

Environmental Law and International Business

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The creeping trend in expanding “crimes against humanity” to hold individuals, in multinational corporations, legally accountable for international environmental human rights violations

Introduction

Over the past few decades environmental human rights¹ issues involving multinational corporations² (MNCs) have taken a prominent role in corporate boardrooms, multilateral trade agreements, human rights organizations and other areas of international law. MNCs play a primary role in economic globalization³ through the rapid expansion of markets in developing states.⁴ Closely aligned with economic globalization is the globalization of justice through concepts of universal jurisdiction in which individuals are increasingly recognized as being accountable to the international community for internationally identified crimes that effect human heritage rights.⁵ As the scope of these crimes expands and substantial enforcement mechanisms are introduced this will encourage MNCs, and the most responsible individual decision makers, to change their attitudes and practices towards environmental issues. Ideally, within the philosophical principles of liberal⁶ democratic governance the most substantive method to initiate lasting change is when individuals freely comply to the needs of the whole. Voluntary, environmental friendly business practice and compliance to emerging international

1 Given that the definition and nature of the term 'human rights' has broad contested interpretations, for the purposes of this paper it is sufficient to adopt the common usage, a term used to identify the broad range of rights necessary for human dignity. Human rights and environmental rights are terms that will be used interchangeably.

2 Many corporate entities are large transnational corporations (TNCs), multinational corporations (MNCs), or, multinational enterprises (MNEs). According to the U.N. Draft Code of Conduct on TNCs they are defined as, entities in two or more countries, regardless of the legal form and fields of activity, they operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centers, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with others. *Per*, Code of Conduct on Transnational Corporations, U.N. ESCOR, Organizational Sess. For 1988, Provisional Agenda Item 2, at 4, U.N. Doc. E/1988/39/Add.1 (1988).

3 R. McCorquodale, & R. Fairbrother, *Globalization and Human Rights* 21 HRQ 736-739 (1999). Globalization is a contested term and there is no one accepted definition.. It is a political, social and cultural process, but, it is foremost an economic process. Economic globalization is seen in terms of "Markets" where the actors in the market have changed, as have the goods and services they offer.

4 The term "developed and developing states" is misleading as it suggests a level of satisfactory fulfillment, democratically, economically and in human rights protections. In reality even the most "developed" states fall short of achieving this level of fulfillment. The term is comparative and should not to be confused with a literal meaning.

5 R. P. Claude, B. H. Weston, *Human Rights in the World Community* 188-197 (1992). Human heritage or Planetary Rights are derived from the temporal relationship among generations in using the natural environment. As the threats to the integrity of our planet and our natural resources have become increasingly severe and long-term, it has become necessary to look at the human species as part of an on going global system and to look at the rights which generations have in relation to each other for the use of the planet.

6 N. Stammers, *A Critique of Social Approaches to Human Rights* 17 HRQ 493 (1995), "Liberal" refers to the developmental strand of liberal thought which can also be termed "social democracy."

environmental standards is encouraged through positive incentives.⁷ However, because a number of MNCs, and states, have not responded adequately to environmental concerns it is necessary to encourage a change in attitudes with the threat of international legal censure. This is particularly relevant due to the potential scope of harm caused by MNCs business practice and resulting environmental abuses. Problems arise due to the historic development of nation states legal accountability, therefore censure has largely been in the domain of individual states. Depending upon the particular circumstances and the developmental needs of the state MNCs will be held accountable to different standards. In effect, the resulting lack of international uniformity and culpability means that MNCs operate with varying degrees of due care and diligence to the environment.

The idea of individual international obligations, duties and accountability for environmental human rights crimes, under 'crimes against humanity'⁸, is not as far fetched as it may sound.⁹ Currently, substantive individual accountability has been introduced for the most serious human rights crimes that effect the international community. Expanding the scope of 'crimes against humanity' to include a broad range of environmental crimes would be a big step to encourage MNCs compliance with the highest standards of care.¹⁰

7 The best incentive for business is increased profitability as the result of good public relations and public confidence. For the most part voluntary self-regulation generally occurs through free market forces and not within the business as a whole, therefore, standards of care vary. The Preamble to the Draft Stockholm Convention on Persistent Organic Pollutants Available on; [UNEP/POPS/INC.5/7](#); recognizes the important positive voluntary contribution the private sector makes to the environment, while at the same time, stresses the responsibility manufactures have for products through the polluter pays principle.

