

Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges

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The function of international law is to provide a legal basis for the orderly management of international relations. The traditional nature of that law was keyed to the actualities of past centuries in which international relations were inter-state relations. The actualities have changed; the law is changing.¹

INTRODUCTION

¶1 A piece published in the Harvard Law Review in 2001 made an ostensibly innocuous statement on the extant state of international law regarding the legal status of corporations.

Though corporations are capable of interfering with the enjoyment of a broad range of human rights, international law has failed both to articulate the human rights obligations of corporations and to provide mechanisms for regulating corporate conduct in the field of human rights. Since the nineteenth century, international law has addressed almost exclusively the conduct of states. Traditionally, states were viewed as the only “subjects” of international law, the only entities capable of bearing legal rights and duties. Over the last fifty years, though, the gradual establishment of an elaborate regime of international human rights law and international criminal law has begun to redefine the individual’s role under international law. It is now generally accepted that individuals have rights under international human rights law and obligations under international criminal law. *This redefinition, however, has occurred only partially with respect to legal persons such as corporations: international law views corporations as possessing certain human rights, but it generally does not*

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¹ Philip C. Jessup, *The Subjects of a Modern Law of Nations*, 45 MICH. L. REV. 383, 384 (1947); see also Myres S. McDougal & Gertrude C.K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 YALE L.J. 60, 84 (1949).

*recognize corporations as bearers of legal obligations under international criminal law.*²

¶2 The article also stated that “international law is virtually silent with respect to corporate liability for violations of human rights”³ and “has neither articulated the human rights obligations of corporations nor provided mechanisms to enforce such obligations.”⁴

¶3 The above statements have been the subject of severe strictures by a section of the scholarly community who view them as a misstatement of the law.⁵ Some of these scholars, supported by human rights activists, have proceeded to argue that international human rights law imposes direct duties on corporations and other private actors.⁶

¶4 The two opposing positions have recently been challenged by the United Nations (“UN”) Secretary-General’s Special Representative on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (“SRSG”)⁷ mandated by the UN’s apex human rights body,⁸ *inter alia*, to identify and clarify the obligations of corporations in international law. Then UN Secretary-General Kofi Annan appointed Professor John Ruggie of the Kennedy School of Government at Harvard University to this position in July 2005.⁹ Within the terms of his original two-year mandate, which, upon his request, has since been extended by another year, the SRSG has come to the conclusion that the position of the corporation in international law has undergone some change, but that this change is not as far-reaching as that expressed by a number of academics and civil society groups.

¶5 Both at the issuance of his interim report in 2006¹⁰ and at the submission of what would have been a final report at the conclusion of his original mandate in 2007, the

² *Developments in the Law—Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2030-31 (2001) (citations omitted) (emphasis added).

³ *Id.* at 2025.

⁴ *Id.* at 2025–26.

⁵ Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT’L L. 801, 802 n.2 and accompanying text (2002) [hereinafter Paust, *Human Rights Responsibilities*]; Andrew J. Wilson, *Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable Under the Alien Tort Claims Act*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 43, 53 (Olivier de Schutter ed., 2006).

⁶ See, e.g., Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT’L L. 1229, 1242-43 (2004) [hereinafter Paust, *Reality of Private Rights*] (“As documented in a study of human rights duties of private corporations, most modern human rights instruments create private duties expressly or by implication.”) (citation omitted); Paust, *Human Rights Responsibilities*, *supra* note 5, at 810-15. See also Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 54 (1992) (for an earlier argument along these lines); NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 36 (2002) (staking a position in that direction).

⁷ The appointment of a special representative to deal with the issue of business is unprecedented in the history of the UN, further buttressing the growing importance of this subject. See Jane Nelson, *The Way Forward – The Mandate of the Special Representative*, in THE 2005 BUSINESS & HUMAN RIGHTS SEMINAR REPORT: EXPLORING RESPONSIBILITY AND COMPLICITY 31, 31 (Dec. 8, 2005).

⁸ The United Nations Human Rights Commission, now replaced by the Human Rights Council. The Human Rights Council was established via United Nations General Assembly resolution 60/251 of April 3, 2006, adopted at the 60th session of the assembly. G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

⁹ See Annie Wallis, *Data Mining: Lessons from the Kimberley Process for the United Nations’ Development of Human Rights Norms for Transnational Corporations*, 4 NW. U. J. INT’L HUM. RTS. 388, ¶ 66 (2005).

¹⁰ The Special Representative of the Secretary-General, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business*

SRSG took a position somewhat at variance with the two opposing views and essentially adopted a middle position.¹¹

¶16 Ruggie's reports indicate that in the course of the past few decades, the legal status of corporations in international law has shifted to some extent from the classical position, with corporations now considered bearers of duties under international criminal law.¹² The SRSG believes that while this shift is emerging in the international criminal context, it has not yet extended to other aspects of human rights law. Ruggie's report notes, however, that significant changes are occurring in the domestic and international planes that suggest that a more far-reaching shift, that would more fully integrate private business enterprises into the international legal system, will occur some time in the near future.¹³

¶17 This clarification is of immense significance because the cacophony that has surrounded this discussion has, over the years, constituted a formidable obstacle to any meaningful progress in identifying the proper place and role of corporations -- especially multinational corporations ("MNCs") -- in contributing to the solution of many global problems.¹⁴ Even with the clarification, which is a product of broad consultations with representatives of the divergent positions,¹⁵ it is not certain that the disputation will die

Enterprises, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter *Interim Report*].

¹¹ The Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie: *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, delivered to the Human Rights Council*, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007) [hereinafter *Mapping International Standards*].

¹² For an articulation of this position that preceded both the Harvard Law Review article and the SRSG's reports, see Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

As the US Military Tribunal Judgments in Nuremberg show, corporations are bound by international criminal law concerning war crimes and crimes against humanity. Fifty years later at the Rome Conference on the International Criminal Court, no delegation challenged the conceptual assumption that legal persons are bound by international criminal law.

Id. at 191. While the SRSG would agree with the conclusion regarding the legal position, it is doubtful that he accepts the premise behind it. Thus, the assertion that one can surmise the acceptance of States of this legal position from their silence during the Rome Conference negotiations or that the extension of international criminal responsibility to multinational corporations dates as far back as 1945 leave a lot of room for challenge. To that extent, neither contention suffices as a basis to consider the Harvard Law Review position a misstatement of the extant law.

¹³ See further, ANITA RAMASASTRY & ROBERT C. THOMPSON, *COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW: A SURVEY OF SIXTEEN COUNTRIES* (Fafo-Report 536, 2006).

¹⁴ Some scholars have offered suggestions on how to avoid what appears to be an unproductive debate on the subjectivity of multinational corporations in international law. See, e.g., Daniel Thürer, *The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State*, in *NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW: INTERNATIONAL LAW - FROM THE TRADITIONAL STATE ORDER TOWARDS THE LAW OF THE GLOBAL COMMUNITY* 37, 53 (Rainer Hofmann ed., 1999) (suggesting a constitutional approach that would enable us "avoid the intensely debated but largely sterile question" of whether transnational enterprises have joined the category of subjects of international law).

¹⁵ See Liz Umlas, *Commentary on The Ruggie Report: The Interplay of Business, States and Human Rights*, KLD NEWSLINE (Apr. 2007), available at http://www.kld.com/newsletter/Newsline/April_2007_Newsline/Commentary_on_The_Ruggie_Report_full.html.

down.¹⁶ It can only be hoped that interested parties can move beyond the unhelpful intellectual debates on the legal status of corporations¹⁷ and begin to focus strongly on formulating solutions to the monumental problems confronting humanity, some of which MNCs¹⁸ have played a substantial role in creating.¹⁹

¶8 The terms “international legal person” or “legal personality”²⁰ are usually employed in reference to entities that are “capable of possessing international rights and duties and endowed with the capacity to take certain types of action on the international plane.”²¹

¹⁶ Ruggie contributes to the confusion himself, with a choice of language that seems to equivocate on whether the imposition of direct duties on corporations under international law is a definite fact. In his interim report, he writes about the “possible exception of certain war crimes and crimes against humanity.” *Interim Report, supra* note 10, ¶ 60 (emphasis added). In the 2007 Report, he speaks of criminal responsibility of corporations in international law as “emerging” and adds: “Although it continues to evolve, there is observable evidence of its existence.” *Mapping International Standards, supra* note 11, ¶ 33. He then proceeds to use that argument as a basis for stating that this shift has not affected human rights obligations in general: “In contrast, what if any legal responsibilities corporations may have for other human rights violations under international law is subject to far greater existential debate.” *Id.* (citation omitted).

¹⁷ The present author has previously commented on this debate. In relevant areas, this work draws extensively from, and revises substantially Chapter 6 of the author’s monograph on the subject. *See* EMEKA A. DURUIGBO, *MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY AND COMPLIANCE ISSUES IN THE PETROLEUM INDUSTRY* 189-208 (2003).

¹⁸ Although some differences can be identified with other related terms such as “transnational corporations (TNCs)” and “multinational enterprises (MNEs)”, the term “multinational corporations (MNCs)” will be used interchangeably in this work with these related terms. *See* WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 8296.10 (Sept. 2007) (stating that these terms are used interchangeably). The term multinational corporation has been defined in various ways, although no consensus exists. *See* Alejo José G. Sison, *When Multinational Corporations Act as Governments: The Mobil Corporation Experience*, in *PERSPECTIVES ON CORPORATE CITIZENSHIP* 166, 166 (Jörg Andriof & Malcolm McIntosh eds., 2001) (“Strangely, there is no agreed definition for a ‘multinational corporation.’”). For definitions, *see, e.g.*, Alfred D. Chandler, Jr. & Bruce Mazlish, *Introduction to LEVIATHANS: MULTINATIONAL CORPORATIONS AND THE NEW GLOBAL HISTORY* 1, 3 (Alfred D. Chandler, Jr. & Bruce Mazlish eds., 2005) [hereinafter *LEVIATHANS*].

One of the simplest definitions is that MNCs are firms that control income-generating assets in more than one country at a time. A more complicated definition would add that an MNC has productive facilities in several countries on at least two continents with employees stationed worldwide and financial investments scattered across the globe.

Id. *See also* PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 12 (1995) (explaining that economists define the multinational as an entity that “owns (in whole or in part), controls and manages income generating assets in more than one country”); PHILLIP BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* viii (1993) (defining MNCs as affiliated corporations that are incorporated in different jurisdictions but are conducting a common enterprise under common control); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 *AM. J. INT’L L.* 901, 907-10 (2003) (providing a variety of definitions of the terms MNC, TNC and MNE).

¹⁹ *See* Karsten Nowrot, *Reconceptualising International Legal Personality of Influential Non-State Actors: Toward a Rebuttable Presumption of Normative Responsibilities*, 79 *PHIL.L. J.* 563 (2004) (“The increasingly important role of multinational corporations as economic and political actors on the international scene results in chances for, but especially also risks to, the promotion of community interests, also known as global public goods, such as, for example, the protection of human rights and the environment, as well as the enforcement of core labour and social standards.”) (citations omitted).

²⁰ For a discussion of the concept of legal personality in the domestic and international systems, *see* Esa Paasivirta, *The European Union: From an Aggregate of States to a Legal Person?*, 2 *HOFSTRA L. & POL’Y SYMP.* 37, 38-45 (1997).

²¹ LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 249 (4th ed. 2001).

Such entities are also known as subjects of international law.²² It is a trite fact that the international legal and political system is state-centric.²³ It is primarily concerned with, and concentrates its attention on, nation-states. J.L. Brierly's 1963 definition of international law as "the body of rules and principles of actions which are binding upon civilized States in their relations with one another"²⁴ was representative of the common position at the time he wrote. The overwhelming focus on states has led many scholars and commentators to conclude that international law is law pertaining to states only and that only states are the subjects of international law.²⁵ This view is quite entrenched and under its extreme version, individuals, MNCs, intergovernmental and non-governmental organizations all interact with the international system, but are objects rather than subjects.²⁶

This conclusion is not of merely theoretical importance,²⁷ but is of particularly pressing significance and consequence to the modern world. It suggests that the activities of other actors in the international plane are not under direct international legal control, even when such activities represent a clear breach of the stipulations and regulations of the international legal system.²⁸ This point is more pronounced in the human rights arena which, by its nature, makes the primacy of application to states more easily justifiable.²⁹

²² *Id.* See also Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533, 535 (1956) ("The subjects of international law may be defined as persons to whom international law attributes rights and duties directly and not through the medium of their states.").

²³ See Simon Chesterman, *Oil and Water: Regulating the Behavior of Multinational Corporations Through Law*, 36 N.Y.U. J. INT'L L. & POL. 307, 309-10 (2004); A. F. M. Maniruzzaman, *International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View*, 20 WIS. INT'L L.J. 1, 11 (2001).

²⁴ J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 1 (Sir Humphrey Waldock ed., 6th ed. 1963). See also INTERNATIONAL LAW: TEACHING AND PRACTICE 516 (Bin Cheng ed. 1982) (stating that "the international legal system is still basically a legal system established and maintained by States to regulate their mutual relationships").

²⁵ L. OPPENHEIM, *INTERNATIONAL LAW* (2d ed. 1912).

²⁶ See Jessup, *supra* note 1, at 383 ("International law is generally defined or described as law applicable to relations between states. States are said to be the subjects of international law and individuals only its 'objects.'"). The object-subject distinction can be likened to the game of chess in which the objects are the chessmen on the chessboard and subjects are the chess players. See Sigmund Timberg, *International Combines and National Sovereigns* 95 U. PA. L. REV. 575, 576 n.4 (1947) [hereinafter Timberg, *International Combines*]. For an illuminating discussion of the evolution and import of the object theory, see George Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT'L L. 428 (1952).

²⁷ For an expression of similar sentiment in the context of an inquiry into the legal personality of an international organization, see Hugo J. Hahn, *Euroatom: The Conception of an International Personality*, 71 HARV. L. REV. 1001, 1043-55 (1958).

²⁸ See Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L. J. 748, 764 (stating that the accountability of corporations to international legal rules appear to be linked to the extent of their ability to be direct participants in the international legal process); Nicola Jägers, *The Legal Status of the Multinational Corporation Under International Law*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 259, 261 (Michael K. Addo ed., 1999) ("Under present international law entities only owe responsibilities to the international community when they are considered to be subjects of law; in other words, the bearers of international legal personality."); Special Rapporteur, *First Report on Responsibility of International Organizations*, ¶ 15, delivered to the International Law Commission, U.N. Doc. A/CN.4/532 (Mar. 26, 2003) (noting that "responsibility under international law may arise only for a subject of international law," and adding that "[n]orms of international law cannot impose on an entity 'primary' obligations or 'secondary' obligations in case of a breach of one of the 'primary' obligations unless that entity has legal personality under international law").

²⁹ This is because the objective of the human rights system has been the protection of individuals from the

¶10 Over the course of time, noticeable changes have begun to occur in the perception and reception of non-state actors on the international stage.³⁰ The structure of international law has undergone some transformation with the recognition that, in certain situations and under a range of circumstances, some other entities besides the state come within the direct protection of international law or owe some clearly defined duties to uphold the dictates of that law. This is particularly evident with regard to human rights and humanitarian issues.³¹

¶11 There is a glaring gap in this movement toward change. While the international rights and duties of international organizations and, to a lesser extent, individuals, have received some recognition under the international legal system, the same cannot be said of the MNC.³² There appears to now be a grudging acceptance that international law governs the activities of juridical persons that implicate international criminal law.³³ It is generally believed that the changes in the international legal position and responsibility of corporations have been limited to international criminal law. However, one should not lose sight of the strong insistence in some quarters that the changes extend beyond international crimes to other aspects of international human rights.³⁴

¶12 Therefore, a critical, unresolved question confronting contemporary international legal scholars and practitioners centers on the extent to which other actors in the international sphere, besides states and intergovernmental organizations, possess international legal personality.³⁵ As a matter of fact, the controversy surrounding international legal personality is an age-old one.³⁶ Today, the issue acquires greater importance considering the growing relevance and significance of the MNC in an era of globalization and liberalization of trade and investment.³⁷ The fact cannot be gainsaid that the status of the corporation in the international sphere has appreciated significantly

abusive exercise of power by their governments and not necessarily the regulation of private-to-private conduct. See David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 935 (2004) ("The orthodox vision of international human rights law generally binds only states because it is principally designed to protect individuals from the excesses of state power."); Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT'L L. 691, 724 (2006); Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, *supra* note 12, at 75.

