thought, conscience, and religion and freedom of opinion and expression.”⁷⁹ Another civil right potentially affected by corporate activity is the freedom from “arbitrary interference with [an individual’s] privacy, family, home or correspondence.”⁸⁰ These civil and political rights could be infringed upon by corporate activity and therefore require particular scrutiny by both France and the United States.

The U.N. Norms state further that a company “shall respect economic, social and cultural rights . . . and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and

76. See *id.* at 23-24; see also ICCPR, *supra* note 13, arts. 2(1), 26 (declaring that discrimination is prohibited on the grounds of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); UDHR, *supra* note 12, art. 2 (stating that discrimination is prohibited on the grounds of “marital status, nationality, ethnic origin and economic position”).

77. See UDHR, *supra* note 12, art. 2; see also ICCPR, *supra* note 13, arts. 2, 3 & 26; ICESCR, *supra* note 14, art. 2; CEDAW, *supra* note 16, art. 1.

78. See, e.g., Convention Concerning Discrimination in Respect of Employment and Occupation art. 5, June 25, 1958, 362 U.N.T.S. 31, *reprinted in* INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS: 1952-1976, at 176 (1996); Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (No. 100), June 29, 1951, 165 U.N.T.S. 303, *reprinted in* INTERNATIONAL LABOUR ORGANISATION, *supra* at 653; see also CEDAW, *supra* note 17, art. 11; ICESCR, *supra* note 15, art. 7 (calling specifically for “fair wages and equal remuneration for work of equal value”).

79. See U.N. Norms, *supra* note 1, ¶ 12; ICCPR, *supra* note 14, arts. 18, 19 (establishing freedom of expression subject to prohibition by Article 20 regarding hate speech); UDHR, *supra* note 13, arts. 18, 19. See generally Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., 73d plen. mtg., U.N. Doc. A/RES/36/55 (Nov. 25, 1981) (reinforcing the protections afforded in UDHR and ICCPR regarding freedom of religion).

80. See UDHR, *supra* note 12, art. 12; ICCPR, *supra* note 13, art. 17.

mental health, adequate housing, privacy, [and] education”⁸¹ All of these rights are protected by various human rights conventions.⁸² These rights are generally seen as unrelated to business, but their close relationship to corporate activity is increasingly recognized.⁸³ TNC operations can have a negative impact on the realization of economic, social, and cultural rights (“ESCR”) and conversely, TNCs “are in a unique position to promote . . . a foundation of social, economic and cultural rights.”⁸⁴ Governments have a duty to act, rather than refrain from acting, in order to ensure these rights to individuals.⁸⁵ Professor Alston argues that states should “search for methods of regulating [TNC] operations so as to benefit local communities . . . as well as the international economic system.”⁸⁶ For example, under the ICESCR’s right to food, states must ensure that companies produce food that is “free from adverse substances,” available, and economically and physically accessible.⁸⁷ Under the ICESCR’s right to health, states are required to not only ensure that companies do not sell “contaminat[ed] foodstuffs,” but also to “avoid or destroy naturally occurring toxins.”⁸⁸

In addition, the U.N. Norms provide that companies “shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labor, hostage-taking, [or] extrajudicial, summary or arbitrary executions

81. See *U.N. Norms*, *supra* note 1, ¶ 12.

82. See ICESCR, *supra* note 14, arts. 11-13 (calling for protection of adequate food, clothing, housing, “the highest attainable standard of physical and mental health,” and education); UDHR, *supra* note 12, arts. 25-26.

83. See Aguirre, *supra* note 24, at 54, 61-63 (citing the example of Shell in Nigeria and affirming that the violations of ESCR led to violations of political and civil rights); see also *U.N. Norms*, *supra* note 1, ¶ 12 (recognizing the close relationship between the activities of TNCs and ESCR by protecting both ECSR and civil and political rights on the same footing).

84. See Aguirre, *supra* note 24, at 63 (asserting that the consequences of instability and political turmoil can be problematic for the TNCs’ local business operations).

85. See Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 378-81 (1990) (discussing the controversy over the obligation clauses in the ICESCR and their potential conflicts with the U.S. Constitution).

86. See Aguirre, *supra* note 24, at 66.

87. See *Comment 12*, *supra* note 42, ¶¶ 10, 12, 13 (defining the terms “free from adverse substances”, “availability” and “accessibility”).

88. See *id.* ¶ 10; *U.N. Norms*, *supra* note 1, ¶ 13.

...”⁸⁹ Various conventions also prohibit these acts.⁹⁰ These rights can be affected when state or private security forces are employed by TNCs operating abroad.⁹¹

Furthermore, the U.N. Global Compact emphasizes the importance of overseeing the impact of corporate activities on the environment. Principles 7 through 9 state: “Businesses should support a precautionary approach to environmental challenges”; “undertake initiatives to promote greater environmental responsibility”; and “encourage the development and diffusion of environmentally friendly technologies.”⁹² The U.N. Norms also recognize obligations for TNCs relating to environment preservation.⁹³ The “right to a healthy and sustainable environment” is a third-generation right, derived from the UDHR⁹⁴ and is increasingly recognized by international declarations and texts.⁹⁵ Therefore, France and the United States have an emerging duty to control corporations’ environmentally harmful activities. Even when a specific convention has not recognized the right to a healthy and sustainable environment, human rights bodies have inferred this right from other

89. See *U.N. Norms*, *supra* note 1, ¶ 3.

90. See ICCPR, *supra* note 13, arts. 6-8, 10 (prohibiting arbitrary killing; torture and other cruel, inhuman or degrading treatment or punishment; slavery; and violations against humanity and dignity with respect to detainees); UDHR, *supra* note 12, arts. 3-5 (noting many of the enumerated prohibitions in Articles 6-8 of the ICCPR). See generally CAT, *supra* note 17, pmbl.

91. See FRANKENTAL & HOUSE, *supra* note 21, at 13 (making various recommendations regarding the provisions in security agreements between companies and the state entities in order to ensure the protection of human rights).

92. See Global Compact, *supra* note 65, Principles 7-9.

93. See *U.N. Norms*, *supra* note 1, ¶ 14.

94. See generally UDHR, *supra* note 12, art. 28 (proclaiming that “everyone is entitled to a social and international order in which the rights set forth in this Declaration can be fully realized”). This has served as a basis for what scholars have named “Third Generation Rights,” including the right to political, economic, social, and cultural self-determination; the right to economic and social development; the right to participate in and benefit from “the common heritage of mankind”; the right to peace; the right to a healthy and sustainable environment; and the right to humanitarian disaster relief. See *id.* arts. 1-30.

95. See generally U.N. Comm’n on Human Rights, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* art. 11, U.N. Doc. E/CN.4/Res/2001/35 (Nov. 17, 1988); Stockholm Declaration on the Human Environment, Report of the United Nations Conference on the Human Environment, Principle 1, Annex 1, U.N. Doc. A/Conf. 48/14 Rev.1, *reprinted in* 11 I.L.M. 1420 (1972).

protected rights, such as the right to privacy and family life.⁹⁶ Some commentators argue that this is one of the most important rights to be regulated given the extremely negative impact TNCs can have on the environment, especially when authoritarian regimes control host countries.⁹⁷

Both France and the United States benefit from clear guidance by the international community of which human rights are to be specifically targeted when regulating corporate activity. In practice, however, it can be difficult for the state to assert the contents of certain rights and therefore protect them. The right to a living wage, for example, is one such right, where the importance of the right in corporate activity is recognized, but the definition of an acceptable minimum wage level is debatable.⁹⁸

B. DIVERGING METHODS OF ENSURING COMPANY COMPLIANCE WITH HUMAN RIGHTS

1. Regulation of Corporate Activities

States usually fulfill their human rights obligations by promulgating laws requiring companies to respect specific standards. Despite differences concerning the incorporation of international human rights standards into domestic law in the United States and France, both states have domestic laws prohibiting gross violations of human rights by companies. For example, both countries prohibit

96. See, e.g., Press Release, Chamber Judgment in the Case of *Hatton v. United Kingdom*, <http://www.echr.coe.int/eng/Press/2001/Oct/Hattonjudepress.htm> (recounting the ECHR's opinion that the UK government was responsible for not taking "reasonable and appropriate measures" to stop airplane company activities from producing night-time noise under the right to privacy and family life).

97. See, e.g., Aaron Sachs, *What do Human Rights Have to Do With Environmental Protection? Everything.*, SIERRA, Nov.-Dec. 1997, http://globallearningnj.org/global_ata/Human_Rights_and_Environmental_Protection.htm (last visited Apr. 9, 2008).

98. See BEYOND VOLUNTARISM, *supra* note 2, at 30-31 (discussing the debate surrounding the right to a "living wage"); see also U.S. Dep't of Labor, International Labor Standards, <http://www.dol-union-reports.gov/ilab/webmils/intillaborstandards/workingconditions.html> (last visited Apr. 9, 2008) (asking that some mechanism for establishing minimum wages be established in each respective country, as no general international consensus currently exists).

slavery and torture of their workers.⁹⁹ In addition, both countries regulate companies through different areas of law that involve human rights.¹⁰⁰ For example, environmental law can ensure that companies respect the environment; consumer protection laws can ensure that consumers are given protections with regard to products purchased from companies; corporate law can require companies to abide by certain standards or disclose information to investors concerning their corporate operations abroad.¹⁰¹

Corporate social responsibility (“CSR”) movements have profoundly influenced American and French domestic regulation. These movements, however, have had markedly distinct impacts in America and France, reflecting the cultural differences between these two countries.

The first CSR movement that took place in the 1970s had a profound influence on American corporate regulation, whereas its imprint on French regulation is virtually invisible. This movement was driven by the idea that “to solve the ills of society—thought in large part to be the product of corporate behavior . . .—some sort of government intervention was necessary to make large corporations and their managers again accountable.”¹⁰² This movement therefore focused on governmental intervention into corporate activity and resulted in many proposals of reform¹⁰³ and major changes to U.S.

99. See Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2000); U.S. CONST. amends. XIII, XIV.

100. See BEYOND VOLUNTARISM, *supra* note 2, at 77 (stating that most countries use existing or new instruments, that are not considered human rights legislation, in order to enforce observance of human rights by companies). See generally James A. Fanto, *The Role of Corporate Law in French Corporate Governance*, 31 CORNELL INT’L L.J. 31, 36-47 (1998) (discussing the French corporate governance system); Robert W. Hamilton, *Reflections of a Reporter*, 63 TEX. L. REV. 1455, 1460-64 (1985) (discussing the development of the Revised Model Business Corporation Act).

101. See BEYOND VOLUNTARISM, *supra* note 2, at 77.

102. See Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1211 (2002) (stating that such accountability should be “if not to the owners of such corporations, then to the society as a whole”).

103. See *id.* at 1212-15 (discussing several of the proposals for corporate law reform, such as giving individual shareholders more power, having public interest directors, or coupling corporate social accounting with SEC-required “social-audit results”).

policies.¹⁰⁴ Much of this regulation had an impact on the promotion of human rights within companies, in particular concerning environmental rights.¹⁰⁵ In France, traditionally a more interventionist country, government regulation of companies had always been more prominent and was not particularly influenced by this first CSR movement.¹⁰⁶

The second CSR movement that has gained momentum since the late 1990s has had an impact on both France and the United States, although the specific human rights addressed and the impact in question varies.¹⁰⁷ This CSR movement has focused increasingly on the enforcement of human rights standards in corporations. According to one author, “business and human rights has emerged as a distinct field within the broader corporate citizenship or corporate social responsibility movement.”¹⁰⁸ Another commentator notes that

104. Robin Broad & John Cavanagh, *The Corporate Accountability Movement: Lessons and Opportunities*, 23 FLETCHER F. WORLD AFF. 151, 152 (1999).