8 Rome Statute of the International Criminal Court, 1998. *Per* Article 7. Available on; http://www.un.org/law/icc/statute/99_corr/cstatute.htm

9 L. K. Caldwell, *Issues in Modern International Environmental Law: Is World Law an Emerging Reality? Environmental Law in a Transnational World*. 10 Colo. J. Int'l Env'tl. L. & Pol'y 235 (1999). Opinions regarding the role and responsibility of MNCs with respect to environment and natural resources issues are mixed. However, it seems highly probable that MNCs will be major players in future global environmental affair, and that their activities will induce responsive provisions in international law.

10 S. Wiessner, A. R. Willard, *Symposium on Method in International Law: Policy-Orientated Jurisprudence and Human Rights Abuses in International Conflict: Towards a World Public Order of Human Dignity* 93 A. J. I. L. 332 (1999). To address this issue one approach uses the projection of what are called "developmental constructs," which are pictures and pathways of possible futures and can be quite specific to particular circumstances. Different institutional arrangements or

mechanisms of accountability would be included in the construct to provide guidance to legal scholars, advisors and MNCs decision makers empirically grounded anticipations of the future.

The process of expanding individual obligations, responsibility and culpability could be carried out through the cross fertilization of international treaties, customary international law¹¹ and general principles of international law.¹² Within the category of general principles are emerging case laws directed at individual accountability. In particular, the Pinochet case¹³ has thrown open the door of individual accountability for recognized serious crimes against humanity and breathed new life into substantive universal jurisdiction concepts.¹⁴

This paper will briefly consider how globalization trends call for a need to establish international individual accountability for the most serious environmental abuses.

Globalization trends

11 *E.g.*, International Law Commission Report to the General Assembly, UN Doc. A/45/10 (1990) at 147 and 169. The ecosystems of international water courses and a duty to take all measures necessary to protect and preserve the marine environment against inputs of pollution from rivers.

12 Article 38 of the Statute of the International Court of Justice considers the sources of international law as being, Treaties, customary international law and general principles of international law. General principles are evidenced by, case law, doctrines and academic writings.

13 Human Rights Law Journal, 30th July (1999) Vol.20 No. 1-3 p.68 per. Lord Browne-Wilkinson quoting Sir Arthur Watts in *The Legal Position in International law of Heads of States, Heads of Government and Foreign Ministers* p.82 ; "While generally international law...does not directly involve obligations on individuals personally, that is not always appropriate, particularly for acts of such seriousness that they constitute not merely international wrongs but rather international crimes which offend against the public order of the international community...The idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law. Problems in this area-such as the non-existence of any standing international tribunal to have jurisdiction over such crimes, and the lack of agreement as to what acts are internationally criminal for this purpose- have not affected the general acceptance of the principle of individual responsibility for international criminal conduct." The Pinochet case pierced the 'veil of state sovereignty' and the idea that heads of state can hide behind state sovereignty and be immune from international prosecution for international crimes against humanity. *Also see*, M. Weller, *Dictators and other international criminals* International Affairs, 599 (1999). The Pinochet case highlights at a very fundamental level the present state of transforming from modern international law to an international constitutional system.

14 D. F. Orentlicher, *Genocide and Crimes Against Humanity: The Legal Regime*. Available on <<http://www.house.gov/lantos/caucus...ts/articles/orentlicher12-8-98.htm>>. *Also, Id.*, Weller at 603-609.

