

International Business and Human Rights

By: R. F. Pollard

**Should Multinational Corporations be held liable for “crimes against humanity” as
globalization trends continue?**

Introduction

Since the mid-20th century the international legal system¹ has expanded to include

¹International law is generally divided in to conflict laws and public international law. The term public international law was

greater monitoring and compliance of state practices by other states and by international bodies. In particular, since the end of the Cold War there has been marked acceleration especially in the area of substantive human rights protections.² However, in many of the areas of expansion, the powers of multinational corporations³ (MNCs) threaten to undo many of the gains of the international legal system since MNCs are not parties too, or objects of treaties and other international instruments.⁴ It is encouraging to note that over the past few decades human rights issues involving MNCs have taken a prominent role in corporate boardrooms, multilateral trade agreements and human rights organizations, particularly as MNCs play a primary role in economic development through the process of globalization.⁵ Through the globalization of the economy MNCs continue to move into expanding markets in developing states.⁶

first used by Jeremy Bentham; See, Introduction to the Principles of Morals and Legislation, (London 1780). International law consists of a number of rules regulating state and individual behavior, and reflects the ideas and preoccupations of the global society. For this reason it is well suited to consider human rights issues and the standards reflected by the international community.

²Given 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.

³Many of the 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, two 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). Also see; C. Baez, M. Dearing, M. Deltour, C. Dixon, *Multinational Enterprises and Human Rights* 8 Yearbook of Int'l Law 187 (1999-2000). Many different approaches to defining MNCs remain possible. There are a number of different factors to consider including, ownership, location, size and percentage of foreign sales.

⁴G. A. Tzeuschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 Columbia Human Rights Law Review 360 (1999). A lacuna gap exists between state responsibilities to individuals and MNCs responsibilities to individuals.

⁵R. McCorquodale, & R. Fairbrother, *Globalization and Human Rights* 21 Human Rights Quarterly, 736-739 (1999) Globalization is a contested term and there is no one accepted definition of it. Clearly 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. Globalization is not a gradual emergence of a world society under the leadership of inter-state politics, but, is a highly fragmented and often contradictory process in which politics has lost the lead role. Global jurisprudence grows mainly from the social margins, not from political centers of nation-states and international institutions. A clear example of this is the influence MNCs have through foreign direct investment and the transnationalization of production.

⁶In particular Asia, Eastern Europe, and Latin America. However, 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 use of the term is comparative and should not to be confused with a literal meaning.

Expansion and investment into developing states can have the dual role of positively contribution too, and enhancing basic human rights by helping to eliminate poverty and strengthen democracy. However, it can be the case that MNCs simultaneously pursue profit at the expense of the weakest individuals further contributing to possible human rights abuses.

The dual role of MNCs raises a number of serious questions for protecting and establishing fundamental human rights within the process of globalization.

1. As the globalization of economy rapidly progresses should there be a parallel development in democratic and human rights progress. If this is the case, how can the lack of effective international enforcement mechanisms, that can hold individuals and MNCs accountable for human rights violations, be justified and strengthened?

2. Currently the scope of human rights violations only covers the most serious peremptory norm crimes, including genocide, torture, slavery, drug trafficking, specific war crimes and crimes against humanity. The possible scope of crimes is potentially wide depending upon how human rights are defined, are enforceable, and are perceived as necessary in the developmental stage of the democratic majoritarian process.

In expanding the scope and accountability of crimes against humanity it is necessary to discover if they can be extended beyond the traditional bounds currently recognized in

international law.⁷ Through human rights considerations the scope of crimes and individual accountability could be widened beyond traditional bounds. For example, they could cover additional environmental crimes, the manufacturing of products that knowingly cause individual and mass harm to society,⁸ the displacement of large groups of indigenous peoples⁹, and other serious actions that directly and indirectly affect human dignity.

⁷S. Chesterman, *An Altogether Different Order: Defining The Elements of Crimes Against Humanity* 10 Duke J. Comp. & Int'l L. 307 (2000). Also see; W. J. Aceves *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Towards a Universal System of Transnational Law Litigation* 41 Harv. Int'l L.J. 129 (2000). International law by definition, refers to the law between states and is not between individuals and organizations. There are a growing number of exceptions to these rules found in International Criminal Tribunals. As the field of individual transnational litigation grows the scope of crimes against humanity is expected to be widened.

⁸S. C. Yeazell, *From Medieval Group Litigation to the Class Action* 240-243 (1987); Suggesting that if a lawsuit could achieve the same economies of scale as a manufacturer, it could counterbalance the manufacturer's advantage. For instance the manufacture of tobacco products, or, the manufacturing of hand guns and other fire arms that are known to be used in multiple "Saturday night" homicides. Lawsuits are also called, "mass production remedies for mass production wrongs." *Per*; G. C. Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307, 308 (1973).

⁹For example; The Three Rivers Dam Project in China that is eventually going to displace an estimated 1 million people. This raises questions as to accountability of International Banks that are jointly financing the project with China and if the human rights of the displaced people are of consequence.

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. MNCs are not only expanding globalization of markets, but they are also challenging state sovereignty concepts in international law. The problem is compounded when considering the growing power of MNCs in relation to states.¹⁰ 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 law allows MNCs to evade accountability in any system except their host state.¹¹ Lack of accountability is in part due to the absence of universal enforcement standards and mechanisms in domestic states, no effective

¹⁰R. Claude, B. Weston, M. Lippman, Human Rights in the World Community, Issues and Action 392-393 (2nd Ed. 1999). Authors make an analysis of the role of MNCs in developing states. They have concentrated 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.

Also see; K. Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation* 16 Michigan Journal of International Law 998 (1995). The globalization of the world economy has moved at such a rapid pace that world trade has for the most part displaced domestic trade as the engine of economic growth. Part of the reason for rise in MNCs power is due to 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.

Also see; L. Belsie, *Rise of the Corporate Nation-State*, Christian Science Monitor April 10, 2000.

Also available on, < <http://www.globalpolicy.org/socecon/bwi-wto/wbank/bigbus.htm>>. Around the globe, more and more corporations are beginning to act like governments...By most accounts corporations are getting stronger while governments are getting weaker. "Business has taken a much more central role in our society,"...Some observers say the trend is irreversible because globalization will make the corporation, not the nation-state, the primary entity on the world stage in the 21st century. Others only see a temporary pendulum swing.

Also see; McCorquodale *Supra* note 5, at 783; In today's globalization , the actors involved are not only States but include MNCs...of the world's 100 biggest economies, only 49 are states, while the 51 economies are corporations.

¹¹K. L. Boyd, *Collective Rights Adjudication in U. S. Courts: Enforcing Human Rights at the Corporate Level*, B.Y.U.L. Rev. 1139 (1999)

single international court¹², and the fact that traditional concept of international law and human rights law is directed at the state and not individuals.¹³ Another, contributing factor to the threat of human rights violations is the physical location and types of MNCs business operations.¹⁴ 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., and Europe, it would seem prudent to hold them accountable where substantive results can be attained.¹⁵

This paper will discuss globalization trends and democratic justifications for holding MNCs, and individual decision makers, responsible for human rights violations under crimes against humanity. Attention will be paid to how far the scope of crimes against humanity could be expanded within the foreseeable future.

