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Beyond Voluntary Corporate Social Responsibility: Corporate Human Rights Obligations to Prevent Disasters and to Provide Temporary Emergency Relief

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Beyond Voluntary Corporate Social Responsibility: Corporate Human Rights Obligations to Prevent Disasters and to Provide Temporary Emergency Relief

Anastasia Telesetsky*

ABSTRACT

Much of the focus of the emerging field of International Disaster Law is on state responsibility. Yet the source of some disasters is the failure of corporations to address known risks created by a company or located on company property. This Article queries whether there are obligations for corporations to act under international human rights law to prevent disasters where corporations have control over known hazards such as tailings dams or chemical dumps. This Article concludes that corporations have a legal duty to act in order to support and protect human rights whenever there is corporate knowledge of hazards that may precipitate a disaster. Additionally, corporations are often well-placed to provide temporary emergency relief during disaster. This Article suggests there may be a legal duty for corporations to temporarily protect the fundamental human rights of communities during a disaster until government-organized relief is available.

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I. INTRODUCTION

In places where hazardous business operations are the source of mass disasters, companies have been held legally responsible for injuries to the neighboring communities.¹ This is the case in post-Bhopal India with the creation of a doctrine of “absolute liability” when the Supreme Court of India decided two years after Bhopal that

an enterprise that is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of the hazardous or inherently dangerous nature of the activity which it has undertaken.²

Can this concept of businesses proactively protecting a community from harm extend beyond operational business failures to protect communities from natural disasters? Before and when disaster strikes, do businesses, particularly well-capitalized multinational corporations, owe any special legal duties to the communities where they operate based on human rights law?

In the years to come, the legal status of businesses, as potential actors in the field of international disaster law, will become increasingly important, as both the number of people affected by disaster and the cost of disasters increase.³ While businesses may

1. See, e.g., *Exxon Shipping v. Baker*, 554 U.S. 471, 515 (2008) (Exxon was held responsible for \$507 million in compensatory damages for damage to the property interests of Inuit, commercial fishermen, and neighboring landowners); DEEPWATER HORIZON CLAIMS CENTER: ECONOMIC AND PROPERTY DAMAGES SETTLEMENT, <http://www.deepwaterhorizoneconomicsettlement.com/index.php> (last visited Sept. 6, 2015) [<http://perma.cc/4XLV-NSHL>] (archived Sept. 30, 2015) (showing the organization managing ongoing compensation claims for the 2010 BP Deepwater Horizon oil spill).

2. *Mehta v. Union of India*, (1987) 1 SCR 819. (India).

3. See EM-DAT, The International Disaster Database, *Natural Disaster Summary 1900-2011*, http://www.emdat.be/sites/default/files/Trends/natural/world_

choose to engage in disaster relief efforts, as the Union Carbide Corporation did when it funded the Prime Minister's Relief fund with \$2 million and provided immediate medical equipment and supplies after the Bhopal disaster,⁴ the question is whether this corporate response is based on concepts of corporate social responsibility (CSR) or whether corporate involvement in disaster prevention and relief should be based instead on a human rights-based legal duty. The source of the response matters because a response based on CSR is voluntary and not enforceable by law, while a response based on protecting fundamental human rights is obligatory and may be legally enforceable. This Article argues that under existing human rights law, corporations have dual international legal duties in relation to potential or actual disasters that correlate with duties based on the protection of individual human rights. First, corporations operating within a specific community or region must proactively protect communities from corporate activities or conditions that are likely to directly or indirectly cause harm to the community, such as a Bhopal-like industrial disaster. Second, corporations operating within a specific geographically designed community must be prepared to be first responders when they have the capability, after a disaster, of responding with goods or services (e.g., logistics) to alleviate human suffering within the region where the company operates. The source of these duties resides in corporate duties to "support and respect" human rights, which includes a duty for a corporation within its "sphere of influence" to support a state in achieving its obligations to fulfill individual human rights.⁵

This Article begins with examining what the term "disaster" means in a legal context and offers a definition relevant to corporate activities. The second Part reviews corporate efforts to reduce disaster risks and respond to disasters in the context of corporate social responsibility. The third Part explores the relationship between corporations and human rights and suggests that businesses may have a subset of human rights obligations that extends beyond corporate social responsibility, to include an active duty to support and respect human rights. The final Part of the Article describes the

1900_2011/kefyr1.pdf (last visited Sept. 6, 2015) [<http://perma.cc/3SK5-Z6VD>] (archived Sept. 30, 2015) (illustrating recent trends in the number of people affected by natural disasters); EM-DAT, *Estimated Damage (US\$ billion) caused by reported natural disasters 1975-2011*, http://www.emdat.be/sites/default/files/Trends/natural/world_1900_2011/damyrTemp2.pdf (last visited Sept. 6, 2015) [<http://perma.cc/6BUF-RG7E>] (archived Sept. 30, 2015) (highlighting the rising economic cost of natural disasters).

4. See UNION CARBIDE CORPORATION, <http://www.bhopal.com/UCC-Response-Efforts-to-Tragedy> (last visited Sept. 6, 2015) [<http://perma.cc/2S8W-NJFX>] (archived Sept. 30, 2015) (detailing UCC's response efforts to the tragedy and the settlement).

5. UN GLOBAL COMPACT, GUIDE FOR INTEGRATING HUMAN RIGHTS INTO BUS. MGMT., at 8 (2006).

two human rights obligations of corporations: (1) a duty to take adequate measures to prevent disasters, and (2) a limited duty to provide noncommercial relief during a disaster. In some instances, corporations have acknowledged a moral duty to both prevent and respond to disaster; this Article proposes that given the causes of disaster (e.g., the failure to sufficiently manage hazards either at the firm level or the community level), specific legal duties are emerging that, when internalized into corporate functions, will enhance both disaster prevention and relief efforts.

A. Definition of Disaster

If corporations have some sort of legal responsibility for “disaster relief” or “disaster risk reduction,” then it is essential to define “disaster” in order to know what kinds of events might trigger a duty for a corporation to respond. Defining “disaster” has not proven to be a simple task, and, as of 2014, there are a variety of similar but differentiated definitions in use by state parties, intergovernmental organizations, and international nongovernmental organizations. In a 1998 multilateral treaty, “disaster” was defined as “a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property, or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes.”⁶ The International Law Commission (ILC), in its Draft Articles on the Protection of Persons in the Event of a Disaster, removed the causation portion of the Tampere Convention language and defined disaster as “a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.”⁷

The United Nations even more broadly defines disaster as “a serious disruption of the functioning of a community or a society causing widespread human, material, economic, or environmental losses which exceed the ability of the affected community or society to cope using its own resources.”⁸ This definition is broad enough to encompass both industrial disasters and natural disasters. The Tampere Convention definition, ILC definition, and UN International Strategy for Disaster Reduction definition all posit disaster as

6. Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations art. 1, June 18, 1998, 2296 U.N.T.S. 5.

7. U.N. GAOR, 66th Sess., U.N. Doc., A/CN.4/L.831 (May 15, 2014).

8. UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION, TERMINOLOGY, <http://www.unisdr.org/we/inform/terminology> (Aug. 30, 2007) [<http://perma.cc/XE2T-WAM2>] (archived Sept. 30, 2015).

something that is catastrophic in terms of degree of damage because it exceeds the ability of a community to respond to protect human lives, property, and the environment.