The fast moving pace of the global free market has been recognized as a manifestation of new opportunities for MNCs. Globalization is helping to remove old barriers between states, subsequently states are becoming increasingly interconnected and interdependent.¹⁵ At the same time the impacts of the global free market on the environment and on state sovereignty, could indicate dangers in the process of globalization.¹⁶ These opportunities and dangers appear because globalization is an economic, political, social and ideological phenomenon which carries with it unanticipated and often contradictory consequences.¹⁷ One problem being that the growing power of MNCs, in relation to states, can now impact world events and yield a great deal of influence over individuals and states.¹⁸ While many environmentally harmful activities result only in local damage, other damage may have a serious impact far beyond the boundaries of the states in which they take place as they cause damage to the earth's environment as a whole.¹⁹ Current and predicted threats to the

15 Vienna Declaration and Programme of Action, U.N. GAOR, World Conference on Human Rights, 48th Session 22nd plen. Mgt., part1, 8, U.N. Doc. A/CONF.157/24 (1993), Available on, <http://www.unhchr.ch/html/menu5d/vienna.htm>. The process of globalization generally creates a more interdependent world where political, economic, social and cultural relationships are not restricted to state boundaries or to state actors. In trying to establish an ideal global model, in which economic growth and human rights can flourish interdependently, but, in a mutually reinforcing manner, it is worth considering which is the best approach as not all states have the necessary built in environmental rights safeguards.

Also see; U.N.Doc. E/CN.41998/33(1998) available on <http://www.unhchr.ch/html/menu4/chrres/1998.res44.htm>. The United Nations Commission on Human Rights has adopted a series of resolutions that have reaffirmed "the universality, indivisibility, interdependence and interrelationship of all human rights and concluded that promoting and protecting one category of rights should never exempt or exclude states from the promotion and protection of rights.

16 K. Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation* 16 Michigan Journal of International Law 998 (1995). Rapid economic globalization of world trade has displaced domestic trade as the engine of economic growth. Part of the reason for rise in MNCs power is due to the massive rapid growth of foreign direct investment, as a direct response to the end of the Cold War combined with information technology advancements combined with diminishing official developmental aid. The globalization of the world economy encourages developing states to use every possible advantage to compete for foreign direct investment if they wish to develop and remain competitive in the global market.

17 J. Donnelly, *Human Rights, Democracy and Development* 21 Nos. 3-4 HRQ 608 & 735 (1999).

18 L. Belsie, *Rise of the Corporate Nation-State*, Christian Science Monitor April 10, 2000, Available at <http://www.globalpolicy.org/soecon/bwi-wto/wbank/bigbus.htm>; Business has taken a central role in society as around the globe, more corporations are beginning to act like governments...By most accounts MNCs are getting stronger while governments are getting weaker...Some observers say the trend is irreversible because globalization will make MNCs, not the nation-state, the primary entity on the world stage in the 21st century. In today's globalization, the actors involved are not only States but include multinational corporations...of the world's 100 biggest economies, only 49 are States, while the remaining 51 economies are corporations.

19 J. I. Charney, *Universal International Law*, 87 A. J. I. L. 529 (1993). *E.g.*, The discharge of some substances into the atmosphere may adversely affect the global climate or stratospheric ozone depletion. Discharges that pollute the common spaces of the oceans may have a global impact.

Also see; D. Hunter., D. Zaelke, & J. Salman, *International Environmental Law and Policy* Chapter 1 (1998), There are at least four pressing global environmental problems that demonstrate how we are reaching, and perhaps have already exceeded, the

environment highlight the importance of establishing international standards to control activities that endanger all states and populations, in spite of where the activities take place.

“sustainable” limits of human activity: climate change, including global warming; stratospheric ozone depletion, species extinction and the loss of biodiversity; and the contamination of our air and water by hazardous chemicals and wastes. In addition, many local and regional environmental problems such as the lack of access to fresh water and air pollution now have a transboundary if not global dimension.

