A HUMAN RIGHTS FRAMEWORK FOR CORPORATE ACCOUNTABILITY

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I. INTRODUCTION

The ongoing controversy over corporate liability for human rights violations[1] seems counterintuitive today, in an era characterized by the unprecedented expansion of both rights instruments and global commercial intercourse. There is a dual paradox in our "age of rights:"[2] while the post-War "human rights revolution" recognized and gave legal content to individual human rights, the sovereign state continues to control the exercise of international legal personality. International legal personality is the capacity to be a subject of rights and duties under international law, that is, to participate in the creation of legal norms, to enforce legal claims, and to be held legally accountable.[3] This problem was only superficially

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1. The debate has taken place within the United Nations, in the legal academy, and in the courts. In a major retreat, recent United States Federal Court decisions have ruled that corporations cannot be sued for violations of international law under the Alien Torts Statute. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 456 F.Supp.2d 457 (S.D.N.Y. 2006). *Cf.* Romero v. Drummond Co., Inc., 552 F.3d 1303 (11th Cir. 2008). United Nations norms are being developed by Harvard professor John Ruggie. *See* John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 819 (2007). For academic discussion *see* Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 927 (2005); Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT'L L. 1229, 1232 (2004); Gabriel D. Pinilla, *Note & Comment: Corporate Liability for Human Rights Violations on Foreign Soil: A Historical and Prospective Analysis of the Alien Tort Claims Controversy*, 16 ST. THOMAS L. REV. 687, 687 (2004); *Developments in the Law-Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2025 (2001).

2. *See generally* LOUIS HENKIN, THE AGE OF RIGHTS (Columbia Univ. Press 1990).

3. During the period beginning in the mid-15th century through the 19th century, the concept of state sovereignty was being constructed in Europe. International legal personality emerged as a concept distinct from sovereignty in the seventeenth century, in order to allow certain non-state actors, the German Princes, to participate in diplomatic activities. Although this was after Westphalia, the Holy

addressed in the human rights canon, while at the same time the dominant states structured international law and society so as to facilitate the unimpeded pursuit of profit by global corporations that have the rights, but not the duties, of international persons.

II. THE WESTPHALIAN CONCEIT

Modern international law is traditionally dated from the 1648 Peace of Westphalia.[4] Under the prevailing—but increasingly contested[5]—doctrine, Westphalia symbolizes the consolidation of the sovereign state system in Europe. Accordingly, the Treaty provides textual affirmation of the state-centered essence of international law and its subjects.[6] The state-centric perspective survived despite the origins of international law in natural law philosophy,[7] which "obliges all men, in all conditions, in all times, and in all places, in one and the same way."[8]

Yet at the time of Westphalia non-state actors, in particular global corporations, were exercising sovereign prerogatives: negotiating treaties with foreign sovereigns; capturing and administering territory; collecting taxes; coining money; and waging war with indigenous peoples in Asia, Africa and the Americas.[9] The state did not assert itself as the sole subject of international law until it became the dominant form of political

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Roman Empire remained dominant over much of Europe's territory. Since then international legal personality has been used both to include and to exclude actors from international legal society. For example, chartered trading companies were delegated international legal personality to enable them to play a vanguard role in the conquest of colonial empires.

4. 1 CONSOLIDATED TREATY SERIES 198.

5. *See, e.g.*, STEPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW: THE WORD SOVEREIGNTY IN BODIN AND VATTEL AND THE MYTH OF WESTPHALIA 185 (Martinus Nijhoff Publishers 2004).

6. Leo Gross, *The Peace of Westphalia*, 42 AM J. INT'L L. 20, 28 (1948).

7. *See, e.g.*, the earliest writings by international legal scholars such as Hugo Grotius, Emmerich de Vattel, and Fransisco de Vitoria: HUGO GROTIUS, MARE LIBERUM (1609); EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (1758); FRANCISCO DE VITORIA, POLITICAL WRITINGS 223, 295 (Anthony Pagden et al. eds., Cambridge Univ. Press, 1st ed., 1991) (1486–1546); as well as DE POTESTATE CIVILI (1528).

8. John P. Doyle, *Francisco Suarez on the Law of Nation*, *in* RELIGION AND INTERNATIONAL LAW 103, 106 (Carolyn Evans & Mark W. Janis eds., 2004). *See also*, Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 25 (1999).