The International Federation of the Red Cross and Red Crescent Societies (IFRC) provides a similar definition that it summarizes with the following formula: “(Vulnerability + Hazard) / Capacity = Disaster.”⁹ The IFRC definition is a particularly significant operational definition because it highlights the relationship of community vulnerability and objective hazards to the creation of conditions for a disaster. Hazards will always exist, whether they are the operation of a chemical plant or a tsunami. Notably, hazards only result in disasters when there is either a failure to minimize the risks associated with a given hazard or a failure to appropriately respond to an event that injures persons, property or the environment within a given area.¹⁰

For purposes of this Article, a disaster is a known hazard that has not been adequately addressed through disaster risk reduction measures and has been either triggered by a natural event or a primarily human-generated event (e.g., an industrial accident or land use decision) that leads to substantial damage that a group is unable to adequately respond to due to a lack of resources or services. There is some value in explicitly including the term “hazards” in any definition of disaster because it provides a recognition that there are risks in modern living that must be understood by human decision makers as part of their determination of what constitutes appropriate action in a given geographical or socioecological context. There is added utility in creating a definition that distinguishes between naturally triggered disasters and primarily human triggered disasters because such a definition has the potential to assist in flagging which actors might be accountable in the event of a disaster. When an earthquake happens and all buildings have been built to code in proper zones, then the resulting disaster is a great misfortune for which damaged parties might look to the state for relief because of the state’s duties to protect fundamental human rights.¹¹ When an earthquake happens and a construction company with knowledge

9. INT’L FED’N OF RED CROSS AND RED CRESCENT SOCIETIES, WHAT IS A DISASTER?, <http://www.ifrc.org/en/what-we-do/disaster-management/about-disasters/what-is-a-disaster> (last visited Sept. 30, 2015) [<http://perma.cc/LLQ5-96EW>] (archived Sept. 30, 2015).

10. See M.C. LINDELL ET. AL., FUNDAMENTALS OF EMERGENCY MANAGEMENT 155–179 (2006).

11. See International Covenant on Civil and Political Rights, art. 2, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, art. 2, Dec. 16, 1966, 993.3 (“Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms . . .”).

that the area is seismically active, or has the potential to be seismically active, failed to build structures with the potential to survive earthquake damage, then the construction company should be held accountable for disaster damage because of its prior knowledge of hazards.

While the legal fiction of an “Act of God” persists in legal contracts, the concept is not just useless in terms of disaster risk reduction, but potentially dangerous because it justifies a lack of thinking about consequences. In an era when more extreme events such as sudden storms and long-term droughts can be expected, any legal concept of “disaster” used for decision making must recognize that there are numerous discrete opportunities for both public and private actors to reduce hazards.¹² Excessive optimism, reflected in some of the rhetoric of climate skeptics or the fatalism of “Act of God” provisions, undermines collective social action to cope with rapid socioecological changes.

B. Current Business Engagement in Disaster Risk Reduction and Disaster Relief

Businesses have been increasingly engaged in emerging social and political conversations about disaster, in part because of increasing understanding of the economic risks associated with unmitigated hazards.¹³ Most of the attention for the business “disaster agenda” has been on individual disaster risk reduction plans for businesses across the supply chain and creating a disaster-resilient society.¹⁴ Observing events such as the Great Indian Ocean

12. See Aiguo Dai, *Increasing Drought Under Global Warming in Observations and Models*, 3 NATURE CLIMATE CHANGE 52, 52 (2012) (suggesting that drought modeling shows an increased risk of drought in the twenty-first century); Seung-Ki Min, et. al., *Human Contribution to More Intense Precipitation Extremes*, 470 NATURE 378, 378 (2011).

13. See, e.g., Fujitsu Global, *Business and Other Risks: Natural Disasters and Unforeseen Incidents*, <https://www.fujitsu.com/global/about/ir/policy/risks/07> (last visited Sept. 30, 2015) [<https://perma.cc/S85B-DWXX>] (archived Sept. 30, 2015) (announcing to investors the potential risks of disaster to Fujitsu’s business operations including damage to facilities, disruption of business services, and damage to supply chains).

14. See Price Waterhouse Cooper, *Rebuilding for Resilience: Fortifying Infrastructure to Withstand Disaster* (September 2013), http://www.pwc.com/en_GX/gx/capital-projects-infrastructure/disaster-resilience/report-downloads.jhtml [<http://perma.cc/DS9Q-YXC7>] (archived Sept. 30, 2015) (looking at opportunities for public and private sector collaboration in building or rebuilding risk-resilient infrastructure); FED. EMERGENCY MGMT. AGENCY, PRIVATE SECTOR DIVISION NEWSLETTERS, <http://www.fema.gov/media-library/assets/documents/94239> (last visited Sept. 30, 2015) [<http://perma.cc/MX3E-LFXG>] (archived Sept. 30, 2015) (providing tools for private sector emergency planning, preparedness and resilience); Stefan Tangen & Dave Austin, *Business Continuity-ISO 22301 When Things Go Seriously Wrong*, INT’L

Tsunami, Fukushima, Hurricane Sandy, Hurricane Katrina, and Typhoon Haiyan, businesses recognize that major disasters will wreak nationwide and potentially international economic havoc through a combination of direct and indirect losses.¹⁵ In fact, since 1981, losses from disasters in states belonging to the Organization of Economic Cooperation and Development are growing faster than the respective states' GDP.¹⁶ Businesses understand in principle that \$1 spent in disaster prevention efforts today might avoid \$15 of future losses.¹⁷ Many businesses are investing in "disaster-proofing."¹⁸ A political understanding of businesses as agents of change for disaster risk reduction is reflected in both the 2005–2015 Hyogo Framework for Action (HFA) and the Sendai Framework for Disaster Risk Reduction 2015–2030 (Sendai Framework).¹⁹

Under the HFA, state parties agree to the goal of a "substantial reduction of disaster losses, in lives and in the social, economic and environmental assets of communities and countries."²⁰ HFA parties understand that achieving this goal would require "full commitment and involvement of all actors concerned," including "the private sector."²¹ Private actors are expected to engage in multi-sectoral and interdisciplinary national platforms for disaster reduction.²² As part

STANDARDS ORG. (June 18, 2012), <http://www.iso.org/iso/news.htm?refid=Ref1602> [<http://perma.cc/9KWS-QUJH>] (archived Sept. 30, 2015) (describing ISO Standard 22301 for Business Continuity Management as a standard for the "protection of society from, and in response to, incidents, emergencies and disasters caused by intentional and unintentional human acts, natural hazards and technical failures.").

15. See generally NAT'L RESEARCH COUNCIL, *THE IMPACTS OF NATURAL DISASTER: A FRAMEWORK FOR LOSS ESTIMATION* 35–44 (Nat'l Academy Press 1999) (calculating substantial indirect losses associated with disasters including \$100 billion losses due to business interruption during the Kobe Earthquake).

16. See UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION, *TOWARDS A POST-2015 FRAMEWORK FOR DISASTER RISK REDUCTION*, ¶ 14, http://www.unisdr.org/files/25129_towardsapost2015frameworkfordisaste.pdf [<http://perma.cc/UA6D-7K8S>] (archived Sept. 30, 2015).

17. See Andrew Healy & Neil Malhotra, *Myopic Voters and Natural Disaster Policy*, 103 AM. POLITICAL SCI. REV. 387, 397 (2009) (describing chronic underinvestment by the government in disaster preparedness).

18. See, e.g., Teijin, *Corporate Social Responsibility: Disaster Prevention Activities*, <http://www.teijin.com/csr/environment/disaster.html> [<http://perma.cc/ZYT5-M8N3>] (archived Sept. 30, 2015) (describing ongoing investments in "Measures for Compliance with the Promotion of Building Earthquake-resistance Reinforcement Law").