To resolve these dilemmas it is necessary to establish new rules that are binding upon all subjects of international law regardless of the attitude of any particular state.²⁰ Hopefully, this will create a level playing field that is beneficial not only for long term economic strategies, but also provide uniform human rights protections. It will also encourage all states to participate in globalization knowing that the rules apply equally and are mutually beneficial.²¹ The Universal Declaration of Human Rights²², and additional specific human rights treaties covering Civil, Political, Economic, Social, Cultural rights along with recent treaties on the environment, have established a full and comprehensive body of substantive international law to protect the rights of the individual. These universal legal instruments, based upon concepts of natural proportional necessity, describe a minimum standard of what it means to exist in a global society. They have also broken with the tradition view of state sovereignty as the dominant force over human rights. The concepts embodied in the liberal democratic “social contract” are now being extended beyond the state to include individual actors, including MNCs.

20 S. Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20 HRQ 82 (1998), *Per*; When someone is tortured or when a person’s right to speak freely is restricted, observers almost unconsciously hold the State responsible. However, when people die of hunger or thirst, or when thousands or urban poor and rural dwellers are evicted from their homes, the world still tends to blame nameless economic or “developmental” forces,...before placing liability at the doorstep of the State....in some countries, they are even characterized as criminals on this basis alone.

21 W. Meyer, *Human Rights and International Political Economic in 3^d World Nations: Multinational Corporations, Foreign Aid and Repression* 21 #3 HRQ 824 August (1999). Globalization advocates, mainly comprising of MNCs, neoliberal economists and political allies, argue that direct foreign investment and MNCs production promotes economic development and protects economic and social rights. They argue that jobs, workers standards, technology, housing benefits and numerous civil and political rights are promoted and protected through the liberal democratic economic alliance. Critics, mainly human rights and environmental advocates, argue that MNCs directly and indirectly contribute to human rights violations in developing states. Leftist intellectuals, argue that MNCs drain resources, exploit labor and contribute to the inequitable transfer of wealth. They also claim that destabilization of society occurs often leading to social unrest and political repression by the rich and powerful, including the multinational investors. Investment into developing states can have the dual role of enhancing basic human rights by helping to eliminate poverty and strengthen democracy, while simultaneously pursuing profit at the expense of the weakest individuals In particular Asia, Eastern Europe, and Latin America.

22 Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. 217A(111), U.N. GAOR, 3d Sess. (Resolutions, part 1), at 71, U.N.Doc. A/810 (1948). Since the United Nations General Assembly adopted the UDHR, the vast majority of states have endorsed the Declaration, which arguably has acquired the added status of customary international law. Preamble; “a common standard of achievement for all peoples and all nations.”

Another, contributing factor to the threat of human rights violations is the physical location and types of MNCs business operations.²³ Considering MNCs often conduct business in remote locations far from the observance of human rights organizations and the public eye it necessary to establish a culture of accountability. As a temporary solution, if a developing state is unable to protect human rights then the next best course of action is to enforce legal obligations in the MNCs host state. Considering that the majority of MNCs have some business interests in U.S. it would seem prudent to hold them accountable where substantive results can be attained.²⁴

The Law of International Human Rights: From State to Individual

²³ For example; extractive industries, oil and mining, frequently operate in remote areas far from oversight. The security, labor, business and environmental practices of these MNCs can threaten unique ecosystems, indigenous cultures, core workers rights and other human rights. Additionally, the host state is often not in a position to dictate human rights terms to the powerful MNCs and even if it has the political will it might not have the domestic legal structures to enforce human rights obligations.

²⁴ K. L. Boyd, *Collective Rights Adjudication in U. S. Courts: Enforcing Human Rights at the Corporate Level*, B.Y.U.L. Rev. 1139 (1999). *E.g.*; Large entities, including Unocal, Texaco, Degussa, Ford, Daimler-Chrysler, Volkswagen and Swiss, German, French and Austrian banks have all been targeted in international human rights in U.S. federal courts by classes of plaintiffs alleging that their rights have been violated under customary international law and demanding large-scale monetary and injunctive relief. (1144), plaintiffs can readily enforce their judgments because they can easily access the assets of transnational enterprises. (1200), Transnational choice of law applied in U.S. federal courts may allow punitive damages, subjecting “deep-pocket” corporate defendants to U.S.-style discovery of financial worth, which would be unavailable in other international fora.