9. M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 93 (1926).

organization after the Industrial Revolution.[10] The Industrial Revolution facilitated the division of the Global South into colonial appendages of European territorial states, thus strengthening them economically and militarily while also elevating this organizational structure above other more diffused polities, such as the Italian City-State and the Germanic Hanseatic League.[11]

During this period, legal positivism came to prominence, replacing natural law as the jurisprudential foundation of international law.[12] With its emphasis on the concentration of power, positivism better accommodated the increasingly prominent role of the state in global affairs,[13] enforcing a rigid dichotomy between state and non-state actors. However legal positivism, with its veneration of state power, lost much of its appeal after the systematized horror of World War II.[14] In response, natural rights-based norms were given legal substance in the Nuremberg Charter[15] and an array of human rights treaties;[16] nevertheless, the post-war legal system fashioned by these instruments retained the essence of the state-centric regime: the power of the so-called "civilized" states to grant and withhold legal personality.

Prominently absent from the Westphalian narrative is the legal subjectivity that enabled the first corporations to shape the international legal order. Since the sixteenth century, chartered trading companies had

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10. B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER 226–27 (Sage Publications 1993).

11. *See generally* HENDRIK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS: AN ANALYSIS OF SYSTEMS CHANGE (Princeton Univ. Press 1994).

12. *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

13. Positivist theory, asserting that law is the creation of sovereign states possessing certain "unique, civilized, and social institutions" peculiar to the West, facilitated this consolidation. It was necessary to "distinguish sovereigns proper from other entities that also seemed to possess the attributes of sovereignty, such as pirates, non-European states . . . nomads" and corporations. Thus, the doctrine of territorial sovereignty became paramount. Anghie, *supra* note 8, at 26.

14. *See, e.g.*, Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (providing a prominent example of the postwar debate on positivism). *See also* ISSA G. SHIVJI, THE CONCEPT OF HUMAN RIGHTS IN AFRICA 48 (1989).

15. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

16. *See, e.g.*, the core international human rights instruments, including the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); Convention on the Elimination of All Forms of Racial Discrimination, Oct. 26, 1996, 660 U.N.T.S. 195.

been empowered with international legal personality.[17] These corporations were the means by which European states conquered their vast empires.[18]

It was only after the European states had consolidated themselves politically and militarily—that is, after the Industrial Revolution and the triumph of legal positivism—that these charters were revoked, the states themselves claimed sovereignty over their distant empires, and the corporations were reduced in international legal theory from "subject" to "object" of international law.[19] Yet many of the rules that today grant rights to powerful corporations emerged from the practice of these profit-driven entities[20] that are now shielded from human rights law as "non-state actors."

Thus, in the post-War legal regime international legal personality, though expanded, was not democratized. While the rights of individuals were proclaimed in declarations and legally entrenched in covenants, states retained the power to decide whether these rights could be adjudicated;[21] colonized peoples continued to be "objects" of the law as the post—War institutions embraced patronizing "trusteeships;"[22] and undemocratic and

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17. *See* SIBA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW 68–69 (Univ. of Minnesota Press 1996).

18. LINDLEY, *supra* note 9, at 91–93.

19. *Id.* at 109.

20. Under the slogan of "flag follows trade," norms of international law were developed to protect overseas investors, such as the law of state responsibility requiring "prompt, adequate and effective compensation" for expropriations. This has become known as the "Hull formula." *Secretary Hull to the Mexican Ambassador, August 22, 1938*: "The Government of the United States merely adverts to a self-evident fact when it notes that the applicable and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore. In addition, clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation. These, in themselves, are declaratory of the like principle in the law of nations." *See generally* Pamela B. Gann, *Compensation Standard for Expropriation*, 23 COLO. J. TRANSNAT'L L. 615 (1985). *See* R.P. ANAND, NEW STATES AND INTERNATIONAL LAW 102 (1972). A 1991 review showed that, with one exception, every arbitral tribunal that had considered the issue from 1971 to 1991 had "affirmed that customary international law requires a state expropriating the property of a foreign national to pay the full value of that property measured, where possible, by the market price." Patrick Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 488 (1991).

21. *See, e.g.*, Optional Protocol to the International Covenant on Political and Civil Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

22. Under the United Nations Charter a Trusteeship Council was established to supervise the administration of colonial territories, ostensibly to "promote the advancement of the Trust Territories and their progression towards sovereignty." *Trusteeship Council*, UN.ORG, http://www.un.org/en/mainbodies/trusteeship/ (last visited Feb. 25, 2011). *See generally* Christian E. Ford & Ben A.

unaccountable financial institutions were endowed with autonomy, personality, and enormous power.[23] Despite the natural law-based human rights infrastructure, the positivist superstructure maintained the dichotomy between "state" and "non-state" actor.