19. See U.N. INT'L STRATEGY FOR DISASTER REDUCTION, *HYOGO FRAMEWORK FOR ACTION 2005–2015* [hereinafter *Hyogo Framework*], http://www.unisdr.org/files/1037_hyogoframeworkforactionenglish.pdf [<http://perma.cc/G27M-6XNT>] (archived Sept. 30, 2015); *Building Resilience of Nations and Communities to Disasters*, U.N. Doc. A/CONF.206/6 (Jan. 22, 2005); G.A. Res. 69/283, annex, *Sendai Framework for Disaster Risk Reduction 2015–2030*, U.N. Doc. A/RES.69/283 (June 23, 2015).

20. *Hyogo Framework*, *supra* note 19, ¶ 11.

21. *Id.*

22. *Id.* at 6 n.10.

of implementing the framework, states are encouraged to (1) “promote the establishment of public-private partnerships to better engage the private sector in disaster risk reduction activities”; and (2) “encourage the private sector to foster a culture of disaster prevention, putting greater emphasis on, and allocating resources to, pre-disaster activities such as risk assessments and early warning systems.”²³ The HFA identifies public-private partnerships as mechanisms to “spread out risks, reduce insurance premiums, expand insurance coverage and thereby increase financing for post-disaster reconstruction and rehabilitation.”²⁴

Either in parallel with or in response to the HFA framework, companies—especially insurance companies—have been active in creating a “culture of insurance.”²⁵ A number of major reinsurers have begun to offer index insurance products to assist vulnerable populations facing drought or excess precipitation events.²⁶ Major insurance companies have begun to participate in a number of public-private ventures to enhance the role of the insurance industry in disaster risk management as both risk carriers and risk managers. With organizational members that represent 15 percent of the world’s premium volumes for insurance, the UN Environmental Programme Finance Initiative Principles for Sustainable Insurance is involved in various efforts, including providing advice on creating disaster-resilient communities and mapping global disasters in order to identify individual communities most in need of disaster reduction efforts.²⁷

Various other business initiatives have been created to reduce corporate exposure to disaster risk.²⁸ In 2014, the United Nations

23. *Id.* ¶¶ 11, 19(ii)(l)

24. *Id.* ¶¶ 19, 34(e)

25. *Id.*

26. *See, e.g.*, Katie Gilbert, *Index Insurance Takes Root as Climate Change Stings Agriculture*, INSTITUTIONAL INV’R (Oct. 21, 2014), <http://www.institutionalinvestor.com/article/3392422/asset-management-hedge-funds-and-alternatives/index-insurance-takes-root-as-climate-change-stings-agriculture.html#VLHQft597dk> [<http://perma.cc/3SB4-VL6R>] (archived Sept. 30, 2015).

27. *See* Press Release, United Nations Environment Programme, *As World Convenes for First United Nations Environment Assembly, UN and World’s Insurers Unite to Tackle Natural Disaster Risk* (June 27, 2014), http://www.unepfi.org/psi/wp-content/uploads/2014/06/201406_PSI_press_release.pdf [<http://perma.cc/5HEA-AQ8E>] (archived Sept. 30, 2015).

28. *See, e.g.*, Tangen & Austin, *supra* note 14 (describing ISO Standard 22301-Business Continuity Management); United Nations Environment Programme Finance Initiative and Principles of Sustainable Insurance, *Insurance Industry Commitments To Build Disaster Resilience and Promote Sustainable Development*, <http://www.unepfi.org/psi/commitments/> [<http://perma.cc/ZRA4-3YXZ>] (archived Sept. 30, 2015) (describing multinational insurer AXA’s commitment to “[d]evelop risk management processes and insurance underwriting guidelines that promote disaster risk reduction and climate change adaptation and mitigation”).

announced the launch of the “R!SE” initiative to provide for disaster risk sensitive investments and encourage mainstreaming of disaster risk management into business processes. The Initiative, which has the support of companies such as Walmart and Citibank, intends to reach at least 1000 asset owners and investment managers, 200 insurers and reinsurers, and one hundred global businesses in at least fifty cities and twenty countries.²⁹

Statements by twenty-one Asian, Oceanic, North American, and South American leaders participating in the Asia-Pacific Economic Cooperation Summit show that states are keen to have broader engagement from business interests, particularly in disaster risk reduction and response.³⁰ In the 2014 Leaders’ Declaration, states committed to “encourage further cooperation of member economies in disaster preparedness, risk reduction, response and post-disaster recovery . . . including through . . . improving supply chain resiliency.”³¹ The reference to supply chain resiliency suggests an active role for critical businesses such as food, water, medicine, and energy supply corporations to coordinate with governments on disaster response.

States negotiated the Sendai Framework at the March 2015 UN World Conference on Disaster Risk Reduction and the UN General Assembly adopted it in June 2015.³² Like its predecessor, the HFA, the Sendai Framework references priorities for the “private sector” including public-private partnerships.³³ In addition to these references, the Sendai Declaration mentions “business” explicitly with a focus on building the resilience of businesses to respond to known hazards.³⁴ The framework articulates a need for “business to integrate disaster risk into their management practices, investments and accounting.”³⁵ States recognize the significance of corporate governance in reducing disaster risks and call for a “clear articulation of responsibilities across public and private stakeholders, including business, to ensure mutual outreach, partnership and

29. See United Nations Office for Disaster Risk Reduction, UN’s New Push to Revolutionise Business World’s Approach to Disaster Risk (May 19, 2014), <http://www.unisdr.org/archive/37549>. [<http://perma.cc/EU8L-97WS>] (archived Sept. 30, 2015).

30. See Asian-Pacific Economic Cooperation [APEC], 2014 Leaders’ Declaration, ¶ 49, (Nov. 11, 2014), http://www.apec.org/Meeting-Papers/Leaders-Declarations/2014/2014_aelm.aspx [<http://perma.cc/6YKZ-2SUG>] (archived Sept. 30, 2015).

31. *Id.*

32. G.A. Res. 69/283, *supra* note 19, ¶ 1.

33. *Id.* ¶ 19(d).

34. *Id.* ¶ 30(o).

35. *Id.* ¶ 7.

accountability.”³⁶ To assist businesses in addressing their disaster risks, states at the national level are expected to “promot[e] and provid[e] incentives, as relevant” to national businesses to address hazards.³⁷ Private investment in disaster risk reduction is also recognized with an emphasis placed on protection of livelihoods, protection of the supply chain, continuity of services, and integrating “disaster risk management into business models and practices.”³⁸ At the international level, the UN Global Compact, as the liaison between businesses and the United Nations, is expected “to further engage with [the private sector] and promote the critical importance of disaster risk reduction for sustainable development and resilience.”³⁹

One paragraph summarizes the “shared responsibility” of businesses and government to reduce disaster. Businesses are expected to

integrate disaster risk management, including business continuity, into business models and practices through disaster-risk-informed investments, especially in micro, small and medium-sized enterprises; engage in awareness-raising and training for their employees and customers; engage in and support research and innovation, as well as technological development for disaster risk management; share and disseminate knowledge, practices and non-sensitive data; and actively participate, as appropriate and under the guidance of the public sector, in the development of normative frameworks and technical standards that incorporate disaster risk management.⁴⁰