105. See, e.g., National Environmental Protection Act, 42 U.S.C. § 4321 (2000) (identifying the encouragement of “productive and enjoyable harmony between man and his environment” as one of the congressional purposes of the Act); RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 67 (2004) (“The 1970s were an extraordinary decade for environmental law. Prior to 1970, environmental protection was evident in only a handful of fledgling regulatory efforts scattered across offices in the federal government and a relatively few state governments Within just a few years in the 1970s, the federal government brought together and dramatically expanded many of these programs in an effort to forge a comprehensive legal regime for environmental protection.”).

106. See Official Website of The European Monitoring Centre on Change, Corporate Social Responsibility in France, Germany, Hungary and the United Kingdom (2003), <http://www.eurofound.europa.eu/emcc/content/source/eu03002a.htm> (last visited Mar. 27, 2008) (stating that “the overall picture in France is one of moderate development of CSR due to the presence of a system of state regulations and agreements governing labour relations”).

107. See Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 628-32 (2001) (stating that the first CSR movement ended with the “law and economics” and contractarian movements). Another CSR movement emerged in the 1990s with the “good corporate governance” movement and institutional investor activism. *Id.* These movements treated the corporation as the private contractual arrangements of its statutory constituents—stockholders, directors, and officers governed largely by market forces. *Id.*

108. See Anthony P. Ewing, *Understanding the Global Compact Human Rights Principles*, in *EMBEDDING HUMAN RIGHTS INTO BUSINESS PRACTICE* 28, 28-29 (2003), available at http://www.unglobalcompact.org/docs/issues_doc/human_rights/embedding.pdf (last visited Apr. 10, 2008) (pointing to globalization trends

[t]he core of CSR concerns compliance with internationally proclaimed human rights, such as the right to life and physical integrity and respect for basic labor standards including the prohibition on the use of child workers or other forms of forced labor. At the outer edge of this core, CSR encourages responsibility of businesses toward the environment and the communities in which they operate.¹⁰⁹

The business standards advocated by the CSR movement therefore overlap with international human rights standards.

Although this second CSR movement has had an impact on both France and the United States, the human rights targeted vary considerably. CSR in France aims at “integrat[ing] social and environmental concerns” into business operations.¹¹⁰ However, in the United States, CSR has a larger scope and is aimed at enhancing “business decision-making linked to ethical values . . . and respect for people, communities and the environment” around the world.¹¹¹ One scholar describes this difference by the observing that in Europe, “CSR has focused on the environmental and social impact of companies’ business functions,” whereas in the United States, CSR “involves donations to social and artistic causes and other such acts of corporate philanthropy.”¹¹²

Moreover, this CSR movement has had a diverging impact on France and America. This second CSR movement no longer places its emphasis on government regulation, but instead promotes

in the areas of human rights, trade and investment, and communications as the source of pressure on companies to consider human rights issues).

109. Pall A. Davidsson, Note, *Legal Enforcement of Corporate Social Responsibility Within the EU*, 8 COLUM. J. EUR. L. 529, 550 (2002).

110. EUROPEAN COMM’N, GREEN PAPER, PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY 8 (2001), available at http://ec.europa.eu/employment_social/soc-dial/csr/greenpaper_en.pdf [hereinafter GREEN PAPER] (noting that CSR should not be a substitute for proper state regulation or legislation regarding the protection of the social rights and the environment).

111. Yale Global Online, <http://yaleglobal.yale.edu/display.article?id=1339> (last visited May 15, 2008) (quoting Business for Social Responsibility’s definition).

112. See Abid Aslam, *Background: Corporate Social Responsibility*, http://www2.gsb.columbia.edu/ipd/j_corporatesocial.html (last visited Apr. 10, 2008) (referring to CSR as “a balancing act between the interests of a company’s ‘stakeholders’ including shareholders, executives, employees, communities, and customers”).

voluntary initiatives undertaken by companies.¹¹³ In the United States, this movement has resulted in an explosion since the late 1990s of voluntary corporate initiatives undertaken by companies themselves. The fact that there has been increased government regulation of corporate disclosure in the United States is not, however, a direct result of this second CSR movement, but instead has stemmed from the need to protect American investors in the wake of financial scandals.¹¹⁴ In France, this CSR movement has, on the contrary, resulted directly in increased regulation of French companies without an increase in voluntary corporate initiatives. Subsequent to the European Union Green Paper on CSR,¹¹⁵ France passed a law which mandated the disclosure of social, environmental, and profit performance.¹¹⁶ This law applies to all French companies listed on the French Stock Exchange and therefore to TNCs as well.¹¹⁷ French companies now have the obligation to describe to all stakeholders the social and environmental consequences of their activities in their annual reports.¹¹⁸ However, the companies have no further obligation to act upon these consequences.¹¹⁹

In promoting the protection of the environment and the well-being of employees, the community, and civil society in general,¹²⁰ the

113. See Branson, *supra* note 102, at 1225 (offering the view that the new CSR movement is only a part of the movement to create good corporate governance); GREEN PAPER, *supra* note 110, at 8.

114. See Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 (2006). The disclosure required in Sarbanes-Oxley has influenced the requirements applicable to public companies. For example, Section 406 of the Sarbanes-Oxley Act requires a public company to disclose whether it has adopted a code of ethics for its senior financial officers, and if not, the reasons why not. *Id.* § 406.

115. GREEN PAPER, *supra* note 110.

116. Law No. 2001-420 of May 15, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 16, 2001, p. 7776.

117. See *id.* (providing an exception for companies that are not listed on an exchange).

118. See generally Novethic.fr, Le Dispositif de la Loi NRE Sur le Reporting Sociétal des Entreprises [The Perspective of the NRE Law on the Social Responsibility Reporting of Companies], <http://www.novethic.fr/novethic/site/article/imprimer.jsp?id=74593> (last visited Apr. 11, 2008) (describing the decree of February 20, 2002, which provides a rubric for such disclosures).

119. *Id.*

120. See Official Website of Business and Sustainable Development, Corporate Social Responsibility (CSR), <http://www.bsdglobal.com/issues/sr.asp> (last visited

CSR movement therefore furthers certain human rights standards in American and French businesses, although its impact on compulsory measures varies between France and the United States.

2. *Holding the State Accountable for Corporate Human Rights Violations*

States “are increasingly held to be in breach of their human rights obligations when they fail to prevent abuses by private actors.”¹²¹ Criteria are therefore gradually being determined to measure this liability.¹²² A state can be liable for supporting or acquiescing to a private actor’s commission of a human rights violation.¹²³ This scenario is rare, however, and it is improbable that France or the United States would be held liable under this standard. Additionally, a state will be responsible for not taking “reasonable or serious steps to prevent or respond to an abuse by a private actor.”¹²⁴ This due diligence test was first stated by the Inter-American Court of Human Rights¹²⁵ and has subsequently been applied by human rights bodies worldwide to the actions of states.¹²⁶

Plaintiffs can complain about the failure of France or the United States to comply with their human rights obligations in their domestic tribunals. A country’s domestic courts are viewed as more

Mar. 27, 2008) (asserting that the traditional role of corporations solely as profit-making entities is being increasingly swept away in favor of corporate social responsibility); *see also Branson, supra* note 102, at 1225 (stating that this new CSR movement has advocated for corporations to become more transparent, to respect the environment, and to account for the social consequences of their actions).

121. *See* BEYOND VOLUNTARISM, *supra* note 2, at 53.

122. *Id.* at 51-52

123. *Id.* at 52.

124. *Id.*

125. *See Velásquez-Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988) (stating that an “illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State . . . because of the lack of due diligence to prevent the violations or to respond to it as required by the Convention”).

126. *See Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, art. 4(c), U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/104 (Dec. 20, 1993) (calling upon states to exercise due diligence regarding violence against women).

convenient forums for individuals to seek relief¹²⁷ and their use can be required before international proceedings.¹²⁸ Nevertheless, their use in France and the United States differs. In France, individuals have the right to recourse in domestic courts for infringement of rights guaranteed under the ECHR.¹²⁹ Moreover, the French court's power to use international human rights law has been greatly influenced by the European context, in which European law applies directly to French judges.¹³⁰ In the United States, however, domestic enforcement of international human rights law is not as developed.¹³¹ There is a narrow constitutional scope for direct application of treaties, and U.S. courts have tended not to construct customary international law from universal state practices.¹³²

If the use of a domestic court does not yield results, individuals can complain about the failure of France or the United States to comply with a human rights treaty in an international arena. Again, France is more readily liable in the international arena, due in part to the increased number of jurisdictions open to French citizens.

First, the U.N. Human Rights Council, charged with monitoring the ICCPR, can "receive and consider communications from individuals . . . who claim to be victims of a violation by that state party of any of the rights set forth in the covenant."¹³³ France ratified the first Optional Protocol to the ICCPR, which enabled this

127. See Alam, *supra* note 33, at 1 (arguing that there is no effective international mechanism for the enforcement of international law).

128. See ECHR, *supra* note 19, art. 35 ("The Court may only deal with the matter after all domestic remedies have been exhausted.").

129. *Id.*

130. See Alam, *supra* note 33, at 5 ("The courts in the countries of Europe enjoy wide power and jurisdiction to apply international law, whether treaty or customary. Application of general international law by the national courts in Europe has been influenced by the application of the European community law by these countries. The decisions of the European Commission, the European Court of Justice and the European Court of Human Rights have greatly influenced the jurisprudence of judicial decisions of the member-states.").

131. *Id.* at 3-4.

132. *Id.*

133. See Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, at 59, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

procedure in 1984; the United States is not party to this protocol.¹³⁴ Therefore, French citizens can benefit from lodging complaints with the Human Rights Council whereas American citizens cannot. France, for example, was held responsible for its role in a development project, carried out in partnership with a private company, which violated a tribal community's right to family and privacy.¹³⁵ The U.N. committee monitoring the ICESCR cannot receive individual complaints from individuals, although it can raise issues when examining country reports.¹³⁶ This committee's jurisdiction applies to France, but not the United States as the latter did not ratify the ICESCR.¹³⁷

Second, the U.N. Commission on Human Rights, the main political body of the U.N. that dealt with human rights, could receive individual complaints—known as the 1503 procedure—about a “consistent pattern of gross violations” by a state which had been “reliably attested.”¹³⁸ Resolutions from the Commission refer to state responsibilities in relation to human rights abuses by businesses.¹³⁹

134. See Office of the U.N. High Comm'r for Human Rights, Optional Protocol to the International Covenant on Civil and Political Rights, <http://www2.ohchr.org/english/bodies/ratification/5.htm> (last visited Apr. 10, 2008) (updating the recent status of the ratification of the First Optional Protocol).

135. See *Hopu v. France*, U.N. GAOR, Hum. Rts. Comm., 60th Sess., Communications No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1 (Dec. 29, 1997) (finding France in violation of Articles 17 and 23 of the Optional Protocol to the International Covenant on Civil and Political Rights).

136. See Office of the U.N. High Comm'r for Human Rights, Human Rights Bodies: Committee on Economic, Social and Cultural Rights, <http://www2.ohchr.org/english/bodies/cescr/index.htm> (last visited Apr. 10, 2008) (noting that the United Nations is moving forward on an additional optional protocol that would give the Committee cognizance over individual complaints).

137. See ICESCR, *supra* note 15, at 4 (showing that the United States was not among the countries that ratified the ICESCR).

138. See Official Website of FrontlineDefenders, 1503 Procedures, <http://www.frontlinedefenders.org/book/export/html/833> (last visited Feb. 10, 2008).