The reign of the European global empire was punctuated by two devastating world wars, signaling the contraction of the global economy. During this period, roughly covering the first half of the twentieth century, the ravages of unregulated *laissez-faire* capitalism—or liberalism—were challenged and tempered.[24] Economic conditions and mass movements forced industrialized states to regulate corporate power[25] and to provide

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Oppenheim, *Neotrusteeship or Mistrusteeship? The "Authority Creep" Dilemma in United Nations Transitional Administration*, 41 VAND. J. TRANSNAT'L L. 55 (2008). *See also* Brian Deiwert, *A New Trusteeship For World Peace and Security: Can an Old League of Nations Idea Be Applied to a Twenty-First Century Iraq?*, 14 IND. INT'L & COMP. L. REV. 771, 772 (2004).

23. As World War II was ending, the Western Allied Powers gathered in Bretton Woods, New Hampshire, to govern the global economy. They chartered the International Bank for Reconstruction and Development (World Bank) to fund post-War reconstruction, and the International Monetary Fund (IMF) to provide short-term loans for countries experiencing balance of payments deficits. Because of the nature of their decision-making processes, the International Financial Institutions have been criticized as undemocratic institutions. *See* Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243, 253–54 (2000). Voting in the Fund and the Bank is weighted according to the financial contributions of the Members, known as quotas, giving the most power to the richest States. This "democracy deficit" leaves developing countries with little influence over IFI policies and decisions. The United States exercises 17.38% of the vote, the largest share of any member. The U.S. is followed by Japan with 6.23%, Germany with 6.09%, and France and the United Kingdom, with 5.03% each. These institutions have also been accused of unduly interfering in the affairs of sovereign States. This charge relates primarily to the practice of conditioning assistance on the adoption of neo-liberal macroeconomic reforms. Conditionality requires countries to undertake market liberalization measures such as privatizing state-owned enterprises; discontinuing government intervention in agricultural and raw materials markets; reducing tariffs and non-tariff barriers such as quotas and licensing requirements; shifting to an export-oriented economy; removing subsidies on exports; reducing expenditures on education, health, and social security. The net result of such measures is the concentration of wealth in the hands of a few; inability of the rural population to grow their own food; internal displacement of the rural population through migration to overcrowded cities; growing emiseration of the nation's poor. *See also* Susan Park, *Assessing the Accountability of the World Bank Group*, INT'L STUDIES ASS'N, March 2008, at 253, *available at* http://www.allacademic.com//meta/p_mla_apa_research_citation/2/5/3/5/1/pages253519/p253519-1.php (last visited Feb. 22, 2011).

24. *See, e.g.*, Abbott P. Usher, *Economic History—The Decline of Laissez Faire*, 22 AM. ECON. REV., no. 1, 1931, at supp. 3–10. *See also* Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215, 246–47 (2001).

25. Edward John Ray, *The Political Economy of International Trade Law and Policy: Changing Patterns of Protectionism: The Fall in Tariffs and the Rise in Non-Tariff Barriers*, 8 NW. J. INT'L L. & BUS. 285, 291 (1987). *See generally* Giovanni Arrighi, 2 THE GLOBAL MARKET JOURNAL OF WORLD-SYSTEMS RESEARCH, 217–51 (1999), *available at* http://jwsr.ucr.edu/archive/vol5/number2/v5n2_split/jwsr_v5n2_arrighi.pdf (last visited Feb. 23, 2011).

safety nets for their people.[26] Protectionist trade policies limited the ability of multinational corporations (MNCs) to penetrate foreign markets.[27]

After World War II and the triumph of U.S. power, global security and financial institutions were created under its leadership.[28] A free trade regime was established under the General Agreement on Tariffs and Trade (GATT)[29] that steadily eroded protectionist policies and expanded the reach of western-based corporations. In the 1980s, the Reagan, Thatcher, and Kohl administrations implemented policies of "*neo*-liberalism:" deregulation proceeded with abandon at home, accompanied by the imposition of the "Washington Consensus"[30] upon debtor nations abroad. This consolidated the trend of liberalization of the global economy, the relaxation or removal of local government controls over international flows of goods, services, technology and capital, and the privatization of former state functions. Advancements in transportation and communication, like those that sparked the post-Industrial Revolution expansion, coinciding with the opening of new markets in China and Eastern Europe, triggered another globalization.[31]

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26. Ray, *supra* note 25, at 291–92.

27. *Id.*

28. *See generally* Robert L. Kuttner, *Development, Globalization, and Law*, 26 MICH J. INT'L L. 19 (2004). *See also* John W. Head, *Developing the IMF, the World Bank and the Regional Development Banks: The Future of Law and Policy in Global Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks*, 17 KAN. J. L. & PUB. POL'Y 194, 198 (2007).

29. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194. The GATT was negotiated during the United Nations Conference on Trade and Employment and operated between 1948 and 1994, prior to the creation of the World Trade Organization in 1995. *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154. The WTO expanded the scope of trade liberalization from goods to trade within the service sector and intellectual property rights. *See generally* General Agreement on Trade Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1167 (1994); Agreement on Trade-Related Aspects on Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, vol. 31, 33 I.L.M. 81 (1994).

30. The "Washington Consensus" is a neoliberal approach to poverty and development that promoted the implementation of market-friendly regulatory reforms to counter "protectionism, government control of investment, and state monopolies in key sectors." Such reforms "replaced state intervention in markets with private incentives, public ownership with private ownership, and protection of domestic industries with competition from foreign producers and investors." *See, e.g.*, *World Bank Development Report*, WORLD BANK 61–62 (2000), *available at* http://www.worldbank.org/poverty/wdrpoverty/report/Index.htm (last visited Feb. 23, 2011).

31. The United Nations Committee on Economic, Social and Cultural Rights defines globalization as:

By the late 1990s, it was widely recognized that globalization diminished the authority and control of the territorial state over economic activities by its nationals conducted within its borders.[32] Once again private corporations were at the forefront of an expansion of the global economy, [33] while states played supporting roles.[34] This time global business enterprises also have at their disposal the resources of a network of powerful multilateral institutions such as the United Nations (UN), the Bretton Woods Institutions, the World Trade Organization, a plethora of Bilateral Investment Treaties (BITs), and regionally-based Free Trade Agreements (FTAs).

Wielding this enormous wealth, power, and institutional support, MNCs are able to deploy a variety of strategies to avoid accountability when their activities cause harm to individuals, groups or their

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> [c]losely associated with a variety of specific trends and policies including increasing reliance on the free market, a significant growth in the influence of international financial markets and institutions in determining the viability of national policy priorities, a diminution in the role of the state and the size of its budget, the privatization of various functions previously considered to be the exclusive domain of the state, the deregulation of a range of activities with a view to facilitating investment and rewarding individual initiative, and a corresponding increase in the role and even responsibilities attributed to private actors, both in the corporate sector, in particular to the transnational corporations, and in civil society.

Comm. on Economic, Social and Cultural Rights, Rep. on its 18th Sess., *Globalization and the Enjoyment of Economic, Social and Cultural Rights*, ¶ 2, U.N. Doc. E/1999/22 (May 11, 1998).

32. *See, e.g.*, SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY (Cambridge Univ. Press 1996); THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 3 (Thomas J. Biersterjer & Rodney Bruce Hall eds., Cambridge Univ. Press 2002).

33. Many global corporations have evolved into titans with economies rivaling those of small countries. Of the largest economies in the world, more than half are corporations. For example, in 2000 Exxon-Mobil's gross sales were $210.3 billion while Indonesia's GDP was $153 million. *See* Frank R. Lopez, *Corporate Social Responsibility In a Global Economy After September 11: Profits, Freedom, and Human Rights*, 55 MERCER L. REV. 739, 739–40 (2004). Global corporations play a significant role in shaping the world economy and, arguably, the political landscape. The size of corporations, measured by sales and the number of employees, is staggering. For example, Wal-Mart's workforce has grown from 62,000 employees in 1983 to 1,140,000 in 1999. *Id.* In terms of sales, it is now the largest company in the world. Comparing GDP and sales, General Motors is now bigger than Denmark, Wal-Mart is bigger than Poland, and Exxon-Mobil is bigger than South Africa.

34. One way in which states can support impunity is by creating secrecy havens for corporations registered in their jurisdictions. A secrecy haven can pose a barrier to accountability by cloaking the identity of the shareholders or personnel of a corporation registered in its jurisdiction, or otherwise withholding information relevant to a potential liability finding in another state. *See, e.g.*, Robin F. Hansen, *Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill*, 26 BERKELEY J. INT'L L. 410, 424–25 (2008).

environments.[35] Like the chartered companies of the past, today's MNCs exercise quasi-sovereign authority, like the ability to arbitrate on equal footing with states.[36] They are enabled through state law and multilateral institutions to exploit and injure not only the peoples of poor countries, but those of the most powerful states as well.[37]

III. NEW/OLD PARADIGMS OF EXPLOITATION AND IMPUNITY

In their dogged quest for profit, MNCs target the most vulnerable people and spaces. This section identifies three contemporary patterns of corporate conduct that illustrate the complicity of MNCs and international organizations: uranium mining in Africa, international arbitration, and the international plan for post-earthquake Haiti.