There are a few surprises in this articulation of what business might contribute to disaster risk reduction. Notably, there is no language explicitly about the relationship between a business entity’s activities and its community. Obliquely, the language refers to “business continuity,” which might presume a need for close interaction between a business and its immediate community.⁴¹ It is possible that undertaking specific disaster prevention efforts to protect a community would be part of the “disaster risk management” efforts suggested in this paragraph, but this is not made clear.⁴² Curiously, no minimal definition of the term “disaster risk management” is offered in the Sendai Framework itself, though the

36. *Id.* ¶19(e).
37. *Id.* ¶ 27(a)(ii).
38. *Id.* ¶ 30(o).
39. *Id.* ¶ 48(f).
40. *Id.* ¶ 36(c).
41. *Id.*
42. *Id.*

term is peppered throughout the document as something guiding both public and private stakeholders.⁴³

A comparison between the original draft negotiating document for the post-2015 framework and the final negotiating document suggests that negotiators were unwilling, for undisclosed reasons, to request more direct engagement from corporations beyond typical business responsibilities.⁴⁴ The draft negotiating document for the Sendai meeting anticipated even greater potential engagement from companies in terms of predisaster preparedness and postdisaster reconstruction.⁴⁵ States identified the importance of developing robust regional disaster relief approaches that “may include the use of business facilities and services . . . upon request.”⁴⁶ This discretionary language proposing possible direct corporate engagement in disaster preparedness or reconstruction as part of a regional disaster relief plan did not remain in the final version of the Sendai Framework.⁴⁷

While businesses do not offer detailed explanations of why they are engaged in various disaster reduction initiatives, most of the existing efforts that do not create a future market for business products or services, like disaster insurance or protect a core business interest, can be best characterized as voluntary corporate social responsibility (CSR) measures. John Twigg, a scholar at the Benfield

43. See *id.* ¶ 3 (“Effective disaster risk management contributes to sustainable development.”); *id.* ¶ 23 (“Policies and practices for disaster risk management should be based on an understanding of disaster risk in all its dimensions of vulnerability, capacity, exposure of persons and assets, hazard characteristics and the environment.”); *id.* ¶ 33(j) (addressing the need to “[p]romote the incorporation of disaster risk management into post-disaster recovery and rehabilitation processes.”); see also WORLD BANK, THE SENDAI REPORT: MANAGING DISASTER RISKS FOR A RESILIENT FUTURE 16 (2012), https://www.gfdr.org/sites/gfdr/files/publication/Sendai_Report_051012_0.pdf [<https://perma.cc/B25M-W6ZN>] (archived Sept. 3, 2015) (characterizing disaster risk management as including, at a minimum, efforts for risk identification, risk reduction, preparedness, financial protection, and resilient reconstruction).

44. Compare *Sendai Framework for Disaster Reduction 2015–2030*, *supra* note 19, ¶ 36(c) (encouraging indirect means of relief support for businesses such as the development of “normative frameworks,” policies, business models, and training systems) with Third U.N. World Conference on Disaster Risk Reduction, *Post-2015 Framework for Disaster Risk Reduction*, ¶¶ 32(a), 34(a), U.N. Doc. A/conf.224/pc(ii)/1.3 (Oct. 23, 2014) [hereinafter *Post-2015 Framework*], http://www.un.org/disabilities/documents/events/wcdrr/zero_draft.pdf [<http://perma.cc/JT7U-8QMP>] (archived Sept. 3, 2015) (requesting companies provide facilities to directly support disaster relief management).

45. See *Post-2015 Framework*, *supra* note 44, ¶ 32(a).

46. *Id.*

47. Compare *Sendai Framework*, *supra* note 19, ¶¶ 34(a)–(h) (removing the phrase “use of business facilities” in the completed *Sendai Framework*) with *Post-2015 Framework*, *supra* note 44, ¶ 32(a) (using “business facilities” to coordinate disaster relief management strategies).

Greig Hazard Research Centre at University College London, in a report on corporate social responsibility and disaster reduction, identifies five types of corporate involvement in disaster reduction and disaster mitigation, including: (1) philanthropic involvement (donations of cash, goods, services, or facilities to groups working in disaster reduction), (2) contractual involvement (contracting with public or private groups to carry out work for public benefit), (3) collaborative involvement (working in partnership with other groups for disaster reduction), (4) adversarial involvement (using public relations to work against additional corporate involvement), and (5) unilateral involvement (the business operates independently to reduce disaster).⁴⁸ Twigg's characterization of CSR and disaster reduction could also apply when there is corporate involvement in disaster relief. Notably, none of Twigg's categories of corporate involvement reflect any legal duty on the part of the companies to provide disaster risk reduction, but are, with the exception of the practice of adversarial involvement, simply good corporate policies that may improve the long-term reputation of a given corporate actor.

What one observes with existing corporate involvement in disaster risk reduction and disaster relief is that the corporation is morally motivated to be a good corporate citizen.⁴⁹ Corporations do not appear to be acting to reduce disaster risks because they understand that they have a legal duty to support and respect human rights in relation to the state and other non-state actors.⁵⁰ States have not pushed for explicit corporate responsibility. For example, in the current requests for public-private partnerships to respond to

48. John Twigg, *Corporate Social Responsibility and Disaster Reduction: A Global Overview*, BENFIELD GREIG HAZARD RESEARCH CENTRE 11 (Oct. 2011), <http://dr.upeace.org/english/documents/References/Topic%207-Preparedness-%20Early%20Warning,%20Planning,%20Monitoring%20and%20Evaluation/Twigg%202001%20CSR%20and%20disaster%20management.pdf> [<http://perma.cc/ZKH5-FMAD>] (archived Sept. 3, 2015).

49. See *Engineering & Construction Disaster Resource Partnership: A New Private-Public Partnership Model for Disaster Response*, WORLD ECON. FORUM 9, 29 (2010), http://www3.weforum.org/docs/WEF_EN_DisasterResourcePartnership_Report_2010.pdf [<http://perma.cc/E4YV-2WZU>] (archived Sept. 3, 2015) (observing that "[s]uch immediate actions undertaken by companies in response to disasters are not isolated philanthropic gestures. They are based on an understanding of their extended responsibility as part of a global citizenship in an increasingly interconnected world There is a desire by an increasing number of private sector firms to engage proactively in humanitarian response as part of a wider corporate global citizenship agenda, which recognizes business' role in society (locally and globally) and contributes to developing corporate culture, brand reputation and employee loyalty beyond the short-term financial bottom line.").

50. See Twigg, *supra* note 48, at 14–15 (explaining that societal expectations and the UN proposed Global Compact suggest a change in the role of businesses in humanitarian concerns where businesses have altruistic responsibilities beyond the traditional requirements imposed upon them).

disaster risks, states, through intergovernmental organizations such as the UNISDR, have never explicitly articulated any corporate obligations to support and protect human rights but have instead facilitated voluntary initiatives.⁵¹ This disconnect between corporate actions or omissions and human rights duties is particularly problematic in the context of disaster prevention because at least some of a community's unmanaged hazards are under direct corporate control. While a state has the legal authority to closely control corporate entities created under its domestic laws, exercising this control requires a robust regulatory system that is unavailable in a number of states limited by enforcement capacity.