139. See Comm'n on Human Rights Res. 2001/35, ¶ 5, U.N. Doc. E/CN.4/RES/2001/35 (Apr. 20, 2001) (calling on governments to attend to their international obligations in order to prevent waste dumping in their territory); see also Comm'n on Human Rights Res. 2001/33, ¶ 2, U.N. Doc. E/CN.4/RES/2001/33 (Apr. 20, 2001) (urging states to act by treating those suffering from HIV/AIDS); ECOSOC, Comm'n on Human Rights, Report on the Right to Food, 57th Sess., ¶ 73, U.N. Doc. E/CN.4/2001/53 (Feb. 7, 2001) (prepared by Jean Ziegler, Special Rapporteur) (warning that some patents held by

The Human Rights Council, which replaced the U.N. Commission on Human Rights in 2006,¹⁴⁰ is establishing a new complaint procedure to build on and improve this 1503 procedure.¹⁴¹ This procedure can be used by individuals complaining against France or the United States for a company's human rights violation, although commentators note the limitations of this procedure for violations of an individual's rights.¹⁴²

Third, the committees of independent experts within the United Nations charged with monitoring a state's implementation of the conventions concerning racial discrimination, torture, and women's rights can receive complaints from victims concerning abuses by their state. Subject to certain conditions, these committees can hold France and the United States liable under this procedure. If the victims' rights are found to have been violated, they can receive compensation or other remedies, including interim measures to prevent damage that cannot be undone.¹⁴³ Additionally, the committees against torture and for the elimination of discrimination against women "can investigate systematic violations by a state of the rights they oversee."¹⁴⁴

multinational corporations greatly harm farmers in certain countries). In addition, the U.N. Commission approved the Draft U.N. Norms on the responsibilities of transnational corporations.

140. G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Mar. 15, 2006) (establishing the Human Rights Council which replaced the U.N. Commission on Human Rights).

141. See U.N. Human Rights Council, Human Rights Council Complaint Procedure, <http://www2.ohchr.org/english/bodies/chr/complaints.htm> (stating that this new complaint procedure "is established in compliance with the mandate entrusted to the Human Rights Council by General Assembly resolution 60/251 of 15 March 2006, in which the Council was requested to review and, where necessary, improve and rationalize, within one year after the holding of its first session, all mandates, mechanisms, functions and responsibilities of the former Commission on Human Rights, including the 1503 procedure, in order to maintain a system of special procedures, expert advice and a complaint procedure").

142. See, e.g., Stop Violence Against Women, The 1503 Procedure, http://www.stopvaw.org/The_1503_Procedure_.html (stating that the "procedure [is] useful if a victim wants the UN to investigate the situation in her country, but not her particular case").

143. See BEYOND VOLUNTARISM, *supra* note 2, at 84 (highlighting the importance of these interim measures as "[m]any years may pass after the abuse before a judgment is given").

144. *Id.* at 85 (noting that an investigation can be asked for by "any person or organization, including NGOs, . . . [so long as] their source of information is

Fourth, the International Labor Organization (“ILO”) has looked more closely at the “impact of trade on labour rights” since “the decision by trade ministers to keep labour rights issues out of the [World Trade Organization].”¹⁴⁵ France and the United States report to a Committee of Experts on how they have implemented ILO standards and these reports can be used to investigate how they are domestically enforcing ILO standards in relation to companies. Additionally, member states, employers, or employees can lodge a formal complaint with the ILO claiming that another state is violating a convention, which will be investigated by a quasi-judicial Commission of Inquiry.¹⁴⁶

Apart from U.N. auspices, France can additionally be held accountable by the European Court of Human Rights.¹⁴⁷ Individuals may therefore complain about the violation of civil and political rights guaranteed under the European Convention on Human Rights.¹⁴⁸ These civil and political rights are complemented by the European Social Charter, although rights guaranteed in the Charter are not subject to individual complaints.¹⁴⁹ Nevertheless, France reports on how it has implemented the Charter which can be followed by recommendations from the Committee of Ministers of

‘reliable.’ Investigation is confidential and occurs only in severe cases. In some circumstances the conclusions can be made public”).

145. *Id.* at 89 (arguing that the WTO and the ILO should forge a formal relationship, but also noting that this has not been well received by either organization).

146. *See id.* at 90-91; *see also* Press Release, International Labor Organization, ILO Governing Body Opens Way for Unprecedented Action Against Forced Labor in Myanmar (Nov. 17, 2000), *available at* <http://www.ilo.org/global/lang-en/index.htm> (follow “About the ILO”; click “Media and Public Information: Press Releases”) (reporting that international organizations were asked to suspend relations with Myanmar because they could be seen as aiding Myanmar’s forced labor policies in violation of several human rights conventions).

147. *See* Optional Protocol to the International Covenant on Civil and Political Rights arts. 4-5, Mar. 23, 1976, 999 U.N.T.S. 302.

148. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Nov. 4, 1950, 213 U.N.T.S. 221 (giving the European Court of Human Rights jurisdiction over individual complaints charging a state party with a violation of the Convention).

149. *See* European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 (granting the right to work, to organize, to collective bargaining, and to training).

the Council of Europe.¹⁵⁰ Moreover, France allows “international and national employer and trade union organi[z]ations, and NGOs which have consultative status with the Council of Europe [to] lodge collective complaints about a state’s failure to comply with the Social Charter,”¹⁵¹ which can result in recommendations from the European Committee of Social Rights¹⁵² against France.¹⁵³

Agreements that do not qualify as human rights agreements may also have a profound impact on individual complaints, particularly in the United States. The United States is party to the 1992 North American Free Trade Agreement (“NAFTA”),¹⁵⁴ which aims to promote free trade, but also seeks sustainable development, stronger environmental laws, and enhancement of workers rights.¹⁵⁵ Private parties may lodge complaints of an environmental nature with the Commission for Environmental Cooperation and the Commission

150. Marie Guiraud Nicolas Legoff, *La Charte sociale européenne et son Protocole : un modèle à suivre ?* [*The European Social Charter and Its Protocol: A Model to Be Followed?*], available at http://www.fidh.org/article.php3?id_article=408.

151. See ECSR R. P. 20 (European Comm. of Social Rights 1999) (stating that the complainant must establish his or her standing by showing that he or she represents the interests of the group whose rights are allegedly violated); see also Additional Protocol to the European Social Charter Providing for a System of Collective Complaints art. 9, Nov. 9, 1995, Europ. T.S. 158 (requiring a two-thirds vote of the Committee of Ministers in order to make a recommendation to a state party). These collective complaints have particularly concerned states’ work practices and some have even dealt with the alleged failure of a state to adequately monitor labor conditions in private companies. See Legoff, *supra* note 150 (stating that France among other countries has ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints).

152. See European Committee of Social Rights, Council of Europe, http://www.coe.int/t/e/human_rights/esc/2_ECSR_European_Committee_of_Social_Rights/ (last visited Apr. 20, 2008).

153. See, e.g., Réclamation n°38/2006, CESP contre France [CESP v. France], Conseil de l’Europe [Council of Europe], available at http://www.coe.int/t/f/droits_de_l'homme/cse/4_R%C3%A9clamations_collectives/Liste_des_R%C3%A9clamations/default.asp; Syndicat National des Officiers de Police [National Trade Union of Police Officers], http://www2.snop-snapc.fr/newsite/index.php?option=com_content&task=view&id=564&Itemid=67 (stating that all of the members of the French police can benefit from the European Committee of Social Rights decision that France has violated the European Social Charter concerning over-time remuneration).

154. See North American Free Trade Agreement pmbl., U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 296 (1993).

155. *Id.*

may release the report publicly.¹⁵⁶ Additionally, a NAFTA side agreement allows individuals and NGOs to submit complaints to a national administrative office in each country when one of the countries fails to enforce its labor laws.¹⁵⁷ “Many of the complaints relate to the failure of a government to ensure that private businesses abide by labor laws” and the findings are made public.¹⁵⁸ These two side agreements are therefore “important steps forward in explicitly linking international trade liberalization with social concerns.”¹⁵⁹ They have been described as “the most effective mechanisms existing today for victims . . . to hold private businesses indirectly accountable to at least a small range of rights.”¹⁶⁰

However, the task of corporate compliance with human rights is best resolved when undertaken by French and American corporations themselves. Such self-enforcement has recently been the subject of intense international debate.

II. APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW TO AMERICAN AND FRENCH COMPANIES

A. FROM VOLUNTARY INITIATIVES TO BINDING OBLIGATIONS

1. *Corporate Voluntary Initiatives to Comply with Human Rights*

The past decade has seen a surge in voluntary initiatives undertaken by corporations to actively respect human rights in their activities. This trend has several explanations. First, over the past twenty years, the scrutiny of private actors and their responsibilities

156. See North American Agreement on Environmental Cooperation arts. 8-9, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 (entered into force on Jan. 1, 1994) (calling for the Commission to meet at least once per year). The Commission must also meet in special sessions as requested by any of the three parties: Canada, the United States, or Mexico.

157. North American Agreement on Labor Co-operation art. 14, U.S.-Can.-Mex., Sept. 13 1993, 32 I.L.M. 1502 (1993) (providing for the creation of the National Administrative Offices at the federal levels of government in Canada, Mexico, and the United States).

158. See BEYOND VOLUNTARISM, *supra* note 2, at 95.

159. *Id.* at 97.

160. *Id.* at 92.

under international law has increased.¹⁶¹ Anthony Ewing characterizes this phenomenon as follows: "Beginning with the issue of Apartheid in the 1970s, expanding in the 1980s to business operations in countries with poor human rights records, and exploding around labor conditions in the 1990s, human rights activists have placed the private sector at the center of their advocacy efforts."¹⁶² Second, many TNCs domiciled in the United States adopted codes of conduct in the 1990s after discovering human rights violations in the developing countries in which such companies conducted business.¹⁶³ In these circumstances, the governments of these developing countries did not enforce the law and some even participated in their violation.¹⁶⁴ Third, "the international community's definition of corporate responsibility has evolved" since Milton Friedman's statement that solely the government was responsible for social issues.¹⁶⁵ Finally, the argument by economic analysts that adopting human rights standards is profitable for the corporation in the long run has gained credence.¹⁶⁶

161. See Ewing, *supra* note 108, at 29 (noting that during the same period, the "economic power of governments" has decreased).

162. *Id.*

163. See Kimberly Gregalis Granatino, *Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability?*, 23 SUFFOLK J. TRANSNAT'L L. REV. 191, 196 (1999) (arguing that these transgressions occur in spite of the United Nations Universal Declaration of Human Rights).

164. *Id.* at 199 (providing China's deliberate violation of human rights and labor rights as an example of a government knowingly aiding in the violation of human rights); see also Frey, *supra* note 30, at 155-73 (detailing legislative and executive efforts in the United States to address human rights issues within transnational corporations that failed to be enacted into law).

165. Granatino, *supra* note 163, at 211-12; Milton Friedman, *The Social Responsibility of Business Is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at SM17 (maintaining that a business's only social responsibility is to make as much money as possible without breaking the laws made by governments).

166. See Granatino, *supra* note 163, at 210-11 n.122 (observing that consumers prefer products made by socially responsible companies); see also Marc J. Epstein & Karen E. Schnietz, *Social and Environmental Responsibility Does Pay Off*, ETHICAL CORP., Apr. 3, 2003, at 2, available at http://www.ethicalcorp.com/content_print.asp?ContentID=475 (stating that after the WTO's failure in Seattle, firms with a reputation for social and environmental responsibility were protected from a significant decline in market value, whereas firms not considered socially responsible suffered huge losses).