³⁰ See generally NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW, *supra* note 14.

³¹ In general, however, human rights and humanitarian law applies mainly to States, despite the changes that have occurred in the past few decades. See John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 VAND. J. TRANSNAT'L L. 1447, 1455 (2006).

³² See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 55 (1994); IGNAZ SEIDL-HOHENVELDERN, *CORPORATIONS IN AND UNDER INTERNATIONAL LAW* (1987).

³³ See *supra* notes 11, 12, and accompanying text.

³⁴ *Supra* notes 5, 6, and accompanying text.

³⁵ See James E. Hickey, Jr., *The Source of International Legal Personality in the 21st Century*, 2 HOFSTRA L. & POL'Y SYMP. 1, 11-12 (1997).

³⁶ The controversy has taken various forms in relation to different international legal persons or potential subjects. See Andrew Stumer, *Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections*, 48 HARV. INT'L L. J. 553, 572-74 (2007) (referring to the controversy surrounding certain aspects of the personality of international organizations).

³⁷ One scholar has astutely observed that "[t]he regulation of multinational corporations looms as one of the major challenges facing the international legal system at the start of the 21st century." Beth Stephens, *Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, *supra* note 12, at 209.

over the years. Corporations play key roles in the global marketplace and participate vibrantly in the shaping of international law, albeit indirectly. Their rights, especially regarding investment issues, have also been recognized in a number of international instruments.³⁸ International environmental law also imposes a few direct duties on corporations.³⁹ Nonetheless, corporations still remain clearly outside the mainstream of international law.⁴⁰

¶13 Some observers have made the point that international law cannot continue to play the ostrich and pretend that these corporations can be under the effective control of national laws and institutions only.⁴¹ Victims of multinational corporate abuses, particularly in the human rights and environmental arenas, have raised their voices and international policymakers are beginning to take note.⁴² As a result, a number of high-level discussions among scholars, policymakers, business groups and non-governmental organizations have commenced to locate the proper place of business entities in international law.⁴³ The most prominent of such initiatives at the moment is the appointment of the SRSG.

¶14 This article traces the controversy surrounding the position of the corporation in international law up to this point and examines the changes in the international legal status of corporations as well as challenges to direct corporate regulation and accountability. In essence, it looks not only at the issues of whether and to what extent international law directly regulates corporations, but also whether it *should*. This work focuses primarily on MNCs in view of the fact that, of all types of corporations and business organizations, they are -- because of their “amorphous nature”-- the least likely to be amenable to the control of any particular state, thus simultaneously raising problems for, and inviting, international legal control.⁴⁴ When determining the subject of a legal order, the obvious answer is the body or entity to whom the norms of the legal order apply, and more specifically, whose conduct such order regulates or licenses by imposing

³⁸ JEFFREY DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 216, 217 (2d ed. 2006).

³⁹ See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L. J.* 443, 479–81 (2001).

⁴⁰ As noted in the 1987 Restatement of the Foreign Relations Law of the United States, although the profile of the multinational corporation has appreciated significantly in the international system, the MNC “has not yet achieved special status in international law.” *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 213(f) (1987).

⁴¹ See, e.g., *CTR. FOR HUM. RTS. & GLOBAL JUST. AT THE N.Y.U. SCH. OF LAW, & HUM. RTS. WATCH, ON THE MARGINS OF PROFIT: RIGHTS AT RISK IN THE GLOBAL ECONOMY* 3 (Feb. 2008) (“Our overarching conclusion is that global intergovernmental standards on business and human rights are needed.”), available at <http://hrw.org/reports/2008/bhr0208/bhr0208webwcover.pdf>.

⁴² See HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1388 (3d ed. 2008) (“The past decade or so has seen extensive activity aimed at developing corporate human rights accountability.”).

⁴³ See David Weissbrodt, *Business and Human Rights*, 74 *U. CIN. L. REV.* 55, 55 (2005). (“As human rights abuses have persisted worldwide, so too have various attempts to establish international standards for corporate actions.”).

⁴⁴ Menno T. Kamminga & Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law: Introduction* to *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW*, *supra* note 12, at 1, 3. See also Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 *COLUM. HUM. RTS. L. REV.* 287, 290 (2006) (“Unlike domestic corporations, multinational corporations form webs of economic relationships well beyond the control of any one state.”) (citation omitted).

duties or conferring rights. However, a legal system (in this case international law) may in some circumstances regulate or license the conduct of other lesser entities, such as MNCs, without direct regulation. The focus of the present study, however, is on direct, not indirect regulation.

¶15 This article is organized into five major parts. Part I takes a look at the origin and evolution of the MNC. The utility of tracing the origin and growth of MNCs may rightly elicit skepticism, which is further exacerbated by the fact that it is difficult to reconcile the disparate historical accounts. Yet a historical excursion is useful if only to illuminate and contextualize the amazing journey and interesting evolution of the MNC from a barely noticed business association to the major force it has become today with an enormous influence on social, economic, political and legal developments domestically and internationally.⁴⁵

¶16 Part II tackles the perennial problem of international legal personality. The predominant views and theories of legal personality are examined regarding the status (or lack thereof) of corporations as subjects of international law. The issue of whether corporations are entities capable of possessing rights and duties in international law is most relevant to the debate on the role of the international system in controlling the activities of MNCs operating in various parts of the world.

¶17 Part III discusses the changing position of the MNC in international law. This part critically examines the SRSG's conclusions on this issue. This article, however, limits itself to that aspect of the SRSG's assignment alone and does not address other issues covered in his mandate. Part IV offers some rationale for this change in position, as well as challenges thereto and Part V concludes the article. The object of this work is to provide a further opportunity to think critically about the place of MNCs in international law and to lay a foundation for forging the right course for advancing human rights and promoting corporate accountability, thus improving the lot of those adversely affected by corporate conduct, particularly in developing countries.

I. ORIGIN AND EVOLUTION OF THE MULTINATIONAL CORPORATION

¶18 The first known use of the term “multinational corporation” was by David Lilienthal at a conference at Carnegie Mellon University in 1960.⁴⁶ This fact, of course, has no bearing on the age of the MNC, an entity whose existence dates back at least several centuries.⁴⁷

⁴⁵ For a more sophisticated discussion of how history matters in international business studies, see Geoffrey Jones & Tarun Khanna, *Bringing History (back) into International Business*, 37 J. INT'L BUS. STUD. 453 (2006); see also *Robertson v. Levy*, 197 A.2d 443, 444 (D.C. 1964) (Hood, C.J., lead opinion) (commenting that in order to come to a better understanding of the problems raised in that situation, “some historical grounding is not only illuminative but necessary”).

⁴⁶ Stephen J. Kobrin, *Multinational Corporations, the Protest Movement, and the Future of Global Governance*, in LEVIATHANS, *supra* note 18, at 219, 222; *Bulova Watch Company, Inc. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1335 (E.D.N.Y. 1981).

⁴⁷ For excellent accounts of the historical evolution of multinational enterprises, see *inter alia*, JAMES W. VAUPEL & JOAN P. CURHAN, *THE MAKING OF MULTINATIONAL ENTERPRISE* (1969); MIRA WILKINS, *THE EMERGENCE OF MULTINATIONAL ENTERPRISE: AMERICAN BUSINESS ABROAD FROM THE COLONIAL ERA TO 1914* (1970); JAMES VAUPEL & JOAN P. CURHAN, *THE WORLD'S MULTINATIONAL ENTERPRISE* (1973); MIRA WILKINS, *THE MATURING OF MULTINATIONAL ENTERPRISE: AMERICAN BUSINESS ABROAD FROM 1914 TO 1970* (1974); JOAN CURHAN ET AL., *TRACING THE MULTINATIONALS* (1977); GEOFFREY JONES, *THE EVOLUTION OF INTERNATIONAL BUSINESS: AN INTRODUCTION* (1996); John H. Dunning, *Changes in*

¶19 Indeed, a number of classical scholars and economic and business historians trace the origin of MNCs to more than 2000 years ago. According to Karl Moore and David Lewis, “the businesses operated by the ancient Assyrian colonists [in the second millennium B.C.] constituted the first genuine multinational enterprises in recorded history.”⁴⁸ From the 13th to the 16th centuries, many European businesses involved in such diverse sectors as banking, mining and manufacturing had investments and operations across political borders and conceivably could be categorized as transnational or multinational.⁴⁹

¶20 Some scholars, however, reject any notion of the existence of the MNC in earlier epochs. One commentator encapsulates the criticisms thus:

[M]ultinationals . . . have been traced back two thousand years by classical scholars. This is accurate in the sense that certain trading groups were transnational. It is anachronistic in that nation-States did not exist at the time, thus giving a different meaning to multinational. If we add the word “corporation,” we again must realize that it is a legal term given precise meaning only recently. In any case, modern multinational corporations can be discerned emerging in the seventeenth century and flourishing, for example, in the shape of the Dutch and British East India companies.⁵⁰

¶21 Still other scholars situate the emergence of the MNC in the second half of the 19th century.⁵¹ One legal scholar notes: “Although business enterprises probably have had some type of foreign operations since the Middle Ages, multinational corporations as we now know them did not appear until the mid-nineteenth century, when advances in technology, manufacturing, and management processes made possible the international division of a firm’s production.”⁵²

¶22 Regardless of the precise history and evolution of the MNCs, some inescapable facts jump to attention. One is that the modern MNCs differ in many significant respects from their precursors, particularly in terms of their size, reach and sophistication of

the Level and Structure of International Production: The Last One Hundred Years, in *THE GROWTH OF INTERNATIONAL BUSINESS* 84 (Mark Casson ed., 1983).

⁴⁸ KARL MOORE & DAVID A. LEWIS, *BIRTH OF THE MULTINATIONAL: 2000 YEARS OF ANCIENT BUSINESS HISTORY—FROM ASHUR TO AUGUSTUS* 27 (1999).

⁴⁹ See Mira Wilkins, *Multinational Enterprise to 1930: Discontinuities and Continuities*, in *LEVIATHANS*, *supra* note 18, at 45, 47-49; Yitzhak Hadari, *The Structure of the Private Multinational Enterprise*, 71 *MICH. L. REV.* 729, 735 (1973); Mark B. Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?* 24 *U. MIAMI INTER-AM. L. REV.* 399, 401 (1993); KWAMENA ACQUAAH, *INTERNATIONAL REGULATION OF TRANSNATIONAL CORPORATIONS: THE NEW REALITY* 45 (1986) (“Some intellectual archaeologists have traced the origins of TNCs to the fifteenth century Fuggers merchant family which was based in Augsburg [Germany] and operated various economic activities throughout Europe.”).

⁵⁰ Bruce Mazlish, *A Tour of Globalization*, 7 *IND. J. GLOBAL LEGAL STUD.* 5, 11 (1999). See further, Sigmund Timberg, *The Corporation as a Technique of International Administration*, 19 *U. CHI. L. REV.* 739, 739 (1952).

⁵¹ See MUCHLINSKI, *supra* note 18, at 20; Natasha Rossell Jaffe & Jordan D. Weiss, *The Self-Regulating Corporation: How Corporate Codes can Save our Children*, 11 *FORDHAM J. CORP. & FIN. L.* 893, 897 (2006).

⁵² Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 *GEO. L. J.* 563, 569 (1999) (citation omitted).

operations.⁵³ Secondly, MNCs were not significant features in the global marketplace or political landscape until fairly recently -- perhaps as recently as after World War II.⁵⁴

II. THEORIES OF LEGAL PERSONALITY

¶23

Before delving into the important theoretical discussion of personality and subjectivity, it is instructive to note that determining the subjects of international law is closely bound up with the basic concept of international law itself. Thus, as one concept has undergone a significant metamorphosis, invariably so has the other. Until the early part of the twentieth century, international law was defined with an exclusive focus on states and their relations with each other.⁵⁵ The reason for this definition is easy to

⁵³ One business historian has observed:

I believe that to a significant extent there was a wide divide between the modern MNEs and their many precursors. The modern MNEs of the 19th (particularly late 19th) and 20th centuries have had a formidable impact on globalization. The MNE integrates the world economy in a manner that differs from trade, finance, migration, or technology transfer; it puts under one organizational structure a package of ongoing relationships – transfers of goods, capital, people, ideas, and technology. Moving internationally from the more advanced parts of the world through the MNE are business culture, practices, perspectives, and information along with products, processes and managers.

Wilkins, *supra* note 49, at 51 (citation omitted).

⁵⁴ As the court observed in *Bulova Watch*, *supra* note 46, at 1335, “it was not until after World War II that the phenomenon of the multinational enterprise, as we know it, became a major factor in the world scene.” See also PETER J. BUCKLEY & MARK CASSON, *THE FUTURE OF THE MULTINATIONAL ENTERPRISE* 1 (25th Anniv. ed. Palgrave Macmillan 2002) (“One of the most remarkable economic phenomena of the postwar period has been the rise of the multinational enterprise (MNE).”); MUCHLINSKI, *supra* note 18, at 25 (stating that the period from 1945 heralded and is characterized by the “unprecedented importance [of the multinational corporation] in international production.”); Geoffrey Jones, *Multinationals from the 1930s to the 1980s*, in LEVIATHANS, *supra* note 18, at 81, 101 (“The decades between the 1950s and the 1970s became the era of the classic MNE, when large integrated corporations appeared as the dominant organization form in international business.”); Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 538–39 (2002).

⁵⁵ The following sample of definitions is offered to accentuate this point. THEODORE D. WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW: DESIGNED AS AN AID IN TEACHING AND IN HISTORICAL STUDIES* 18 (2d ed. 1864) (“International law, *in a wide and abstract sense*, would embrace those rules of intercourse between nations which are deduced from their rights and moral claims; or, in other words, it is the expression of the jural and moral relations of states to one another.”); GEORGE B. DAVIS, *OUTLINES OF INTERNATIONAL LAW: WITH AN ACCOUNT OF ITS ORIGIN AND SOURCES AND OF ITS HISTORICAL DEVELOPMENT* 2 (1887) (defining international law as “comprising the aggregate of rules and limitations which sovereign states agree to observe in their intercourse and relations with each other”); THOMAS A. WALKER, *A MANUAL OF PUBLIC INTERNATIONAL LAW* 1 (1895) (“International law consists in those rules of conduct which civilised States observe in their relations with one another and with one another’s subjects.”); THOMAS J. LAWRENCE, *A HANDBOOK OF PUBLIC INTERNATIONAL LAW* 3 (1898) (defining international law as “[t]he rules which determine the conduct of the general body of civilised States in their dealings with each other”); GEORGE C. WILDON & GEORGE F. TUCKER, *INTERNATIONAL LAW* 3 (1901) (“International law may be considered . . . as setting forth the rules and principles which *are* generally observed in interstate relations.”) (emphasis in original); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 24 (1904) (“International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations.”); JOHN WESTLAKE, *INTERNATIONAL LAW* 1 (1910) (“International law . . . is the law of the society of states or nations.”); THOMAS J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 1 (1910) (defining international law as “the rules which determine the conduct of the general body of civilized states in their mutual dealings”); ROLAND R. FOULKE, *A TREATISE OF INTERNATIONAL LAW: WITH AN INTRODUCTORY ESSAY ON THE DEFINITION AND NATURE OF THE LAWS OF HUMAN CONDUCT* 138 (Vol. 1, 1920) (“International law, therefore, is that branch of law which relates

understand. At that time, international law was law that pertained to the affairs of states, and only certain states at that: the reference was only to “civilized states” or “Christian nations,” terms that excluded the vast majority of countries that compose the contemporary international community.⁵⁶ As international law’s reach and interests went beyond the activities of states, a shift in definition became inevitable. According to Michael Akehurst, the matter of definition of international law has “become more complicated due to both the expansion of the scope of international law into new areas and the emergence of actors other than states on the international plane.”⁵⁷ This remarkable redefinition is reflected in the more modern writings on international law.⁵⁸

¶24

Various theories exist regarding the notion of legal personality in the international system. The question has been posed countless times, and answers attempted equally as often, concerning which entities are subjects of international law.⁵⁹ This frequency in itself reveals the difficult and controversial nature of the subject, while also suggesting its importance.⁶⁰ The question of whether MNCs are subjects of international law would have been easier to answer if there were clear agreement among scholars on what constitutes legal personality under the international legal system.⁶¹ “Unfortunately, there is little agreement among scholars on the essential elements of legal personality.”⁶² This part navigates the murky waters of the controversy surrounding this issue in order to present a clearer picture of the status of MNCs in international law.

to the conduct of independent states.”); Edwin Maxey, *Development of International Law III: From American Independence to the Present Time*, 40 AM. L. REV. 188, 193 (1906) (quoting a definition of international law from another work as “that recognized universal law of nature which binds different states together in a human jural society, and which also secures to the members of different states a common protection of law for their general human and international rights.”); Roland R. Foulke, *Definition and Nature of International Law*, 19 COLUM. L. REV. 429 (1919) (“International law, therefore, is that branch of law which relates to the conduct of independent states.”); Joseph W. Stinson, *Definition and Sources of International Law with Relation to Private Right*, 42 CAN. L. TIMES 602, 604-05 (1922) (providing a couple of definitions with a bias toward an exclusive focus on states).