CSR, which has been embraced by many companies and has been transformative in some cases, is a different project than a legal duty to support community human rights. Even though CSR efforts may have positive social outcomes, such as the delivery of needed medicines to populations who cannot afford them, they are largely an internal management decision where outside stakeholders have little to no input into when or how the corporation responds. Human rights protection focuses instead on individual human dignity and offers stakeholders an opportunity to be subjects rather than objects of corporate altruism. As Joel Feinberg explains, "Rights are not mere gifts or favors . . . [a] right is something . . . that can be demanded or insisted upon without embarrassment or shame A world with claim-rights is one in which all persons, as actual or potential claimants, are dignified objects of respect . . ." ⁵²

In the sections that follow, this Article suggests that all businesses have two implicit human rights duties related to disaster risk reduction and relief that must be exercised independent of any state action. Specifically, businesses must (1) actively reduce disaster risks within their immediate geographical communities over which they have control; and (2) deliver uncompensated disaster relief resources or services to neighboring communities during a disaster event when the state is unable to respond efficiently to the disaster and the business will not bankrupt itself by using its resources to deliver uncompensated emergency relief. To contextualize these legal

51. See *Disaster Risk Reduction Private Sector Partnership: Post-2015 Framework—Private Sector Blueprint Five Private Sector Visions for a Resilient Future*, UNIBAR 22 (2015), http://www.preventionweb.net/files/42926_090315wcdrrpspublicationfinalonli.pdf [http://perma.cc/QM4Z-CBEL] (representing the viewpoints of ninety-five businesses from thirty-five countries, this document mentions "accountability" as part of the partnership strategy but accountability and responsibility are only referenced obliquely in relation to "commitment areas" that include "resilience building . . . expansion of risk evaluation . . . improving risk zoning" but not support and respect of human rights).

52. JOEL FEINBERG, *SOCIAL PHILOSOPHY* 58–59 (Prentice-Hall, Inc., 1973).

responsibilities, the following Parts describe an evolution in corporate legal duties and human rights.

C. Corporations and Human Rights

Typically, human rights duties and obligations are assigned to states, and these duties are not directly transferable.⁵³ Even though states may be the primary holders of obligations to individuals under human rights doctrine, this does not mean that corporations do not hold any legal duties. Twentieth century history suggests otherwise. After World War II, when a number of German corporate leaders were prosecuted for crimes against peace, war crimes, and crimes against humanity, the courts explicitly identified corporate duties.⁵⁴ These duties corresponded with negative rights and required businesses to refrain from certain actions that infringe on basic human rights.

Scholars have argued that corporations have a variety of legal obligations to populations that reside within a given corporation's sphere of influence.⁵⁵ Specifically, Steven Ratner makes the case that businesses may owe duties to particular individuals or communities because of a nexus of "associative ties" that might include employment or local residence.⁵⁶ One might characterize this duty as "localized responsibility."

With the adoption of the Global Compact and the publication of the UN Guiding Principles on Business and Human Rights, there is an evolving normative outlook such that corporations do not just have duties to refrain from certain actions but also are responsible for the exercise of positive duties to take action in support of positive human rights (e.g., economic and social rights).⁵⁷ The Global Compact, a UN

53. See PATRICK VAN WEERELT, A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT PROGRAMMING IN UNDP—ADDING THE MISSING LINK 8 (United Nations Development Programme 2001) ("States have the primary responsibility to create the enabling environment in which all people may enjoy all human rights, and have the obligation to ensure that respect for human rights norms and principles is integrated into all levels of governance and policy-making.").

54. See *United States v. Krauch*, U.S. Mil. Trib. Nuremberg VI, Judgment, 1139 (1948), reprinted in *1 Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. VIII 1080 (finding that "the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben"); *United States v. Krupp*, U.S. Mil. Trib. Nuremberg III, Judgment, 1352 (1948) ("[T]he Krupp firm, through defendants . . . voluntarily and without duress participated in these violations . . .").

55. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 511 (2001) ("In general, the corporation's duties can be defined in spheres.").

56. *Id.* at 508.

57. See U.N. GLOBAL COMPACT, *The Ten Principles of the U.N. Global Compact*, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited

voluntary program designed to improve corporate, social, and environmental sustainability programs for businesses, requires its 8000 business members to adhere to ten general principles of practice.⁵⁸ Principle One provides that “[b]usinesses should support and respect the protection of internationally proclaimed human rights.”⁵⁹ The language in the principle calls for business to both “support and respect” human rights.⁶⁰ In its description of Principle One, the Global Compact Secretariat recognizes that “respect and support . . . are often closely interlinked in terms of the management steps,” but yet distinguishes between the corporate responsibility for respecting international human rights and for supporting international human rights.⁶¹ For the Secretariat, respecting human rights requires businesses to refrain from having a negative impact on the enjoyment of human rights, and supporting human rights in the business context “involves making a positive contribution to human rights, to promote or advance human rights.”⁶²

Finalized in 2011, the UN Guiding Principles on Business and Human Rights (Guiding Principles) provide for a similar framing of human rights responsibilities as the UN Global Compact.⁶³ The Guiding Principles are not intended to create “new international law obligations” but instead reflect an understanding of customary legal obligations.⁶⁴ Businesses can either be directly involved in human rights impacts through their operations, services, or products such as

Sept. 4, 2015) [<https://perma.cc/4KLF-AB24>] (archived Sept. 4, 2015) (“Business should support and respect the protection of internationally proclaimed human rights; and . . . make sure that they are not complicit in human rights abuses.”). See generally U.N. Special Representative of the Secretary-General, United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (June 16, 2011) [hereinafter *Guiding Principles on Business and Human Rights*], http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [<http://perma.cc/4392-E2MP>] (“These Guiding Principles are grounded in recognition of . . . States’ existing obligations to respect, protect and fulfill human rights and fundamental freedoms . . .”).

58. See U.N. GLOBAL COMPACT, *About the U.N. Global Compact*, <https://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last visited Sept. 4, 2015) [<https://perma.cc/3KJD-B4GP>] (archived Sept. 4, 2015); U.N. GLOBAL COMPACT, *Our Participants*, <https://www.unglobalcompact.org/what-is-gc/participants> (last visited Sept. 4, 2015) [<https://perma.cc/7PSH-GRKL>] (archived Sept. 4, 2015).

59. U.N. GLOBAL COMPACT, *The Ten Principles of the U.N. Global Compact, Principle One: Human Rights*, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1> (last visited Sept. 4, 2015) [hereinafter *UN Global Compact Principle One*] [<https://perma.cc/VE4D-VXMY>] (archived Sept. 4, 2015).

60. *Id.*

61. *Id.*

62. *Id.*

63. See generally *Guiding Principles on Business and Human Rights*, *supra* note 57 (reflecting a normative duty rather than imposing additional responsibilities concerning the protection of human rights).

64. *Id.* at 1.

conflict diamonds, or may become a source of human rights impacts as a result of “business relationships.”⁶⁵ Under the Guiding Principles, businesses are expected to “respect human rights,” which means that they “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”⁶⁶

The Guiding Principles prescribe specific actions on behalf of business by encouraging each business to publish a statement of human rights policy that is publicly available to potentially impacted stakeholders.⁶⁷ As part of an ongoing “human rights due diligence” process, businesses should identify potential impacts that the business either causes or contributes to individually or through its “business relationships”⁶⁸ and should engage in “meaningful consultation with potentially affected groups and other relevant stakeholders.”⁶⁹ Based on the “human rights due diligence” process, businesses are expected to respond by internally integrating the findings and taking “appropriate action” to ensure that business activities or relationships do not have adverse impacts on human rights.⁷⁰ In practice, a company should identify point persons or key departments within the institution to address potential human rights impacts and ensure that there are adequate human resources and financial resources in order to address the impacts.⁷¹ Business efforts to respect human rights should be communicated broadly—particularly to affected stakeholders since “[t]he responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice.”⁷²

Businesses—particularly businesses who are either located within a disaster zone or have a business affiliation with a disaster zone—have undertaken through their foundations a variety of positive actions during and after disasters that have alleviated

65. See *id.* at 15 (defining business relationships as “relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products, or services.”).