¹²See; Analysis of Issues in the International Law Commission Report, 1996, Draft Code of Crimes against the Peace and Security of Mankind, available at <<http://www.un.org/law/ilc/reports/1996chap02.htm>>. In 1948, the General Assembly mandated the International Law Commission to study the possibility of establishing a permanent International Criminal Court. However, the Cold War political climate made it difficult to make any progress. At the end of the Cold War the General Assembly, Resolution 47/33 of 25 November 1992, requested the International Law Commission to draft a statute for a permanent International Criminal Court. Also see; Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9*, reprinted in 37 ILM 999 (1998). Also; available at <http://www.un.org/law/icc/statute/99_corr/cstatute.htm> .

¹³J. Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents* 31 Colum. H. R. L. Rev. 81 (1999).

¹⁴For 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.

¹⁵Boyd *supra* note 11, at 1139. *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.

Globalization Trends

MNCs directly and indirectly influence more lives in developed and less developed states than other global institutions.¹⁶ MNCs are a vital presence in many national economies and have accumulated significant economic and political power. This power puts them in a position to greatly influence government policies in many areas making them key players in basic human rights issues.¹⁷

¹⁶Baez *supra* note 3, at 184. Noted exceptions include, United Nations, the World Bank, the International Monetary Fund and a select few intergovernmental organizations.

¹⁷W. Meyer, *Human Rights and International Political Economic in 3rd World Nations: Multinational Corporations, Foreign Aid and Repression* 21 #3 HRQ 824 August (1999). Globalization advocates, mainly comprising of MNCs, neoliberal economists and their 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. Examples include, Chile and the USA 1970's interference into elections with the resulting Pinochet administration and massive human rights violations.

The increased financial and political power of MNCs is additionally important not only to domestic human rights issues, but also in the international political arena because some MNCs have greater political influence in governing world trade and finance than do some less developed states.¹⁸ Because the contemporary processes of globalization stresses deregulating business activities, lowering state barriers, developing free market economies and expanding world trade and the flow of capital, it has had the overall effect of gradually reducing state participation necessary for human rights protections.¹⁹ The lessening of protective mechanisms is compounded by MNCs drive for the desire for profit, and accountability limited to shareholders rather than all members of society. Also, MNCs are often unaware, or simply disregard, the adverse impact their activities may have on human rights. Even though ignorance is no excuse it might be a realistic factor to explain MNCs behavior toward human rights issues.

¹⁸Baez *supra* note 3, at 184.

¹⁹H. J. Steiner, Business and Human Rights: An Interdisciplinary Discussion Held at Harvard University Law School in December 1997. Available on; <http://www.law.harvard.edu/programs/HRP/Publications/bussession1.htm1>. Also see; S. Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Non-governmental Organizations*, available on <<http://www.globalpolicy.org/ngos/role/intro/def/2000/chaleng.htm>>. At the threshold of the twenty-first-century, the concept of the state is subject to profound challenges. Among Western states, one can observe the transfer of tasks from the public to the private sector, such as the well-known example of the privatization of state owned businesses.

The substantial growing power of MNCs, both domestically and internationally, raise questions of whether and how human rights law ought to apply. Traditionally, the state has been held accountable for human rights obligations. However, through globalization and the introduction of the powerful “corporate nation state”²⁰ MNCs have threatened established protective mechanisms and helped shift greater accountability to individual and organizational actors. In the years following WWII international law has generally recognized that individuals hold certain rights. Today, international law is undergoing a transformation in that it is recognizing that individuals and some international organizations hold certain responsibilities, duties and obligations. This is evidenced by the increased number of international criminal tribunals and through democratic majoritarian pressures applied by public interest groups.²¹ Additional 21st century transformations should recognize that MNCs are subject to international law and governed by many of the same duties to which states are bound, such as the respect and promotion of human rights, especially serious crimes against humanity. However, this is a highly problematic area of international law because by giving MNCs additional international obligations and duties then arguably they can also receive specific state rights to further empower them as global entities.

²⁰Belsie *supra* note 10, at 7.

²¹For example the pressures that non governmental organizations, Human Rights Watch, Amnesty International and Green Peace (to name a few) apply on MNCs to comply to the wishes of vast numbers of people.

Within the policy-orientated jurisprudence paradigm it is possible to see numerous possible outcomes.²² Forecasting future trends requires an understanding of conditioning factors and how they might be expressed in the future. In assessing past trends, policy-orientated jurisprudence is interested not only in what the future might bring, as opposed to what the past has brought, but also in how well the future is likely to judge the value on a public order of human dignity. To address this issue in relationship to MNCs, one approach uses the projection of what are called “developmental constructs,” which are both images and directions of possible futures.²³ The purpose of the construct and their development, is to provide guidance to human rights advocates, states, and individual decision makers of MNCs through the provision of empirically grounded anticipations of the future. This guidance is constructed to help negotiate current and future problems and enhance the likelihood of decisions that move MNCs behavior toward higher standards for respecting human dignity. Anticipating the future is very context-sensitive, however, it is more likely to be successful and accepted when the goals have been clarified, future alternatives projected, and advantage and disadvantage trends analyzed.²⁴

²²S. Wiessner, A. R. Willard, *Symposium on Method in International Law: Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity* 93 A. J. I. L. 317-321. Policy-orientated jurisprudence offers a comprehensive, detailed and self-aware approach to any problem. One of its distinctive features is its highly integrated stock of concepts and propositions about human behavior.

²³*Id.* at 332. Developmental constructs are both pathways and pictures of possible futures. They draw from different institutional arrangements or mechanisms of accountability to show how they might work in the future.

²⁴*Id.* at 332.

One construct, popular with globalization advocates, includes promoting MNCs as they help to improve standards in developing states.²⁵ As developing states middle classes grow financially independent and gain increased political power they can demand greater democratic accountability and government transparency, thus strengthening the democratic rule of law. In the argument for promoting MNCs positive global contributions is a growing tendency to emphasize compatibilities between civil and political rights, and development. Therefore, reaching the conclusion that the overall long term effect of globalized free markets is beneficial to human rights protections.²⁶ For example, international financial institutions have increasingly emphasized the economic contributions of good self governance. But, however persuasive this argument maybe it has still fallen short of advocating the full range of internationally recognized civil and political rights and falls far short of dealing with the highly complex issues surrounding economic, social and cultural rights.²⁷

²⁵See; Meyer *supra* note 17 at 824. Also; Claude *supra* note 10 at 392.