Today, the concept of corporate responsibility includes social responsibility¹⁶⁷ and corporations have increasingly adopted codes of conduct to conform to this evolving definition. A code of conduct is a “formal statement of the values and business practices of a corporation.”¹⁶⁸ These codes increasingly deal with human rights protection for employees and stakeholders¹⁶⁹ and companies are encouraged to refer to an international human rights text in their code.¹⁷⁰

American corporations were the first to adopt codes of conduct, spurred on by private initiative.¹⁷¹ In the late 1970s, American corporations in South Africa largely adopted the “Sullivan Principles” to establish corporate responsibility in the political climate of apartheid.¹⁷² These principles were especially important in that “the firms that took part adopted unprecedented, far-reaching commitments to corporate social responsibility toward human rights violations.”¹⁷³ They also served as a successful model for future

167. See Granatino, *supra* note 163, at 212 (asserting that corporate responsibility requires a duty to promote human rights as well as a duty to maximize profits).

168. DEBORAH LEIPZINGER, *THE CORPORATE RESPONSIBILITY CODE BOOK* 36 (2003).

169. See Cassel, *supra* note 8, at 1971-72 (stating that these codes often “address forced labor, child labor, labor organizing and bargaining, non-discrimination, worker health and safety, and in some cases minimum wage, and maximum hour guidelines”).

170. See FRANKENTAL & HOUSE, *supra* note 21, at 82-90 (providing examples of codes of conduct that incorporate international human rights instruments such as the Universal Declaration of Human Rights).

171. See Granatino, *supra* note 163, at 196-98 (stating that American corporations in China adopted the first generation of codes of conduct and encouraged other TNCs in China to adopt similar policies).

172. See *id.* at 208 (explaining that the Sullivan Principles aimed at preventing employee discrimination in the areas of employment). The Sullivan Principles required TNCs to pay fair wages, well above the minimum cost of living, provide managerial training programs for blacks and other non-whites, provide their workers supportive services for housing, health care, transportation and recreation, and use corporate influence to help end Apartheid in South Africa. *Id.* at 208-09; see also Patricia Arnold & Theresa Hammond, *The Role of Accounting in Ideological Conflict: Lessons from the South African Divestment Movement*, 19 ACCT., ORG. & SOC’Y 111, 116 (1994) (stating that by 1986, 200 of the 260 U.S. firms doing business in South Africa had adopted the Sullivan Principles). See generally Sanctions Against South Africa, Sullivan Principles for U.S. Corporations Operating in South Africa, Nov. 8, 1984, 24 I.L.M. 1464, 1496.

173. See Cassel, *supra* note 8, at 1970.

codes of conduct in countries with prevalent human rights conditions.¹⁷⁴ Similarly, the MacBride principles were initiated in the mid-1980s by U.S. companies to protect Catholic workers in Northern Ireland against discrimination benefiting Protestants.¹⁷⁵ French companies, on the contrary, have historically not been as active as American companies in adopting codes regulating corporate activities abroad.

Nevertheless, both France and the United States have been influenced by international organizations as an important source in the drafting of codes of conducts. Codes are usually classified based on the author of the code.¹⁷⁶ Codes can be drafted by private individuals,¹⁷⁷ governments (in intergovernmental organizations or alone),¹⁷⁸ or by corporations themselves.¹⁷⁹ As early as 1974, the United Nations recognized the need for codes of conduct to “maximize the contributions of transnational corporations to economic development and growth and to minimize the negative effects of the activities of these corporations” in developing countries.¹⁸⁰ The 2000 United Nations Global Compact further called

174. See Orentlicher & Gelatt, *supra* note 37, at 83 n.45 (explaining that the U.S. Anti-Apartheid Act of 1986 based its Code of Conduct on the Sullivan Principles).

175. See Cassel, *supra* note 8, at 1971 (stating that the MacBride Principles focus on non-discrimination with “‘one unusual commitment’ . . . to make reasonable, good faith efforts to protect the personal safety of their workers, at the workplace but also traveling to and from work”). “As of February 1995, thirty-two out of the eighty publicly traded U.S firms operating in Northern Ireland had signed onto the MacBride Principles.” *Id.* at 1972. See generally WILLIAM C. THOMPSON, JR., THE MCBRIDE PRINCIPLES AND THE EQUALITY AGENDA IN NORTHERN IRELAND: A STATUS REPORT 6 (Nov. 2006), available at http://www.comptroller.nyc.gov/press/pdfs/pr-06-11-084_macbride_principles.pdf (describing New York’s implementation of the MacBride Principles).

176. Granatino, *supra* note 163, at 201.

177. *Id.* at 201.

178. *Id.*

179. *Id.* at 202.

180. *Id.* at 202 n.65 (quoting the Preamble to the U.N. Code of Conduct on Transnational Corporations). The Code of Conduct, presented in 1990, established standards of conduct for host countries and TNCs, including respect of the fundamental rights of workers, a prohibition on discrimination based on an individual’s exercise of freedoms, and the fair treatment of workers. *Id.* However, the Code was never adopted, due in part to opposition stemming from the numerous responsibilities placed upon TNCs compared to allocated to host governments. *Id.* at 202-03.

on companies to commit themselves to respect nine core principles in relation to human rights, labor, and the environment.¹⁸¹

Responding to this call from the United Nations for codes of conduct, the Organisation for Economic Co-operation and Development (“OECD”) formulated guidelines to provide “voluntary principles and standards for responsible business conduct consistent with applicable laws.”¹⁸² These guidelines, with their “distinctive implementation mechanisms,” require TNCs to cooperate with unions and create complaint procedures for resolving labor disputes.¹⁸³ These guidelines have served as a basis for private codes of conduct¹⁸⁴ and are described as “the only multilaterally endorsed and comprehensive code that governments are committed to promoting.”¹⁸⁵

The elevated importance of labor issues within developing countries was reinforced by the ILO adoption of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977.¹⁸⁶ Although the Declaration addresses solely

181. See Global Compact, *supra* note 65 (adding a tenth principle related to anti-corruption). Hundreds of companies, including many of the world’s largest, have joined this initiative. See Official Website of U.N. Global Compact, Participants and Stakeholders: Business Associations, http://www.unglobalcompact.org/ParticipantsAndStakeholders/business_associations.html (last visited Feb. 29, 2008) (providing an updated list of business associations that have joined the Global Compact).

182. OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES 15 (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (last visited Apr. 1, 2008) [hereinafter OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES].

183. See Granatino, *supra* note 163, at 203-04 (stating that TNCs must cooperate with unions, must not interfere with contract negotiations, and must provide timely notice and mitigation of layoffs).

184. *Id.* at 204 n.78.

185. See OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES, *supra* note 182, at 5; OECD, *Guidelines for Multinational Enterprises: Statements Made on The Adoption of the Review 2000*, ¶ 3 (2000) (commenting additionally that “[t]he Guidelines’ recommendations express the shared values of governments of countries that are the source of most of the world’s direct investment flows and home to most multinational enterprises”). “We believe the revised guidelines can have a strong positive impact on Multinational Enterprises’ (MNEs) contributions to economic, environmental and social progress. The Guidelines aim to promote their positive contributions to economic, environmental and social progress.” *Id.* ¶ 18; see BEYOND VOLUNTARISM, *supra* note 2, at 67.

186. INTERNATIONAL LABOUR ORGANIZATION, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (4d

labor issues, its complaint procedure is more extensive than the OECD code¹⁸⁷ and enforcement of ILO standards are done through media disclosure to the public and notification to ILO officials of TNCs' noncompliance.¹⁸⁸

Both American and French governments have played a part in encouraging corporations headquartered in their territories to adopt codes of conduct. The United States, for example, adopted the American Model Business Principles of 1995 to encourage such an adoption of codes.¹⁸⁹ However, the U.S. Council for International Business prefers the OECD and ILO multilateral guidelines as these do not put U.S.-based firms at a competitive disadvantage.¹⁹⁰ In France, the European commitment to voluntary codes of conduct has influenced the promotion of codes of conduct within French businesses,¹⁹¹ although the focus remains on compulsory governmental measures.

These differences in approach have spurred considerable international debate. Amnesty International and Maplecroft, for example, emphasize the "ongoing discussion on the relative merits of voluntary initiatives [as done in the United States] and compulsory, normative initiatives [as preferred in France]."¹⁹² Adopting codes of conduct can have a positive impact on limiting human rights

ed. 2001), available at <http://www.ilo.org/public/english/employment/multi/download/declaration2006.pdf> [hereinafter TRIPARTITE DECLARATION].

187. Granatino, *supra* note 163, at 205 (explaining that a Standing Committee on Multinational Enterprises investigates the TNC violations alleged by the ILO).

188. *Id.*

189. See Cassel, *supra* note 8, at 1974 (noting that President Clinton adopted the American Model Business Principles as a way to unlink U.S. trade policy with China from human rights concerns).

190. *Id.* at 1975.

191. See generally Eur. Parl., Comm. on Development and Cooperation, Code of Conduct for European Enterprises Operating in Developing Countries, 1999 O.J. (C 104) 180 (seeking to establish a European enforcement mechanism in order to hold European MNCs to international standards governing labor rights, human rights, minority and indigenous people's rights, environmental protection, international security and corruption control).

192. See ALYSON WARHURST, KATY COOPER & AMNESTY INT'L, THE U.N. HUMAN RIGHTS NORMS FOR BUSINESS 14 (2004), available at <http://www.amnestyusa.org/business/unhrbusinessnorms.doc>.

violations¹⁹³ and has been described as “emphasiz[ing] the duty of corporate responsibility and accountability.”¹⁹⁴ Nevertheless, the trend of adopting codes of conduct as a way of expressing adherence to human rights norms is also viewed by many commentators as insufficient.¹⁹⁵

Most commentators note the “inability of voluntary approaches to reduce persistent abuses and achieve compliance with generally agreed substantive norms.”¹⁹⁶ Moreover, “the historical reality [shows] that some form of legal framework is often necessary to restrain abuses.”¹⁹⁷

2. Towards Binding Obligations on Corporations

Because of the increased influence corporations can have on human rights, the traditional view of human rights law as solely concerning the relationship between the state and the individual¹⁹⁸ is seen as having “fallen behind global reality.”¹⁹⁹ Because traditional human rights doctrine was developed at a time when “international business was less prominent and international economic

193. See Orentlicher & Gelatt, *supra* note 37, at 70 (arguing that American corporate leadership can and has been able to promote basic human rights standards through the voluntary adoption of human rights codes of conduct).

194. Granatino, *supra* note 163, at 194.

195. See *id.* at 221 (asserting that voluntary codes of conduct are insufficient because they do not have expressly stated responsibilities or accountability that ensures compliance with international laws).

196. AMNESTY INT’L, THE U.N. HUMAN RIGHTS NORMS FOR BUSINESS: TOWARD LEGAL ACCOUNTABILITY 12 (2004), available at <http://www.globalpolicy.org/reform/business/2004/2004ainorms.pdf>.

197. *Id.*

198. John P. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 75 (1973) (tracing the expansion of human rights law from domestic to international and from the right to just treatment to the inclusion of economic and social rights).

199. See Jennifer Johnson, *Public-Private Convergence: How The Private Actor Can Shape Public International Labor Standards*, 24 BROOK. J. INT’L L. 291 (exploring the power of the private market actor in conjunction with State efforts to change international human rights law).

interdependence was far less important,"²⁰⁰ it is increasingly challenged as "unrealistic" in relation to today's world.²⁰¹

Commentators argue that "a narrow application of human rights law is not conducive to furthering the protection of human rights and subtracts from its credibility."²⁰² "Since international business is now mobile enough to avoid stringent national regulations, or influential enough to persuade against the adoption of such regulation, international law must move beyond the traditional view towards regulating all of the organs of the international community."²⁰³ One scholar even goes so far to say that TNCs "have transcended national legal systems and ignored the feeble international system to make the imposition of human rights norms nearly impossible."²⁰⁴

Therefore, a "reconceptualization of the prevailing international framework of accountability, as well as the legal status of MNCs [multinational corporations] under international law" is needed.²⁰⁵ Indeed, "[t]he international community is realizing that in order to achieve fuller and wider realization of human rights, the umbrella of human rights obligations and their enforcement should cover MNCs."²⁰⁶

Since the Second World War, non-state actors, such as international organizations, insurgent and rebel groups,²⁰⁷ and individuals,²⁰⁸ are increasingly given rights and duties in

200. See Aguirre, *supra* note 24, at 58.

201. See Sigrun I. Skogly, *Economic and Social Human Rights, Private Actors and International Obligations*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 239 (Michael K. Addo ed., 1999) (observing that a formalistic understanding of international law, rather than a realistic view of the world, is the basis for the traditional definition of international human rights law regarding private actors).