⁵⁶ See, e.g., THEODORE DWIGHT WOOLSEY & THEODORE SALISBURY WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW: DESIGNED AS AN AID IN TEACHING AND IN HISTORICAL STUDIES 3-4 (6th revised and enlarged ed. 1897).

⁵⁷ PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 1 (8th ed. 2007).

⁵⁸ *Id.* (quoting Restatement (Third)’s definition of Foreign Relations Law of United States, according to which, international law “consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *Inter se*, as well as with some of their relations with persons, whether natural or juridical.”); H.B. JACOBINI, INTERNATIONAL LAW: A TEXT 1 (1962) (“International law or the law of nations may be defined as that body of rules or laws which is binding on [S]tates and other international persons.”).

⁵⁹ August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 37, 69 (Philip Alston ed. 2005) (“The question of personality or subjectivity under international law has fascinated generations of international lawyers and it has remained a precarious and complicated one.”) (citation omitted).

⁶⁰ There is little doubt that this is an important subject. See Jaap W. de Zwaan, *The Legal Personality of the European Communities and the European Union*, 30 NETH. Y.B. INT’L L. 75, 77 (1999).

⁶¹ N.D. WHITE, THE LAW OF INTERNATIONAL ORGANIZATIONS 27 (1996) (“International personality appears to be a nebulous concept in international law.”). See also Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 59, at 3, 20 [hereinafter Alston, ‘Not-a-Cat’ Syndrome] (critiquing Bin Cheng’s articulation of the criteria for ascertaining whether an actor possesses international legal personality).

⁶² Charney, *supra* note 28, at 774. See also ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 62 (2006) (noting that “there seem to be no agreed rules for determining who can be classed a subject”).

¶25 Professor Christian Okeke, in his epic work on the subject entitled *Controversial Subjects of Contemporary International Law: An Examination of the New Entities of International Law and Their Treaty-Making Capacity*, outlines three essential elements that should be considered *conditio sine qua non* for an entity to be properly regarded as a subject of a legal system. Such an entity must (1) possess duties as well as responsibility for violating those duties; (2) have the capacity to benefit from legal rights as a direct claimant and not as a mere beneficiary; and (3) in some capacity, be able to enter into contractual or other legal relations with other subjects of the system.⁶³ The extent to which any entity meets these criteria appear to be strong factors in determining whether or not they are considered subjects of the international legal system.⁶⁴

A. States as the Sole Subjects of International Law

¶26 One of the leading theories on international legal personality is the traditional, classical or orthodox theory that emphasizes the position and capacity of states. “According to that theory, the only subjects of international law are nation-states. All other entities, particularly individuals and business organizations, interact with international law indirectly through their national governments.”⁶⁵ Providing a rationale for this position, Lassa Oppenheim reasoned that “[s]ince the Law of Nations is primarily a law between States, States are, to that extent, the only subjects of the Law of Nations.”⁶⁶

¶27 This traditional theory finds sanctuary mainly in the hallowed domain of subscribers to the classic dualist theory in international law. Dualism, unlike its counterpart theory, Monism,⁶⁷ is well-known for its association with “positivist theories and with the notion that States, not individuals, are the primary subjects of international

⁶³ CHRIS N. OKEKE, *CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW: AN EXAMINATION OF THE NEW ENTITIES OF INTERNATIONAL LAW AND THEIR TREATY-MAKING CAPACITY* 19 (1974). See also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 57-58 (6th ed. 2003) (“A subject of law is an entity capable of possessing rights and duties and having the capacity to maintain its rights by bringing international claims”) (citing *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11)).

⁶⁴ For a similar articulation of the criteria, see Henn-Jüri Uibopuu, *International Legal Personality of Union Republics of U.S.S.R.*, 24 INT’L & COMP. L.Q. 811 (1975).

International law requires certain criteria for legal personality. These are said to be: capacity to act in the international arena, capacity to enter into international agreements, capacity to pursue claims before international fora and capacity to be held responsible for the breach of international obligations.

Id. at 828 (citation omitted). See also Mala Tabory, *The Legal Personality of the Palestinian Autonomy*, in *NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO THE PALESTINE ENTITY* 139, 139 (Amos Shapira & Mala Tabory eds., 1999). (“When an entity is a legal personality in the context of international law, it is a subject of international law. Thereby it has capacity (a) to enter into legal relations; and (b) to have legal rights and duties.”).

⁶⁵ Charney, *supra* note 28, at 753 (citations omitted). See also Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 193 n. 145 (1988) (“Under the orthodox theory, only nation-states can be the subject of international law.”); MALUNCZUK, *supra* note 57, at 1.

⁶⁶ L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 636 (H. Lauterpacht ed., 8th ed. 1955).

⁶⁷ For a succinct description of the distinction between Dualism and Monism, see Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (Or, The European Way of Law)*, 47 HARV. INT’L L.J. 327, 327 n.1 (2006) (“Monists argue that international law and domestic law are part of the same system, in which international law is hierarchically prior to domestic law. Dualists, in contrast, claim that international law and domestic law are part of two distinct systems and that domestic law is generally prior to international law.”).

law.”⁶⁸ While discussing the work of a noted dualist, the German scholar Heinrich Triepel, respected scholar John Starke noted Triepel’s contention that “state law deals with individuals, international law regulates the relations between states, who alone are subject to it.”⁶⁹

¶28 The traditional theory has faced vigorous challenges over the years.⁷⁰ Some scholars question the validity of this view in the first place, seeing it as inconsistent with the history of international law.⁷¹ It was essentially on that basis that two scholars described the proposition that public international law deals with relations among states as a “nineteenth century canard.”⁷² These scholars view the emphasis on relations among states, to the exclusion of individuals, as a derogation from historical understandings of international law that garnered greater strength more recently as a product of 19th century positivism.⁷³ Besides, the theory did not seem to match the practice.⁷⁴ Malcolm Shaw observes that, in practice, there is less certainty that the orthodox position affirming states as the only subjects of international law was ever maintained.⁷⁵ He supports this claim by noting that non-state entities including the Holy See, insurgents and belligerents, international organizations, chartered companies, and some territorial entities such as the League of Cities have at some point or other been accorded a degree of recognition as international legal persons.⁷⁶

¶29 Another critique of the traditional view is one that does not dismiss that view altogether, but holds that the notion of states as the only subjects of international law is not carved in stone. Proponents of this view argue that modern developments in the international system have had a substantial effect on legal attitudes toward non-state

⁶⁸ J. G. Collier, *Is International Law Really Part of the Law of England?*, 38 INT’L & COMP. L.Q. 924, 925 (1989).

⁶⁹ J. G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT’L L. 66, 70 (1936) (citing HEINRICH TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* (Liepzig, C.L. Hirschfeld 1899)). For more discussions on Dualism and Monism, see Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1993); Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 Hague Recueil, 70-80 (1957 – II). Harold Koh elaborates on the implications of the application of the dualist position to certain situations:

A strictly dualistic view denies a meaningful role to both individuals and domestic courts in the making of international law. In a dualistic system, individuals injured by foreign states would have no right to pursue claims directly against those states in either domestic or international fora. Instead, their states would pursue those claims for them on a discretionary basis in international fora, and subsequently determine the rights of those injured individuals to redress as a matter of domestic law.

Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 n.10 (1991).

⁷⁰ See Timberg, *International Combines*, *supra* note 26, at 576 (complaining that “international law blithely continue[d] to assert . . . that only states can be the “subjects” of international law”) (citation omitted).

⁷¹ See Charney, *supra* note 28, at 753.

⁷² McDougal & Leighton, *supra* note 1, at 74.

⁷³ See Charney, *supra* note 28, at 753 n.9; D.P. O’CONNELL, *INTERNATIONAL LAW* 106-11 (2d ed. 1970); OKEKE, *supra* note 63, at 68–69; MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 239-46 (4th ed. 2003) (arguing that the law of nations of the 17th and 18th century commonly applied to States and individuals but developed into a narrower scope with applicability to States in the era of 19th century positivism); Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J. INT’L 347, 406 (1998).

⁷⁴ See MALCOLM N. SHAW, *INTERNATIONAL LAW* 177 (5th ed. 2003).

⁷⁵ *Id.* See also MALANCZUK, *supra* note 57, at 1.

⁷⁶ SHAW, *supra* note 74, at 177.

entities such as international organizations, individuals, MNCs and a host of others, incontrovertibly catapulting them into the category of subjects of international law. In *Reparations for Injuries in the U.N. Service*,⁷⁷ the International Court of Justice, in an advisory opinion, stated that international organizations such as the United Nations are subjects of international law.⁷⁸

B. *The Position of the Individual in International Law*

¶30

As stated previously, under the classical theory, “states were the sole subjects of international law, whereas no direct relation between that law and individuals existed.”⁷⁹ Diametrically opposed to the traditional theory that states are the only subjects of international law is the theory that assigns that important position to individuals. The influential French scholar Léon Duguit was a pioneering figure of this theory. “For him not states but individuals are subjects of international law.”⁸⁰ Toward the end of the first part of the twentieth century, another French scholar, Georges Scelle, argued that individuals are the only subjects of international law, anchoring that view on the contention that the State and other collectivities were a fiction and none of them could be a subject of international law.⁸¹ Some commentators have observed that the position staked by Duguit and Scelle should be understood in the context of the Third French Republic in which these scholars sought to defend individual liberties against abuse of state power by the rulers.⁸² Critics have assailed this view as an abandonment of legal analysis and as an excursion into philosophy.⁸³

⁷⁷ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) [hereinafter *Reparations for Injuries* case]. For insightful discussions of the jural competence of the United Nations or other international organizations to make international legal demands on behalf of its agents, shortly before and after the handing down of the opinion in the *Reparations for Injuries* case, see Quincy Wright, Editorial Comment, *Responsibility for Injuries to United Nations Officials*, 43 AM. J. INT’L L. 95 (1949). See also Quincy Wright, Editorial Comment, *The Jural Personality of the United Nations*, 43 AM. J. INT’L L. 509 (1949); Yuen-Li Liang, *Notes on Legal Questions Concerning the United Nations*, 43 AM. J. INT’L L. 460 (1949).

⁷⁸ *Reparations for Injuries* case, *supra* note 77, at 178–79. See further, David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 VA. J. INT’L L. 275, 343–58 (1996); P. R. Menon, *The Legal Personality of International Organizations*, 4. SRI LANKA J. INT’L L. 79 (1992); Manuel Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 BRIT. Y.B. INT’LL. 111 (1970). For an excellent discussion preceding the *Reparations for Injuries* case, see C. W. Jenks, *The Legal Personality of International Organizations*, 22 BRIT. Y.B. INT’LL. 267 (1945).

⁷⁹ CARL A. NORGAARD, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW* 11 (1962). Soviet scholars provided a significant base of support for this view. See A.P. Movchan, *The Human Rights Problem in Present-Day International Law*, in *CONTEMPORARY INTERNATIONAL LAW* 233, 239 (Grigory Tunkin ed. 1969) (“The Soviet science of international law is unequivocal in its claim that the ‘legal position of individuals is determined by national and not international law’.”); GRIGORY I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 382 (William E. Butler trans. 1974) (“The subjects of international legal responsibility are the subjects of international law; consequently, they are above all, and primarily, states. . . . In isolated instances there occurs responsibility of physical persons.”); Uibopuu, *supra* note 64, at 811 (stating that the “Soviet doctrine of international legal personality is mainly centred around the notion of the State”) (citation omitted).

⁸⁰ Korowicz, *supra* note 22, at 539.

⁸¹ WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 233 (1964) (citing GEORGES SCELLE, *PRECISE DE DROIT DES GENS* 42–44 (1932)). See also Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT’L L.J. 241, 244 (2001); Korowicz, *supra* note 22, at 539.

⁸² JANNE ELISABETH NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO*

¶31 Despite the criticism of the French scholars' theory, the stock of individuals in international law has appreciated considerably over the years,⁸⁴ as the individual "acquired a status and stature [that] transformed him from an object of international compassion into a subject of international right."⁸⁵ Philip Jessup was among the earliest commentators on the transformation of the international legal position of the individual.⁸⁶ He recognized that states traditionally were the subjects of international law and that in international legal relations the individual had to rely on the state, but added that this situation had substantially changed over the years and that the change was not likely to be quickly truncated.⁸⁷

¶32 Sir Hersch Lauterpacht, in his revision of Lassa Oppenheim's seminal work, attributes the recognition of, and justification for, the international legal personality of the individual to the development of human rights and humanitarian values. As a consequence, he contends, the traditional view has become moribund:

The various developments since the two World Wars no longer countenance the view that, as a matter of positive law, States are the only subjects of International Law. In proportion as the realisation of that fact gains ground, there must be an increasing disposition to treat individuals, within a limited sphere, as subjects of International Law.⁸⁸

¶33 At a different forum, Lauterpacht also argued that, because international law has witnessed an expansion beyond the issues of war, the definition of international legal personality must also expand to include international organizations and individuals.⁸⁹ He asserted that international law is flexible enough to allow for the admission of new entities into the revered club of subjects of international law.⁹⁰

THE HISTORY AND THEORY OF INTERNATIONAL LAW 192 – 243 (2004).

⁸³ See Orakhelashvili, *supra* note 81, at 244.

⁸⁴ See Liam Burgess & Leah Friedman, *A Mistake Built on Mistakes: The Exclusion of Individuals Under International Law*, 5 MACQUARIE L.J. 221, 225-28 (2005). It should be noted, however, that the position that international law had no direct application to individuals has long been vehemently assailed. See, e.g., Frederick S. Dunn, *The International Rights of Individuals*, 35 AM. SOC'Y INT'L L. PROC. 14, 14 (1941) ("In my view, this particular legal fossil is highly misleading and in large degree false, and its continued hold on the minds of many people explains in part why international law is held in such ill repute by laymen today."); Sigmund Timberg, *An International Trade Tribunal: A Step Forward Short of Surrender of Sovereignty*, 33 GEO. L.J. 373, 395 (1945) (referring to and rejecting "the formidable and venerable doctrinal notion that individuals are not and cannot be the subject of international law").

⁸⁵ HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 4 (1950); see also CHRISTOPHER C. JOYNER, *INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE* 28 (2005).

⁸⁶ See Korowicz, *supra* note 22, at 538 ("A special place in this struggle of doctrine for the recognition of the international personality of both state and individual should be reserved for Professor Jessup.").

⁸⁷ PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 15-16 (1948). See also FRIEDMANN, *supra* note 81, at 162; OKEKE, *supra* note 63, at 2-3; Charney, *supra* note 28, at 753 n. 10.

⁸⁸ OPPENHEIM, *supra* note 66, at 639.

⁸⁹ Hersch Lauterpacht, *The Subjects of the Law of Nations*, 64 L. Q. REV. 97, 117-19 (1948).

⁹⁰ H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 79 (1927).

Gradually, a consensus of opinion is evolving to the effect that although it is States which are the normal subjects of international law, there is nothing in international law which is fundamentally opposed to individuals and other legal persons becoming subjects of international rights and duties, i.e., subjects of international law.

Id. See also E. I. NWOGUGU, *THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES* 249-50 (1965).