66. *Id.* at 13.

67. *Id.* at 17.

68. *Id.* at 17–18.

69. *Id.* at 19.

70. See *id.* at 20–21 (“In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.”).

71. See *id.*

72. *Id.* at 23–24.

human suffering.⁷³ Even before Hurricane Katrina's wholesale destruction of neighborhoods in the Gulf Coast, Walmart made preparations to deploy emergency provisions to the region.⁷⁴ Walmart provided—without compensation—one hundred trucks worth of merchandise to disaster victims.⁷⁵ Walmart's response was couched in terms of generous corporate citizenship and not in terms of any specific preexisting obligations to its employees or the communities where it operates. This Article suggests that corporate responses to disaster must be grounded in more than simply corporate morality or corporate social responsibility practices. Rather, corporate responses to prevent disaster and deliver temporary disaster relief should be understood as specific legal obligations to "support and respect" human rights.⁷⁶ The final section of this Article explores to what extent businesses have positive legal obligations to act before and after a disaster to support and respect human rights.

D. Corporations and Human Rights During Disasters

The corporate duty to support and respect human rights that is captured in both the Global Compact Principles and the UN Guiding Principles is embodied within disaster law through two distinct duties for corporations—the less controversial duty to prevent disaster related to corporate activities and the more controversial duty for businesses in disaster zones to deliver emergency relief to communities within a disaster zone.⁷⁷ The basis for each of these duties is the responsibility of companies to secure fundamental human rights within their "sphere of influence."⁷⁸ A failure by a

73. See generally *The Role of Business in Disaster Response*, U.S. CHAMBER OF COMMERCE (2012), at 10–11, 20, 22–23, 34–35, <http://www.uschamberfoundation.org/sites/default/files/publication/ccc/Role%20of%20Business%20in%20Disaster%20Response.pdf> [<http://perma.cc/TYM7-R8AC>] (archived Sept. 4, 2015) (describing actions by Shell to provide support to first-responders during Texas wildfires, by UPS to support Red Cross in a project for warehousing, inventory management, and prepositioning of supplies in the Southeast United States in advance of the start of the hurricane season, by Fedex to provide transport for emergency goods and use their knowhow to reduce international customs backlog for delivery of emergency goods, and by Google to create a Crisis Response team to assist with finding people during and after an emergency).

74. See Michael Barbaro & Justin Gillis, *Wal-Mart at Forefront of Hurricane Relief*, WASH. POST (September 6, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090501598.html> [<http://perma.cc/V4PZ-T6GV>] (archived Sept. 6, 2015).

75. See *id.*

76. See *UN Global Compact Principle One*, *supra* note 59, at 1.

77. See *id.* at 5.

78. "Sphere of influence" is a term used by the UN Global Compact in its publications for business members. While each business has the opportunity to define its "sphere of influence", the "sphere" typically includes employees but may also include business partners, suppliers, local communities, and customers. In some instances, the

corporate actor to prevent disaster by reducing disaster risks over which it has control, or a failure to deliver emergency relief when it has the viable capacity to do so, will likely impact the ability of a state to achieve its obligations related to fulfilling positive human rights during a disaster. Here, the fundamental positive rights that would be implicated by a failure to act would include the satisfaction of the right to food, the right to medical care, and the right to housing.⁷⁹ Because all of these rights have the potential to be impacted by corporate inaction or corporate malfeasance, corporations must have a self-reflexive and affirmative duty to their immediate community in order to satisfy their recognized duty to support and respect human rights.⁸⁰ The immediate community would extend beyond employees with a vested interest in the operation of the corporation to the geographical community in which a business entity is located.

1. Duty to Prevent Disaster through Disaster Risk Reduction or Mitigation Efforts

Disasters often happen because known hazards are ignored by those actors who are in the best position to manage the hazard or eliminate the hazard.⁸¹ Before a disaster arises, corporations have a duty to undertake a process of “human rights due diligence” and understand how their actions or inactions may contribute to the creation of a disaster.⁸² This requires businesses to flag potential hazards associated with their industry or their business site and to identify what environmental, social, or other hazards might trigger a

“sphere” might include government and the wider society. U.N. Global Compact, *A Guide for Integrating Human Rights into Business Management*, 8 (2006); *Report of the U.N. High Commissioner on Human Rights and Transnational Corporations and Related Business Enterprises with regard to Human Rights*, ¶¶ 36-39, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005).

79. See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); U.N. Doc. A/810 and the International Covenant on Economic, Social and Cultural Rights (16 December 1966) (entered into force 3 January 1976), 993 UNTS 3.

80. See generally 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, 963 (2004) (identifying self-reflexive duties as duties directed towards a corporation's conduct).

81. See, e.g., The Buffalo Creek Flood and Disaster: Official Report from the Governor's Ad Hoc Commission of Inquiry (1973) <http://www.wvculture.org/history/disasters/buffcreekgovreport.html> [<http://perma.cc/H8EE-5GHC>] (archived Sept. 6, 2015) (describing the negligent construction of a coal waste impoundment dam by Pittston Coal Company that failed and led to death of 125 people and \$50 million of property damage. The report clearly stated that in investigating the dam failure that there was “no evidence of an Act of God”).

82. See *Guiding Principles on Business and Human Rights*, *supra* note 57, at 15-16.

disaster. Part of “human rights due diligence” is then conducting a form of ongoing hazard auditing to help a company understand how its decision making over the years may contribute to unnecessary risks.

The exact substantive content of a corporate duty to prevent disaster will depend on the hazards associated with the industry. The 2010 Kolontar red mud disaster provides an interesting case study for thinking about a general corporate duty to prevent disaster. In October 2010, a reservoir belonging to the private corporation Magyar Aluminum in Hungary ruptured due to human error. The rupture released more than one million cubic meters of highly alkaline red sludge which killed ten, injured 120, and caused millions of euros of property damage requiring replacement of topsoil.⁸³ The aluminum company ultimately ended up paying 472 million euros for environmental damage but only provided approximately 300 euros per person for parties that had experienced damage.⁸⁴

When evaluating the disaster in the context of the existing law at the time of the disaster, experts observed that even though Hungary had adopted legal measures on environmental liability, there was little emphasis on preventing disasters.⁸⁵ Seemingly, efforts to prevent the tailings dam hazard from becoming a full-blown disaster had been ignored for years.⁸⁶ Even though the International Commission for the Protection of the Danube River had placed the Hungarian tailings pond that ultimately ruptured on a 2006 “watch list” and the World Wildlife Fund had requested for the pond to be closed, the Magyar Aluminum Company did nothing.⁸⁷ There was no disaster audit or effort to undertake “human rights due diligence.”⁸⁸ Yet as a result of the company’s failure to reduce or mitigate the known risks associated with the operation of the tailings dam,

83. See Alan Taylor, *A Flood of Red Sludge: One Year Later*, ATLANTIC (Sept. 28, 2011), <http://www.theatlantic.com/infocus/2011/09/a-flood-of-red-sludge-one-year-later/100158/> [<http://perma.cc/N2VW-673N>] (archived Sept. 6, 2015); Justice and Environment: European Network of Environmental Law Organisations, *The Kolontar Red Mud Case, Environmental Liability 2011*, http://www.justiceandenvironment.org/_files/file/2011%20ELD%20Kolontar.pdf (last visited Sept. 30, 2015) [hereinafter *Kolontar Red Mud*] [<http://perma.cc/VX7N-8CNR>] (archived Sept. 30, 2015).