202. Aguirre, *supra* note 24, at 57.

203. *Id.* at 58.

204. *Id.* at 57.

205. Deva, *supra* note 27, at 2.

206. *Id.* at 1; see, e.g., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001).

207. See Aguirre, *supra* note 25, at 58 n.30 (discussing the duties on the part of rebel groups to respect certain rules of combat, including protecting prisoners and disallowing children to fight).

208. Sigrun I. Skogly, *Economic and Social Human Rights, Private Actors and International Obligations*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 239, 244 (Michael K. Addo

international law.²⁰⁹ Corporations have also been granted certain rights found in human rights documents. The European Court of Human Rights for example has recognized that companies can enjoy rights such as rights to a fair trial, privacy, and aspects of freedom of expression.²¹⁰ The right to freedom of expression, for example, “applies to everyone, whether natural or legal persons”²¹¹ and companies can bring legal claims to the ECHR to enforce these rights. Therefore, even though companies have not taken part in negotiating the treaty which creates obligations, there is “no conceptual obstacle [that] prevents states from requiring companies to abide by legally binding international human rights obligations.”²¹²

There is in fact debate as “to what extent . . . international human rights standards [have] already been applied directly to companies.”²¹³ First, the preamble of the UDHR calls on “every individual and every organ of society” to “promote respect for” and “secure . . . recognition and observance” of human rights.²¹⁴ Companies are included in “every organ of society” and therefore “the Universal Declaration applies to them.”²¹⁵ However, the UDHR is a declaration which does not create legally binding obligations,

ed., 1999) (conveying the traditional view that human rights law protects the individual citizen from the state).

209. See Aguirre, *supra* note 24, at 58 (positing that the expansion of international business over the past century has contributed to varying human rights considerations).

210. Michael K. Addo, *The Corporation As a Victim of Human Rights Violations*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 187, 192-93 (Michael K. Addo ed., 1999) (admitting that the idea of corporations as victims seems odd, but arguing that if entities’ rights are protected, they will do their part in protecting human rights).

211. *Autronic AG v. Switzerland*, Eur. Ct. H.R. Series A.178 (1990); 12 (1990) E.H.R.R. 485 at ¶ 47 (stating that neither a party’s legal status as a company nor its commercial activity precludes it from protection).

212. See BEYOND VOLUNTARISM, *supra* note 2, at 57.

213. *Id.* at 58.

214. See UDHR, *supra* note 12, pmbl.

215. See BEYOND VOLUNTARISM, *supra* note 2, at 58 (quoting Professor Louis Henkin at the 50th anniversary of the Universal Declaration in 1998); see also FRANKENTAL & HOUSE, *supra* note 21, at 23; Office of the High Comm’r for Human Rights, *The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity*, in EMBEDDING HUMAN RIGHTS INTO BUSINESS PRACTICE, *supra* note 108, at 14, 15 (stating that “[t]he concept of ‘every organ of society’ covers private entities such as companies”).

although some of its articles are considered to be customary law.²¹⁶ The International Council on Human Rights Policy notes, however, that the preamble is at least “an authoritative guide to the interpretation of human rights articles in the UN Charter, which themselves create legal obligations.”²¹⁷ Article 30 of the UDHR also states that “[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”²¹⁸ However, there is continuing debate as to the legal force of Article 30.²¹⁹

The Committee for Economic, Social and Cultural Rights has placed some level of responsibility on companies concerning particular rights, such as the right to adequate food and the right to health.²²⁰ In declarations, U.N. member states have placed responsibilities on businesses, which “hastens the transformation of non-binding international standards for businesses into obligations of a more legal character.”²²¹

216. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996) (noting that once a provision is considered customary international law, intergovernmental committees, tribunals, and organizations recognize its legally binding nature on all states); see also Ewing, *supra* note 108, at 32 (“Some human rights [in the UDHR] are so widely accepted that they have become part of customary international law, or the international law that binds all states regardless of whether states have ratified particular international treaties.”).

217. BEYOND VOLUNTARISM, *supra* note 2, at 61 n.164 (explaining that most U.N. members have ratified treaties that refer directly to the UDHR, and some provisions have even been incorporated into state constitutions and laws).

218. See UDHR, *supra* note 12, art. 30.

219. See Hannum, *supra* note 216, at 350 (noting that Article 30 of the UDHR, also known as the “savings clause,” is included in nearly all human rights treaties and may simply be a warning not to act in opposition to the provisions of the conventions).

220. See *Comment 12*, *supra* note 42, ¶ 20 (stating that while only States are parties to the Covenant, and thus ultimately accountable, private companies should pursue conduct that bolsters these rights); see also BEYOND VOLUNTARISM, *supra* note 2, at 66-65.

221. See BEYOND VOLUNTARISM, *supra* note 2, at 65 (showing that most members of the U.N. World Conference in the 1990s have “expected the private sector to take on certain internationally-agreed responsibilities” with regards to the environment in particular).

The revision of the OECD Guidelines in 2000 demonstrates an evolution towards the view that corporations should respect human rights. The revision added that “[enterprises should] respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”²²² Although the Guidelines are not legally binding, they have been described “as a tool to interpret the meaning and application of international instruments and domestic laws.”²²³

Additionally, the ILO Declaration recommends that all parties, including employers, respect the UDHR, the Covenants, and the ILO principles.²²⁴ Similarly, the Declaration is not legally binding but it represents a “high-level statement of international public policy” from an organization representing governments, employers, and employees and has a higher number of member governments than the OECD.²²⁵

The U.N. Norms, adopted in 2003, have provoked the most debate on the direct application of human rights law to companies.²²⁶ The U.N. Norms declare that “within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of,

222. *Id.* at 66 (referring to paragraph II.2 of the OECD Guidelines and arguing that, despite the vague language of the revision, MNCs should define human rights broadly, and measure their conduct against the host state’s international obligations and not merely its national laws).

223. *Id.* at 68. *But see* Norbert Horn, *Codes of Conduct for MNEs and Transnational Lex Mercatoria: An International Process of Learning and Law Making*, in 1 LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 45, 58 (Norbert Horn ed., 1980) (stating that because the OECD Guidelines are an up-to-date consensus of developed nations about general principles of international business regulation and public policy, complemented by 24 years of interpretative clarifications, they rise to the level of customary international law).

224. *See* TRIPARTITE DECLARATION, *supra* note 186, ¶ 8 (creating a duty on the part of organizations to respect all commitments and obligations concerning human rights).

225. *See* BEYOND VOLUNTARISM, *supra* note 2, at 69 (stating that “the Tripartite Declaration represents the authoritative voice of the vast majority of the world’s governments”).

226. *See* David Weissbrot & Maria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights*, 97 AM. J. INT’L L. 901, 903 (2003) (highlighting the enormous attention that the Norms attracted in the corporate social responsibility field).

respect, ensure respect of and protect human rights recognized in international as well as national law.”²²⁷ The Norms “appear to be more comprehensive and more focused on human rights” than any other guidelines drawn up by governmental, private or corporate initiatives.²²⁸ Moreover, they are mandatory in nature, as shown by their implementation provisions, which go beyond the previous international voluntary guidelines.²²⁹ The Norms also show the importance of not limiting the debate to TNCs, of applying to “other business enterprises,”²³⁰ and of addressing the issue of subcontractors and suppliers, which was not addressed by the ILO Tripartite Declaration and was only mentioned in the OECD Guidelines.²³¹

There is heightened international debate regarding the precise meaning and impact of the U.N. Norms. The Norms, at first glance, can be seen as “not directly binding on corporations”²³² and have been described as a “mere restatement of international human rights

227. *U.N. Norms*, *supra* note 1, ¶ 1 (noting in the commentary that the general obligations apply to a corporation’s activities occurring in its home country or any other country).

228. Weissbrott & Kruger, *supra* note 226, at 912 (demonstrating that the Norms restate a wide range of human rights principles and therefore reinforce many earlier attempts to enforce greater social responsibility on corporations).

229. *Id.* at 913 (providing modes for implementation by business enterprises, by the United Nations, and by other intergovernmental organizations). The author adds that though the Norms are not primary sources of international law, they could possibly be classified as customary international law. *Id.*

230. *See U.N. Norms*, *supra* note 1, ¶ 21 (defining “other business enterprises” as “being any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity”).

231. *See OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES*, *supra* note 182, at 19 (stating that enterprises are to “encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible” with the OECD Guidelines); *see also U.N. Norms*, *supra* note 1, ¶ 15 (declaring that “[e]ach transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons who enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms”).

232. Troy Rule, *Using “Norms” to Change International Law: U.N. Human Rights Law Sneaking in Through the Back Door?*, 5 CHI. J. INT’L L. 325, 326 (2004).

law.”²³³ However, they have also been viewed as “the first major stepping stone towards the adoption of an international, enforceable set of legal obligations binding on transnational corporations.”²³⁴ One author has gone so far as to say that the Norms do in fact “legally bind transnational corporations and other business enterprises.”²³⁵ In any case, one source notes, “since the Norms are based on international law, which countries have undertaken to be translated into national law, a business enterprise might well expect to see similar provision legally binding on it through national legislation.”²³⁶

The U.N. Norms are soft law, meaning that they are presented in the form of recommendations. As such, over a period of time, the Norms may help establish customary law, serve as a guide for the interpretation of a treaty, or even serve as the basis for the later drafting of treaties.²³⁷ It is only when a declaration has achieved international consensus that it is codified in treaty form.²³⁸ However, acquiring a consensus on binding obligations for corporations has proven to be difficult. Importance is also given to the body having enacted the declaration²³⁹ and to whether the declaration is in fact being complied with internationally.²⁴⁰

233. *Id.* (referencing a debate between two experts regarding the actual effect of the U.N. Norms on transnational corporations).

234. *Id.*

235. See Campagna, *supra* note 29, at 1207 (contending that the monitoring and implementation procedures to which corporations are bound reflect the legally binding nature of the U.N. Norms).

236. Thomas E. McCarthy, *Business and Human Rights: What Do the New U.N. Norms Mean for the Business Lawyer*, 28 INT’L LEGAL PRAC. 73, 74 (2003).

237. See Dinah L. Shelton, *Compliance with International Human Rights Soft Law*, in INTERNATIONAL COMPLIANCE WITH NON-BINDING ACCORDS 119 (Edith Brown Weiss ed., 1998) (distinguishing hard and soft international law); Weissbrott & Kruger, *supra* note 226, at 914 (stating that hard law “is clearly intended to create legally binding obligations from the outset, whereas soft law starts in the form of recommendations and over a period of time may be viewed as interpreting treaties and helping to establish custom or may serve as the basis for the later drafting of treaties”).

238. See Weissbrott & Kruger, *supra* note 231, at 914.

239. See *id.* at 915 (stating that the “higher the UN body and the closer to consensus the vote in adopting soft-law principles such as the Norms, the greater the authority they would obtain”).