Not only has the enforcement of human rights law been problematic from its inception, but MNCs are rarely held accountable for transnational harm to human rights. In fact, MNCs have, until recently, operated in a virtual legal and moral vacuum where the narrow view of international law²⁵ allows MNCs to evade accountability in any system except their host state.²⁶ In many of the areas of expansion the power of MNCs threaten to undo many of the gains of the international legal system since MNCs are not parties to, or objects of treaties and other international instruments.²⁷ In order to establish a direct legal responsibility to MNCs and individuals it is necessary to keep in mind that the basic goal of human rights advocacy is to establish environmental rights as an international rule of law fully implemented in customary practice.²⁸

25 International law is generally divided into conflict laws and public international law. The term public international law was first used by J. Bentham, see *Introduction to the Principles of Morals and Legislation*, (London 1780). It is the law that consists of a number of rules regulating state and individual behavior and reflects to some extent, the ideas and preoccupations of the global society. For this reason it is suited to consider human rights issues and the standards reflected by the international community.

26 Boyd *supra* note 24, at 1139. Lack of international accountability is in part due to the absence of universal enforcement standards and mechanisms in domestic states, no effective single international court, and, the fact that traditional concepts of international and human rights law is directed at the state and not individuals.

27 G. A. Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 C. H. R. L. R. 360 (1999).

28 J. J. Shestack, *Role of the Lawyer in Human Rights Issues*, *Global Law in Practice* 29 (1996).
Also see., R. Claude, B. Weston, M. Lippman, *Human Rights in the World Community, Issues and Action* 392-393 (2nd Ed. 1999). Authors analyze the role of MNCs in developing states. Concentrating their questions on whether MNCs assist or hinder the economic and social development of developing states. The discussion has diverted attention from the fact that their activities may often result (directly or indirectly) in the violation of the civil, political and socioeconomic universal human rights of the citizens of the host state. This raises the question whether it would be advisable to impose, on MNCs, the legal, or at least ethical, duty and obligation to protect human rights. There are some limited instruments that set forth standards for MNCs, however, the majority of these duties are to respect state sovereignty and not directed at ensuring or protecting individual human rights freedoms. Arguments for considering imposing a comprehensive set on international obligations and duties are based on at least four interrelated considerations. First, economic power is often stronger than state political systems. Second, International character and economic power combined are, per Brandt Commission, are major actors in the worlds political economy. Third, socioeconomic impacts on developing states are impressive. Finally, some small developing states are too weak, or unable, to regulate the activities of MNCs.

Traditionally, international law has been between states, and governments dealt with those within their jurisdiction. States resisted outside interference and claimed that human rights were matters of domestic jurisdiction and the responsibility of each state alone.²⁹ Because international enforcement mechanisms are mainly directed at states and not individuals there is a lack of immediate incentive for MNCs to change. However, since the mid-20th century the international legal system has expanded to include greater monitoring and compliance of state and individual practices by other states and international bodies. Human rights have now become a formative part of international law with established institutional structures, including substantive definitions of human rights and increasingly developed mechanisms to enforce these rights. In particular, at the end of the Cold War there was a marked acceleration especially in the area of environmental rights protections.³⁰ Currently, the growing trend is for human rights laws to have universal application³¹, and states have acknowledged in principle that “the promotion and protection of all human rights is a legitimate concern of the international community.”³² This has given rise to the recognition and growing acceptance of international constitutionalism and the universal jurisdiction for individual crimes against humanity. At the moment the scope of these crimes is fairly narrow and

29 Based upon principles of reciprocity and treaty subsidiarity dating back to *The Peace of Westphalia* 1648. Also see; U.N. Charter art. 2 para.7 signed 26 June 1945, 59 Stat. 1031, T.S. No. 933, 3 Bevans 1153 (entered into force 24 Oct. 1945). And; L. Henkin, *Human Rights and State “Sovereignty,”* 25 Ga. Journal of International & Comparative Law, 31 (1996).