²⁶J. Donnelly, *Human Rights, Democracy and Development* 21 Nos. 3-4 HRQ 619 (1999). Democracy and human rights share a commitment to the ideal of equal political dignity for all, therefore, international human rights norms require democratic government. However, problems arise because the link between them does not necessarily run in both directions as rights of democratic participation are only one set of internationally recognized human rights. Even where democracy and human rights are fundamentally different in character and are not in direct conflict, they often point in significantly different directions. Although democracy aims to allocate sovereign authority to the people, to empower them in order to ensure that they rule, it requires little of the sovereign people in return. At the same time, human rights aim to empower individuals to stand up for their ensured and protected rights, therefore, restricting rather than empowering the people and governments. The tension that exists between the two suggests that unless human rights advocacy is majoritarian it is profoundly anti-democratic as advocacy regularly frustrates the will of the majority. This is not as problematic within the liberal democratic model as some rights-abusive choices are denied to the people and other rights-protective choices are mandated. Liberal democratic states must meet certain substantive standards and at the same time achieve a balance of democratic and human rights principles. However, prior to the liberal democratic model is the less robust procedural, electoral model of democracy. Therefore, the struggle for liberal democracy is a struggle for human rights but only because the adjective has built human rights into the definition. In mature liberal democracies by requiring that every person receives certain goods, opportunities, and services, the acceptable range of political, social, economic and cultural systems and practices are greatly limited. A balancing act goes on within the democratic state with different players promoting and negotiating their causes. The only conciliation for individuals who are not able to secure all their affirmed rights within a just majoritarian process is that it has been for the greater benefit of all in the state. However, problems arise when the majoritarian process is not just and a those with advantaged social attributes dominate the negotiations. The same is true when developed liberal democratic states negotiate with developing states and gain favorable trade agreements due to their economic power.

²⁷*Id.* at 627. In the relatively rare cases where sustained economic growth has been achieved by highly repressive regimes, there is little evidence that repression has been the necessary for development. An emphasis on the compatibility between civil and political rights and economic development is entirely appropriate as an emphasis on transparency, accountability, and the rule of law does generally lead to satisfactory procedural democracy and a comprehensive range of civil liberties.

On the other hand, advocates for strengthened human rights protections are concerned with states that fail to protect human rights due to the rise of MNCs corporate power and the difficulties faced when expanding the range of universal human rights norms.

Part of the difficulty is due to the rapid globalization of economic development and increased capital mobility which occurs in a diverse political world with varying degrees of success in human rights enforcement.²⁸ During the twentieth century there was a historical shift in the form of foreign investment portfolios' to direct foreign investment into states carried out by MNCs.²⁹ This change became manifested as large capital entities absorbed weaker ones creating the emergence of large vertically integrated MNCs. Even though in recent years there has been a shift back to portfolio investment, due to the development and rise of stock markets in many developing states, the legacy of MNCs' direct investment still serves as the basis for today's globalized economy. Globalization of the world economy encourages developing states to use every possible advantage to compete for direct foreign investment if they wish to develop and remain competitive in the global market.³⁰ The competition for investment capital has resulted

²⁸M. Robinson, UN High Commissioner for Human Rights, *Business and Human Rights: A Progress Report* available at <<http://www.unhchr.ch/business.htm>>. She stressed that today, human rights is a key performance indicator for corporations all over the world. Also see, *The Global Compact*, available on <<http://www.unglobalcompact.org>>. The UN and its organs have continually stressed human rights as the primary objective, however, this has not always been translated into practice by states and business. Also see; Employment, Growth and Basic Needs: A one-world Problem, Int. Labor Office (1977). In the late 1970's, the International Labor Organizations's World Employment Program stressed increasing employment as a mechanism to spread income and the benefits of growth world wide.

²⁹Baez *supra* note 3, at 192.

³⁰Donnelly *supra* note 26, at 224-225. There are two main economic development theories, dependency and equitable growth theorists. Dependency theories propose that pre-industrial states become incorporated into the capitalist world system through structural subordination. This suggests there is an economic advantage for developed industrial and high technology states to keep a hierarchical order. Providing the main balance of power is kept relatively intact, then, the system will work efficiently. Equitable growth theorists take a more radically progressive view to a growth-based understandings of development, they emphasize equality or social justice rather than the narrow economic process. United Nations Development Program, UNDP, vision

in the race-to-the-bottom dynamics in which MNCs would rather establish production facilities in states with lower labor and production costs, lower labor standards and fewer human rights protections.³¹ The result being that developing states have an incentive to compete for business by altering their domestic regulations in order to create a regulatory environment that MNCs will find attractive.³² Some scholars even discuss the possibility that “regulatory competition” leads to the lowering of human rights and environmental standards.³³ Therefore, the resultant lowered regulatory environment can have dire human rights consequences for local populations who find themselves vulnerable to the direct, or indirect dictates of some purely profit orientated

of sustainable human development provides one of the current indicators for an expanded conception of development. According to the UNDP there are five aspects to sustainable development all affecting the lives of the poor and vulnerable. Progressive equitable growth theories are more in line with human rights ideals. See; United Nations Development Programme, *Governance for Sustainable Development: A UNDP Policy Document 2* (1997), available on <<http://magnet.undp.org/policy/default.htm>>. They include, empowerment, co-operation, equality, security and sustainability. However, some claim this definition is incomplete as it simply redefines human rights, along with democracy, justice and peace as subsets of development. Less radically equity orientated theories face similar problems.

³¹Stone *supra* note 10, at 992.

Also see; See; K. Bales, Disposable People, New Slavery in the Global Economy (Uni. Of California Press 2000). The author estimates that there are 27 million ‘new slaves’ in the world. The biggest number, 15-20 million, is represented by bonded labor in India, Pakistan, Bangladesh and Nepal. Other slavery trends are concentrated in Southeast Asia, Africa, and parts of South America. Slaves tend to be used in simple, nontechnical, and traditional work with the largest number being in agriculture. However, in Brazil the auto industry is supported by traditional charcoal workers who assist in steel making. After MNCs, including Volkswagen, have deforested vast tracts of land the slave workers are then put to work to produce charcoal, necessary in steel production, using the felled timber. This is just one example of many depicting how MNCs, acting through subsidiaries in the developing world, take advantage of slave labor to improve their bottom line and increase the dividends to their shareholders. The author gives numerous examples of new slavery and how it directly and indirectly effects the global economy. The resultant business flight to lower labor standards, commonly referred to as the “runaway shop”, has been a concern of Western labor movements for many decades.” At the bottom end of the scale are the so called “new slavery” workers who experience gross human rights violations and have almost no recognizable workers rights, but, still contribute to the global economy. For the most part “new slave” economy’s are found in developing states with either non-democratic, or, newly democratic political systems, however, they are not strictly limited to these circumstances.

Also see; J. Hall, Human Rights and the Garment Industry in Contemporary Cambodia 36 #1 *Stanford Journal of International Law* 119-122 (2000). The author uses Cambodia as an example of a non-democratic political system where a culture of impunity has been created for human rights violations in the garment industry. Garment workers are subjected to slave like conditions while those in power operated the factories with impunity. These violations continue despite the fact that Cambodia has ratified the International Covenant on Civil and Political Rights and is a United Nations member, both of which provide for human rights protections. The political system is non-democratic despite the procedural show of elections, in reality there is no substance to its democracy.

Also see; J. Bindman, Global Sex Workers: Rights, Resistance and Redefinition *Human Rights Quarterly* 839 (August 1999). *And, For information on “sweat-shops” in USA and other democratic states, available on, <<http://www.sweatshopwatch.org/swatch/newsletter/11.html>>.*

³²*Id.* Hall at 119.

³³Stone *supra* note 10, at 993.

MNCs.³⁴

³⁴See e.g., P. Lewis *Blood and Oil* New York Times Feb. 13 1996. Allegations of complicity to human rights abuses made against Shell Oil in Nigeria.