240. *Id.*

The U.N. Norms were adopted by state representatives within the Commission on Human Rights; furthermore, the principles contained therein will be reinforced by views and recommendations to be presented in 2008 to the U.N. Human Rights Council by John Ruggie.²⁴¹ Therefore, as one source said, the Norms “have room to become more binding in the future. The level of adoption within the United Nations, further refinement of implementation methods by the working group, and increasingly broad acceptance of the Norms will continue to play an important role in the development of their binding nature.”²⁴²

B. ENSURING CORPORATE COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

1. Corporate Complicity in Human Rights Abuse

When former U.N. Secretary-General Kofi Annan first proposed the Global Compact in January 1999, he called upon the business world to “support and respect the protection of international human rights within their spheres of influence” and “to make sure their own corporations were not complicit in human rights abuses.”²⁴³ There are, therefore, two ways for a company to be deemed responsible in a human rights violation: either the company has directly violated a human right that it had the duty to support and respect within its sphere of influence, or the company is an accomplice of the human rights violation, but not the principal actor. Complicity is a “large part” of the “issue of corporate accountability for human rights or international crimes”²⁴⁴ as states and businesses often violate rights

241. See Ruggie Report, *supra* note 3.

242. See Weissbrodt & Kruger, *supra* note 226, at 915.

243. See Global Compact, *supra* note 65, Principles 1-2; Kofi A. Annan, Secretary-General, Address to World Economic Forum in Davos (Feb. 1, 1999) (discussing ideas that were codified in the Global Compact as Principles 1 and 2).

244. Mark Taylor, *Corporate Fallout Detectors and Fifth Amendment Capitalists: Corporate Complicity in Human Rights Abuse*, in EMBEDDING HUMAN RIGHTS IN BUSINESS PRACTICE 44, 48 (Mark Taylor ed., 2003); see BEYOND VOLUNTARISM, *supra* note 2, at 125; see also Ewing, *supra* note 109, at 39 (stating that “allegations of corporate complicity in human rights abuse appear with increasing frequency and pressure for corporate human rights accountability is growing”).

together. It has “relative youth as a political problem”²⁴⁵ and there is therefore ongoing debate on the delimitation of parameters of corporate complicity. Hence, clarifying the notion of corporate complicity is essential to seeing “how close a company need be to any human rights violation for it to be considered responsible in some way.”²⁴⁶ Authors advance three categories of corporate complicity in human rights abuses: direct, indirect and silent complicity.²⁴⁷

First, “companies are directly complicit when they knowingly assist or encourage human rights abuses by others.”²⁴⁸ A company is directly complicit in a human rights abuse if “contractors, joint venture partners, the host government, or other independent actors abuse human rights on behalf of, or with the active aid and encouragement of the company.”²⁴⁹ International criminal law provides guidance on the requirements for direct complicity under the legal standard of “aiding and abetting.”²⁵⁰ First, case law from the two ad hoc international criminal tribunals suggests that “direct complicity requires intentional participation, but not necessarily any intention to do harm, only knowledge of foreseeable harmful effects.”²⁵¹ The International Criminal Tribunal for Rwanda stated

245. See Taylor, *supra* note 244, at 48.

246. See BEYOND VOLUNTARISM, *supra* note 2, at 121 (stating that the determination of whether a company is a principal actor or an accomplice is based upon the following: the company’s intentions; whether the company had knowledge of the violations; whether the company’s actions helped cause the violations; and the relationship between the company, victims, and perpetrators).

247. See Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT’L & COMP. L. REV. 339, 342-49 (2001) (noting that all three types of complicity require that the corporation have knowledge of the human rights abuse).

248. See Ewing, *supra* note 108, at 39 (grounding the concept of direct complicity in international criminal law, cases of which are prosecuted in forums such as the International Criminal Court).

249. *Id.* (providing examples of when a company would be directly complicit, such as paying local security forces to abuse human rights or providing equipment to local security forces to be used to abuse human rights).

250. *Id.* (defining the “aiding and abetting” standard as when a company provides “substantial or material assistance” and has knowledge of the consequences that are likely to occur as a result of this assistance).

251. See Clapham & Jerbi, *supra* note 247, at 342 (emphasizing that a corporation can be directly complicit in a human rights violation when it violates or assists in violating customary international law regarding human rights).

that “the accomplice need not even wish that the principal offence be committed.”²⁵² Therefore, a corporation, argues one source, need not “actually wish the [human rights violation]. It is enough if the corporation or its agents knew of the likely effects of their assistance.”²⁵³ Second, international criminal law affirms that “all criminal systems provide that an accomplice can be tried in the absence of the conviction of the principal perpetrator.”²⁵⁴ This means that that “the abuse must have occurred but does not have to have been formally proven in a court of law.”²⁵⁵ Thus, a corporation can be liable for contributing to human rights abuses even if the primary perpetrator of a human rights violation has not been found responsible.

Second, companies are indirectly complicit “if the company benefits from human rights abuses committed by someone else, even if the company did not authorize, direct or have prior knowledge of the activities.”²⁵⁶ The company must have knowledge that human rights abuses are taking place.²⁵⁷ Some authors concentrate on the primary actor being a government,²⁵⁸ whereas others recognize that

252. See *Prosecutor v. Akayesu*, Judgment, ¶ 539, Case No. ICTR-96-4-T (Sept. 2, 1998) [hereinafter *Akayesu*, Judgment] (reiterating that willingness to participate in the principal offense does not have to be established, only knowledge is required).

253. See Clapham & Jerbi, *supra* note 249, at 346 (arguing that an accomplice corporation can be held liable where it makes the decision to participate in or assist another in perpetrating human rights abuses); see also *Akayesu*, Judgment, *supra* note 252, ¶ 539 (stating that “anyone who knowing of another’s criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence”).

254. See *Akayesu*, Judgment, *supra* note 252, ¶ 531 (quoting the Rwandan Penal Code which states that accomplices can be prosecuted where the perpetrator may not be prosecuted because the perpetrator is insane, dead, or unidentified).

255. See Clapham & Jerbi, *supra* note 247, at 342 (noting that the accomplice need not actually desire the offense be committed).

256. See Ewing, *supra* note 108, at 39 (clarifying that the company must know abuses are taking place, but need not have knowledge prior to the abuses being committed).

257. *Id.* (quoting Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon*, 20 BERKELEY J. INT’L L. 91, 150 (2002), stating that “knowledge of ongoing human rights violations, plus acceptance of direct economic benefit arising from violations, and continued partnership with the host government should give rise to accomplice liability”).

258. See BEYOND VOLUNTARISM, *supra* note 2, at 132 (noting that governments are often motivated to provide infrastructure; to provide resources; to provide

the principal violators of human rights may also be any other actor, such as a business partner or a supplier.²⁵⁹

When a government is primarily responsible for a human rights abuse, companies may benefit in at least three ways.²⁶⁰ First, governments could violate certain human rights in the construction of infrastructure for business use. The Danish Human Rights and Business Project has stated the *Unocal* case represents an example of this.²⁶¹ Governments could also commit abuses to favor companies over its residents.²⁶² The International Council on Human Rights Policy has stated that allowing a luxury hotel project to be built on tribal lands, thereby damaging the tribes' ability to fish is such an example.²⁶³ Finally, allowing repression to hinder labor unrest is another way in which governments can cater to companies' interests.²⁶⁴ This happened, for example, in apartheid South Africa,

suppression of labor unrest). These government projects may lead to human rights abuses by private actors.

259. See Ewing, *supra* note 108, at 39; see also Global Compact, *supra* note 65, Principle 2 (stating that beneficial complicity "[s]uggests that a company benefits directly from human rights abuses committed by someone else").

260. See BEYOND VOLUNTARISM, *supra* note 2, at 131-32 (listing three forms of abuse which create an environment whereby the corporation benefits from the abuses even if it does not aid in or cause the human rights violations itself).

261. See THE HUMAN RIGHTS & BUSINESS PROJECT, DEFINING THE SCOPE OF BUSINESS RESPONSIBILITY FOR HUMAN RIGHTS ABROAD 10-11, available at <http://www.humanrights.dk/humanrightsbusiness/index.html> (last visited Feb. 11, 2008) (describing a situation in which a joint venture was undertaken between several international oil companies including Unocal, the Burmese government and the Burmese state oil company to construct an oil pipeline. The state oil company was in charge of providing labor and security for the construction of the gas pipeline. Allegations later emerged that the state oil company had used forced and child labor and violated other human rights in order to clear the area and provide security).

262. See CRAIG FORCESE, PUTTING CONSCIENCE INTO COMMERCE 21-22 (International Centre for Human Rights and Democratic Development 1997) (providing an example in Suriname where the government was accused of forcibly relocating residents of lands in favor of Canadian mining companies that have mineral rights).

263. See BEYOND VOLUNTARISM, *supra* note 2, at 132 (referring to *Hopu v. France*).

264. See FORCESE, *supra* note 262, at 22 (listing examples in Sri Lanka and Indonesia where troublesome workers were assaulted and disappeared, in the Philippines where pro-union workers were "visited," abducted, and tortured by agents of the government, and in Burma where a strike was broken by a government paramilitary unit).

where black union activity was suppressed by security forces to benefit white businesses.²⁶⁵ Under existing principles of criminal law and tort law, however, “if the company really just passively benefits from the government’s wrongdoing, it will not be responsible.”²⁶⁶ Yet, “the idea that companies are morally complicit if they passively benefit from violations is gaining ground”²⁶⁷ and is stated in the Global Compact.²⁶⁸ Therefore, it has been suggested that “to accept the benefits of measures by governments or local authorities to improve the business climate which themselves constitute violations of human rights, makes a company a party to those violations.”²⁶⁹

When the primary actor of the violation is a non-state actor, however, beneficial complicity could occur “if a corporation tolerates or knowingly ignores the human rights violations of one of its business partners committed in furtherance of its common business objectives”: for example, buying materials from a supplier that violates human rights or that tolerates poor working conditions.²⁷⁰

Third, silent complicity occurs when “a company is aware that human rights violations are occurring, but does not intervene with the authorities to try and prevent or stop the violations.”²⁷¹ Although

265. *Id.* at 22-23 (mentioning the suppression of black interests by the white South African government during apartheid); *see also* BEYOND VOLUNTARISM, *supra* note 2, at 132.

266. *See* BEYOND VOLUNTARISM, *supra* note 2, at 132 (charging that a passive benefit often easily slides into more active complicity regarding human rights abuses, thereby opening corporations to legal accountability).

267. *Id.* (arguing that a corporation which knows of human rights abuses must take reasonable steps to prevent the abuse so that they are not accused of passive complicity).

268. *See* Global Compact, *supra* note 65 (acknowledging that complicity is a difficult concept to understand and, therefore, to enforce, because society and its expectations are constantly changing).

269. *See* AMNESTY INT’L & PAX CHRISTI, MULTINATIONAL ENTERPRISES AND HUMAN RIGHTS: A REPORT 45, 51 (1998) (noting that a corporation is complicit in human rights abuses if an individual’s rights are violated due to his or her opposition to the corporation).

270. *See* Ewing, *supra* note 108, at 39 (indicating that incidents of corporate silent complicity often occur in relation to violations committed by security forces upon groups or people).

271. *See* BEYOND VOLUNTARISM, *supra* note 2, at 133 (providing examples of silent complicity, such as when a company remains silent while an employee is arbitrarily arrested for union activities, or when systematic discrimination takes

the parameters of silent complicity and the conditions for triggering such complicity are being defined, systematic human rights is a leitmotiv.²⁷² This means that “companies operating in states widely known or subject to international sanctions for gross and systematic human rights violations are at high risk of silent complicity human rights abuse.”²⁷³ This is because human rights abuse is so evident that it should force the company to take action.²⁷⁴ Therefore, silent complicity is easier to find when TNCs operate in countries with repressive or corrupt governments.²⁷⁵ It is still not clear whether “silent complicity would give rise to a finding of breach of legal obligation against a company in a court of law.”²⁷⁶ Nevertheless, the moral consequences of inaction in such a situation are not to be underestimated.²⁷⁷ Therefore, even if “silent complicity does not yet trigger international legal responsibility for companies, [it] is considered by many to be a moral obligation of the private sector.”²⁷⁸

place); *see also* Ewing, *supra* note 108, at 39 (listing examples of silent complicity such as acceptance of discrimination or failure to protest government actions that result in human rights violations).