The extractive industries are among the most notorious violators of rights, historically known for violent population displacement;[38] murders;[39]

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35. *See generally* Sarah Anderson, Manuel Perez-Rocha & Rebecca Dreyfus, *Mining for Profits in International Tribunals: How Corporations Use Trade and Investment Treaties as Powerful Tools in Disputes Over Oil, Mining, and Gas*, Institute for Policy Studies Report 7 (2010), *available at* http://www.ips-dc.org/reports/mining_for_profits_in_international_tribunals (last visited Feb. 23, 2011).

36. *See infra* notes 52–56 and accompanying text.

37. For example ASARCO, a multinational corporation responsible for severe environmental damages due to its smeltering operations in El Paso, Texas, filed for bankruptcy in 2005. The $1.79 billion settlement to cover the costs of environmental monitoring and cleanup and limited compensation to certain employees "represents less than one percent of the funds originally identified as needed by claimants." *See* Mara Kardas-Nelson, Lin Nelson & Anne Fischel, *Bankruptcy as Corporate Makeover: ASARCO Demonstrates How to Evade Environmental Responsibility*, DOLLARS AND SENSE MAG., May/June 2010, *available at* http://www.dollarsandsense.org/archives/2010/0510kardas-nelson-nelson-fischel.html (last visited Feb. 23, 2011). *See also Special Investigations Unit: Broken Government—Scorched Earth*, Aired Mar. 8, 2008 (CNN television broadcast, Mar. 8, 2008), *available at* http://edition.cnn.com/TRANSCRIPTS/0803/08/se.01.html (last visited Feb. 25, 2011).

38. *See, e.g.*, Theodore Downing, *Avoiding New Poverty: Mining-Induced Displacement and Resettlement*, INT'L INST. FOR ENV'T AND DEV. AND WORLD BUS. COUNS. FOR SUSTAINABLE DEV. (2002).

39. For example, Drummond, a U.S. based mining company, has been accused of conspiring to murder three trade union activists in Colombia. *See* Anastasia Moloney, *U.S. Mining Group Faces Trial Over Dead Activists*, FIN. TIMES, July 8, 2007. *See also* Wiwa v. Royal Dutch Petroleum, 392 F.3d 812 (2004), a lawsuit brought against Royal Dutch/Shell, the head of its Nigerian operation, and Royal Dutch/Shell's Nigerian subsidiary, charging them with complicity in human rights abuses against the Ogoni people in Nigeria. The suit alleges that the company and its subsidiary colluded with the Nigerian government to instigate the arrest and execution of a group of activists that were hanged in November, 1995 after a trial before a special military tribunal which was based on fabricated charges. *See also* Osita Nnamani Ogbu, *Combating Corruption in Nigeria: A Critical Appraisal of the Laws, Institutions, and the Political Will*, 14 ANN. SURV. INT'L & COMP. L. 99 (2008).

environmental degradation;[40] destruction of agricultural lands, subsistence economies, and marine ecosystems;[41] and desecration of sacred religious sites.[42] These extremely resource-intensive industries are inherently unsustainable. Climate change will exacerbate the destructive impact of these industries, threatening the very survival of many people, particularly indigenous communities.

Ironically, climate change is being used as an excuse to accelerate uranium mining, one of the most dangerous operations. Data presented before the UN Department of Economic and Social Affairs, for example, showed that many foreign corporations have gone to great lengths to establish uranium mining operations in vulnerable African countries such as Namibia, Tanzania, Niger, and Malawi. These corporations are creating significant economic, environmental, and health problems in fragile areas.[43] It is no coincidence that companies are targeting countries in Africa—the site of the notorious nineteenth century scramble in which mining companies took the lead in colonial conquest[44]—to exploit weak regulatory regimes and monitoring capacity.[45]

In Namibia, for example, uranium mining extracts huge amounts of water from the underground aquifers, destroying the means of subsistence of the Nama people. In Tanzania, open-cast uranium mining threatens to destroy the traditional lands of the Wasandawi people, who live as hunter-

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40. United Nations Conference on Trade and Development, Apr. 20–25, 2008, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development*, at 147, U.N. Doc. UNCTAD/WIR/2008 (Apr. 24, 2008).

41. For example in the Niger Delta, Shell Oil operations have rendered useless rich agricultural lands and fishing resources.

42. *See, e.g.*, Indigenous Environmental Network, and International Indian Treaty Council et al., Submission to the United Nations Universal Periodic Review on the United States of America, Ninth Session of the Working Group on the UPR, Human Rights Council (Nov. 1–12, 2010), *available at* http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/USHRN_UPR_USA_S09_2010_Annex25_Indigenous%20Peoples%20Rights.pdf (last visited Feb. 25, 2011).