Given the globalization of human rights norms and the continuous development of substantive enforcement mechanisms, it would only seem reasonable that western liberal democratic states³⁵ with advantaged economic and political positions would champion the cause for human rights equality.³⁶ It is ironic that this is not always the case as the capitalist free market economic model³⁷ seeks the greatest profit return on investments, often at the expense of human rights.

³⁵N. Stammers, *A Critique of Social Approaches to Human Rights* 17 HRQ 493 (1995). The term "liberal" refers to the radical or developmental strand of liberal thought which can also be termed "social democracy." Liberal democratic states compensate those who are less fortunate in the market through the welfare state. The welfare state guarantees all individuals certain economic and social goods, services, and opportunities irrespective of the market value of their labor. The state assumes the responsibility for short term suffering and assures long term compensation. The welfare state is a device to assure that a minority that is disadvantaged in, or deprived by, the markets is treated with maximum economic concern and respect. At the same time individuals who are harmed by the operation of social institutions that benefit the whole are recognized as having a right to a fair share of the social product their participation helped to produce.

³⁶The liberal democratic models of Western Europe, Japan and North America are attractive models because of the balance they strike between the competing demands of democratic participation, market efficiency and internationally recognized human rights. "Markets democracy" (the language of President Clinton's foreign policy administration) are of largely instrumental value from a human rights perspective. Without market efficiencies and democratic electoral politics, internationally recognized human rights are at grave risk. However, it should be noted that even the noted liberal democratic states fall short of realizing all human rights for their own citizens.

³⁷Donnelly *supra* note 26, at 228-230. Recognized by the rampant social inequalities produced by an unregulated capitalist economy. The relationship between development and economic and social rights is complex, especially when considering the role of the free markets. Markets are social institutions designed to produce economic efficiency. Smoothly functioning markets systems of production and distribution generally produce a greater output of goods and services with a given quantity of resources than alternate schemes. Growth seems to be substantively linked to economic and social rights. What is at time an uncontrollable contemporary enthusiasm for markets is extremely problematic from a human rights perspective. Unless the market is kept in check by human rights standards it is possible for a crude class of privilege to merge. Like pure models of democracy, where individuals rights are equally considered along with the collective, free markets are justified by discussions of collective good and mutual benefit and not individual rights (except for the right to participate and economic accumulation). Markets encourage efficiency, not social equality or the enjoyment of individual rights for all. Rather than ensuring that every individual is treated with concern and respect, markets systematically deprive some individuals in order to achieve the collective benefits of efficiency. Markets are designed to distribute growth without regard for individual needs and rights. The poor tend to be less efficient as a class, they have fewer skills valued highly by markets, therefore, they are systematically disadvantaged. What is most frustrating for human rights advocates is that it is generally the "economically downtrodden" that end up being kicked time and time again. Market advocates typically argue that in return for short run disadvantages for the few, 'everybody' benefits from the greater supply of goods and services made available through growth. 'Everyone' is in reference to the average, an abstract entity, and not substantial individuals and their families. Efficient markets offer improvements to a limited few at the cost of the others, while the suffering is usually at the expense of the most vulnerable and the weakest. Additionally, markets redistribute the benefits of growth without regard to the short-term deprivations. Those who suffer adjustment costs, such as lost jobs, higher food prices, or inferior health care or education, acquire no special claim to a share of the collective benefits that efficient markets produce.

One solution proposed by the United Nations is that globalization requires a universal understanding to balance the elements of democracy, human rights and economic development.³⁸ Consequently, states, that do not at least claim to pursue majoritarian democratic political participation, respect for the rights of individuals and rapid sustained economic growth, risk their national and international legitimacy.³⁹ Democracy, human rights and economic development have important theoretical and practical connections the most obvious being that international human rights norms require democratic government.⁴⁰ Because democratic states seek to ensure and protect individuals' rights by providing accountability, transparency and the redistribution of economic growth, along with the rights that they provide they may restrict predatory abuse that undermines development.⁴¹

³⁸"Democracy, human rights and economic development have become supreme political ideals that are fundamental, interdependent and mutually reinforcing." The Vienna Declaration and Programme of Action, adopted by The World Conference on Human Rights 24 June 1993, U.N. Doc. A/Conf.157/24 (Part1), at 20-46 (13 Oct. 1993). 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/menu5/d/vienna.htm>, [hereinafter Vienna Declaration].

³⁹Donnelly *supra* note 26, at 608.

⁴⁰Universal 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)[hereinafter UDHR] Article 21 states; that "the will of the people shall be the basis of the authority of government."

⁴¹Donnelly, *supra* note 26, at 610.

In 1998 the High Commissioner for Human Rights stated that “democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.”⁴² According to the Vienna Declaration formulation the democratic global objective is to determine “the freely expressed will of the people.”⁴³ Democratic theories are frequently distinguished by their reliance on substantive or procedural tests in making this decision.⁴⁴ In determining the will of the people, especially those affected by MNCs, it is important that there are functional democratic electoral systems in place with the same rights and freedoms guaranteed as this is the ultimate safeguard against MNCs unfettered behavior.⁴⁵ No matter how many safeguards exist for procedurally priority the electoral majoritarian consultation process is currently the best mechanism to determine the will of the people. However, even procedural democracy can decline into non-democratic, or anti democratic ceremonies.⁴⁶ It is important to constantly recognize that substantive conceptions⁴⁷ justly assert we do not lose sight of the core values of popular authority and control of the state to the growing economic power of MNCs. If

⁴²M. Robinson, Message from the High Commissioner for Human Rights, in Integrating Human Rights, United Nations Development Programme, Integrating Human Rights with Sustainable Development: A UNDP Policy Document 2 (1998), available on <<http://magnet.undp.org/Docs/policy5.html>>.

⁴³Vienna Declaration, *supra* note 37, at Part1 para. 8.

⁴⁴D. Held, *Models of Democracy 2* (1987). “a form of government in which ...the people rule.” There are certain indicators to determine what the rule of the people means. They include, the people are involved in processes of legislation, judiciary, administration, crucial decision making,, general policy, and, that the rulers are, accountable to the ruled and to the representatives of the ruled, rulers are chosen by the ruled and to the representatives of the ruled and finally the rulers should act in the best interests if the ruled. One way to determine the will of the people is to consult them, or their representatives, directly through free and open elections within an unfettered political environment

⁴⁵Stone, *supra* note 10, at 996. Social theorists have recognized that a robust democracy requires that there be an abundance of voluntary organizations in which citizens can participate. In keeping check on MNCs it is important that these voluntary organizations have access to many aspects of MNCs activities.

⁴⁶J. J. Linz, & A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (1996). See also G. A. O'Donnell, *Illusions About Consolidation*, 7 *Journal Democracy*, April 1997, at 34 (1996).

⁴⁷Substantive democracy is a progressive ideal with no limitations on its end result. As democracies progress to take care of the citizens the scope of governance duties expands to include an ever widening responsibility and duties to ensure and respect human rights and human dignity.

democratic values are to be legitimized, morally and ethically, through the fusion of capital economies, sustainable development and continued human rights protections then this must occur throughout the total globalization process including economic markets, democratic governance and substantive human rights standards. Part of the problem is that it has not been possible to reach a consensus on development strategy and democracy as there is a conflict of self interest between individuals, MNCs and states.