¶34 One of the major arguments deployed by proponents of the subjectivity and personality of the individual in international law revolved around the point that, even if it were conceded that international law was designed to govern inter-state relations only, the realities that led to that design had become moribund and present realities called for a different approach.⁹¹ Moreover, the case for asserting the legal personality of the individual gained strength as individuals were granted access in a number of instances to claim their rights directly before international tribunals.⁹² The Nuremberg Tribunal set up at the end of the Second World War rejected a submission that international law is only concerned with the actions of states and declared that international law has long imposed duties not only upon states, but also upon individuals.⁹³

¶35 The legal position of the MNC and the arguments surrounding it have followed a somewhat similar trajectory. As a matter of fact, when Judge Jessup hypothesized in the 1940s that individuals have become the subjects of international law, he included corporations and partnerships within the meaning of “individual.”⁹⁴ The following section focuses on corporations and subjectivity under international law.

C. Corporations and International Legal Personality

¶36 Those challenging the international legal orthodoxy excluding corporations (and other non-State actors) as subjects of international law have adopted a multi-pronged strategy. The first approach is to reject it as an offspring of nineteenth century positivism, which should not displace relevant natural law principles of earlier origins.⁹⁵

⁹¹ See Jessup, *supra* note 1, at 384; McDougal & Leighton, *supra* note 1, at 82 (decrying reliance on international law designed for an unscientific era to govern international affairs in the era of the atomic bomb).

⁹² See Korowicz, *supra* note 22, at 535 - 537.

⁹³ *United States v. Goering*, 6 F.R.D. 69 (1946) (“The Nuremberg Trial”).

⁹⁴ Jessup, *supra* note 1, at 387; For a more recent articulation of this position, see Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT’L L. 91, 96 (2002) (“To the extent that individuals have rights and duties under customary international law and international humanitarian law, MNCs as legal persons have the same set of rights and duties.”). See also Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 59, at 177, 214-215. But see Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1147, 1156 (1962) (“Another positivist fallacy was the identification of both individuals and corporations for purposes of law as being, in a legal sense, ‘individuals.’ . . . In international law the differences between the individual and the private corporation are fundamental.”). Interestingly, Friedmann, like the authors above, was also arguing for the subjectivity of private corporations in international law (albeit a limited *ad hoc* subjectivity), but, in making these statements, appears driven by a desire to overcome the objections to corporate personality on the same basis that individual personality had been resisted, and thus establish that corporations were on a different plane and thus (more) deserving of being accorded the status of subjects of international law. See *id.*

⁹⁵ For a discussion along these lines with a focus on individuals, see Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 445-50 (2002). Professor Stephens decries the positivist hijack of international law in the nineteenth century and the dismissal by positivists of “the moral, natural law basis of international obligations, only recognizing the validity of agreements accepted by states, the only actors recognized as subjects of international law.” *Id.* at 448. See also McDougal & Leighton, *supra* note 1, at 83; Paust, *Reality of Private Rights*, *supra* note 6, at 1231 (“Some British positivists in the early 1900s had preferred a ‘states alone’ view, but such a conception was radically opposed to traditional eighteenth and nineteenth century Western – and American – views and was also seriously and widely opposed even at the start of the twentieth century.”) (citations omitted).

Secondly, the challengers dismiss the orthodox view as obsolete,⁹⁶ a relic of a past era which is irrelevant today because it is incompatible with modern realities.⁹⁷ They, therefore, can be seen as seeking to liberate humanity from the thralldom of such a historical artifact of a concept. Opponents of the current paradigm that places MNCs outside the core of international law have also attacked it by arguing for the abandonment of the subject-object dichotomy.⁹⁸ They call for its replacement with the notion of *participants*, a term that is broad enough to encompass states, international organizations, individuals, private non-governmental groups and MNCs.⁹⁹ Another weapon in the arsenal of attacks is the contention that international legal personality is not a prerequisite for the imposition of rights and duties.¹⁰⁰ Instead, international legal personality follows attribution of rights and duties.¹⁰¹ A final argument to hold corporations accountable is that corporations are international legal persons because they already, in certain international settings, possess rights and duties and the capacity to enforce those rights.¹⁰²

Looking at Okeke's criteria,¹⁰³ a credible case could be made that MNCs, at least to a certain extent, are subjects of international law: they have rights, possess duties and are empowered to vindicate their rights.¹⁰⁴ Ascription of international legal personality to the MNC has been anchored partly on the volume, transboundary nature and international effect of multinational corporate activity, coupled with access to international legal processes.¹⁰⁵ Drawing from previous and present activities involving these business enterprises, Jonathan Charney comfortably posits that MNCs possess international legal personality and have had an enduring participation in the international legal system.¹⁰⁶ As examples of such participation, he offers the fact that public international law has been applied to contracts concluded between MNCs and state entities, as well as

⁹⁶ Int'l Fed'n for Hum. Rts., Position Paper, *Comments to the Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Feb. 22, 2006, at 7, (Mar. 15, 2006), available at <http://www.fidh.org/IMG/pdf/business442a.pdf>; INT'L PEACE ACADEMY & FAFO AIS, BUSINESS AND INTERNATIONAL CRIMES: ASSESSING THE LIABILITY OF BUSINESS ENTITIES FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW: EXECUTIVE SUMMARY 14-15 (Dec. 1, 2004), available at http://www.fafono.liabilities/exe_summary.pdf.

⁹⁷ Even as early as sixty years ago, some scholars had already begun to attack the position that international law pertained to states only as being out of step with modern times. See McDougal & Leighton, *supra* note 1, at 82, 84.

⁹⁸ See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 48-49 (1994).

⁹⁹ *Id.* at 49 - 50. See also PHILIP ALLOTT, EUNOMIA, NEW ORDER FOR A NEW WORLD 372-73 (1990).

¹⁰⁰ Olivier de Schutter, *The Challenge of Imposing Human Rights Norms on Corporate Actors*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS, *supra* note 5, at 1, 33-34 [hereinafter De Schutter, *Imposing Human Rights Norms*].

¹⁰¹ *Id.* ("The attribution of rights and duties, and of an international legal capacity, do not follow from legal personality, as if to give a certain substantive content to that legal personality once it is recognized; rather, international legal personality follows from the attribution of rights and duties."); Int'l Fed'n for Hum. Rts., *supra* note 96, at 7-8 (arguing that "the recognition of an international legal personality to transnational corporations should not be seen as a prerequisite to the imposition of obligations on such entities"). Indeed, many publicists would dispute this assertion. See, e.g., Bin Cheng, *Introduction to Subjects of International Law*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 23 (Mohammed Bedjaoui ed., 1991).

¹⁰² Jägers, *supra* note 28, at 266.

¹⁰³ See *supra* note 63 and accompanying text.

¹⁰⁴ See *supra* note 103 and accompanying text. But see SHAW, *supra* note 74, at 224-25. ("The question of the international personality of transnational corporations remains an open one.") (citation omitted).

¹⁰⁵ See CYNTHIA DAY WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE 1 (1983).

¹⁰⁶ See Charney, *supra* note 28, at 762-64.

corporate access to forums established under international conventions or by intergovernmental organizations for the settlement of disputes.¹⁰⁷ He further observes that certain principles of public international law, by virtue of their broad acceptance, have become binding on the international operations of MNCs. MNCs are bound by principles of international law when advising international organizations and lobbying national governments on pertinent international issues.¹⁰⁸

¶38 David Ijalaye holds a similar view, advancing the claim that MNCs can now be regarded as selective subjects of international contract law for contracts entered into with states.¹⁰⁹ International arbitral practice provides some support to this position. For instance, in the *Libya-Oil Companies Arbitration*,¹¹⁰ Umpire Dupuy applied international law in a dispute between a state and a private oil company, viewing international law as part of the governing law of the contract (in addition to Libyan law).¹¹¹

¶39 Elihu Lauterpacht, looking at the dispute settlement mechanisms contained in modern investment treaties as well as earlier developments in investor-state arbitration, reasons that these developments have “put an end to the myth, so prevalent until the end of the Second World War, that only States are subjects of international law and that individuals cannot possess rights or bear duties directly under international law.”¹¹² He thus contends that corporations, by virtue of these agreements and other modern developments in the international system, have been shown to possess international legal personality.¹¹³

¶40 In a book review, Michael Reiterer “challenges the proposition that ‘states alone are the subject of international law’”¹¹⁴ and believes that nongovernmental organizations (NGOs), transnational corporations and individuals are “new (at least partly) subjects of international law.”¹¹⁵ Reiterer observes that traditional international law concerned itself principally with relations between sovereign entities and recognized them as the sole subjects of international law, but notes that events have veered in a direction in which nation-states, while still the main actors in international law and international relations, have had to give up their claim to being the sole subjects of international law.¹¹⁶ This observation accords with the conclusion of another scholar that “[t]he modern trend is to recognize that there are other subjects of international law, including certain corporations.”¹¹⁷

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ DAVID ADEDAYO IJALAYE, *THE EXTENSION OF CORPORATE PERSONALITY IN INTERNATIONAL LAW* 221-23 (1978).

¹¹⁰ Rudolf Dolzer, *Libya Oil Companies Arbitration*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 215, 216 (Rudolph Berhardt et al. eds., 1997).

¹¹¹ *Id.*; but see Orakhelashvili, *supra* note 81, at 257-61 (arguing that international arbitral practice does not necessarily support the contention that contracts between private corporations and national governments were on par with international treaties or that corporations are subjects of international law).

¹¹² Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 *IND. J. GLOBAL LEGAL STUD.* 259, 274 (1997).

¹¹³ *See id.* at 272-76.

¹¹⁴ Michael Reiterer, Book Review, 81 *AM. J. INT’L L.* 970 (1987) (reviewing RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* (1983)).

¹¹⁵ *Id.* at 970.

¹¹⁶ *See id.*

¹¹⁷ Chow, *supra* note 65, at 165. *See also* Jonathan Fried, *Globalization and International Law – Some Thoughts for States and Citizens*, 23 *QUEEN’S L.J.* 259, 266 (1997) (“Over twenty years ago, Wolfgang

¶41 The above views are by no means conclusive on this issue. Many jurists, scholars and commentators have questioned the conclusion that the extension of international legal personality to corporations is an established fact. The authors of a leading American casebook on international law, after discussing the point that MNCs have become the subject of considerable controversy stemming from the economic and political power they wield, the complexity that surrounds their operations and the difficulties associated with exercising legal authority over them by either home or host states, nevertheless identify with the traditional view.¹¹⁸ In their opinion, “[s]uch corporations are private, nongovernmental entities; they are subject to applicable national law, and they are not international legal persons in the technical sense. That is, they are not generally subject to obligations and generally do not enjoy rights under international law.”¹¹⁹ A similar sentiment is expressed by Francois Rigaux, who states that “transnational corporations are neither subjects nor quasi-subjects of international law.”¹²⁰

¶42 Ian Brownlie, while noting that “jurists have argued that the relations of states and foreign corporations as such should be treated on the international plane and not as an aspect of the normal rules governing the position of aliens and their assets on the territory of a state,”¹²¹ minces no words in rejecting that argument. Instead, he makes the contrary assertion that “[i]n principle, corporations of municipal law do not have international legal personality. Thus, a concession or contract between a state and a foreign corporation is not governed by the law of treaties.”¹²² Peter Malanczuk, in a relatively recent study of the MNC, adopts a similar position, rejecting outright the notion that special “internalized contracts” with a sovereign state suffice to render a corporation a subject of international law, “even in a partial or limited sense.”¹²³

¶43 The views expressed immediately above find support in the jurisprudence of the Permanent Court of International Justice (PCIJ) and its successor, the International Court of Justice (ICJ). In the *Serbian Loans Case*,¹²⁴ the PCIJ held that the governing law for an agreement not concluded between subjects of international law should be the municipal law of the State concerned with the dispute.¹²⁵ In the *Anglo-Iranian Oil Company Case*¹²⁶ involving the government of Iran and a British oil company, the ICJ adopted a line of reasoning that suggested that an oil corporation was not a subject of

Friedmann already presaged this expansion of international regulation in highlighting the new subject-matters and new subjects of international law. These included corporations, individuals and international organizations – a so-called “vertical” expansion of international law beyond the nation state to reach other actors within.”).

¹¹⁸ DAMROSCH ET AL., *supra* note 21, at 421.

¹¹⁹ *Id.*

¹²⁰ Francois Rigaux, *Transnational Corporations*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, *supra* note 101, at 121, 129.

¹²¹ BROWNLIE, *supra* note 63, at 65 (citation omitted).

¹²² *Id.* (citation omitted).

¹²³ See Adam I. Muchmore, *Recent Publications: Treaty-Making and Codification*, 26 YALE J. INT’L L. 547, 548 (2001) (reviewing MULTILATERAL TREATY-MAKING: THE CURRENT STATUS OF CHALLENGES TO AND REFORMS NEEDED IN THE INTERNAL LEGISLATIVE PROCESS (Vera Gowlland-Debbas ed. 2000)).

¹²⁴ See *Payment of Various Serbian Loans Issued in France* (Fr. v. Serb.), 1929 P.C.I.J. (ser. A) No. 20, at 41 (July 12); *Serbian Loans Case*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 256-57 (Rudolph Bernhardt et al. eds., 1981).

¹²⁵ See *id.*

¹²⁶ See Rudolf Dolzer, *Anglo-Iranian Oil Company Case*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 167-68 (Rudolph Bernhardt et al. eds., 1992).

international law.¹²⁷ Accordingly, it refused to exercise jurisdiction when Iran declined to consent to the Court's jurisdiction.¹²⁸ The ICJ opined that the contract was not an international treaty and thus did not invite the intervention of the Court.¹²⁹

¶144 Other scholars have argued that, because of the decentralized nature of the international legal order, where no centralized law-making and law-enforcing authorities exist, possession of rights and duties alone is not sufficient to confer legal personality.¹³⁰ An international person, the argument continues, should be capable of making¹³¹ and enforcing international law.¹³² In essence, there has to be a public component in which the role of the subject transcends private interests and includes some functions of a public character.¹³³

¶145 The views above, while forceful, nevertheless adopt a very restricted approach to the definition and inclusion of subjects of international law. A more helpful approach would be to recognize, first, that states are the primary and predominant subjects of international law,¹³⁴ but that this recognition is not exclusionary.¹³⁵ Accordingly, other legal entities are not necessarily non-subjects, nor are they precluded from gaining international legal personality at some point in time. Second, a subject of international law does not have to possess the same character or share all attributes of a state to fit into the definition of a subject.¹³⁶ Third, there are degrees of legal personality and so all subjects do not have to be on the same plane at the international level.¹³⁷ As Okeke puts

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See* Orakhelashvili, *supra* note 81, at 256.

¹³¹ Soviet jurists also held the view that an important aspect of legal personality is an active participation in the international law-creating process. *See* OKEKE, *supra* note 63, at 12-13 (citing G. TUNKIN, OSNOVY SOVREMENOGO MEZHDUNARODNOGO PRAVA (1956)).

¹³² This view was also a foundational principle for some Soviet scholars. *See e.g.*, the following excerpt from the work of Professor L. A. Modzhorian:

[A] necessary attribute for any subject of international law is the capacity to be represented on the international plane by a supreme authority which is capable of participating in law-creating processes, is capable of undertaking international legal obligations and of fulfilling them, and is also capable of taking part in measures aimed at the enforcement of the observation of norms of international law by other subjects.

Chris Osakwe, *Contemporary Soviet Doctrine on the Juridical Nature of Universal International Organizations*, 65 AM. J. INT'L L. 502, 505 (1971) (quoting L. A. MODZHORIAN, SUB'EKTY MEZHDUNARODNOGO PRAVA 17 (1958)).

¹³³ *See* Orakhelashvili, *supra* note 81, at 256.

¹³⁴ *See* ANTONIO CASSESE, INTERNATIONAL LAW 71 (2d ed. 2005) (“[T]he fundamental or primary subjects . . . are States”) (emphasis in the original). *See also* HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 124 (2000).

¹³⁵ *See* OPPENHEIM'S INTERNATIONAL LAW 16 (Sir Robert Jennings & Arthur Watts eds., 9th ed. 1992) (“States are primarily, but not exclusively, the subjects of international law . . . States may treat individuals and other persons as endowed directly with international rights and duties and constitute them to that extent subjects of international law.”).