43. For details *see* U.N. Dept. of Econ. and Soc. Aff. Comm. on Sustainable Dev., *Mining and Sustainable Development*, Rep. on its 18th Sess. (May 6, 2010) (presented by Victoria Tauli-Corpuz), *available at* http://www.un.org/esa/dsd/resources/res_statprescsd_18_6may.shtml (last visited Feb. 23, 2011) [hereinafter *Mining and Sustainable Development*].

44. *See, e.g.*, CAROLYN A. BROWN, WE WERE ALL SLAVES: AFRICAN MINERS, CULTURE AND RESISTANCE AT THE ENUGU GOVERNMENT COLLIERY (2003); RAYMOND E. DUMETT, EL DORADO IN WEST AFRICA: THE GOLD MINING FRONTIER, AFRICAN LABOR AND COLONIAL CAPITALISM IN THE GOLD COAST, 1875–1900 (1998); JOHN J. STEPHENS, FUELLING THE EMPIRE: SOUTH AFRICA'S GOLD AND THE ROAD TO WAR (2003).

45. *Id.*

gatherers in the central part of the country.[46] In Niger, uranium mining has already contaminated the groundwater,[47] and fossil water aquifers—non-renewable resources—have been depleted. AREVA, a French mining company, announced officially that its planned new mine in Mali will have depleted the local fossil water aquifer about the same time that the uranium deposit will be exhausted—leaving local Touareg people with nothing to survive on.[48] In Malawi, a newly opened Australian-owned mine has already claimed the lives of two workers; the mine and its tailings pose a serious threat to Lake Malawi, which is a critical freshwater resource on which some three million people depend.[49] The government of Malawi acknowledged that it does not have the capacity to monitor the mine.[50]

These activities have been aggressively encouraged by the World Bank. According to a 2003 Report commissioned by the Bank:

> Since the 1980s [the onset of globalization] the World Bank Group . . . has actively promoted private-sector development in extractive industries in developing countries by reforming mining codes, privatizing state-owned enterprises, and improving market prices by removing subsidies for extractive resources. Attracted by these incentives, foreign private oil, gas, and mining investment poured into developing countries in significant amounts.[51]

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46. African Uranium Alliance, *Two Statements to UN CSD on Indigenous People & Uranium*, MINES & COMMUNITIES (May 29, 2010), http://www.minesandcommunities.org/article.php?a=10138 (last visited Mar. 26, 2011) [hereinafter African Uranium Alliance].

47. *Id.*; The level of uranium in the drinking water is approximately 10 to 110 times higher than the WHO standard. World Hunger Org., *Uranium in Drinking-Water: Background Document for Development of WHO Guidelines for Drinking-Water Quality*, at 2 (2010), *available at* http://www.who.int/entity/water_sanitation_health/dwq/chemicals/uranium290605.pdf (last visited Feb. 23, 2011). *See also Left in the Dust: AREVA's Radioactive Legacy in the Desert Towns of Niger*, GREENPEACE, http://www.greenpeace.org/international/Global/international/publications/nuclear/2010/AREVA_Niger_report.pdf (last visited Feb. 25, 2011).

48. *Mining and Sustainable Development*, *supra* note 43. *See also* African Uranium Alliance, *supra* note 46.

49. *Mining and Sustainable Development*, *supra* note 43. *See also* African Uranium Alliance, *supra* note 46.

50. *Mining and Sustainable Development*, *supra* note 43. *See also* African Uranium Alliance, *supra* note 46.

51. *Striking a Better Balance, The World Bank Group and Extractive Industries Vol. I*, EXTRACTIVE INDUSTRIES REV., at iv (2003). The Report adds: "The WBG has encouraged broader opportunities for development of these mineral endowments by promoting structural reform programs for the reorientation of governing regimes, improved title registries, and broader guarantees for investors, as well as by providing support for individual projects." *Id.* at 7–8.

New multilateral institutions like the International Center for the Settlement of Investment Disputes (ICSID)[52]—another product of the World Bank—are similarly reminiscent of old colonial mechanisms like capitulations, or consular jurisdiction, whereby Asian and African governments were divested of jurisdiction over European residents.[53] The recent surge in the formation of arbitration tribunals similarly strips host states of jurisdiction over disputes involving foreign investors.[54]

Forced to compete for increased foreign investment, developing countries enter into BITs wherein they agree to settle disputes with foreign investors through binding arbitration in ICSID and other international tribunals.[55] MNCs have even accessed these tribunals by changing nationality.[56]

In addition to the humiliating infringement on national sovereignty, the economic consequences can be staggering for small countries. For example, in March 2010, an arbitration panel at the UN Commission on International Trade Law (UNCITRAL) ruled in favor of Chevron in an arbitration proceeding under the U.S.-Ecuador BIT. Ecuadorean plaintiffs had sued Chevron for environmental damage caused by its oil drilling operations. The panel found in part that a domestic court in Ecuador caused

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52. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. The ICSID Convention is a multilateral treaty formulated by the World Bank to facilitate arbitration of international investment disputes, thus promoting international private investment.