30 International law has increasingly recognized that human rights and environmental rights overlap. The United Nations Conference on the Environment, Stockholm Declaration on the Environment (1972) C/N Doc. A. Conf. 48/14.

31 McCorquodale, *supra* note 3, at 740. Every single State has ratified at least one treaty containing legal obligations to protect human rights.

Also see; H. Steiner & P. Alston, *International Human Rights in Context*, (Clarendon Press U.K. 118-65 1996).

32 Vienna Declaration and Programme of Action, U.N. GAOR, World Conference on Human Rights, 48th Session, 22nd plen. Mgt., part 1, para. 4, U.N. Doc. A/CONF.157/23 (1993), reprinted in 32 I.L.M. 1661 (1993). Similar statements are found in the Concluding Document from the Moscow Conference on Security and Co-Operation in Europe, where States involved “categorically and irrevocable [declared] that the commitments undertaken in the field of the human dimension of the (now OSCE) are matters of direct and legitimate concern of all participation States and do not belong exclusively to the internal affairs of the State concerned.” Conference on Security and Co-Operation in Europe: Doc. Of the Moscow Meeting on the Human Dimension. Adopted 3 Oct. 1991, reprinted in 30 I.L.M. 1670, 1672 (1991). Continuing with this recognition the United Nations Commission on Human Rights has adopted a series of resolutions that have reaffirmed “the universality, indivisibility, interdependence and interrelationship of all human rights and concluded that promoting and protecting one category of rights should never exempt or exclude states from the promotion and protection of rights.” *Per*; U.N.Doc. E/CN.41998/33(1998) available on <<http://www.unhchr.ch/html/menu4/chrres/1998.res44.htm>>.

only covers the most serious *jus cogen*³³ crimes. Even for these crimes there is no uniform enforcement procedure as the international community is struggling to balance numerous political, economic, cultural, social and legal variables.³⁴ However, just as economic globalization is inevitable so is the globalization of human rights crimes as advocates push for more actions to be included in the *jus cogen* list under the *pro hommens*³⁵ principle with *erga omnes*³⁶ state responsibility.

33 An internationally recognized class of customary law peremptory norm crimes.

34 The freedom of States to control their own destinies and policies has substantial value, it allows diversity and the choice of each State to address its own social and cultural priorities.

35 Common to the heritage of all humankind.

36 Responsibility to all states.

What do we mean by “human rights abuses” as crimes against humanity? Are they to cover only offenses to human dignity that affect the physical integrity of individuals, or shall attacks against moral integrity, such as claims characterized as “social, economic and cultural ” rights, be included? Do abuses have to be widespread, systematic and under the color of government, or can this be interpreted as affecting a handful of individuals over a limited period of time, and, being conducted by MNCs? These are some of the difficult questions that need to be addressed in order to include individual responsibility to serious environmental violations.

The definition of crimes against humanity and fitting environmental crimes into this category is notoriously elusive.³⁷ In order for national or international judicial bodies to exercise jurisdiction over crimes against humanity it is necessary that they have universally recognized definitions, the scope of the crimes must be clearly defined and can be applied uniformly to situations in which these crimes have been committed.³⁸ It is also necessary for individuals to have knowledge that there is a negative duty not to act in a certain way and that additional positive duties might exist.³⁹ Traditionally, a crime against humanity is simply an inhumane act committed in the context of a widespread violation against a population where the perpetrator is aware of the connection his or her acts. For the perpetrator of a crime against humanity to be culpable they must have some broad knowledge of the connection between their actions and the resulting harm.⁴⁰ In expanding the scope and accountability of these

³⁷ M. McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes against Humanity*, 22 #2 HRQ 336 May (2000).

³⁸ D. McGoldrick, *The Permanent International Criminal Court: an end to the culture of impunity?* Crim.L.R. 634 (1999). Article 7 of the ICC provides a definition of crimes against humanity. Section (k) states; “Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” Crimes against humanity do not now appear to require any connection with an armed conflict. Also see the *Tadic* II case. A number of states expressed concern at the potential breadth of this provision.