¹³⁶ *See* De Schutter, *Imposing Human Rights Norms*, *supra* note 100.

¹³⁷ *See Reparations for Injuries case*, *supra* note 77, at 178. (“The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights.”). *See also* Hahn, *supra* note 27, at 1045. (“Neither in municipal nor in international law are all persons possessed of the same status.”); Charney, *supra* note 28, at 775 (noting that “many scholars recognize varying degrees of legal personality”); FRIEDMANN, *supra* note 81, at 218-19 (“There is no reason why there should not be different degrees of subjectivity in international law.”); DAMROSCH ET AL., *supra* note 21, at 249 (“As in any legal system, not all subjects of international law are identical in their nature or their rights and one must

it, “any subject of law must be capable of having certain rights and duties under the given legal system, any differences in the degree of capacity notwithstanding.”¹³⁸ Viewed from those perspectives, it becomes easier to conclude that MNCs to an extent have, or at least have the potential to possess, international legal personality.¹³⁹

¶46 The SRSJG confronted the debate at this juncture or somewhere close to it and came to his own conclusions on the present position of MNCs and other business enterprises in international law. The next part examines these conclusions.

III. THE CHANGING POSITION OF THE MULTINATIONAL CORPORATION

A. *The Appointment of a Special Representative*

¶47 The growth in size and influence of MNCs has elicited calls to hold them accountable in various ways, including under international law.¹⁴⁰ A clear response to these calls was the August 2003 drafting and adoption of a set of norms (“Norms”) to govern business conduct by the United Nations Sub-commission for the Protection and Promotion of Human Rights.¹⁴¹ The cool reception, loud controversy, polarization and deadlock¹⁴² that accompanied the adoption of the Norms and their subtle rejection in 2004 by the sub-commission’s parent body, the now-defunct UN Human Rights Commission,¹⁴³ led to the appointment of a SRSJG in 2005.¹⁴⁴

constantly be aware of the relativity of the concept of international legal person.”).

¹³⁸ OKEKE, *supra* note 63, at 1-2. (emphasis added). See also Joanna Balaskas, *The International Legal Personality of the Eastern Orthodox Ecumenical Patriarchate of Constantinople*, 2 HOFSTRA L. & POL’Y SYMP. 135, 157 (1997) (“[A] non-state entity may indeed have a limited scope of international legal personality either for a specific purpose or event, or for a temporary period of time. Individuals, international organizations, nongovernmental organizations (NGOs), and multinational (or transnational) corporations all have been acknowledged to possess a limited degree of international legal personality.”).

¹³⁹ See Int’l Council on Hum. Rts. Pol’y, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* 76 (2002) (citing the views of Christopher Weeramantry, a former judge of the International Court of Justice); Shaw, *supra* note 74, at 224; Tarek F. Maassarani et al., *Extracting Corporate Responsibility: Towards A Human Rights Impact Assessment*, 40 CORNELL INT’L L.J. 135, 166 (2007) (“Indeed, international law may soon confer upon corporations the rights and responsibilities of international legal personality.”).

¹⁴⁰ See Zhu Jia-Ming & Elliott R. Morss, *The Financial Revolutions of the Twentieth Century*, in LEVIATHANS, *supra* note 18, at 203 (noting that as MNCs “grow in size and influence, so does the pressing need to hold them accountable in ways that go beyond a mere bottom line”).

¹⁴¹ See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion and Protection of Hum. Rts, *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=7440.

¹⁴² While the *Norms* were generally favored by human rights, labor and environmental groups, it was highly resisted by the business sector. See Upendra Baxi, *Market Fundamentalisms: Business Ethics at the Altar of Human Rights*, 5 HUM. RTS. L. REV. 1, 3 (2005) (stating that the *Norms* encountered a “silhouette of global corporate resistance”) (citation omitted); Karsten Nowrot, *The 2006 Interim Report of the UN Special Representative on Human Rights and Transnational Corporations: Breakthrough or Further Polarization?* POL’Y PAPERS ON TRANSNAT’L ECON. LAW NO. 20, 1, 3 (2006), available at <http://www2.jura.uni-halle.de/telc/PolicyPaper20.pdf>.

¹⁴³ See generally Melina Williams, *Privatization and the Human Right to Water: Challenges for the New Century*, 28 MICH J. INT’L L. 469, 489-91 (2007).

¹⁴⁴ See *id.*

¶48 The SRSB has a broad five-part mandate,¹⁴⁵ including an assignment to “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights,”¹⁴⁶ and to “elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation.”¹⁴⁷ The SRSB is still in the process of completing his mandate but has already made some pertinent conclusions, particularly in relation to the legal status of corporations in international law.¹⁴⁸ The next section discusses his conclusions on the issue.

B. The SRSB’s Conclusions on the Position of Corporations in International Law

¶49 In his interim report presented in 2006, the SRSB, ostensibly heeding the call of prominent human rights groups such as Amnesty International, was quite mindful of the awful situation in which some states have exhibited an unwillingness, indifference or inability to protect human rights.¹⁴⁹ Thus, he entertained the notion that “it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations, especially where host governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended.”¹⁵⁰ But that particular point should not be conflated with the critical inquiry of whether such obligations already exist. Ruggie, thus, questioned the conclusion of the drafters of the Norms that they are a reflection and restatement of international legal principles applicable to business in the area of human rights, yet simultaneously path-breaking as the first non-voluntary international initiative on this issue which are thus directly binding on corporations.¹⁵¹ Viewing this conclusion as an overreach, the SRSB stated:

But taken literally, the two claims cannot both be correct. If the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so. And if the Norms were to bind business directly then they could not merely be restating international

¹⁴⁵ See Office of High Comm’r for Hum. Rts., *Human Rights and Transnational Corporations and other Business Enterprises*, Human Rights Resolution 2005/69, (Apr. 20, 2005), available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc.

¹⁴⁶ *Id.* ¶ 1 (a).

¹⁴⁷ *Id.* ¶ 1 (b).

¹⁴⁸ See Anne Perrault et al., *Partnerships for Success in Protected Areas: The Public Interest and Local Community and Rights to Prior Informed Consent (PIC)*, 19 GEO. INT’L ENVTL. L. REV. 475, 514-15 (2007); STEINER ET AL., *supra* note 42, at 1405 (“In 2007, Ruggie provided his own assessment of the existing legal and other landscape.”).

¹⁴⁹ See Jem Bendell & Jonathan Cohen, *World Review: A Synopsis of the Key Strategic Developments in Corporate Responsibility around the Globe over the last Quarter*, J. CORP. CITIZENSHIP, Apr.-June 2006, at 5; See also Amnesty International US, *UN Norms for Business: Taking Corporate Responsibility for Human Rights to the Next Level!*, available at http://www.amnestyusa.org/business/un_norms.html (last visited Apr. 13, 2008).

¹⁵⁰ *Interim Report*, *supra* note 10, ¶ 65.

¹⁵¹ See *id.* ¶ 60.

legal principles; they would need, somehow, to discover or invent new ones.¹⁵²

¶150 The SRSR's repudiation of the Norms was assailed by many human rights activists and scholars who insisted that the onus on the SRSR was to build his mandate on the progress that the Norms represented, and not to chart a new course that rejects this advancement.¹⁵³ Ruggie acknowledged the criticisms but, in his responses, remained unconvinced that such a radical transformation in the international legal position of the corporation has already taken place.¹⁵⁴ He reiterated that he was not utilizing the Norms as the key foundational element of his assignment due to his concerns, upon research and consultations with international experts, that their legal and conceptual frameworks were "poorly conceived" and "highly problematic," and that the doctrinal claims were "excessive."¹⁵⁵ Ruggie expressed fears that the Norms would turn global corporations into "benign twenty-first century versions of East India companies, undermining the capacity of developing countries to generate independent and democratically-controlled institutions capable of acting in the public interest -- which is by far the most effective guarantor of human rights."¹⁵⁶

¶151 Professor David Weissbrodt, an architect of the Norms, responded to the SRSR's criticisms by accusing Ruggie of drawing his conclusions from the advocacy script of lawyers for the international business community.¹⁵⁷ He also observed that, while the SRSR's rejection of his team's legal conclusions was reportedly based on the views of "mainstream international lawyers and other impartial observers," not one of them was cited in the report.¹⁵⁸ Ruggie apparently accepted this challenge when, in a later article in

¹⁵² *Id.*

¹⁵³ See, e.g., Joint NGO Letter in Response to the Interim Report of the UN Special Representative on Human Rights and Business (May 18, 2006), available at http://www.escr-net.org/actions_more/actions_more_show.htm?doc_id=430932&parent_id=430908; see also Surya Deva, *Sustainable Good Governance and Corporations: An Analysis of Asymmetries*, 18 GEO. INT'L ENV'T'L L. REV. 707, 739 (2006); David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUM. RTS. REV. 447, 461 (2006). ("We consider the SRSR's forthright dismissal of the Norms in their current form to be a backward, rather than forward, step.")

¹⁵⁴ See Response by John Ruggie to Amnesty International (May 1, 2006), available at <http://www.reports-and-materials.org/Ruggie-response-to-Amnesty-International-1-May-2006.pdf> [hereinafter Response to Amnesty]. For other responses, see Response by John Ruggie to Joint NGO Comments (May 22, 2006), available at <http://www.reports-and-materials.org/Ruggie-response-to-joint-NGO-letter-22-May-2006.pdf>; Response by John Ruggie to Mary Robinson (Mar. 31, 2006), available at <http://www.reports-and-materials.org/Ruggie-response-to-Mary-Robinson-31-Mar-2006.pdf>; Response by John Ruggie to Earthrights International (Mar. 23, 2006), available at <http://www.reports-and-materials.org/Ruggie-response-to-EarthRights-23-Mar-2006.pdf>; Response by John Ruggie to International Federation of Human Rights Leagues (Mar. 20, 2006), available at <http://www.reports-and-materials.org/Ruggie-response-to-FIDH-20-Mar-2006.pdf>.

¹⁵⁵ John Ruggie, Opening Statement to United Nations Human Rights Council (Sept. 25, 2006) [hereinafter Ruggie, *Opening Statement*]; *Interim Report*, *supra* note 10, at para. 59; Response to Amnesty, *supra* note 154.

¹⁵⁶ Ruggie, *Opening Statement*, *supra* note 155.

¹⁵⁷ See David Weissbrodt, *UN Perspectives on "Business and Humanitarian and Human Rights Obligations"*, 100 AM. SOC'Y INT'L L. PROC. 135, 138 (2006) (complaining that the SRSR "embark[ed] on an extremely negative and unproductive critique of the Norms – inspired, if not copied word for word, from the advocacy of the International Chamber of Commerce and the International Organization of Employers").

¹⁵⁸ *Id.*

the *American Journal of International Law*, he cited some supporting authorities for his position, including (as Professor Weissbrodt had claimed) the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE), but also a number of notable commentators.¹⁵⁹

¶52 In his 2007 Report to the Human Rights Council, the SRSG shed more light on his thinking on this issue. He meticulously reviewed the work of scholars on the subject and suggested that there has been a metamorphosis in the position of corporations -- both in doctrine and practice -- in some areas of international law, but cautioned that the wind of change has not blown across many other aspects of international law, including most human rights obligations. According to the SRSG:

Long-standing doctrinal arguments over whether corporations could be “subjects” of international law, which impeded conceptual thinking about and the attribution of direct responsibility to corporations, are yielding to new realities. Corporations increasingly are recognized as “participants” at the international level, with the capacity to bear some rights and duties under international law. . . . [T]hey have certain rights under bilateral investment treaties; they are also subject to duties under several civil liability conventions dealing with environmental pollution. Although this has no direct bearing on corporate responsibility for international crimes, it makes it more difficult to maintain that corporations should be entirely exempt from responsibility in other areas of international law.¹⁶⁰

He again rejected the UN Sub-Commission on the Promotion and Protection of Human Rights’ attribution of direct obligations for human rights on corporations, aligning himself with the “traditional view of international human rights instruments . . . that they impose only ‘indirect’ responsibilities on corporations -- responsibilities provided under domestic law in accordance with states’ international obligations.”¹⁶¹ While noting that “[n]othing prevents states from imposing international responsibilities directly on companies,”¹⁶² he said that a pertinent question revolved around whether states have in fact done so.¹⁶³ He answered the question -- in the negative -- when he surmised: “In conclusion, it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations.”¹⁶⁴

¹⁵⁹ See John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM J INT’L L. 819, 827 n. 43 and accompanying text (2007).

¹⁶⁰ *Mapping International Standards*, *supra* note 11, ¶ 20. See also *Interim Report*, *supra* note 10, ¶ 61 (“Under customary international law, emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or complicity in, the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture, and some crimes against humanity.”).

¹⁶¹ *Mapping International Standards*, *supra* note 11, ¶ 35.

¹⁶² *Id.* ¶ 36. International legal scholars have made the same point for generations. See, e.g., G. SCHWARZENBERGER, INTERNATIONAL LAW 62 (1945) (“The only premise which it is safe to state is that the existing subjects of international law are free to extend the application of international law to any entity whom they see fit to admit to the realm of the international legal system.”)

¹⁶³ *Mapping International Standards*, *supra* note 11, para. 36.

¹⁶⁴ *Id.* ¶ 44.

¶53 Ruggie's reference to the term "participants" is not insignificant. Without doubt, the objective behind the substitution of *participants* for *subjects* by such eminent jurists as Rosalyn Higgins¹⁶⁵ and Theodor Meron¹⁶⁶ is the discontinuation of "the sterile debate" on who are the subjects of international law and a change in focus to devising veritable solutions to real problems.¹⁶⁷ It is likely that the SRSG shares this objective and considers his report an invitation to move the conversation on this issue along those lines.

¶54 Ruggie is a firm proponent of the view that states bear a major responsibility in addressing human rights issues, including those associated with corporations. In his assignment, he has examined human rights treaties and treaty body commentaries to identify any requirements for states to exercise extraterritorial jurisdiction.¹⁶⁸ Through this mechanism, home states can police the activities of their corporations doing business abroad, especially in settings where institutional capacity for holding those corporations accountable is weak or non-existent. A successful application of extraterritorial jurisdiction will eliminate the double standards that characterize the foreign operations of some MNCs compared to their operations in their home countries.¹⁶⁹ Presently, however, there is little to inspire confidence that home states would be inclined to regulate their corporations for the benefit of people in other countries without international law requiring them to do so.¹⁷⁰ Even if home states were willing to do so, it is not at all guaranteed that host states would not resent or reject such exercise of jurisdiction as interference with their territorial sovereignty¹⁷¹ and as a move verging on imperialism.¹⁷² The SRSG's interest in extraterritorial jurisdiction is crucial in that it may contribute

¹⁶⁵ See HIGGINS, *supra* note 98.

¹⁶⁶ See generally THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* (2006).

¹⁶⁷ Jochen A. Frowein, Book Review, 101 AM. J. INT'L L. 680, 683 (2007) (reviewing THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* (2006)).

¹⁶⁸ See The Special Representative of the Secretary-General, *Addendum, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 81-92, delivered to the General Assembly, A/HRC/4/35/Add.1 (Feb. 13, 2007), available at <http://www.reports-and-materials.org/State-Responsibilities-to-Regulate-Corporate-Activities-under-UN-Core-Treaties-12-Feb-2007.pdf>.

¹⁶⁹ For a discussion of this phenomenon of double standards in multinational corporate operations, see Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 SW. J.L. & TRADE AM. 293 (1995); Michael K. Addo, *Human Rights and Transnational Corporations – an Introduction*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, *supra* note 28, at 3, 11. [hereinafter Addo, *Human Rights*]. For a vivid description of a U.S. oil company's operations in Ecuador which would have been completely unacceptable in the United States, see William Langewiesche, *Jungle Law*, VANITY FAIR, May 2007, available at <http://www.vanityfair.com/politics/features/2007/05/texaco200705>.

¹⁷⁰ See Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 931 n.14 (2005).

¹⁷¹ See Rory Sullivan, *Legislating for Responsible Corporate Behavior: Domestic Law Approaches to an International Issue*, in GLOBAL GOVERNANCE AND THE QUEST FOR JUSTICE, Vol. 2: CORPORATE GOVERNANCE, 183, 195 (Sorcha MacLeod ed., 2006).