53. *See* CHARLES HENRY ALEXANDROWICZ, THE EUROPEAN-AFRICAN CONFRONTATION: A STUDY IN TREATY MAKING 83–91 (1973).

54. *See generally* Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 LAW & CONTEMP. PROBS. 217, 221 (2008).

55. *See* Sarah Anderson & Sara Grusky, *Challenging Corporate Investor Rule*, INST. FOR POL'Y STUDIES 2 (Apr. 2007), *available at* www.ips-dc.org/reports/070430-challengingcorporateinvestorrule.pdf (last visited Feb. 25, 2011). "Through an explosion of multilateral and bilateral trade and investment agreements, global firms have acquired new protections against government acts that might reduce their profits. And to enforce these new privileges, they can turn to an arbitration body connected to the World Bank, the International Centre for the Settlement of Investment Disputes, and other similar international tribunals." *Id.*

56. *See, e.g.*, Pacific Rim Cayman, LLC v. El Salvador, ICSID Case No. ARB/09/12, Pending (June 15, 2009). In this case, Canadian mining company Pacific Rim is suing El Salvador under the CAFTA agreement for $100 million. The company alleges that El Salvador improperly denied environmental permits for its exploration projects, rendering its investment in El Salvador worthless. Because Canada is not a party to the CAFTA agreement, Pacific Rim formed a U.S. subsidiary company in Nevada to access CAFTA's investor-state dispute settlement. *See Mining and Sustainable Development*, *supra* note 43, at 7.

"unreasonable delays" in resolving the suits, and awarded the company $700 million plus interest, taxes, and costs.[57]

In addition to the damaging competition among poor states, globalization has created a "race to the bottom" in which workers in different countries must compete by accepting lower and lower wages. The recent disaster in Haiti demonstrates a trend toward the complicity of multilateral institutions in the exploitation of such natural disasters—which are likely to increase due to climate change—to enable MNCs to maximize profits with no regard for victims, the natural environment, or future generations.[58]

According to the Oxford University economist who fashioned the plan for Haiti's post-earthquake economy, Haiti's minimum wage of about $3.00 a day makes it "fully competitive with China."[59] However, the plan was actually conceived in January 2009, more than a year before the disaster.[60] The highlight of the plan is the establishment of garment industry free trade zones, supported by a $20 million World Bank loan containing no contractual commitments to workers' rights.[61]

With virtually no public education system, inadequate health care, housing, and basic infrastructure—even before the earthquake—it seems counterintuitive to propose moving Haiti from a largely agrarian society to large-scale manufacturing.[62] Yet, within days of the January 12 earthquake that devastated much of southern Haiti, the disaster was being used to promote a UN plan for drastically expanding the country's garment assembly industry, which employs low-paid workers to stitch apparel for duty-free export[63] to U.S. and Canadian markets. Meanwhile, the UN

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57. *Mining and Sustainable Development*, *supra* note 43.

58. John R. Wilke & Brody Mullins, *After Katrina, Republicans Back a Sea of Conservative Ideas*, WALL ST. J., Sept. 15, 2005, at B1.

59. *See* David L. Wilson, *Rebuilding Haiti—the Sweatshop Hoax*, MONTHLY REV., Apr. 4, 2010, *available at* http://mrzine.monthlyreview.org/2010/wilson040310.html (last visited Feb. 25, 2011).

60. *Id.*

61. *See* Rick Cohen, *Rebuilding with Haiti's Troubled Garment Industry*, NONPROFIT Q., Oct. 19, 2010, *available at* http://www.nonprofitquarterly.org/index.php?option=com_content&view=article&id=6556:rebuilding-with-haitis-troubled-garment-industry&catid=155:nonprofit-newswire&Itemid=986 (last visited Feb. 25, 2011).