³⁹ Human rights law expands this broad knowledge to include acts of omission.

⁴⁰ The 2000, United Nations Environment Programme, Draft Stockholm Convention on POPs gives the private sector and manufacturers, greater responsibilities and obligations to achieve the reduction and/or elimination of POPs, and, for reducing adverse effects caused by POPs and their product. The convention also reaffirms Principle 16 of the Rio Declaration on Environment and Development which states; ‘domestic authorities should promote the internationalization of environmental costs,

crimes it is necessary to discover if crimes against humanity can be extended beyond the “color of the law” criteria.⁴¹

taking into account the approach that the polluter pays principle, bear the cost of pollution, with due regard to the public interest and applying the proportionality test to trade and investment.’ These and other international agreements educate individuals as to their individual responsibilities.

⁴¹ _____ Doe v. Unocal , 963 F. Supp 880. The court indicated that certain violations of international law require state action. It recognized, however, that non-state actors could be found liable for these violations of international law if they acted under color of the law, the court looked to the standards developed under 42.U.S.C.§ 1993 in suits seeking redress...It identified four distinct approaches...public function, state compulsion, nexus and joint action. However, private actors maybe found liable for certain violations of international law *jus cogen* crimes, even in the absence of state action.

Within the “developmental construct”⁴² of a crime against humanity, a broad definition approach with wide scope of application can be taken.⁴³ Substantive recognition and enforcement of international human rights law and individual accountability began with the Nuremberg Trials⁴⁴ which recognized crimes against humanity and began a form of politics that favored intervention on behalf of individual rights, even when violations of those rights occurred within the boundaries of sovereign states. The international Military Tribunals of Nuremberg⁴⁵ established the principle of international criminal responsibility for crimes against peace, crimes against humanity and war crimes. The reference of The Nuremberg Charter’s definition of “crimes against humanity” to acts “before or during the war”⁴⁶ should be seen in the context of the limited jurisdiction available at the time and should not limit the prescriptive value of its delimitation of the offences to acts outside armed conflicts. With the emergence of substantive international courts combined with the expanded scope of “crimes against humanity” it is possible to realistically consider these crimes can be attributable to MNCs and individuals acting outside of armed conflicts. Since Nuremberg, Tokyo, Yugoslavia, Rwanda and the 1998 Rome Statute, “crimes against humanity” have been expanded upon to include “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁴⁷

42 Wiessner, *supra* note 10, at 332.

43 Boyd, *supra* note 24, at 1149. From the Nuremberg trials recognition of crimes against humanity, the 1980 Filagartiga case definitions [1151], to the most recent federal court cases pending [1155] human rights abuses have been brought relating to violations related to environmental harm caused by MNCs acting with foreign governments.

44 The Nuremberg trials and the Genocide Convention effectively destroyed the earlier classic conception of international law.

45 The reference in the Nuremberg Tribunal Charter’s definition of “crimes against humanity” to acts should be seen in the historical context of the limited jurisdiction of the court and should not lessen the prescriptive value of its delimitation of the offence to acts outside the immediate context.

46 Charter of the International Military Tribunal, annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Art. 6(c), 59 Stat. 1544, 82 UNTS 279.

47 Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9*, reprinted in 37 ILM 999 (1998).

To understand “humanity” in “crimes against humanity” it is necessary to consider the wider picture. For our approach “human rights” refers to those human desires or wants that the politically relevant members of a community decide to authoritatively protect and promote.⁴⁸ The founders of policy-oriented jurisprudence developed a classification to inventory human desires, wants and values. The approach defines eight value categories, *power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude*.⁴⁹ The specification of each value, their relative importance and how they should be shaped and shared will vary from context to context, depending on the configuration and interstimulation of many factors. The culture, class, interests and personalities of those involved and the aims of the international community addresses these issues to determine the final outcome.

48 Weissner *supra* note 10, at 318.

49 *Id.* at 318.