¹⁷² See N.Y.U. CTR. FOR HUM. RTS. & GLOBAL JUST. & REALIZING RTS.: THE ETHICAL GLOBALIZATION INITIATIVE, WORKSHOP ON ATTRIBUTING CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS UNDER INTERNATIONAL LAW: SUMMARY REPORT 5 (Nov. 17, 2006); Joseph, *supra* note 29, at 86. Some developing countries are also likely to raise objections to unilateral adoption of extraterritorial regulation without a clear international mandate. See Seymour J. Rubin, *Multinational Enterprise and National Sovereignty: A Skeptic's Analysis*, 3 LAW & POL'Y INT'L BUS. 1, 15 (1971) (stating that "when the United States has acted to impose an American-dictated restraints policy on companies abroad, resentment has been prompt and vocal").

significantly to bridging the divide between home and host states on this issue, thus bringing together the divergent interests to work for the common good of humanity.¹⁷³

¶155 The SRSB also hinted at the possibility that some recent innovative soft law arrangements governing the activities of corporations might harden into binding obligations. “As they strengthen their accountability mechanisms, they also begin to blur the lines between the strictly voluntary and mandatory spheres for participants. Once in, exiting can be costly.”¹⁷⁴ His expectation, therefore, is that soft law norms will mature into international legal principles that define corporate responsibility and effect accountability in the event of breach.¹⁷⁵

¶156 Ruggie also does not close his eyes to the numerous weaknesses of current efforts at self-regulation, including free-riding, non-suitability for small and medium sized enterprises, scant participation of even major developing country corporations, and the omission or non-participation of state-owned enterprises located in emerging economies. Exuding optimism, however, he believes that if history is any guide, the international community will be able to control or cure the problem the moment we get to a “tipping point.”¹⁷⁶ He states that his mandate is dedicated to getting us to that point.¹⁷⁷ This particular point is shared by many other observers, who believe that direct regulation of MNCs remains a premature idea that will only come to fruition when corporate social responsibility becomes widely practiced or the tolerance threshold for corporate misbehavior is met, making it impossible to cope with corporate excesses.¹⁷⁸

¶157 In light of the foregoing discussion on the limited changes in the position of MNCs in international law, it is prudent to inquire into the possible reasons behind those changes and the prospects for their further advancement. The following part is devoted to this assignment.

¹⁷³ See CATHOLIC UNIV. OF LOUVAIN & THE FREE UNIV. OF BRUSSELS FOR THE BENEFIT OF THE SPECIAL REPRESENTATIVE OF THE SEC’Y-GEN. ON HUM. RTS. & TRANSNAT’L CORP. AND OTHER BUS. ENTERPRISES, SEMINAR OF LEGAL EXPERTS: EXTRATERRITORIAL LEGISLATION AS A TOOL TO IMPROVE THE ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS FOR HUMAN RIGHTS VIOLATIONS-SUMMARY REPORT (2006), available at <http://www.business-humanrights.org/Links/Repository/397525>.

¹⁷⁴ *Mapping International Standards*, *supra* note 11, ¶ 61.

¹⁷⁵ *Id.* ¶ 62

¹⁷⁶ *Id.* ¶ 82. For a similar argument, see DURUIGBO, *supra* note 17, at 125. (“History has shown that in some instances where a social or economic problem had surfaced, corporate regulation was preceded by self-regulation, which itself was an effort to fend off regulation. As self-regulation failed, the society clamored for public regulation.”).

¹⁷⁷ *Mapping International Standards*, *supra* note 11, ¶ 82.

¹⁷⁸ See Bill Baue, *Ruggie Report Says Voluntary Human Rights Initiatives Set Stage for Binding Global Standards*, SOCIALFUNDS.COM, Mar. 19, 2007, <http://www.socialfunds.com/news/article.cgi/2253.html> (quoting the views of Mort Winston, former Chair of Amnesty International USA). For additional responses to Mr. Ruggie’s 2007 report, see *Oral Intervention: Joint NGO Statement to UN Human Rights Council on John Ruggie’s Report* (Mar. 29, 2007), available at <http://www.reports-and-materials.org/NGO-joint-statement-to-UN-re-Ruggie-report-29-Mar-2007.pdf>; John Hilary, *Corporate Abuse: Efforts to hold Multinational Businesses Accountable for Human Rights Violations are Meeting Stiff Resistance*, GUARDIAN (UK), Mar. 30, 2007, available at http://commentisfree.guardian.co.uk/john_hilary/2007/03/power_without_responsibilities.html; Action Aid, *Tougher Measures Needed for Corporations on Human Rights Abuses*, Mar. 26, 2007, available at <http://www.actionaid.org/pages.aspx?PageID=34&ItemID=251>; Hugh Williamson, *Groups Pressed to Protect Human Rights*, FIN. TIMES, Mar. 9, 2007, available at <http://www.business-humanrights.org/Links/Repository/145383/> (last visited Apr. 13, 2008). See generally Business and Human Rights website, <http://www.business-humanrights.org/Documents/RuggieHRC2007> (last visited Apr. 13, 2008); Susan Aaronson, *Ruggie Tells States to Mind Their Businesses*, POLICY INNOVATIONS, Mar. 5, 2007, at http://www.policyinnovations.org/ideas/commentary/data/ruggie/pf_printable.

IV. RATIONALE FOR CHANGE AND CHALLENGES

¶58

A variety of variables account for the appreciation of the position of MNCs in international law, the most prominent of which are their rise in economic stature, the growth in their global influence, and the corresponding need for this power to be balanced with equivalent responsibility.¹⁷⁹ While certain factors have prompted the shift, others constitute obstacles to further changes in the position of corporations in international law. These factors must be closely examined to determine whether or not enhancing the status of corporations in international law is the prudential, and not just the jurisprudential, course to take.¹⁸⁰ Wolfgang Friedmann's admonition almost five decades ago still resonates today: "It would be as dangerous to uncritically accord subjectivity to the private corporation in international law as it would be to deny its factual participation in the evolution of public international law."¹⁸¹

A. *Explaining the Change*

¶59

More than three decades ago, a "Group of Eminent Persons" reported that "[m]ultinational corporations are important actors on the world stage."¹⁸² If there are any changes to this observation since then, it is that such corporations have grown even stronger and become even more important actors in global affairs. A number of developments in recent years have strengthened the case for an increased role and responsibility for MNCs in international law. MNCs have continued to grow in size, geographic spread, economic power and political influence.¹⁸³ Thus, it is becoming much more unrealistic to continue to keep them on the legal periphery.¹⁸⁴ Beyond simply being held accountable for their activities, some commentators argue that MNCs should have positive obligations as well: their enormous resources and capacities should be harnessed for addressing pressing global problems.¹⁸⁵ Other scholars assert that, since many of

¹⁷⁹ See Justine Nolan, *With Power Comes Responsibility: Human Rights and Corporate Accountability*, 28 UNSW L.J. 581, 581 (2005); Kinley & Tadaki, *supra* note 29, at 935; Reinisch, *supra* note 59, at 74–75; Weissbrodt & Kruger, *supra* note 18, at 901.

¹⁸⁰ See Vazquez, *supra* note 170, at 930.

To say that the direct regulation of private corporations by international law would be a change is not necessarily to conclude that the step should not be taken. International law imposes no conceptual obstacle to an agreement among states to impose obligations directly on private parties The magnitude of the change is, however, a reason to think hard before taking the step.

Id. Similar questions arose regarding the wisdom of making individuals subjects of international rights and duties. See Clyde Eagleton, *The Individual and International Law*, 40 AM. SOC'Y INT'L L. PROC. 22, 27 (1946) ("As to the wisdom and success of this venture, there is and doubtless will continue to be much controversy.").

¹⁸¹ Friedmann, *supra* note 94, at 1158.

¹⁸² U.N. Econ. & Soc. Council [ECOSOC], *The Impact of Multinational Corporations on the Development Process and on International Relations*, U.N. Doc. E/RES/1721 (LIII) (1974).

¹⁸³ See Shira Pridan-Frank, *Human-Genomics: A Challenge to the Rules of the Game of International Law*, 40 COLUM. J. TRANSNAT'L L. 619, 661 (2002).

¹⁸⁴ See MICHELLE LEIGHTON, ET AL., BEYOND GOOD DEEDS: CASE STUDIES AND A NEW POLICY AGENDA FOR CORPORATE ACCOUNTABILITY 158 (2002) ("As a matter of logic, global corporations can only be adequately regulated at a global level.").

¹⁸⁵ The idea that the power and resources of multinational corporations could be harnessed to address major global problems is not new. See, e.g., Sigmund Timberg, *Corporate Fictions: Logical, Social and International Implications*, 46 COLUM. L. REV. 533, 580 (1946) ("Particularly in the international sphere,

these corporations have acquired the kind of power that was until recently the exclusive preserve of states, it is only appropriate that they should shoulder the caliber of responsibilities that are imposed on states by international law.¹⁸⁶

¶160

A concomitant of the expansion of corporate power is an enormous potential for abuse. Large corporations have been implicated in or associated with practices that undermine the realization of objectives behind some international legal provisions on human rights and the environment. In many instances, no legal liability attaches as a result of these practices, thus fostering a situation where victims have no real remedies for the violation of rights guaranteed them under domestic and international law.¹⁸⁷ This state of affairs is partly attributable to the fact that sometimes the governments that are expected to hold corporations accountable are the architect of these wrongful actions or complicit in the perpetration of the wrongs against their citizens.¹⁸⁸ Moreover, because of their scramble for the economic investments of MNCs, developing countries end up too enfeebled to regulate or control them.¹⁸⁹ In any case, MNCs are more likely to demonstrate a preference for those countries with lax regulatory frameworks over business or industrial activities.¹⁹⁰ In developing countries, the absence of the technical and legal expertise that are essential for monitoring or regulating complex activities, such as environmental pollution, also serves as an impediment to any initiatives by persons in these countries to bring MNCs under control.¹⁹¹

¶161

Political considerations also play a role. The leaders of government in some of these countries are quite familiar with the ability of some big foreign corporations to engineer the removal of public officials who are obstacles to the success of their enterprises in the country.¹⁹² As some of these leaders are not eager to lose their

corporations . . . should be regarded as not only the carriers of their own private interests, but instrumentalities for effectuating social and economic interests which the national and international community regards as paramount.”)

¹⁸⁶ See Garth Meintjes, *An International Human Rights Perspective on Corporate Codes*, in GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME 83, 86 (Oliver F. Williams ed. 2000).

¹⁸⁷ The notion that rights and remedies go together is a bedrock jurisprudential principle that should not be allowed to be frustrated with ease. For further discussion of the idea that where there is a right, there is also a remedy (*ubi ius ibi remedium*), see 3 WILLIAM BLACKSTONE, COMMENTARIES *109 (1765); see also *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“[F]or it is a settled and invariable principle... that every right, when withheld, must have a remedy, and every injury its proper redress.”); see also Richard A. Epstein, *Standing and Spending--The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 13 (2001); Reinhard Zimmermann, *Roman-Dutch Jurisprudence And Its Contribution To European Private Law*, 66 TUL. L. REV. 1685, 1696 (1992).

¹⁸⁸ See Chesterman, *supra* note 23.

¹⁸⁹ See Sullivan, *supra* note 171, at 185.

¹⁹⁰ See Matthew Lippman, *Transnational Corporations and Repressive Regimes: The Ethical Dilemma*, 15 CAL. W. INT'L L.J. 542, 545 (1985).

¹⁹¹ See *id.*

¹⁹² The United Fruit Company (UFC) (now known as Chiquita Corporation), a United States multinational, seriously concerned that land reforms then going on in Guatemala would jeopardize its interests, orchestrated a coup in that country in 1954. See Ariadne K. Sacharoff, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?* 23 BROOK. J. INT'L L. 927, 927 (1998). UFC also engineered an armed invasion of Honduras. See THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 9 (1989). Similarly, International Telephone & Telegraph (ITT) played a prominent role in the overthrow of the Allende government in Chile in 1973. See Celia Wells & Juanita Elias, *Catching the Conscience of the King: Corporate Players on the International Stage*, in NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 59, at 141, 143-44; O. E. Udofia, *Imperialism in Africa: A Case of Multinational Corporations*, 14 J. BLACK STUD. 353, 360 (1984); Olivier de Schutter, *Transnational Corporations as Instruments of Human Development*, in HUMAN RIGHTS AND

privileged political positions, they are constrained to do the politically expedient thing, that is, play along and turn a blind eye to corporate misdeeds in their domain. This point does not impeach the fact, however, that many of these leaders are corrupt souls who do not have the interests of their citizens at heart and who not only directly oppress them, but also use the business sector to consolidate their hold on power.¹⁹³

¶62 Even where national regulators are active, international regulation still appears to be preferable because the ability of national officials to “actually control the behavior of corporations operating within their borders has been substantially diminished by the global dispersion of assets,” thus making it virtually impossible for any single state to be able to place some of these MNCs under their control or exercise any meaningful influence over them.¹⁹⁴

¶63 In all of this, international law has largely remained aloof, effectively fostering corporate impunity.¹⁹⁵ Without a doubt, the current situation has succeeded in placing MNCs in a sphere where their operations are conducted in a legal and moral vacuum and the protection of “personal” interests is the cardinal rule.¹⁹⁶ Tolerating this unpalatable state of affairs is clearly unconscionable. The minimal measures adopted by international policymakers in the form of voluntary initiatives have been largely ineffective, thus

DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 403, 406 (Philip Alston & Mary Robinson eds., 2005) (discussing “[w]ell-known historical episodes, such as the influence of the U.S.-based corporations ITT, Pepsi-Cola and the Chase Manhattan Bank in the *coup d’Etat* which put Pinochet into power in Chile or the role of the Union Miniere in the secession of Katanga from Congo” that demonstrate MNC interference in internal affairs of States in which they operate).

¹⁹³ For a discussion by this author of the “leadership curse” that has plagued many resource-rich developing countries, see Emeka Duruigbo, *Permanent Sovereignty and People’s Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT’L L. REV. 33 (2006).

¹⁹⁴ Plenary Theme Panel, *The Challenge of Non-State Actors*, 92 AM. SOC’Y INT’L L. PROC. 20, 33 (1998) (remarks of Linda Mabry). See also Addo, *Human Rights*, *supra* note 169, at 11 (“In the era of the global economy and the reduction of trading and investment barriers, the laws of one particular country will be inadequate in controlling corporate behavior.”).

¹⁹⁵ See Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations – Emergent International Rights and Wrongs* 38 VA J. INT’L L. 331, 335–36 (1998); Olivier de Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 59, at 227.

¹⁹⁶ See Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 2 (1995). One commentator sums up this scenario as follows:

Even though the global community is aware of the tremendous power of MNCs, private corporate entities bear almost no obligations under public international law Furthermore, even in areas where international law has something to say about corporate behavior (for example, basic human rights and environmental protection) its dictates are difficult, if not impossible, to enforce. The transnational activity of corporations implicates a home country and a host country, each with their own interests. These interests, and the legal control of each country over a corporation, are not perfectly aligned, so at times the countries’ jurisdictions overlap and there is a jurisdictional lacuna where the corporation is not subject to any law. In the case of many resource-extraction firms, the host government will not upbraid the foreign MNC for actions that the government is involved in, while the MNC’s home courts are unlikely to engage in extraterritorial control. In other words, in many instances, where a developing host country is eager to attract corporate capital and expertise and, for various reasons, does not (or cannot) subject corporate conduct to judicial scrutiny, a corporation acts without any legal control, domestic or international.

Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT’L L. & FOREIGN AFF. 81, 84-86 (1999). See also Claudio Grossman & Daniel Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT’L L. & POL’Y 1, 8-9 (1993).

leading to cries for binding enforceable rules.¹⁹⁷ The rules desired would go beyond the current approach that rewards free-riding and other forms of disobedience, while essentially placing responsible companies at a competitive disadvantage.¹⁹⁸ Undoubtedly, there is something wrong with a system that closes its eyes to obvious misbehavior as states shirk their responsibility and corporations escape accountability. It has become imperative to fortify the international legal system and re-orient it to proactively address some of the serious problems plaguing humanity as a result of corporate operations worldwide. The foregoing reasons provide a real rationale for the changing position of the MNC in international law.