In the past, most states justified violations of human rights by appealing to national security, cultural relativism and the higher imperatives of economic development and democracy. These justifications are still claimed by a limited number of states, however, in the post-Cold War international society, arguments of interdependence are the norm.⁴⁸ Whatever the gap between ideals and practice, today most states prominently feature appeals to democracy, human rights and economic development in their efforts to establish national and international legitimacy.⁴⁹

⁴⁸For example; a recent United Nations Development Program policy statement affirms that "human rights and sustainable human development are interdependent and mutually reinforcing." See; United Nations Development Program, Integrating Human Rights with Sustainable Development: A UNDP Policy Document 2 (1998). Available on <<http://magnet.undp.org/Docs/policy5.html>>, [hereinafter UNDP].

⁴⁹Donnelly, *supra* note 26, at 611.

Globalization of basic minimum human rights standards has been resisted partly due to the self interest ethos of capitalism through the greatest profit factor, however, at the heart of the democratic state lies the right of the individual and the will of the people. Based on these core values states are obligated to act in the best interests of the individuals welfare and in doing so keep democracy, human rights and development in balance. This allows for progressive growth in all three areas, and at the same time remain in compliance with emerging universal values and minimal human rights standards.

There is some emerging law governing the global economy. The growing web of international agreements governing trade in goods and services⁵⁰, international investment treaties⁵¹ and environmental treaties do provide some human rights protections, however for the most part, these laws do not have complete substantive enforcement mechanisms.

In general, the problems of the effect's MNCs have in developing states has not been fully addressed. There are no simple answers to the highly complex issues, and progress has, and continues, to be slow.

Human Rights and International Law

To have an understanding of “humanity” in the context of “crimes against humanity” it is necessary to briefly consider what are ‘human rights’ and ‘human dignity’.

⁵⁰The World Trade Organization (1995).

⁵¹The World Bank and its organizations, The International Monetary Fund, and the proposed Multilateral Agreement on Investments.

Human rights are literally the rights that one has simply as a human being.⁵² They are equal rights because we are all inherently equally human beings.⁵³ They are also universal inalienable rights, because no matter how inhumanely we act or are treated we cannot become other than human beings.⁵⁴ Every person is entitled to enjoy his or her human right even though they are subject to a variety of social and political obligations.⁵⁵ Human rights specify an inalienable set of individual goods, services, and opportunities that the state and society are usually required to respect or provide. Because the individual inherent rights have *prima facie* priority over the interests and desires of society and the state, they restrict the legitimate range of state action.⁵⁶

⁵²D. Kinney, *The Legal Dimension of Human Rights*, in *Human Rights in Australian Law* 6 (D. Kinney ed. 1998) Philosophical arguments justify that such rights inhere in the natural condition of being human and that they are part of a transcendental moral code that is necessary to maintain a base stratum of human dignity.

⁵³UDHR *supra* note 45, at Article 1 states; "all human beings are born free and equal in dignity and rights." Since being adopted the vast majority of states have endorsed the UDHR, which arguably has acquired the status of customary international law. However, a number of developing states are advocating that the human rights principles enshrined in the UDHR reflect Western values and are not their own. They complain that the West is interfering in their internal affairs when it comes to imposing its own definition of human rights upon them, and it hampers their trade and weakens their competitiveness. Because of social and cultural differences, they say, they should not be held to the same standards, *per*; Cerna, *supra* note 26, at 740. Example of states include, China, Columbia, Cuba, Indonesia, Iran, Iraq, Libya, Malaysia, Mexico, Myanmar, Pakistan, Singapore, Syria, Vietnam and Yemen. *Also*; International Covenant on Civil and Political Rights, adopted 16 December 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc A/6316 (1966), 99 U.N.T.S. 1771 (entered into force 23 March 1976) [hereinafter ICCPR]. *Per*; Civil and Political rights.

Also see; International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [hereinafter ICESCR], *per*; "these rights derive from the inherent dignity of the human person." *Also*; Vienna Declaration; "all human rights derive from the dignity and worth inherent in the human person." In contemporary international society these documents set the meaning of "human rights" and repeatedly affirmed the universality of human rights.

⁵⁴J. Shestack, *The Philosophical Foundations of Human Rights*, 20 HRQ 201 (1998), The concept of universality of human rights flows from the notion that as a human being one is automatically entitled to respect for one's dignity.

⁵⁵The notion of universal human rights does not mean that they are timeless, unchanging, or absolute, rather, any list or conception of human rights is historically specific and contingent. As we enter the 21st century we are faced with specific political, economic and legal challenges. In the 22nd century we would expect to have progressed significantly building upon the foundations of the past. Currently there is a gradual political realization of first generation human rights, namely political and civil. The substantive realization of second generation rights, economic, social and cultural, is more problematic. Third generation human heritage rights could well be followed by fourth generation rights. Currently, fourth generation rights of the right to love and happiness are far too abstract to be of legal consideration. However, there was a time when basic political and civil rights were considered to be beyond the realm of substantive legal enforcement mechanisms.

⁵⁶Donnelly *supra* note 26 at 612. From a human rights viewpoint, the legitimacy of a state is a function of the extent to which it respects, ensures, protects and realizes the natural human rights of its citizens. *See*; ICCPR *supra* note 14, at Article 2 (1) Each State Party to the present Covenant undertakes to *respect* and to *ensure* to all individuals.... and (2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to *take the necessary steps*,...to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Although this priority is rarely absolute,⁵⁷ human rights ordinarily “trump” other legitimate claims of the state and society.⁵⁸ However, the trumping of other legitimate claims of the state is a recent emergence in international law.⁵⁹

⁵⁷ICCPR *supra* note 52, at Articles 4 (derogations in times of state emergencies). Also, Article 22 for legal restrictions as “prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order the protection of public health or morals or the protection of the rights and freedoms of others.

⁵⁸Donnelly *supra* note 26, at 613.

⁵⁹F. Teson, *A Philosophy of International Law 1* (Westview Press 1998). Building upon the assumptions of classic international legal theories, the liberal theory is committed to concepts of *normative individualism* where the state and governments are to serve and benefit its citizens, in turn, international law must also serve and benefit individuals not states or governments. Respect for states and sovereignty is simply derivative of respect for individuals. In this way the, notion of sovereignty is redefined as the state is dependant upon the state’s domestic legitimacy. The idea that a state’s legitimacy is a function of the extent to which it ensures and protects the human rights of its citizens received its first major substantive international recognition in the 1948 Universal Declaration of Human Rights. *Normative individualism* recognizes that the primary normative unit is the individual, not the state. It also insists that our moral concepts should be referred to individual rights and interests. Placing the individual in a primary position, it is understandable that a states legitimacy is a function of the extent to which it ensures and protects the individual rights of its citizens. In other words, state sovereignty is derivative of the rights of individuals, namely *derivative statism*.