84. See Taylor, *supra* note 83; *Kolontar Red Mud*, *supra* note 83, at 3.

85. See *Kolontar Red Mud*, *supra* note 83, at 3 (“It also could be concluded that prevention shall have more importance in the [Hungarian] legislation and in licensing procedures.”).

86. See Elisabeth Rosenthal, *Hungary’s Red Sludge Spill: The Media and the Eco-Disaster*, YALE ENV’T 360 (Oct. 21, 2010), http://e360.yale.edu/feature/hungarys_red_sludge_spill_the_media_and_the_eco-disaster/2330/ [<http://perma.cc/4TGB-5NZL>] (archived Sept. 6, 2015).

87. See *id.*

88. See *Guiding Principles on Business and Human Rights*, *supra* note 57, at 15–16.

hundreds were displaced from their homes and at least temporarily lost their livelihoods. While changes in Hungarian policies did occur after the tailings dam failure, there was no systematic effort six months after the disaster to prevent future disasters in the region in spite of knowledge of decommissioned tailings dams across the region containing heavy metals.⁸⁹ Recognizing a specific corporate duty to prevent disaster as a fulfillment of a corporation's responsibility to support and respect human rights would require companies to accept responsibility for mitigating hazards that otherwise might trigger future disasters with adverse impacts on human rights. In the context of "human rights due diligence," companies must review the potential of their actions or omissions to adversely impact fundamental community human rights and take active steps to mitigate against known industry hazards.

Corporate legal responsibility for disaster prevention makes sense in terms of holding accountable parties that have the power and capacity to make changes to operations or, where changes may not be possible, to create specific contingency plans that will protect communities that may fall within a corporation's "sphere of influence." Given the extent of the Kolontar disaster, one area requiring particular attention by private parties is remediation of tailings dams. In the world of mining infrastructure, there is consensus that the susceptibility of a tailings dam to fail depends on its design.⁹⁰ "Upstream dam" designs are particularly problematic.⁹¹ While there are estimated to be 3,500 tailings dams worldwide, there is no publicly available source that ranks the disaster risk level for these dams.⁹² Yet these dams are known risks that continue to fail.⁹³ A human rights based duty to prevent disaster would obligate

89. See *Little Action on Toxic Tailings Six Month After Hungary Red Mud Disaster*, WORLD WILDLIFE FUND (Apr. 6, 2011), <http://wwf.panda.org/?199897/Six-months-after-the-red-mud-tragedy-in-Hungary-tailings-dams-in-region-still-major-threat> [<http://perma.cc/WT3N-DUAR>] (archived Sept. 6, 2015).

90. See Gretchen Gavett, *Tailings Dams: Where Mining Waste is Stored Forever*, FRONTLINE (July 30, 2012), <http://www.pbs.org/wgbh/pages/frontline/environment/alaska-gold/tailings-dams-where-mining-waste-is-stored-forever/> [<http://perma.cc/N2KD-VQX3>] (archived Sept. 6, 2015).

91. See, e.g., INT'L COMM'N ON LARGE DAMS, *Tailings Related Accidents—Failures, Breaches and Mudflows*, <http://www.tailings.info/knowledge/accidents.htm> (last visited Sept. 30, 2015) [<http://perma.cc/9BYL-EVUT>] (archived Sept. 30, 2015) (detailing tailings released from primarily upstream designs).

92. See Gavett, *supra* note 90.

93. See WORLD INFO. SERVICE ON ENERGY, *Chronology of Major Tailings Dam Failures*, <http://www.wise-uranium.org/mdaf.html> (last visited Sept. 30, 2015) [<http://perma.cc/Z4KU-5MKV>] (archived Sept. 30, 2015) (describing a 2011 tailings dam failure in Sichuan, China resulting in the eviction of 272 people and unsafe drinking water for 200,000 people, a 2006 tailing dam failure in Zambia contaminating drinking water, and a 2000 tailings dam failure in Kentucky resulting in contaminated water for several communities).

corporations to identify hazards like tailings dams and then take active steps to mitigate the potential impact of these hazards on the community.

Recognizing a corporate human rights duty in relation to disaster prevention locates accountability at the appropriate level. While states will remain the primary fiduciaries for fulfilling human rights, it is difficult for them to ensure that corporate hazards are adequately addressed beyond creating legislation and then inspecting corporations. While this may satisfy a state's duties towards supporting the human rights of individuals, it may not result in the necessary mitigation of a specific hazard unless the state were to declare a state of emergency and direct business operations during a disaster.⁹⁴ This is unlikely except in an extremely dangerous situation at which point it may be too late to mitigate for the harm associated with specific hazard.⁹⁵ If corporations evaluate their obligations to a community as justiciable human rights obligations rather than voluntary corporate social responsibility programs, corporate leadership may prioritize disaster prevention efforts to reduce a company's exposure to potential liability associated with human rights violations in the case of a disaster. In terms of a company's reputation, it is one thing to be found culpable of negligence in properly maintaining an industrial facility. It is a different matter in the public perception to be held liable for violations of an individual's right to food, right to health, or right to life.⁹⁶ A potential judicial finding of liability for human rights violations in favor of community victims might even raise questions about a corporation's duty to proactively prevent corporate losses.⁹⁷

94. See, e.g., CAL. GOV'T CODE § 8570(i) (providing the Governor of California under a declared state of emergency with the powers to "plan for the use of any private facilities, services and property" subject to proper compensation if used); CAL. GOV'T CODE § 8558(c) (allowing a "local emergency" to be declared when there is the "existence of conditions of a disaster . . . which are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision and require the combined forces of other political subdivisions to combat").

95. See Yoko Kubota, *Japan to Take Over TEPCO After Fukushima Disaster*, REUTERS (May 9, 2012), <http://www.reuters.com/article/2012/05/09/us-tepco-idUSBRE8480G020120509> [<http://perma.cc/425B-SRWC>] (archived Sept. 6, 2015) (explaining that Japan took over TEPCO in order to revive the company as an energy company and to make reforms to company practices).

96. The possibility of companies being held directly accountable for human rights violations is being revisited by the UN Human Rights Council. See Human Rights Council Res. 26, U.N. Doc. A/HRC/26/L.22/Rev.1 (2014).

97. See, e.g., *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) (describing an oversight duty for corporate directors when directors knew or should have known of a violation of law but took no good faith efforts to prevent or remedy the situation, and this failure proximately caused the corporate losses).

2. Limited Duty for Disaster Response by Operational Businesses Located within a Disaster Zone

A corporate legal duty to respond to a disaster also exists for any business located in a disaster zone as long as the business has not been significantly impacted by the disaster by loss of employees, the state is unable to respond rapidly to the disaster, and the business will not bankrupt itself by using its resources to deliver uncompensated emergency relief. This narrow disaster relief duty is based on corporate actors assuming temporary fulfillment of individual fundamental human rights in lieu of the state because of emergency condition.