272. *See* Ewing, *supra* note 108, at 40 (listing other factors which may be looked at when evaluating a corporation’s silent complicity of human rights violations, including whether the corporation’s actions help establish the violating government’s legitimacy, whether the corporation has the power to change the situation, and whether the corporation could feasibly leave the market that encourages human rights violations altogether).

273. *Id.* (emphasizing that current international standards do not find that a corporation is automatically complicit simply because they exist in a country where abuses are occurring). However, the evolving concept of silent complicity is opening the door to possible legal liability for corporations if they exist in violating countries.

274. *Id.* (acknowledging that silent complicity is the most difficult kind of complicity for corporations to understand and against which to guard).

275. *See* FRANKENTAL & HOUSE, *supra* note 22, at 23-24 (specifying that the limits of silent complicity vary from country to country and depend on the country’s cultural context). *But see* CHRISTOPHER L. AVERY, BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE 22 (2002) (quoting Sir Geoffrey Chandler, Chair of the Amnesty International Business Group, stating, “Silence or inaction will seem to provide comfort to oppression and may be adjudged complicity Silence is not neutrality. To do nothing is not an option”).

276. *See* Clapham & Jerbi, *supra* note 247, at 348 (realizing that many corporations who strive to avoid accusations of silent complicity do so as part of a “sensible risk management plan”).

277. *Id.*

278. *See* Ewing, *supra* note 108, at 39-40.

“Corporate complicity at the international level has had less attention due to the obvious lack of international courts with jurisdiction.”²⁷⁹ The International Criminal Court, for example, has no jurisdiction over corporations.²⁸⁰ Nevertheless, plaintiffs increasingly use the theory of corporate complicity in domestic law suits against corporations. As such, defining the parameters of corporate complicity is especially important.²⁸¹ The International Commission for Jurists, for example, was created in 2006 to “develop the legal and public policy meaning of corporate complicity in the worst violations of international human rights and humanitarian law that amount to international crimes.”²⁸² Therefore, the emergence of the notion of corporate compliance affects both French and American companies, although the effect differs because of divergence in the ways these companies can be held accountable.

2. *Holding Companies Accountable for Human Rights Abuse*

It is primarily through domestic law suits that individuals will seek to hold TNCs accountable for abusive practices. The ways in which American and French TNCs can be held accountable for their human rights violations overseas varies widely.

In the United States, the opportunities for individuals to use international law in domestic proceedings against companies are mixed: the United States is not party to all international human rights

279. See Clapham & Jerbi, *supra* note 247, at 349 (observing that intentional complicity is accepted by the international community as a breach of human rights law).

280. See Ewing, *supra* note 108, at 39 (observing, however, that the ICC’s Prosecutor, Luis Moreno Ocampo, is using his jurisdiction over individuals to investigate the possibility of corporate complicity in governmental war crimes in the Democratic Republic of Congo).

281. Ewing, *supra* note 108, at 40 (discussing several ATCA cases in American courts that dealt with international human rights violations); see also *John Doe v. Unocal Corp.*, 395 F.3d 932, 969 (9th Cir. 2002) (Reinhardt, J., concurring) (suggesting that ATCA cases can be filed under legal concepts such as joint venture, agency, negligence, and recklessness).

282. See Business & Human Rights Resource Centre, International Commission of Jurists - Expert Legal Panel on Corporate Complicity in International Crimes, <http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity> (last visited Apr. 12, 2008) (detailing that the final report of the panel will become public in early 2008, and will clarify the definition and limits of complicity by looking at law, policy, and practice).

agreements, and even when it is, the agreements need implementing legislation.²⁸³ On the other hand, “[c]ourts in the United States have pioneered the use of civil remedies to sue human rights violators under the Alien Torts Claim Act [ATCA].”²⁸⁴

ATCA allows aliens to bring civil actions in U.S. district courts for torts committed “in violation of the laws of nations (now understood to mean customary international law) or a treaty of the United States.”²⁸⁵ ATCA “became a vehicle for human rights cases”²⁸⁶ with a 1980 Second Circuit decision, *Filartiga v. Pena-Irala*, which used ATCA to punish human rights abuses by a state against a citizen.²⁸⁷ In 1995, the Second Circuit recognized that certain forms of conduct by “private individuals” violated the law of nations, which “opened up the possibility of suing corporations allegedly involved in human rights abuses outside the US [sic].”²⁸⁸ The defendant is to have been personally served while physically present within the territory of the United States,²⁸⁹ which, for a corporation, means that it must be headquartered or doing business in the United States.²⁹⁰

283. See Official Website of the Web-Based Project on the Universal Declaration of Human Rights, Article 5: Cases/Applications, http://ccnmtl.columbia.edu/projects/mmt/udhr/article_5/cases_5.html (last visited Apr. 1, 2008) [hereinafter Columbia Project] (admitting that Congress only ratified the U.N. Torture Convention in 1990, and official ratification was postponed until 1994 so that the RUDs—reservations, understandings, and declarations—could be passed along with implementing regulations).

284. *Id.* (explaining that cases can be brought under the ATCA without any sort of official approval, and that they can be brought by individuals as long as the courts have jurisdiction).

285. Ralph G. Steinhardt, *Litigating Corporate Responsibility* (June 1, 2001), <http://old.lse.ac.uk/collections/globalDimensions/seminars/humanRightsAndCorporateResponsibility/steinhardtTranscript.htm> (last visited Feb. 12, 2008).

286. *Id.*

287. See Columbia Project, *supra* note 283 (quoting, in its “Filártiga (2)” section, the 1980 Second Circuit case *Filartiga v. Pena-Irala* stating that “torture . . . violates universally accepted norms”).

288. *Id.* (describing, in its “Post-Karadzic” section, the case *Kadic v. Karadzic* and stating that non-state actors could be held responsible under ATCA if their crimes were heinous enough).

289. See Sandra Coliver, Executive Dir. of the Ctr. for Justice & Accountability, *The Alien Tort Claims Act: What Next After Alvarez-Machain*, <http://www.cja.org/projects/writingsdocs/Sandy%20whats%20next.htm> (last visited Apr. 12, 2008) (noting that personal service applies in cases of individual defendants).

290. Columbia Project, *supra* note 283.

ATCA has been used against a number of corporations.²⁹¹ Examples include a case against the Anglo-Dutch oil company, Shell, for its alleged complicity in grave human rights abuses in Ogoniland, Nigeria,²⁹² and a case against the Canadian company, Talisman Energy, for its alleged complicity in genocide in Sudan.²⁹³ ATCA has also been used to sue for corporate abuses committed in the United States.²⁹⁴ The Supreme Court recently affirmed in *Sosa v. Alvarez-Machain* its “liberal judicial interpretation of the ATCA that enables victims of human rights abuses to sue their abusers in U.S. courts.”²⁹⁵

291. See Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005, at C1 (referring to cases against Exxon Mobil in Indonesia, Fresh Del Monte Produce in Guatemala, ChevronTexaco in Nigeria, and Occidental Petroleum, Coca-Cola, and coal miner Drummond in Colombia); see also BEYOND VOLUNTARISM, *supra* note 2, at 104 (listing uses of ATCA against corporations: “Shell (for its alleged role in the events that led to the execution of Ken Saro-Wiwa in Nigeria); Chevron (for its alleged role in supporting violent government suppression of protestors on an off-shore platform in Nigeria); Unocal (for alleged complicity in the use of forced labor in Burma); Texaco (on the basis of claims that it is destroying the Ecuadorean rainforest); Exxon-Mobil (for alleged complicity in abuses committed by Indonesian security forces in Aceh); and Coca-Cola together with bottlers of its soft drinks in Colombia (for alleged complicity in the suppression by paramilitaries of union activity, including the killing of a union activist at a bottling plant)”).

292. *Wiwa v. Royal Dutch Petroleum*, No. 96 Civ. 8386, 2006 U.S. Dist. LEXIS 65601, at *3 (S.D.N.Y. Sept. 12, 2006) (discussing the events leading up to the execution of campaigner Ken Saro-Wiwa).

293. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 300-01 (S.D.N.Y. 2003) (describing the alleged collaboration between Talisman and Sudan’s military to “dispose of citizens” and to carry out “cleaning up operations” in Sudanese villages).

294. See *Hawa Abdi Jama v. INS*, 22 F. Supp. 2d 353, 365-66 (D.N.J. 1998) (denying a motion to dismiss filed by a corporation that ran a detention facility on the grounds that the corporation was working for the government and was therefore a state actor).

295. See Coliver, *supra* note 289; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 733 n.20 (2004) (acknowledging that common law provides for some specific causes of action under ATCA, but rejecting Alvarez’s claim as lacking this requisite specificity and citing conflicting cases that imply international law may or may not extend to private actors); Rachel Chambers, *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, 13 HUM. RTS. BRIEF 14, 15 (2005) (stating that the *Sosa* case allowed for more international human rights cases against corporations). Chambers adds that the cases brought after *Sosa* have more difficulty proving standing under the ATCA than cases prior to *Sosa*.

In one major case, *Doe v. Unocal*, ATCA was used against Unocal for allegedly knowingly using forced labor to construct its Yadana gas pipeline in Burma.²⁹⁶ The case has been settled, which bolsters other ATCA cases and “signals to corporations that this law is applicable to them, and that they are going to face major litigation.”²⁹⁷

The scope of ATCA, however, is limited. The violation must be “definable, universal and obligatory”²⁹⁸ and case law shows the torts that meet these standards are “genocide, crimes against humanity, slavery, torture, extrajudicial killing, disappearances, and cruel inhuman or degrading treatment or punishment that would constitute a violation of the Constitution if committed against a U.S citizen.”²⁹⁹ Although these standards are difficult to prove, ATCA has the benefit of encouraging settlement before claims are resolved in court.³⁰⁰

U.S. tribunals can also be used to judge corporate abuses on the basis of domestic law. Nike, for example, was held liable under California state law for false corporate social responsibility statements.³⁰¹ This ruling signals to corporations that they must exercise prudence when asserting their compliance with human rights norms.³⁰²

France epitomizes the opposite of the United States in this regard. In France, judges are accustomed to applying international law in domestic cases because domestic judges readily apply ECHR and

296. Steinhardt, *supra* note 285.

297. See Lifsher, *supra* note 291, at 1 (quoting Robert Benson, a Loyola law school professor who specializes in international human rights law).

298. *Sosa*, 542 U.S. at 732 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)).

299. Coliver, *supra* note 289.

300. See BEYOND VOLUNTARISM, *supra* note 2, at 105 (indicating that settlement is encouraged by cases seeking to access unjustly earned profits).

301. *Nike, Inc. v. Kasky*, 539 U.S. 654, 663 (2003); David Monsma & John Buckley, *Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure*, 11 U. BALT. J. ENVTL. L. 151, 195 (2004).

302. See BEYOND VOLUNTARISM, *supra* note 2, at 105-06 (advancing the notion that the potential for liability, as indicated by previous lawsuits, probably encourages multinational corporations to respect human rights).

European Court of Justice decisions as sources of law.³⁰³ However, again contrary to the United States, the possibility of litigation against corporations on the basis of international human rights standards has not been explored.