62. *Id.*

63. *See* Wilson, *supra* note 59. *See also* Nicholas D. Kristof, *Some Frank Talk About Haiti*, N.Y. TIMES, Jan. 20, 2010, *available at* http://www.nytimes.com/2010/01/21/opinion/21kristof.html?_r=2 (last visited Feb. 25, 2011); Paul Collier & Jean-Louis Warnholz, *Building Haiti's Economy One Mango at a Time*, N.Y. TIMES, Jan. 28, 2010, *available at* http://www.nytimes.com/2010/01/29/opinion/29collier.html?pagewanted=print (last visited Feb . 25, 2011); *Thinking About a New Haiti*,

stopped its Emergency Food Program after less than four months because it decided it was time to provide "cash for work." The main presence of the UN appears to be as soldiers on patrol, pointing guns at people. They are considered by many Haitians to be a foreign occupying army.

IV. CONCLUSION

Given the challenges of globalization, any attempt to employ a human rights framework in an effort to impose corporate liability must entail the following:

1. Framing issues of corporate behavior, globalization, and climate change in terms of the full panoply of human rights guarantees: political and civil; economic, social, and cultural; and third generation rights to a clean and safe environment, development; and peace;[64]
2. Prioritizing the rights of the historically oppressed, marginalized, and most vulnerable people, including racial, ethnic, religious, and other minority groups, women and indigenous peoples;
3. Elevating self-determination, the first norm specified in the two foundational human rights Covenants.[65] This entails emphasizing strategies of participation and empowerment, strategies that support mobilizing efforts at the grassroots level; this would include fighting for the recognition of the right of Indigenous Peoples to require their free, prior informed consent before states and corporations can operate on their lands;

N.Y. TIMES, Feb. 1, 2010, *available at* http://www.nytimes.com/2010/02/01/opinion/01mon1.html?pagewanted=print (last visited Feb. 25, 2011).

64. According to the Vienna Declaration and Programme of Action, "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." Vienna Declaration and Programme of Action, A/CONF.157/24 (Part I) chap. III, *adopted by* the World Conference on Human Rights, Vienna, June 25, 1993.

65. The right to self-determination is the collective right of peoples to "freely determine their political status and freely pursue their economic, social and political development." This right is codified in Articles 1(2) and 55 of the United Nations Charter, as well as in the first article of both major human rights covenants, the International Covenant on Civil and Political Rights and the International Covenant on economic, social and cultural Rights. This rule has been reaffirmed by the UN Security Council in resolutions concerning the former Rhodesia, S.C. Res. 183 (1963); Namibia, S.C. Res. 301 (1971); and Western Sahara. S.C. Res. 377 (1975). The Advisory Opinion of the International Court of Justice relating to the Western Sahara confirmed the validity of the principle in the context of international law. 1975 I.C.J. Rep. 3, 31–33 (Oct. 1975). This right is codified in Articles 1(2) and 55 of the United Nations Charter, as well as in the first article of both major human rights covenants.

4. Fighting for the democratization, transparency and accountability of international economic institutions;
5. Advocacy for enforceable legal norms of corporate responsibility at both the national and international levels; and
6. Credible independent monitoring of corporate conformity with voluntary codes of conduct.[66]

In this writer's view, such a comprehensive approach is the only way that a structurally weak normative and institutional framework can have any success in actually improving the lives of people.

66. The adoption of non-binding standards has been embraced in light of the presumed inability of treaty law to bind corporate non-state actors. Some scholars argue that a norm of "corporate responsibility" is emerging, creating "global standards of action for companies." *See, e.g.*, Cynthia A. Williams, *Symposium: Oil and the International Law: The Geopolitical Significance of Petroleum Corporations: Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457, 461 (2004). Such standards would arguably give teeth to otherwise non-binding norms as corporate activities are examined and evaluated by formal, uniform criteria. *See* James Thuo Gathii, *Good Governance as a Counter-Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 937, 934 (1999). Noteworthy, however, is the fact that some of the most notorious violators of human rights such as Unocal, ChevronTexaco and Shell, have adopted such codes and are as well signatories to many other initiatives. Moreover, non-binding standards are conceptually problematic. Not only do they have the potential to deflect the demand for mandatory, enforceable norms. More importantly, self-selected, self-defined and self-interested norms could circumscribe the scope of human rights law applicable to corporate non-state actors. One recent experience with voluntary codes of conduct illustrates this concern. The Sullivan Principles were promoted as an alternative to the anti-apartheid movement's demand for mandatory sanctions against South Africa, and for disinvestment from multinational corporations doing business there. Not only were the Sullivan Principles demonstrably unsuccessful in ameliorating the crimes of apartheid; the normative impact of this approach was much more pernicious. The Principles sought to redefine the South Africa question as one of racial discrimination *simpliciter* as opposed to a question of decolonization and self-determination. Thus, the problem could be addressed by measures such as desegregation of the workplace.