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.”⁶⁰ One problem is that not all rights have been treated equally. The prevention and remedying of violations of economic, social and cultural rights have achieved, at the best, modest success.⁶¹ In comparison to the enforcement procedures available to violations of actual bodily harm,⁶² deprivations of economic and related social rights are given little attention.⁶³ One only need to witness the excessive levels of the noncompliance with the ICESCR, the large number of states that have failed to ratify this convention,⁶⁴ combined with the widespread refusal of governments to give active support to an Optional Protocol complaint procedure under the ICESCR⁶⁵, is it possible to observe how far human rights law and practice have yet to be actualized.

⁶⁰ *Per*, U.N.Doc. E/CN.4/1998/33(1998) available on <<http://www.unhchr.ch/html/menu4/chrres/1998.res44.htm>>.

⁶¹ S. Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights* 20 Human Rights Quarterly 82 (1998).

⁶² For example, torture, genocide, deprivation of freedom of life and disappearances, which are covered by the ICCPR.

⁶³ J. Donnelly, *Universal Human Rights in Theory and Practice* 163-202 (1989). Part of this reason is due to the difficulty in defining economic, social and cultural rights and effective enforcement procedures. While this area is highly debated there is little consensus on how to establish universal standards and state obligations.

⁶⁴ See; United Nations Human Rights International Instruments: Chart of Ratifications as of June 1996, U.N. Doc. ST/HR/4/Rev.14 (1996), As of January 1997, fifty-seven states had not yet ratified the ICESCR.

⁶⁵ Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a Draft Optional Protocol for the Consideration of Communications Concerning Non-Compliance with the Covenant on Economic, Social and Cultural Rights, U.N. ESCOR, Comm. On Econ., Soc. & Cult. Rts., 14th & 15th Sess., ch. IV, at 91-109 (30 Apr.-17 May 1996, 18 Nov.-6 Dec. 1996), U.N. Doc. E/C.12/1996/6 (1996).

In the nineteenth century, human rights were not recognized under international law because rights were derived from the rights of the state.⁶⁶ The way a state treated its own citizens within its territory was a matter of “domestic jurisdiction,” a private law concept.⁶⁷ After WWII, the idea of international human rights law was universally recognized, as evidenced by the ratification of the Universal Declaration of Human Rights in 1948.⁶⁸ Substantive enforcement of international human rights law began with the Nuremberg Trials,⁶⁹ 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.

What do we mean by “human rights abuses” as crimes against humanity? Are they to cover only offenses to human dignity that effect 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?

For our approach “human rights” refer to those human desires or wants that the politically relevant members of a community decide to authoritatively protect and

⁶⁶*Id.* at 1. International law generally deals with inter state relationships while human rights law aims to protect individuals rights within a state.

⁶⁷Boyd *supra* note 11, at 1148.

⁶⁸UDHR, *supra* note 45, 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. As the UDHR states; “a common standard of achievement for all peoples and all nations.”

⁶⁹The Nuremberg trials and the Genocide Convention effectively destroyed the earlier classic conception of international law. 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, E.A.S. No. 472, 82 U.N.T.S. 279.

promote.⁷⁰ 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*.⁷¹ The specification of each value, their relative importance and how they should be shaped and shared will vary according to different contexts, depending on the configuration, cross-fertilization and inter-stimulation of many factors. The culture, class, interests and personalities of those involved and the aims of the international community address these issues to determine the final outcome.

⁷⁰Wiessner *supra* note 22, at 318.

⁷¹*Id.* at 318.

For policy-orientated jurisprudence, “human rights 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 is established, maintained and changed is the empirical phenomenon referred to by the term “international law of human rights.”⁷² 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 serious violations to human dignity, especially violent physical harm, they are seen as having similar duties as that of states. As this trend for accountability continues it is conceivable to hold MNCs 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

⁷²*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, Article 38, considers these as general principles to evidence customary international law trends. Available at <<http://www.icj-cij.org/>>.

MNC and 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 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 sanctioning goals range from the prevention of particular human rights abuses, to their suspension, to deterrence of future acts and behavior.

Human Rights, MNCs, individuals and International Law

Traditional classic international legal theory focuses upon the rights and duties of states and rejects the argument that the rights of states are simply derivative of the rights and interests of individuals. Accordingly, international legitimacy and state sovereignty is a function of whether the government politically controls the population rather than whether it justly represents the people. The classic view suggests a dual model for the ordering of individuals, one domestic and another international. It may well be that domestic systems aim to promote justice through the majoritarian process while the international system only seeks reciprocal order and compliance.

Despite the recent prominence of the international law of human rights, the dominant discussion in international law still fails to fully recognize the important normative status of the individual and MNCs.

In the wake of WW II the architects of the postwar system replaced the preexisting loose customary web of state-centric rules with an ambitious positivistic order, built on

international institutions and constitutions.⁷³ These global constitutions sought to allocate institutional responsibility and to declare particular rules of international law. For example, political conflict was to be regulated by the United Nations, and its organs, while destructive economic conflicts were to be mitigated through the Bretton Woods system.⁷⁴ This complex law framework re-conceptualized international law as a creative medium for organizing the activities and relations of numerous transnational players, a category that now includes intergovernmental organizations with independent decision making capacity. Within this regulatory global framework, it is imagined, legal rules will reflect international systematic concerns, rather than limited state interests. The post-Nuremberg growth of international human rights law and its potentially deep incursion into domestic jurisdiction has posed powerful theoretical challenges to the dualistic municipal-international distinction. It has even been proposed that a criminal law enforcement model, to enforce international rules, is developed through the United Nations.⁷⁵

⁷³International institutions governed by multilateral treaties organizing pro-active assaults on all manner of global issues.

⁷⁴The World Bank would supervise international reconstruction and development, The International monetary Fund would monitor balance of payments, and General Agreements on Tariffs and Trade (GATT) would manage international principles of economic liberalism and market capitalism. These global economic institutions were supported by regional economic communities such as the European Economic Community.

⁷⁵G. Clark, L. B. Sohn, *World Peace Through World Law* (2d ed. 1960).

The post-Cold War era has seen international law, transnational actors and the modes of regulation develop into numerous forms. International law now comprises of a complex blend of customary, positive, declarative and soft law which seeks not simply to ratify existing practice, but to elevate it.⁷⁶ As sovereignty has declined in importance, global decision making functions are now executed by a complex collective of nation-states, intergovernmental organizations, regional compacts, non-governmental organizations including MNCs.⁷⁷ In considering the theoretical foundations of compliance to international laws and social norms, the “constructivist” strand considers that states and their interests are socially constructed by commonly held philosophical principles, identities and norms of behavior. Rather than arguing that state actors and interests create rules and norms, constructivist’s argue that rules and norms constitute the international game by determining whom the actors are, what rules they must follow and how titles to possessions can be established and transferred. The predominantly American constructivist’s school see the norms, values and social structure of international society as helping to form the identity of actors who operate within it. As the scope of these actors expands beyond the traditional state actors to include powerful MNCs then they take on responsibilities and duties traditionally reserved for states. As these philosophical concepts of international law, human rights obligations and accountability emerge, they are legitimized through compliance measures. Within

⁷⁶ICJ *supra* note 71, at Art. 38.