B. Challenges to Change

¶164

The conceptual and philosophical difficulties regarding the imposition of direct obligations on MNCs in international law present formidable obstacles to accomplishing that goal.¹⁹⁹ Apart from the issue of legal personality already exhaustively discussed here, a major philosophical constraint to imposing direct human rights obligations on corporations is the argument that human rights obligations are meant to constrain the power of the state over citizens and should not be trivialized by applying them to interactions between citizens.²⁰⁰ The apprehension is that such a restructuring of the human rights system would end up being inimical to the notion of human rights itself and the protection of individual rights.²⁰¹ Proponents of imposing direct human rights obligations on MNCs counter that “we can legitimately reverse the presumption that human rights are inevitably a contract between individuals and the state; we can presume that human rights are entitlements enjoyed by everyone to be respected by everyone.”²⁰² However, opponents of such an expansive view of human rights respond that, while it may not necessarily be wrong to adopt such a presumption, proponents need to provide a

¹⁹⁷ It should be noted that substituting binding rules for voluntary initiatives does not automatically translate to success or effectiveness. See Sir Geoffrey Chandler, *John Ruggie: Compelling Corporate Action on Human Rights*, ETHICAL CORPORATION, Apr. 4, 2007, <http://www.ethicalcorp.com/content.asp?ContentID=4995>. (“The debate has long been mired in controversy between the proponents of voluntary and mandatory measures, though history shows that voluntarism has never worked and that the law on its own is inadequate to control so protean an activity as business.”).

¹⁹⁸ See INT’L NETWORK FOR ECON., SOC. & CULTURAL RTS., JOINT NGO SUBMISSION ON HUM. RTS. & THE EXTRACTIVE INDUSTRY-2005 28 (2005), available at http://www.escri-net.org/actions_more/actions_more_show.htm?doc_id=430968 (last visited Apr. 13, 2008); Int’l Fed’n for Hum. Rts., *supra* note 96, at 7 (stating that “the move toward a binding framework has grown out of the gross failure of voluntary mechanisms”). See also *Interim Report*, *supra* note 10, at ¶ 53.

¹⁹⁹ See De Schutter, *Imposing Human Rights Norms*, *supra* note 100, at 33 (advising against underestimating the conceptual difficulties to achieving international responsibility of corporations).

²⁰⁰ For a distillation of this point, see CLAPHAM, *supra* note 62, at 33–35, 58.

²⁰¹ Christine Chinkin counters the “apprehension that to transform the vision of human rights to include acts by private individuals would disturb and undermine the entire edifice of human rights,” asserting that “[i]f human rights law is so fragile that it cannot withstand such reconceptualization, then it is barely worth preserving.” Christine Chinkin, *International Law and Human Rights*, in HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL 105, 115 (Tony Evans ed., 1998).

²⁰² CLAPHAM, *supra* note 62, at 58. See also Addo, *Human Rights*, *supra* note 169, at 27 (“The view that human rights affect all sectors of society by conferring entitlements and imposing obligations on everyone is a powerful one in defining the relationship between human rights standards and corporate policy.”); Sigrun I. Skogly, *Economic and Social Human Rights, Private Actors and International Obligations*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, *supra* note 29, at 239 (providing justification for the re-conceptualization).

persuasive reason for us to do so, but so far have fallen short of that.²⁰³ “Instead, we are called upon to expand human rights law at the same time that we continue to face enormous problems in implementing even the limited, state-centered version of human rights.”²⁰⁴

¶165 Beyond the conceptual challenges, however, there are also practical problems to making corporations international legal persons or holding them directly accountable under international law.²⁰⁵ It almost goes without saying that the challenges to an enhanced legal status for MNCs in international law or attribution of direct responsibilities to them are legion.²⁰⁶ One set of challenges represents obstacles or objections to an enhanced status, while another set of challenges pertains to problems that could emanate from an acceptance of corporations as subjects of international law. The rationale for a change in the international legal structure to accommodate multinational corporations appears to be on solid ground.²⁰⁷ However, it would be imprudent to gloss over the serious questions occasioned by efforts to enhance the status of corporations and simultaneously saddle them with direct obligations in international law.

¶166 One practical objection to enhancing MNC’s legal status is that granting MNCs “direct participation in the international legal system could create a void if it resulted in a weakening of state regulation of MNCs without a corresponding strengthening of international regulation.”²⁰⁸ With such a void, MNCs would be freer and in a better position to pursue the expansion of their economic and political influence worldwide. This situation, it is further argued, may be detrimental to the well-being of other actors who hold competing interests on the global stage.²⁰⁹

¶167 Another practical objection to an expansion of the corporate role is premised on the belief that international law lacks the capability to resolve the most difficult political, military, and economic issues that confront humanity and that “only the nation-state and its domestic system has been able to do so successfully.”²¹⁰ Implicit in this contention is the premise that, at present, the nation-state is the only possible juridical entity with enough power to keep the activities of multinational corporations from prejudicing other human interests.²¹¹ It stands to reason, therefore, that if MNCs are endowed with significant international legal personality and, by virtue of that, receive increased

²⁰³ See Hurst Hannum, Book Review, 101 AM. J. INT’L L. 514, 519 (2007) (reviewing ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006)).

²⁰⁴ *Id.*

²⁰⁵ For a critique of direct regulation of MNCs because of the practical constraints it presents, see Cristina Baez, et al., *Multinational Enterprises and Human Rights*, 8 U. MIAMI INT’L & COMP. L. REV. 183, 221-22 (2000).

²⁰⁶ Indeed, the multinational corporation has long presented challenges for international law. See, e.g., Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law* 83 HARV. L. REV. 739 (1970).

²⁰⁷ See Joseph, *supra* note 29, at 87-88 (discussing some of the advantages of direct regulation of corporations under international law).

²⁰⁸ Charney, *supra* note 28, at 772-73.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* There may be questions as to the continued validity of this observation in light of modern realities relating to the power of the State and policy options at its disposal. See, e.g., Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT’L L. 435, 435 (1997) (stating that “the policy options open to states in any real sense have, especially in recent years, become increasingly constrained, both in practice and as a matter of international law”).

freedom from state control, the result could be a shift in distribution of world power in undesirable proportions.²¹²

¶168 This objection lacks merit, however, as it is quite difficult to maintain a serious argument that human rights and other issues of current global relevance, such as the environment, public health, poverty and security, can properly be addressed only, or even primarily, at the national level.²¹³ In the integrated and globalized society that we live in today, the importance of international cooperation or other collective and concerted efforts that transcend national boundaries cannot be overemphasized.²¹⁴ When the overwhelming influence and stature of the MNC vis-à-vis all but the mightiest of states is factored in, critical questions arise about the prudence of following that course of action.²¹⁵ Moreover, international involvement is not coterminous with complete national displacement. International law can define prohibited acts and give primacy over their investigation and prosecution to national authorities, with international legal processes stepping in only when states have shown an unwillingness or inability to act. International criminal law already provides such a model through the complementarity principle enshrined in the International Criminal Court Statute.²¹⁶

¶169 An enhanced status for MNCs also raises eyebrows because of the perception that it is tantamount to a multiplication of key players in the international legal system, with the attendant possibility of crippling international law and relations. If history of empires is any guide, the danger may be real: “Historians attribute the anarchy of Western Europe’s dark and early middle ages to its surfeit of sovereigns and semi-sovereigns.”²¹⁷ With the above problems, it is clear that the task is to search for solutions that are both responsible and effective.²¹⁸

¶170 A considerable challenge to boosting the position and role of corporations in international law is the conflict between short-term economic development and human rights protection in developing countries. Richard Falk draws attention to this tension when he embraces the utility of a “framework of international legal obligations” in the protection of human rights, particularly in countries where human rights regulation is

²¹² See Charney, *supra* note 28, at 773.

²¹³ See Mark Malloch Brown, *Who Should Pick the World Bank Chief?* L.A. TIMES, May 18, 2007.

²¹⁴ See *id.*

²¹⁵ See also Timberg *International Combines*, *supra* note 26, at 578 (addressing the “consequent necessity for both national states and the international community to cast off the illusion that the public interest in international economic activity is adequately safeguarded by national action alone”).

²¹⁶ For the rich corpus of commentary on the international criminal court and the complementarity principle provided for in the treaty establishing the court, see Miles M. Jackson, *The Customary International Law Duty to Prosecute Crimes Against Humanity: A New Framework*, 16 TUL. J. INT’L & COMP. L. 117, 131 (2007); Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1279 (2007); Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985, 1031 (2007); Remigius Oraeki Chibueze, *The International Criminal Court: Bottlenecks to Individual Criminal Liability in The Rome Statute*, 12 ANN. SURV. INT’L & COMP. L. 185, 191-99 (2006). See also Brief for European Commission as Amici Curiae Supporting Neither Party, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

²¹⁷ Charney, *supra* note 28, at 773.

²¹⁸ As one commentator puts it, “[o]ur challenge then is to modernise the way in which we protect human rights recognising the international nature of corporations, while strengthening rather than weakening the legal force of the nation state.” Jessica Woodroffe, *Regulating Multinational Corporations in World of Nation States*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, *supra* note 28, at 131.

inadequate or non-existent.²¹⁹ Nevertheless, he is apprehensive that “given the clear benefits of foreign investment in mitigating poverty, imposing international standards that reduce the attractiveness of countries with minimal regulation would, in the short term at least, likely accentuate human suffering.”²²⁰ The logic of this position appears to be that raising human rights standards in these countries would reduce their competitiveness and thus frustrate their economic and social development. While this argument may have some merit when the focus is on certain labor rights, its validity is doubtful when it is applied to grave abuses such as slavery and forced labor -- abuses of which some MNCs have been accused.²²¹ Yet, in view of the fact that many proposals for direct human rights duties of MNCs usually include a broad array of labor rights, this challenge remains a formidable one.²²²

¶71 Further, the attachment of direct obligations to corporations, whether in the human rights arena or in other contexts, could create practical problems of enforcement. Many advocates of direct human rights responsibilities of corporations seem to favor the creation of international institutions to give effect to those responsibilities, such as an international tribunal or a mechanism to monitor operations or receive complaints against MNCs and ensure compliance with international regulations.²²³ Skeptics wonder if this development would not result in the overflowing of any such system, thereby rendering it impotent. However, if accountability is a desirable goal, the pursuit of it should not be abandoned simply because the process can be cumbersome or expensive. Instead, it behooves policy makers and interested observers to come up with workable machineries for effectuating the intent of the regulations’ designers.²²⁴

¶72 A more serious challenge, however, is the fact that even the advent of direct international regulation of MNCs and the creation of international institutions to enforce those international norms may only amount to a marginal contribution to the struggle for corporate accountability. International tribunals simply will not have the capacity to hold more than a limited number of MNCs to account, out of the tens of thousands scattered

²¹⁹ Richard Falk, *Human Rights*, FOREIGN POLICY, Mar./Apr. 2004, at 18, 22.

²²⁰ *Id.*

²²¹ See Alston, ‘Not-a-Cat’ Syndrome, *supra* note 61, at 23.

²²² See, e.g., Statement by the Committee on Economic, Social and Cultural Rights, May 11, 1998 (cited in CLAPHAM, *supra* note 62, at 5) (lamenting the risk that an inordinate emphasis on competitiveness poses for the right to work, right to just and favorable working conditions, right to form and join trade unions, right to collective bargaining, right to strike and right to social security).

²²³ See De Schutter, *Imposing Human Rights Norms*, *supra* note 100, ¶ 16; Skogly, *supra* note 202, at 257; Jägers, *supra* note 28, at 269; UWE KREKOW, JENS MARTENS & TOBIAS SCHMITT, THE LIMITS OF VOLUNTARISM: CORPORATE SELF-REGULATION, MULTI-STAKEHOLDER INITIATIVES AND THE ROLE OF CIVIL SOCIETY 14–15 (2003).

²²⁴ A somewhat related question arose in the context of individual access to international processes for redressing abuses, which had the potential of crippling the mechanism in the event of an avalanche of petitions by aggrieved individuals. The question was dismissed outright by some proponents of individual access. See Edward I. Hambro, *Individuals before International Tribunals*, 35 AM. SOC’Y INT’L L. PROC. 22 (1941).

Another argument one meets with is that it would be too impractical, that the courts would be overloaded, etc. This argument is not only weak but immoral. If we as international lawyers recognize the fact that there is a need for enlarging the chance of individuals to plead their cause directly before international tribunals, we must certainly try to create the machinery instead of giving up justice because it in certain cases might prove complicated.

Id. at 26.

across the world.²²⁵ Accordingly, some scholars advocate alternatives (particularly the use of domestic court systems or private arbitral bodies) that will make it more feasible to reach a huge number of actors involved in human rights abuses.²²⁶

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Some scholars also argue that imposing direct human rights obligations on MNCs will not augur well for the interests of human rights protection in the sense that a strong regulatory framework would likely meet with states' resistance while a watered down arrangement would be counter-productive, trivializing the whole notion of human rights in the process. According to one variation of this argument, "the imposition of direct obligations on private corporations, backed by an effective international mechanism to enforce those obligations, would represent a significant disempowering of states. As such, it is a fundamental change that states are likely to resist strongly."²²⁷ On the other hand, imposition of direct obligations without the backing of an effective enforcement mechanism may amount to a failed strategy.²²⁸ Regarding the first prong of this argument, states are widely believed to be reluctant to share their privileged position with, or yield some of their sovereign powers to, corporations at the international level.²²⁹ Notably, state reluctance to extend legal personality to corporations cuts across geographic and ideological lines.²³⁰

¶74

Balancing the need to develop and strengthen democratic accountability mechanisms in developing host countries and creating international rules and processes for addressing corporate abuses constitutes yet another challenge. The SRSB has given some attention to this issue, stressing the imperative of not unduly focusing on international options at the expense of stymieing the emergence and fortification of the necessary political and social structures for protection of human rights in developing countries.²³¹ One benefit of strengthening domestic institutions in contradistinction to an overwhelming focus on direct international regulation of multinational corporations is that it increases the possibility of holding all businesses -- not just the multinationals --

²²⁵ See Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 382, 388 (2006).

²²⁶ See *id.* (advocating the use of contracts with private actors, incorporating public international law norms and enforceable in domestic courts); see also Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM & MARY L. REV. 135 (2005).

²²⁷ Vazquez, *supra* note 170, at 950.

²²⁸ See *id.*

²²⁹ See Fleur E. Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. U.L. REV. 893, 900 (1994) ("In this context, it seems difficult to attribute to states a will to elevate the TNC to the status of subject."). See also INTERNATIONAL RESTRUCTURING EDUCATION NETWORK (IRENE), CONTROLLING CORPORATE WRONGS: THE LIABILITY OF MULTINATIONAL CORPORATIONS: LEGAL POSSIBILITIES, INITIATIVES AND STRATEGIES FOR CIVIL SOCIETY (2000), available at <http://www.cleanclothes.org/publications/corp-1.htm> (last visited Apr. 13, 2008) ("In parallel with national legislation, we need international standards which are directly binding on MNCs. States have long resisted these, because imposing such obligations would give companies status in international law, which they felt was dangerous.").

²³⁰ See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* (1986).

Socialist countries are politically opposed to them [i.e., multinational corporations] and the majority of developing countries are suspicious of their power; both groups will never allow them to play an autonomous role in international affairs. Even Western countries are reluctant to grant them international standing; they prefer to keep them under their control – of course, to the extent that this is possible.

Id. at 134.