For policy-orientated jurisprudence, “law” is the process through which members of a community seek to clarify and secure their common interest. Human rights are established, maintained and changed through the action of this process and refer to the way law in any community authoritatively protects and empowers individual human beings in their ongoing efforts to shape and share each of the values. When the community is the world, the process through which such protection and empowerment are established, maintained and changed is the empirical phenomenon referred to by the term “international law of human rights.”⁵⁰ The international human rights community has been a major influential force to hold individuals accountable for value violations. When MNCs are responsible for large-scale incidents of human dignity violations, especially violent physical harm, they are seen as having similar duties as that of states. As this trend continues it is not inconceivable to hold them additionally responsible for major violations of values such as well-being, respect, affection and rectitude. This approach considers a human rights abuse to be any event, series of events or practice in which individuals are deprived of any of the values if the deprivation results from the infringement or violation of an authoritatively protected practice associated with the shaping and sharing of the value(s) in question. Whether or not it constitutes a human rights abuse depends on the shared patterns of authority among the politically relevant actors.

With these considerations in mind, an appraisal of individual criminal accountability as an appropriate response to abuses of human rights must be situated in the context of each circumstances as it relates to the sanctioning goals of the international community. These sanctioning goals need to be specified with more clarity and definition so as to

⁵⁰ *Id.* at 319. Law is an on going process of authoritative and controlling decisions. Law is powered, in large measure, by human decision within the state and consensus of the international community. For policy-orientated jurisprudence, only those international perspectives of authority backed by control intent are characterized as law. All others are possible emerging trends known as soft law or secondary law. The International Court of Justice, Statute 38, considers these as general principles to evidence customary international law trends.

place the option of criminal accountability in the context of a broad range of other possible community reactions to breaches of fundamental community expectations and policies. The goals range from the prevention of particular human rights abuses, to their suspension, to deterrence of future acts and behavior.

The traditional approach for finding accountability is to balance individuals rights against the rights of others, this occurs within the sphere of domestic and international stability. As political and judicial systems progress so too will the scope of individuals rights protections expand. Through the establishment of international environmental standards that recognize individual actors, or MNCs, this sets an emerging trend that goes beyond direct state responsibility. At the same time interpretative standards of human rights norms are further defined. As these norms are litigated on both in the domestic arena, legislative and judicial, and transnational law litigation the norms become internalized and less likely to be disputed successfully.

Conclusion

As heads of MNCs are introduced to the idea that they could be held accountable for environmental human rights crimes then they should begin to act with the inner sense of social responsibility fitting for the influence and control that they hold over individuals. Business decisions affecting the environment will be judged in conformity with the inner sense of social responsibility including the idea that the well-being of humans matters, and moral rules must be subjected to tests for their consequences on human well-being, therefore, moral acts will be judged as acts that maximize human welfare.⁵¹ What is

⁵¹ R. L. Ostergard, Jr, *Intellectual Property: A Universal Human Right*, 21. HRQ 63 (1999) per; Canadian philosopher Will Kymlicka.

ultimately required is a political and legal system where the tension between economic development and human rights are kept in balance. This ideal model often finds more acceptance, public and political support, when there has been a highly publicized environmental disaster, however, in cases of water, air and low level environmental pollution the international community will be less likely to make dramatic human rights advances. The reliance on wide public advocacy for human rights advances is troubling because it is arguably low level environmental damage that causes the greatest amount of short and long term human suffering.⁵² By holding MNCs and individuals liable for environmental crimes this would be a substantive way to ensure the globalization of free markets operates in compliance with a universal set of standards beneficial to all human heritage.

⁵² G. Easterbrook, *Forget PCB's. Radon. Alar. "The world's greatest environmental dangers are dung smoke and dirty water"* The New York Times Magazine, September 11th 1994. In China an estimated 25 billion tons of unfiltered industrial pollutants went directly into waterways in 199, which means that there was more toxic water pollution in that one country than in the whole of the Western world. A large fraction within the environmental movement concentrates on the comparatively minor ecological problems of developed nations in order to support the view that Western materialism is the root of all ecological malevolence.