⁷⁷The state is still the primary institution to which individuals continue to look for sources of legitimate and effective social organization. It is true that MNCs, international organization, and other actors allocate values, but, it is uniquely the states that retain legitimate authority in virtually all advanced industrial societies. However, similar claims for developing states are questionable. As governments increasingly find themselves constrained by pressures from international markets.

the democratic framework, one of the better enforcement of global rules is through voluntary obedience, not coerced compliance. If transnational actors perceive rules to be fair and in the best interest of the common good they will be more likely to obey them. The constructivist approach, recognizes the positive transformational effects of repeated enforcement of norm values in a legal process.⁷⁸ To the extent that the norms are successfully internalized, they become future determinants of why actors obey. If transnational actors obey international law as a result of repeated interaction with other actors in the transnational legal process, then a first step is to empower more actors to participate. Through the establishment of international human rights 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 legislative and judicial arena, and through transnational law litigation, the norms become internalized and less likely to be disputed successfully.

As a brief conclusion, the role of MNCs has been limited in international law by the state-centered charter of international law. Traditionally, international law has been regulated relations between states. Natural persons' organizations and MNCs were not considered subjects on international law.⁷⁹ This has meant that only states have been

⁷⁸*E.g.*, The 2000, United Nations Environment Programme, Draft Stockholm Convention on Persistent Organic Pollutants (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, 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.' Available at <<http://www.irptc.unep.ch/pops/>>.

⁷⁹Weissner *supra* note 22, at 212.

accountable to international laws. If a MNC had violated human rights it was up to the state to enforce rights and if they failed then action was taken against the state. At the end of the WW I the exclusively state-centered character of international law doctrine began to break down. Further developments after WW II and the decolonization of states lead to the New International Economic Order in the 1970s. As self-determination issues concerning economic, social and cultural development took hold they impacted expropriation issues and states rights over MNCs.

Defining the Elements of Crimes against Humanity

Crimes against humanity have mainly been defined in response to specific needs, circumstances and situations. As needs change so will the elements and criteria of that go to define crimes against humanity, therefore as a class of international crimes they are still evolving in terms of shape and definition. The exact range of this class of criminal conduct is still open to interpretation. The most optimistic views respect and recognize crimes against humanity as international crimes covering a possible wide scope of individual conduct.⁸⁰ To deter human rights abusers and correct their behavior international prescriptions have clarified community policies regarding the scope of individual protections, and have increasingly amplified the range of actions for which individuals are held criminally or civilly accountable.

⁸⁰Doe v. Unocal 963 F. Supp 880, 92 A. J. I. L., 311. Individuals can now act beyond the color of law criteria. 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.

Substantive modern theory and history underpinning of crimes against humanity, as a discrete body of international law, starts with the international Military Tribunals of Nuremberg (1945) and Tokyo (1946). Prior to this point there was a piecemeal inclusion of references to crimes against humanity from a variety of different instruments.⁸¹ The Nuremberg and Tokyo tribunals established the principle of international criminal responsibility for crimes against peace, crimes against humanity and war crimes. Since Nuremberg, 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.”⁸² This paper provides a brief overview of the three definitions of crimes against humanity elaborated in the statutes of the International Criminal Tribunals for the Former Yugoslavia⁸³ (ICTY) and Rwanda⁸⁴ (ICTR) and the Rome Statute. Additional considerations will be given to the general requirements that elevate an act to a crime against humanity, and the elements of specific offences. The Rome Statute and the statutes of the ICTY and ICTR provide different definitions as to what constitutes a crime against humanity, and they all state that certain acts committed under defined circumstances constitute crimes against humanity. For the most part the acts are recognized as *jus cogen* crimes including persecutions on political, racial and religious grounds and ‘other inhumane acts’. In addition to these

⁸¹M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 132 1992).

⁸²Rome Statute *supra* note 12.

⁸³See; Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at art. 5, U.N. Doc. S/RES/827 (1993), amended by U.N.S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878 mtg., U.N. Doc. S/RES/1166 (1998) [hereinafter ICTY Statute].

⁸⁴See; Statute of the International Criminal Tribunal for Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., at art. 3, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

acts, the Rome Statute includes the crime of apartheid and enforced disappearances. A crime against humanity requires that the acts take place under defined circumstances. The ICTY Statute states that the acts are “committed in armed conflict, whether international or internal in character, and directed against any population.” By contrast, the ICTR Statute defines a crime against humanity as an act “committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial, or religious grounds.” The ICTR definition is closer to the position of the Rome Statute, which requires that a crime against humanity be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁸⁵ An “attack” means a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a state, or organizational policy to commit such attack.⁸⁶

The requirement of an armed conflict: The requirement of an armed conflict is stated in Article 6 (c) of the Nuremberg Charter.⁸⁷ The ICTY and the ICTR differ in that the ICTY requires proof of the existence of an armed conflict while the ICTR does not. The reference of The Nuremberg Charter’s definition of “crimes against humanity” to acts “before or during the war”⁸⁸ 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

⁸⁵Rome Statute *supra* note 12, at Art. 7(1).

⁸⁶*Id.* at Art. 7(2) (a).

⁸⁷Nuremberg Tribunals *supra* note 68. *Also See*; Chesterman *supra* note 7, at 310. The Charter limited the Tribunal’s jurisdiction to crimes against humanity committed before or during the World War II. The Tribunal held that acts committed before 1939 were excluded due to the requirement that crimes against humanity be committed “in execution of or in connection with” war crimes or crimes against peace.

⁸⁸Charter 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.

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. It is now well settled that customary international law does not require the existence of an armed conflict for an act to be a crime against humanity. This position is reflected in the ICTR Statute and the Rome Statute.⁸⁹

⁸⁹Chesterman *supra* note 7, at 310.

Attack directed against any civilian population: The ICTY Statute’s requirement that crimes against humanity be “directed against any civilian population” has led to some uncertainty as to whether it was necessary to establish a connection between the act and the armed conflict, or between the act and an attack on a civilian population.⁹⁰ Under the terms of the ICTR an “attack” bears no necessary relation to an armed conflict. Instead, it refers to the context of the acts, which are enumerated in Article 3, para. (a) to (i) of the Statute. In the Akayesu case, the ICTR Trial Chamber 1 held that an attack may be defined as an unlawful act of the kind enumerated in the ICTR Statute, noting that an attack maybe nonviolent in nature.⁹¹ The concept of “attack” maybe defined as an unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute. Including nonviolent acts that exert pressure on the population to act in a particular manner, if orchestrated on a massive scale or in a systematic manner. In a later Rwanda Tribunal case, Kayishema, Trial Chamber II it was held that an attack is the event that encompasses the enumerated crimes. The Rome Statute defines “attack” as “a course of conduct involving the multiple commission of determined acts . . .”⁹²

Because this area of international law is directed at specific circumstances, the best understanding of “attack” is understood to qualify the words “widespread” and “systematic.” In this regard, it refers to the context that elevates an act from the level of a domestic crime to a crime against humanity. As a policy requirement, whether the attack is widespread, systematic, or both, the relevant acts (s)

⁹⁰*Id.* at 311.

⁹¹*Id.* at 315.

⁹²Rome Statute *supra* note 12, at Article 7 (2) (a).

must be connected to some form of policy. However, there is no requirement that the policy comes from a central government or the state. The policy may be that of a private organization or a MNC. The requirements for a crime against humanity may be summarized as follows.