This duty extends beyond good neighborliness where a business might arguably have greater duties to act in favor of its neighbors than another group of individuals. A duty to provide temporary disaster relief is grounded in an obligation for all actors to take steps to fulfill fundamental human rights.⁹⁸ Philosopher Henry Shue claims that fundamental human rights generate three intersecting obligations—an obligation to avoid depriving another of his or her rights, an obligation to protect another from deprivation of rights, and an obligation to aid another who has been deprived of his or her rights.⁹⁹ It is the last of these three obligations that creates a temporary corporate duty of disaster relief. It does not matter that the corporation did not contribute materially to the conditions creating the disaster and is arguably also a victim of the circumstances because it is unable to operate under normal conditions. This corporate duty builds on what John Rawls refers to as the “duty of mutual aid,” which involves “helping another when he is in need or jeopardy provided that one can do so without excessive risk or loss to oneself.”¹⁰⁰ As long as a business is in a position of social authority within a community and able to operate, it has a duty to act in the absence of effective political authority. Disaster relief aid delivered by corporations should conform to basic humanitarian standards such as prioritizing delivery for particularly vulnerable

98. See e.g., 2000 O.J., (C 364) 1 (Charter of Fundamental Rights of the European Union) (noting in preamble that enjoyment of the fundamental rights “entails responsibilities and duties with regard to other persons, to the human community and to future generations”). In some EU states such as Germany, fundamental rights can be assigned to “persons.” See GRUNDGESETZ [GG] [German Constitution] Art. 19(3) (“The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.”)

99. See Henry Shue, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 52 (Princeton University Press, 2nd ed. 1996).

100. John Rawls, A THEORY OF JUSTICE 114 (Belknap Press of Harvard University Press, 1971).

populations such as the elderly, children, or particular marginalized social groups.¹⁰¹

Obviously not all corporations are equal in terms of what they can offer to a disaster relief effort. A food manufacturing or distribution company is likely to have more to offer a community in terms of disaster relief than a soccer ball manufacturer. Yet, the soccer ball manufacturer may still be able to offer substantial support for disaster communications and logistics through its facilities. This duty does not require a company to assume responsibilities that are beyond its normal operations; the soccer ball manufacturer need not stockpile food in preparation for a disaster. However, it may choose to do so as part of a long-term CSR program for the community.

As conceived, this duty does not impact all business interests equally. A small family shop in India is in a very different position to deliver disaster relief aid than a multinational factory or a sizable national company.¹⁰² If the family shop delivered aid, it would be on the basis of the owner's moral obligation and not on the basis on any legal obligation described here. Any legal obligation to act would be a temporary obligation and would cease when a state assumes disaster relief operations either through its own agencies or through the support of intergovernmental organizations and nongovernmental organizations delivering services requested by the state. Because the state is the primary governing entity responsible for protecting and fulfilling human rights within its boundaries, the temporary fulfillment of fundamental human rights obligations by corporations would not substitute for the state's obligations to supply ongoing relief and facilitate post-disaster reconstruction.¹⁰³ A corporation will have fulfilled its obligation either when the state makes it clear that it will take over relief efforts itself or within a period of time, such as one week, when the state should have requested relief assistance from other states or international disaster relief agencies and groups if the disaster exceeds the state's response capacity.¹⁰⁴

No legislation is necessary to mandate corporate action since the corporate duty follows from the independent existence of fundamental human rights. Legislators could expand on the preexisting human

101. See SPHERE PROJECT, HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN HUMANITARIAN RESPONSE 22 (2011), <http://www.ifrc.org/PageFiles/95530/The-Sphere-Project-Handbook-20111.pdf> [<http://perma.cc/2CFS-4N8P>] (archived Sept. 6, 2015) (describing a set of universal minimum standards for aid delivery adopted by the International Federation of the Red Cross and Red Crescent Movement and several others NGOs delivering humanitarian aid); Int'l Law Comm'n, *supra* note 7, art. 7.

102. See *Guiding Principles on Business and Human Rights*, *supra* note 82, at 15 (arguing that while small businesses may have less capacity than larger businesses, they both share an equal obligation to respect human rights).

103. See Int'l Law Comm'n, *supra* note 7, art. 12.

104. See *id.* arts. 13–14.

rights obligation with legislation to coordinate action among those social actors that might be expected to respond. For example, states might require corporate actors of a certain size or a certain capitalization to have a publicly available disaster relief plan that articulates what temporary relief the business might deliver to adjacent communities based on normal business operations. During the fog of a disaster, a duty for temporary corporate disaster relief may permit a state to protect human rights for a larger proportion of the state's population by focusing limited state resources in those areas where there are no alternative relief providers. If a corporation violated human rights or caused certain types of internationally recognized harm in its attempt to deliver relief, the state would remain accountable under principles of state responsibility.¹⁰⁵

While it would not reduce the obligation of a corporate entity to act in the aftermath of a disaster to provide temporary disaster relief, corporations as part of their CSR program might offer basic disaster risk reduction support within a community to reduce the vulnerability of a community to a known hazard such as flooding.¹⁰⁶ For example, under its CSR program, a corporation could assist coastal residents located near the corporation with planting vegetative barriers or renovating with more storm resistant materials. Ordinarily, a corporation would have no legal obligation to undertake predisaster mitigation unless the corporation created a known hazard by removing vegetation as part of its corporate activities.¹⁰⁷ CSR programs that focus on disaster risk mitigation may ultimately reduce the amount of basic disaster relief that a corporation would otherwise be compelled to deliver to protect human rights in the aftermath of a regional disaster.

105. See Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, at 45 (2001) (stating that actions can be attributed to a State "if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.").

106. See *Business and Disaster Preparedness: Helping Communities Prepare for Effective Response*, PRUDENCE FOUNDATION & CSR ASIA (Nov. 2013), http://www.csr-asia.com/report/CSRA2013_Business_and_Disaster_Preparedness.pdf [<http://perma.cc/NP9A-B9JY>] (archived Sept. 6, 2015) (describing a number of proposals for business to support communities on disaster relief planning and risk reduction through CSR programs including "working alongside local businesses to prepare for disasters and putting mechanisms in place that help to provide essential goods and services needed when a disaster hits").

107. See *id.*

II. CONCLUSION

Corporate business ethics historically focus on the fiduciary responsibility of the corporation to its shareholders. In the context of disaster, corporations have additional and potentially competing fiduciary responsibilities to the communities where they operate based on the obligation of businesses to both avoid violations of human rights obligations and support fundamental human rights. The duty to prevent disasters by mitigating risks that lead to disaster emerges from the obligation of companies to support and respect human rights within their sphere of influence. The limited duty to provide disaster relief follows from corporate actors assuming community control in lieu of political actors during an emergency to deliver aid to individuals deprived of their basic human rights. While this Article suggests that these duties exist customarily as an extension of a corporate duty to “support and respect” human rights, it might be desirable for states to negotiate a document that would capture the parameters of these duties.¹⁰⁸

Corporate obligations to act to prevent disaster and to provide emergency disaster relief offer greater possibilities to fulfill basic human rights than the complex public-private partnerships promoted in the Hyogo Framework for Action and proposed in the Sendai Framework. As the world enters an era that is likely to be beset with more large-scale disasters, corporations can no longer remain in the shadow of the state but must “support and respect” the realization of human rights obligations—particularly in the face of impending or existing disasters within their “spheres of influence.”¹⁰⁹ While there may be great value in forming public-private partnerships to reduce disaster risks, it is critical that the basis of these partnerships not simply be the good will of corporations but the legal duty of corporations to “support and respect” human rights.¹¹⁰

108. See U.N Global Compact, *supra* note 5, Principle 1; John Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 27 (2008) (noting that specifying “scope and content” of human duties through an international mechanism would provide necessary uniformity and predictability for private parties); Carlos Vazquez, *Direct v. Indirect Obligations of Corporations under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 958 (2005) (suggesting the potential for negotiated agreements that impose discrete human rights obligations on private corporations).

109. See U.N Global Compact, *supra* note 5, Principle 1.

110. *Id.*