²³¹ See Ruggie, *Opening Statement*, *supra* note 155.

accountable for their human rights and environmental abuses. This approach becomes more attractive if considered in light of the SRS's observation that "[e]vidence suggests that firms operating in only one country and state-owned companies often are worse offenders than their highly visible private sector transnational counterparts."²³² This argument is further accentuated by the observation that the *raison d'etre* of regional and international human rights regimes is "to cause States internally to guarantee basic rights and not merely to allow access to the [regional or international] system."²³³ It can hardly be gainsaid that we defeat that purpose, at least partially, when we place an inordinate emphasis on international processes at the expense of, or with scant regard to, the development of internal guarantees at national levels.²³⁴ Besides, the experience with the International Criminal Court ("ICC"), marked by frustration and unfulfilled expectations as opposed to the euphoria that greeted its emergence, has shown the limitations of excessive focus on international channels.²³⁵ Accordingly, there have been calls for increased emphasis on national prosecution, with the ICC playing a proactive role in providing assistance to states in that regard.²³⁶

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Human rights groups, however, argue that since it may take a while to develop domestic institutions, it is necessary to institute international measures in the interim.²³⁷ Both arguments have considerable merit. A possible way to bridge the gulf between the two camps would be to carve out a role for MNCs in building or strengthening domestic institutions in countries of operation -- which would require, of course, that they be sufficiently incentivized and interested in doing so.²³⁸ Such a move may actually be a significant contribution to the realization of the objectives of the international human rights regime.²³⁹ In sum, lawmakers must keep in mind the need to craft an international solution that does not ultimately jeopardize institutional development in developing countries.²⁴⁰

²³² *Mapping International Standards*, *supra* note 11, ¶ 3. *See also Latin America Consultation*, held by the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises (Jan. 18-19, 2007), at 4 (stating that a State's discharge of its human rights obligations may be hampered where State-controlled corporations are involved).

²³³ Bernard Robertson, *Exhaustion of Local Remedies in International Human Rights Litigation--The Burden of Proof Reconsidered*, 39 INT'L & COMP. L.Q. 191, 196 (1990).

²³⁴ *See* Emeka Duruigbo, *Exhaustion Of Local Remedies In Alien Tort Litigation: Implications For International Human Rights Protection*, 29 FORDHAM INT'L L.J. 1245, 1290-91 (2006) (making a similar argument in the context of international litigation to address human rights) [hereinafter Duruigbo, *Exhaustion Of Local Remedies*].

²³⁵ *See* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in The Rome System of International Justice*, 49 HARV. INT'L L.J. 53 (2008).

²³⁶ *See id.*

²³⁷ *See* INT'L NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 198, at 28.

While building the capacity of national governments to provide protection by 'regulating and adjudicating' the role of transnational corporations and other business enterprises is important, the SRS should recognize that in reality in conflict-prone countries or in countries with a poor human rights record this is not something that is achievable in the short-term. In the interim there is an urgent need for the international community to offer some means to protect the rights of the victims of corporate malpractice.

Id.

²³⁸ For a discussion of the benefits to the business sector, among other interests, in developing and fortifying domestic judicial, political and social structures in host countries, *see* Duruigbo, *Exhaustion Of Local Remedies*, *supra* note 234, at 1294-95.

²³⁹ *See id.*

²⁴⁰ For further discussions on the subject of international cooperation and regulation in the face of national

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There is also the issue of corporate ambivalence or lack of enthusiasm toward acquiring international legal personality.²⁴¹ Unlike some other subjects of international law, or any other legal system for that matter, who agitate for recognition or parity with other subjects,²⁴² corporations do not seem in a hurry to be regarded as international legal persons. Their stance may be explained by the fact that non-status benefits them more, as through their influence they continue to shape and share in the benefits of the international legal system without being saddled with the obligations.²⁴³ The campaign for an enhanced international legal status would have been far less challenging if MNCs were at the forefront of the battle to confer them with personality or did not constitute a hindrance themselves to the realization of the change in position.²⁴⁴ Considering that effective solutions to problems occasioned by MNC activity demand a collaborative approach involving the corporations themselves,²⁴⁵ the task of engineering a change in corporate attitude in this regard, as daunting as it may be, is one that demands serious attention.²⁴⁶

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Moreover, the topic of corporate personality in international law recently seems to be dominated by an interest in attributing responsibilities directly to corporations. Meanwhile, many appear to lose sight of the fact that a component of legal personality could be the endowment of substantive rights and procedural capacity to bring claims before international organs.²⁴⁷ In other words, there is a ‘rights’ element to the equation²⁴⁸ that may empower corporations to make human rights claims before international tribunals.²⁴⁹ As Patrick Macklem has observed in a different but related

limitations, *see* Kobrin, *supra* note 46, at 229.

²⁴¹ *See* Charney, *supra* note 28, at 766-67 (“TNCs have not overtly sought broad international legal personality. In fact, when George Ball proposed that major TNCs should be subject to international rather than national incorporation, the business community was unenthusiastic.”).

²⁴² *See* Guido Acquaviva, *Subjects of International Law: A Power-Based Analysis*, 38 VAND J. TRANSNAT’L L. 346, 386 – 87 (2005).

²⁴³ *See* Charney, *supra* note 28, at 767 (noting that corporations are the beneficiaries of their international nonstatus); Duncan Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. INT’L & COMP. L. REV. 235, 236 (2002) (discussing the growing influence of MNCs in the making and implementation of international law).

²⁴⁴ The opposition of the business sector to the imposition of direct obligations on corporations cannot be overemphasized. *See* International Chamber of Commerce & International Organisation of Employers, *Joint Views of the IOE And ICC on the Draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”* (Mar. 2004), available at <http://www.reports-and-materials.org/IOE-ICC-views-UN-norms-March-2004.doc>.

²⁴⁵ *See* Chandler, *supra* note 197.

²⁴⁶ *See* Ratner, *supra* note 39, at 530 (stating that the participation of all key claimants, including corporations, governments and victims’ representatives, is essential); NYU CTR. FOR HUM. RTS., *supra* note 172, at 8 (“Moreover, rule making in this domain must factor in the likely reactions by all social actors that would be affected by the adoption of new rules.”).

²⁴⁷ Writing in reference to an international charter system for multinational corporations, Sigmund Timberg brings out this point clearly. *See* Timberg, *International Combines*, *supra* note 26, at 611.

In addition to imposing obligations, norms, and negative restrictions on corporations, the grant of a charter could also serve to confer on the [multinational corporation] legal standing and specific positive rights under international law. This has been suggested in the past, but, it is submitted, to the exclusion of a balancing emphasis on enforcing the correlative duties of corporations.

Id. (citation omitted).

²⁴⁸ *See* Manuel Rama-Montaldo, *supra* note 78 at 132 (discussing the range of rights accompanying legal personality in the case of States).

²⁴⁹ *Id.* *See also* Surya Deva, *Human Rights Violations by Multinational Corporations and international*

context, “with international corporate obligations come international corporate rights.”²⁵⁰ This situation raises a number of interesting questions and challenges. For instance, will some states, say Venezuela or Bolivia, be enamored of a system that allows energy corporations operating in their respective domains to bring claims founded on interference with the right to property?

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It is worth noting that a similar question arose regarding individual capacity and some writers were persuaded that states would be disinclined to confer such authority on individuals.²⁵¹ With the benefit of hindsight to view how far the individual has come in this regard, there is solid ground for a counter-argument that the problem may not be as big as imagined and that some states -- particularly home states of the multinationals -- would welcome an opportunity to settle human rights issues arising out of foreign investment before neutral international tribunals. Such transfer of jurisdiction would relieve home states of the onerous responsibility of seeking avenues for protecting the interest of their corporate nationals abroad, leaving the corporations to avail themselves of the opportunities provided by the neutral international forum.²⁵² An added advantage is that the resulting minimization of state intervention in foreign investment-related disputes would actually militate in favor of inter-state relations, thus contributing to international law’s fulfillment of its underlying purpose of avoiding conflicts and maintaining peace and stability.²⁵³

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MNCs may also show considerable interest in that arrangement because of the convenience of not having to go through governments almost all the time in order to resolve disputes between the MNC and other entities or persons.²⁵⁴ It is quite possible therefore that MNCs, seeing the benefits derivable from having a procedural capacity before international human rights tribunals, may condition any acceptance of direct human rights obligations on a corresponding capacity to appear before tribunals as direct claimants.²⁵⁵ Even if they do not exact any such conditions, international corporate rights

law: Where from Here? 19 CONN. J. INT’L L. 1, 55 (2003) (supporting the right of MNCs to bring claims to vindicate their rights before international tribunals). It should be noted that this situation is already the practice at the regional level. *See e.g.*, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, art. 1, 213 U.N.T.S. 262 (entered into force May 18, 1954); Developments in the Law, *supra* note 2, at 2043 n.43 (discussing the practice under the European Convention for the Protection of Human Rights and Fundamental Freedoms); Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105 COLUM. L. REV. 209, 226 n. 91 (2005).

²⁵⁰ Patrick Macklem, *Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction*, 7 INT’L L. FORUM 281 (2005).

²⁵¹ *See* MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 396 (1943) (stating that “many States would probably be reluctant to confer jurisdiction upon any international tribunal which would permit them to be sued by individuals”).

²⁵² It should be noted however that while home governments have stepped in to protect the interests of their MNCs, the relationship is not a one-way street; sometimes, governments have used MNCs to advance their own interests or achieve (foreign) policy objectives. *See* Seymour J. Rubin, *Developments in the Law and Institutions of International Economic Relations*, 68 AM. J. INT’L L. 475, 477 (1974).

²⁵³ *See* Rosalyn Higgins, *International Law in a Changing International System*, 58 CAMBRIDGE L.J. 78 (1999).

²⁵⁴ On the issue of convenience provided by international dispute resolution mechanisms, *see id.* at 84-88.

But it is also the case that [the International Tribunal on the Law of the Sea] is open, in certain types of disputes, to individuals, corporations, State enterprises and international organisations. In questions within its remit relating to the release of arrested vessels and to deep sea mining the convenience of not having to go through national States in order to resolve a dispute is manifest.

Id. at 86.

²⁵⁵ Ordinarily, corporations may not be interested in seeking the benefits of international human rights

may emerge anyway as a natural corollary of the imposition of international corporate obligations.²⁵⁶

¶80 Such a posture is not likely to be well received. One should not lose sight of the fact that states -- with or without questionable human rights records -- are not the only likely opponents of rights for corporations. Civil society groups and other human rights advocates are not particularly enthusiastic about such a development.²⁵⁷ Considering that, in the field of international investment, the investor-protection provision that permits corporations to bring direct claims against governments has been viewed as eviscerating national sovereign authority and restricting the interests of citizens, the conferment of international rights to corporations would likely engender great opposition.²⁵⁸ The complexity surrounding the various dimensions of this issue certainly presents a significant challenge to the further enhancement of the legal status of corporations in international law.

¶81 Some of these factors typify the challenges that will continue to dog efforts to integrate MNCs more fully into the international legal system as subjects, holding rights and bearing duties not only in the human rights area but also in general international law. Nevertheless, in view of the overwhelming evidence that MNCs are becoming dominant players on the domestic scene and key participants on the international stage, there is little option but to reconsider their current legal status.²⁵⁹ They exercise greater influence, in some respects, than other entities such as international organizations which have been

protections, if they come at the hefty price of being saddled with a duty to ensure the protection and realization of the rights of others, particularly since some of these human rights are aspirational in nature and quite expensive to realize. See Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 547 n.82 (2002). However, if the choice is between duty without rights and duties accompanied by rights, they would most likely opt for the latter.

²⁵⁶ See Macklem, *supra* note 250 (stating that such rights, in the context of universal jurisdiction, "would emerge incrementally as corporations seek to defend themselves from criminal prosecution").

²⁵⁷ See Michael K. Addo, *The Corporation as a Victim of Human Rights Violations, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS*, *supra* note 28, at 187 (decrying the lack of appreciation of the suggestion that corporations can also be human rights victims and discussing the value of recognizing the rights of corporations in the overall objective of human rights protection).

²⁵⁸ See Chris Tollefson, *Games without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141 (2002) (stating that critics of the North American Free Trade Agreement's investor protection clause "portray it as a Bill of Rights for transnational corporations, conferring on them the right to sue host governments for enacting bona fide, non-discriminatory public health and environmental regulations."). See also Vivian H.W. Wang, *Investor Protection or Environmental Protection? "Green" Development Under CAFTA*, 32 COLUM. J. ENVTL. L. 251 (2007); Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475 (2001); David A. Gantz, *Global Trade Issues in the New Millennium: Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651(2001). For a contrary view of the perceived negative effects of investor protection under investment treaties, see Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301(2004); Ian A. Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 226-29 (2001).

²⁵⁹ See Friedmann, *supra* note 94, at 1155.

The analytical positivist is likely to meet the assertion that individuals and corporations now play some legally definable part in the law of nations with the flat statement that only states are subjects of international law. Such a statement is as destructive of the development of international law as it is unanswerable from its own premises. . . . The evolution of international law has been overwhelmingly dependent upon the progressive adoption and modification of rules in response to changed international conditions.

clearly recognized as subjects of international law.²⁶⁰ The acknowledgment of this reality offers strong support for a significant change in this area, as “the continued viability of the international system depends upon the close conformity of public international law to international realities.”²⁶¹

V. CONCLUSION

¶82 A quarter of a century ago, one scholar observed that “[t]he spread of the multinational corporation in the post-World War II period has given rise to considerable scrutiny, some puzzlement, and even some alarm.”²⁶² Without question, the position of MNCs in international law has been a subject of interesting debates and intense disputation. The debate has revolved around whether private corporations are subjects of international law or mere players in the international legal system. Subjects of international law hold rights, bear duties, participate in lawmaking and, in some cases, play a role in enforcing the law. Classicists have insisted that only states are subjects of international law. This orthodox position made it virtually impossible for non-state entities to be accorded recognition as subjects of international law.²⁶³

¶83 The past six decades have ushered in some significant changes to the international legal system, with the inclusion of several other entities, notably international organizations and individuals (to some extent), as subjects of international law. For years, it was believed that this wind of change did not blow in the direction of MNCs, and so they remained at the periphery, not the center, of international law.²⁶⁴ However, the past few years have witnessed amazing developments in the international legal system, leading to the indisputable recognition that international law has started, and will continue, to play a greater role in the lives of people across the globe.²⁶⁵ A pertinent question is whether the ongoing changes in the international system will be wide enough to accommodate business enterprises, especially MNCs.

¶84 Recent developments, particularly the work of the SRSG, Professor John Ruggie, suggest that major changes are occurring in relation to the international legal status of business organizations. Proponents welcome these changes, and some demand more far-reaching restructuring of the international legal system as it pertains to human rights and the environment to accommodate and obligate MNCs. The belief is that a clear integration of MNCs into the international legal system will be accompanied by an articulation of direct responsibilities of these corporations under international law. There

²⁶⁰ See DURUIGBO, *supra* note 17, at 203.

²⁶¹ Charney, *supra* note 28, at 769. See also Korowicz, *supra* note 22, at 561 (“The doctrine of international law should take into consideration the realities of international relations and should be in a precise relation to these realities. Otherwise, the doctrine becomes mere philosophical speculation or mental gymnastics, often beautiful and admirable, but of inconsequential value to a jurist”).

²⁶² Oliver E. Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LIT. 1537, 1560 (1981).

²⁶³ See Alston, *‘Not-a-Cat’ Syndrome*, *supra* note 61, at 3; Dinah Shelton, *Remarks*, 100 AM. SOC’Y INT’L L. PROC. 249, 249 (2006) (“Defining international law [as law governing inter-State relations exclusively] meant that by definition individuals and other non-state actors could not be subjects of international law.”).

²⁶⁴ STEINER ET AL., *supra* note 42, at 1385 (stating that non-state actors, such as corporations, occupy the margins of the legal regime on human rights that is focused on states).

²⁶⁵ Slaughter & Burke-White, *supra* note 67, at 327. (“More recently, international law has penetrated the once exclusive zone of domestic affairs to regulate the relationships between governments and their own citizens, particularly through the growing bodies of human rights law and international criminal law.”).

remains some room for skepticism, though, in view of the conceptual challenges that have long stood in the way of this fundamental change in the structure of international law.

¶85 Leaving aside the conceptual, however, some pertinent problems with unequivocally accepting corporations as subjects of international law pertain to the practical questions raised by such envisaged development. Will it redound to the benefit of international law generally, and human rights protection in particular, to have corporations as bearers of rights and duties? More specifically, is the solution not at the state level, with states afforded every needed tool to rein in the excesses of corporations operating in their territory? The questions posed reveal only some of the points of resistance that states and MNCs are expected to put up against such fundamental changes in the international legal order.

¶86 The SRSG seems to offer two options: give home and host countries another opportunity to address the problem of corporate human rights abuses through extraterritorial legislation and the development of democratic accountability structures, or watch corporate abuses ascend to intolerable levels and reach a tipping point at which point international regulation becomes inevitable. The critical question, however, remains: just how far are we from the tipping point?