1. First, there are general requirements for an act to fall into the category of crimes against humanity. The act must have been committed: (a) in an armed conflict (ICTY Statute only); (b) as part of a widespread or systematic attack; (c) against civilian population; and (d) on discriminatory grounds.

2. Second, the act must constitute one of the enumerated acts in Article 3 (a)-(i).

Additionally there needs to be the necessary mental knowledge element specific to the act.

While the current international law understanding of “attack” relates to some form of armed conflict, it should not be limited to just these situations. The limitations are partly due to the politics surrounding international law enforcement. It is often the case that in order to get the greatest amount of states to adhere to international agreements narrow definitions are adopted. Starting from narrow definitions through the cross-fertilization of treaties, customary international law and case law there is a gradual expansion of definitions to cover a wider scope of possible interpretations. As crimes against humanity are substantially enforced with greater legal efficiency, both in domestic courts, regional courts and the new International Permanent Criminal Court (PICC), then they should be expanded upon to cover actions that are not specifically armed

conflicts.⁹³

Further interpretative guidance to crimes against humanity can be derived from the Preamble to the Rome Statute. The Vienna Declaration on Treaty interpretations Art 31. And 32 direct interpretations to be in good faith and in light of current meanings including draft articles and conferences. It is important to read and interpret treaties in the spirit and intent that was intended. The Rome Conference itself apparently concluded that the definitions of the three “core crimes” and “elements of crime” were not sufficiently precise.⁹⁴ When considering how wide to interpret the criteria and elements of crimes against humanity, it is necessary to look for additional guidance in the Preamble of the statute.

⁹³The 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.

⁹⁴J. E. Noyes, Panel Discussion: Assn. Of American Law Schools Panel on the International Criminal Court 36 Am. Crim. L. Rev. 245 (1999).

The Preamble of the Statute considers that certain crimes are of “a shared heritage, and concern . . . of the most serious crimes of concern to the international community as a whole, and that deeply shocks the conscience of humanity . . . for the sake of present and future generations.”⁹⁵

The continual process to define the elements of crimes against humanity can only progress at the rate that the international community can tolerate given the diversity of political, economic and cultural traditions. Ultimately, the PICC will have to interpret its Statute on the basis of the circumstances and facts presented in the cases that come before it. The accumulated knowledge of past Courts and Tribunals will be of some assistance. However, the PICC may have to draw from a wider field of treaties, customary international law and general principles of international law to answer the difficult questions surrounding MNCs responsibility for crimes against humanity.⁹⁶ As in all situations of emerging international law, and in particular those surrounding human rights issues and individual criminal responsibility, there are no straightforward easy answers.

⁹⁵Rome Statute *supra* note 12.

⁹⁶ICJ *supra* note 71.

Inherent constraints outline the legitimate interpretation of international agreements. They include 'living instrument'⁹⁷ approach to treaties, which must be interpreted 'in good faith' in the light of present-day conditions according to the changing needs of contracting states.⁹⁸ It is not just the importance of protecting a fundamental right or its importance in the treaties collective scheme of protecting rights that encourages if the interpretation should be more demanding. Given that there might be comparatively little case work surrounding the treaty, or statute, draft history has a relevance to determine the meaning where such an interpretation is 'ambiguous or obscure.'⁹⁹ For further guidance it is necessary to consider additional draft documents.

The International Law Commission Report Draft Codes of Crimes Against the Peace and Security of Mankind¹⁰⁰ provides further guidance as to possible developments to widening the scope of crimes against humanity. In the introduction (A) (46) the commission stated that the draft code was adopted with the following understanding that the scope of the Code was limited in order to reach state consensuses.¹⁰¹ The Commission acted in response to the interest of adoption of the Code and of obtaining support by governments. The limited list of crimes adopted does not in any way preclude the further development of this important area of law. In (A) (48) the Commission recommends that the General Assembly select the most appropriate form

⁹⁷ See; European Court of Human Rights Courts decisions concerning the approach to regional international treaty interpretations *per*, *Tyler v. UK*, 26 Eur. Ct. H.R. (ser. A) at para. 31 (1978).

⁹⁸ Vienna Convention on Treaty interpretations Articles 31-33.

⁹⁹ *Golder v. UK*, 18 Eu. Ct. H.R. (ser. A) at para. 2 (1975). European Ct. takes the view Art. 31-33 of the Vienna Convention are reflective of customary international law.

¹⁰⁰ International Law Commission Report *supra* note 12.

¹⁰¹ D. McGoldrick, *The Permanent International Criminal Court: an end to the culture of impunity?* Crim. L. R. 630 (1999).

which would ensure the widest possible acceptance of the draft Code. Article 1 (2) refers to the limitations of the present Code and the scope of the crimes covered. From this it is possible to see that there are possible conflicting state values in determining the substantive enforce-ability of certain crimes, however this should not be taken as absolute but a response to present international political circumstances.

In general the draft Codes are far wider than the final provisions adopted by the Rome Statute.

Article 18, crimes against humanity, make reference to the developments since the Nurnberg Tribunal and in doing so imply that further developments should be expected. There are numerous references to possible inclusions to the scope of crimes against humanity and individual responsibility. Article 18 (f) and (k) consider institutionalized discrimination on grounds involving the violation of fundamental human rights and freedoms resulting in seriously disadvantaging a part of the population, and other inhumane acts¹⁰² which severely damage physical or mental integrity, health of human dignity. In order to provide the greatest amount of protection it is necessary for crimes against humanity to have a broad meaning, therefore general formulations, rather than detailed rules, should be used in interpretations.

However, this is an idealistic approach that challenges state sovereignty, economic globalization and imposes western democratic values on other states. Progress in this area needs to be cautious taking into account different variables in order to maintain global economic stability. As moral and ethical values are gradually introduced MNCs

¹⁰² *Also see; Nuremberg Principles VI "other inhumane acts."*

will be obligated to change and comply with higher standards.¹⁰³ For those MNCs that do not progress within the emerging global social contract then it should only be right that they and the individual decision makers be held criminally liable to the global community. In the course of time the PICC and other international judicial bodies may play an important role in deterrence, ending the culture of impunity and ensuring international justice.¹⁰⁴

¹⁰³McGoldrick *supra* note 101, at 654.

¹⁰⁴*Id.* at 655.

Conclusion

The globalization of markets has presented many new opportunities for MNCs as they expand. Because they act beyond the bounds of state sovereignty and traditional state accountability mechanisms there needs to be a realignment not only of values, but methods of international accountability. The realignment of global values includes many human rights considerations, however, due to the difficulty in determining specific universal values the process of implementing values is slow. At the moment MNCs have certain freedom to expand into less developed states and operate with less accountability than exist in their host state. This has proved to be problematic especially when the MNC does not adhere to acceptable human rights standards.

Because of the difficulties surrounding globalization issues it is important to start with basic values already recognized in international law. These peremptory norms can be built upon in scope to cover a wider range of acceptable standards of behavior. By investigating the possibility for holding MNCs and individual decision makers responsible for crimes against humanity it is one way to identify values that can be made substantive within the globalization of democratic governance.