According to Sherpa, a French association created to defend victims of TNCs,³⁰⁴ domestic law is insufficient to hold companies accountable. For one, the prosecutor can filter cases concerning torts committed abroad.³⁰⁵ French law therefore limits the extraterritorial action of domestic judges³⁰⁶ and the procedures can take too long to afford meaningful justice.³⁰⁷ Sherpa denounces this by stating that finding a TNC liable for "economic and social crimes" is "more difficult" than bringing Slobodan Milosevic to justice before the International Criminal Tribunal for the Former Yugoslavia.³⁰⁸

303. Edward A. Tomlinson, *The Saga of Wiretapping in France: What It Tells Us About the French Criminal Justice System*, 53 LA. L. REV. 1091, 1098-1103 (1993) (discussing the role of the European human rights law system in French courts).

304. Sherpa was created in March 2002 by William Bourdon, former Secretary General of the International Federation of Human Rights, to bring together European and international jurists with the aim of condemning TNCs that profit from lax environmental and social legislation in developing countries. See Sherpa, *Revue de Presse sur L'Association Sherpa* [Press Review for the Sherpa Association], http://www.asso-sherpa.org/revuedepresse/revuedepresse_sherpa.html (describing the international events that led to the necessity of such an association); see also Sherpa, <http://www.asso-sherpa.org/> (providing more information on the liability of companies in France).

305. See Sherpa, *Une Nouvelle Etape dans la Responsabilité des Entreprises* [A New Stage in the Responsibility of Corporations], <http://www.asso-sherpa.org/Dossier%20Page%20index/Liens%20une%20nouvelle%20e9tape%20dans%20la%20RSE.html> (arguing that the prosecutor's veto right should be removed).

306. Novethic.fr, *Une Association de Juristes Pour Défendre les Victimes des Multinationales* [An Association of Lawyers to Defend the Victims of Multinationals], <http://www.novethic.fr/novethic/site/article/imprimer.jsp?id=26589> (last visited Apr. 11, 2008) [hereinafter Association de Juristes].

307. See Jacques Clément, *La responsabilité sociale en débat au Forum social européen* [Social Responsibility Debated at the European Social Forum], http://www.asso-sherpa.org/revuede%20presse/revuedepresse_sherpa.html (discussing the criminal and civil complaint filed in 2002 against a subsidiary of the French Rougier Group by Sherpa on behalf of Cameroonian villagers for illegal exploitation of forests which was described as "very long" by Samuel Nguiffo from Friends of the Earth).

308. See Sherpa, "Plus difficile" de traduire en justice des entreprises que Milosevic ["More Difficult" to Bring Companies to Justice than Milosevic],

A vivid example is the difference in treatment afforded to Burmese plaintiffs complaining against the American company Unocal and those complaining against the French company Total. Total was one of the partners of the joint venture between Unocal and the Burmese government. Total was initially one of the defendants in the American lawsuit launched in California, but an *amicus curiae* brief from France convinced the judge of its inaptitude to involve Total in the litigation, namely due to the principle of sovereignty.³⁰⁹ As France does not have the equivalent of the American ATCA, the plaintiffs used French criminal law to bring a suit against Total in France. The difficulty is that the criminal code prohibits only certain crimes committed abroad and additionally requires that the perpetrator be French.³¹⁰ Therefore, in contrast to the *Unocal* plaintiffs, who managed to create an incentive for the company to settle, plaintiffs in French courts have no similar remedy under the same set of facts.

Both the United States and France are nonetheless affected by certain procedural difficulties confronting individuals seeking to bring lawsuits against corporations. In many cases, parent companies escape liability even though they effectively control their subsidiaries. Only in exceptional cases will courts “pierce the corporate veil.”³¹¹ This “often precludes the extension of liability to

http://www.asso-sherpa.org/revuedepresse/revuedepresse_sherpa.html (quoting William Bourdon as further stating that finding responsibility for illegal deforestation or child labor is nearly impossible today, although not unrealizable).

309. RFI.fr, Droits de l'homme: Plainte contre Total pour "Travaux Forcés" en Birmanie [Human Rights: Complaint Against Total for Forced Labor in Burma], http://www.rfi.fr/actufr/articles/032/article_17575.asp (last visited Apr. 11, 2008).

310. *Id.*

311. See Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. SUPP. 493, 494 (2002) (highlighting the application of the concepts of limited liability and corporate responsibility as applied to parent-subsidiary corporate relationships); see also Philip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 305-06 (1996) (addressing the concept of control with respect to parent-subsidiary corporate relationships in the United States); David Aronofsky, *Piercing the Transnational Corporate Veil: Trends, Developments and the Need for Widespread Adoption of Enterprise Analysis*, 10 N.C.J. INT'L & COM. REG. 31, 41 (1985) (explaining that a parent company normally is not subject to liability unless operating with total disregard

the parent entity for the actions or omissions of the affiliate.”³¹² Additionally, in France, the parent corporation cannot be subject to a lawsuit alleging complicity unless its subsidiary has been condemned in the host country.³¹³ Furthermore, in the United States, the doctrine of *forum non conveniens* allows judges to refuse a case when it deems itself not a suitable forum. *Forum non conveniens* is said to “shield multinationals from liability for injuries abroad.”³¹⁴ The equivalent does not apply in France as French tribunals follow international private laws derived from European regulations to determine their competence.³¹⁵ The U.N. Norms do not address either of these two procedural issues.³¹⁶

Individuals can also use the international forum to bring lawsuits against corporations. There are, however, “very few international procedures that can be used to scrutinize corporate conduct

for the subsidiary company, making the subsidiary and the parent one and the same).

312. Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction*, 10 ILSA J. INT'L & COMP. L. 493, 520 n.145 (2004); see Sherpa, *Une Nouvelle Etape dans la Responsabilité des Entreprises [A New Stage in the Responsibility of Corporations]*, <http://www.asso-sherpa.org/Dossier%20Page%20index/Liens%20une%20nouvelle%20e9tape%20dans%20la%20RSE.html> (welcoming President Nicolas Sarkozy's statement, made on October 25, 2007, denouncing the impunity of parent companies for environmental abuse by their subsidiaries).

313. See Association de Juristes, *supra* note 306 (quoting William Bourdon as stating that this is particularly troubling in countries where the legal system is the subject of corruption and where the TNCs are not likely to be bothered).

314. See JAMIE CASSELS, *THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL* 144 (1993); *Dow Chem. Co. v. Domingo Castro Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (stating that the court, while rejecting the plea of *forum non conveniens* in a case brought by farm workers of Costa Rica against Shell Oil and Dow Chemicals, observed that the doctrine is not really about “convenience but connivance to avoid corporate responsibility”); Duval-Major, *supra* note 55, at 650-51 (presenting flaws in the doctrine of *forum non conveniens* including an unclear standard for dismissal and inability of foreign plaintiffs to obtain a fair settlement if they are denied access to courts of the United States); *INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE* 1-30 (Upendra Baxi ed., N.M. Tripathi Pvt. Ltd. 1986).

315. See e.g., Règlement N° 44/2001, CE, Dec. 22, 2000, available at http://www.lexinter.net/UE/reglement_du_20_decembre_2000_sur_la_competence_judiciaire_et_l_execution_des_jugements.htm.

316. Deva, *supra* note 312, at 520-21 (observing that these procedural loopholes, such as *forum non conveniens*, have largely benefited TNC's).

directly.”³¹⁷ International forums tend to judge a state’s³¹⁸ or an individual’s actions.³¹⁹ However, the OECD and ILO provide certain possibilities to judge a corporation’s conduct. The OECD Guidelines provide for National Contact Points (“NCPs”) which can be asked to intervene by member states, companies, employees, and even NGOs if they believe a corporation is violating the Guidelines.³²⁰ These NCPs can then mediate the issue between the complainant and the company, make statements and recommendations, and refer the complaint to the OECD’s Committee on Investment and Multinational Enterprises—although the identity of the company cannot be revealed.³²¹ As for the within the ILO, governments, workers, and employers can ask the Sub-Committee on Multinational Enterprises to interpret its ILO Tripartite Declaration. However, this procedure does not judge the conduct of individual companies and the companies’ names are kept confidential.³²² International proceedings are therefore lacking to judge a French or American

317. BEYOND VOLUNTARISM, *supra* note 2, at 99.

318. COUNCIL OF EUROPE, MANUAL ON HUMAN RIGHTS EDUCATION WITH YOUNG PEOPLE 303, *available at* http://www.eycb.coe.int/compass/en/pdf/4_3.pdf (indicating that the International Court of Justice is for state complaints against other states and the ECJ ensures that the law is consistent among European nations); Official Website of European Court of Human Rights, Applicants: Frequently Asked Questions, <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Frequently+asked+questions/> (last visited Apr. 1, 2008) (indicating that individuals as well as states may bring cases against states to the ECHR). The International Court of Justice is for state complaints against other states; the ECHR or ECJ is for individual complaints against states.

319. Official Website of International Criminal Court, About the Court, <http://www.icc-cpi.int/about.html> (indicating that the court tries individuals); Official Website of International Criminal Tribunal for Rwanda, General Information, <http://69.94.11.53/ENGLISH/geninfo/index.htm> (introducing the ICTR as a forum established to prosecute individuals).

320. OECD, *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, at 2, 4-6, C(2000)/96/FINAL (July 19, 2000), *available at* [http://www.oilis.oecd.org/olis/2000doc.nsf/LinkTo/NT00001016/\\$FILE/00080619.PDF](http://www.oilis.oecd.org/olis/2000doc.nsf/LinkTo/NT00001016/$FILE/00080619.PDF) (mapping out the purpose and basic procedural guidelines for National Contact Points); BEYOND VOLUNTARISM, *supra* note 2, at 100 (stating that “the Guidelines allow ‘other parties concerned’ also to make such a complaint and this broad phrase apparently includes NGOs”).

321. BEYOND VOLUNTARISM, *supra* note 2, at 100-01 (stating that the Committee on International Investment and Multinational Enterprise is the body that “has ultimate responsibility” over the Guidelines).

322. *Id.* at 101.

corporation's conduct and the focus for potential liability remains domestic proceedings.

CONCLUSION

Both France and the United States regulate their companies to comply with certain human rights standards, however the diverging manner in which this is done reflects a continual balance between the two countries.

The recent corporate social responsibility movement highlights the historical differences between these two countries regarding state interventionism. Certainly, regulation of companies exists in the United States and French companies have adopted *codes de conduite*. Nevertheless, corporate compliance in the United States is primarily marked by voluntary corporate compliance initiatives, whereas in France, companies rely on government regulation, influenced by the European Union.

Furthermore, the French and American justice systems reflect marked differences in the manner in which plaintiffs can complain of a corporation's human rights abuse. In France, the fact that the European Convention on Human Rights applies to French judges allows citizens to complain of human rights violations under its framework. Furthermore, in contrast to the United States, France is party to a number of international instruments providing for individual complaints. However, the United States has a more developed domestic system for ensuring liability of corporations, foreign or domestic, by plaintiffs, American or alien, through the use of the Alien Tort Claims Act. The difference in treatment between Burmese plaintiffs in France against Total, resulting in a dismissal of the case, and in the United States against Unocal, resulting in a settlement for the plaintiffs, reflects this difference.

These differences between the United States and France show a continual balance between the two countries to enforce human rights standards within their countries, in accordance with their historical conceptions of the role of business, government interventionism, stakeholders versus shareholders, and international law.

Since 2002, there has been a boost in international guidance on the topic of applying human rights standards to business, including the

Global Compact and the U.N. Norms. John Ruggie's role as Special Representative of the Secretary-General on Business and Human Rights is a novel position that, despite initial opposition from the United States, reflects the international community's view that corporate accountability should be further scrutinized.

As the international community moves forward in elaborating an international consensus, it will be crucial to combine views from both the business and the international human rights arenas. This consensus should combine an increased profitability for business and an enhanced respect of certain human rights standards, which will ultimately be beneficial for all involved—employees, employers, investors, consumers, and individuals affected by the corporate activity. Ultimately, the international community will need to borrow elements from both American and French approaches to this debate to ensure the emergence of a true consensus, accepted by both sides of the Atlantic.