2005

Direct vs. Indirect Obligations of Corporations Under International Law

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43 Colum. J. Transnat'l L. 927-959 (2005)

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International law today addresses the conduct of private corporations in a variety of areas. With very few exceptions, however, international law regulates corporate conduct indirectly—that is, by requiring states to enact and enforce regulations applicable to corporations and other non-state actors. Only a small number of international legal norms—primarily those relating to war crimes, crimes against humanity, and forced labor—apply directly to non-state actors. Scholars have argued forcefully that international law should move in the direction of directly imposing obligations on corporations. These arguments overlook important aspects of the problem. If international legal norms were extended to corporations and backed by effective enforcement mechanisms, states would lose control over compliance with the norms. If not accompanied by an effective enforcement mechanism, the norms would probably be widely disregarded. The first option is likely to be strongly resisted by states; the second option would do little for the interests sought to be protected and would be bad for international law.

* Professor of Law, Georgetown University Law Center. I am grateful to William Bratton, John Jackson, Vicki Jackson, Sean Murphy, Ángel Oquendo, Anthea Roberts, Paul Stephan, Edward Swaine, Daniel Tarullo, and other participants in workshops at Georgetown University Law Center and Boalt Hall for helpful comments on an earlier draft. I also gratefully acknowledge the research assistance of Marc Marinaccio and Mohsen Manesh, and the financial support of the Georgetown-Sloan Project on Business Institutions. I dedicate this Essay to my teacher and mentor, Professor Oscar Schachter, who first taught me to appreciate distinctions such as the one I belabor here.

INTRODUCTION

In August 2003, the Sub-Commission on the Promotion of Human Rights of the United Nations Commission on Human Rights (CHR) approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereinafter Norms).[1] The document purported to be largely a restatement of corporations' existing obligations under international human rights law.[2] Its authors acknowledged, however, that the obligations set forth in the document went further in some respects than existing international law.[3] To this extent, the authors hoped that the document would serve as the basis for elaborating a treaty or other binding international law instrument, or customary international law recognizing obligations of corporations.[4] (The Norms themselves would lack the force of binding international law, even once approved by the CHR.[5]) The principal author of the Norms has reportedly

1. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., 22d mtg., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter *Norms*].

2. *See* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 913 (2003) ("The legal authority of the Norms derives principally from their sources in treaties and customary international law, as a restatement of legal principles applicable to companies."); *id.* at 912 ("[T]he Norms largely reflect, restate, and refer to existing international norms . . . ."). Professor Weissbrodt was one of five Members of the Sub-Commission who comprised a "working group" on what became the Norms. *See id.* at 905 & nn. 25, 27. He has been described as their "principal author." *See* Bernadette Hearne, *Proposed UN Norms on Human Rights: Is Business Opposition Justified?*, ETHICAL CORP., Mar. 22, 2004, *available at* http://www. ethicalcorp.com/content.asp?ContentID=1825.

3. Note the adverbs "principally" and "largely" in the statements quoted in Weissbrodt, *supra* note 2, at 913. *See also id.* at 914–15 (describing the *Norms* as "soft law" and noting that "as yet there does not appear to be an international consensus on the place of businesses and other nonstate actors in the international legal order").

4. *See id.* at 914 (Soft law "help[s] to establish custom or may serve as the basis for the later drafting of treaties."); *id.* (Norms "have started as soft law," which is "necessary to develop the consensus required for treaty drafting.").

5. Many have been confused by the authors' statement that the *Norms* were meant to

suggested that the document was designed to be controversial.[6]

This expectation has proven accurate. Soon after their approval by the Sub-Commission, the Norms received severe criticism from the business lobby. Prominent among the criticisms was the claim that the Norms would "represent a fundamental shift in responsibility for protecting human rights—from governments to private actors, including companies—effectively privatizing the enforcement of human rights laws."[7] Largely because of opposition from the corporate lobby, in April 2004 the CHR declined to adopt the Norms, and instead shelved them for further study.[8]

This Essay considers whether the Norms' critics are right in claiming that the Norms would represent a fundamental shift in international law. Part I considers the extent to which international law already imposes human rights obligations on private corporations.[9] The Norms appear to contemplate the direct

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be mandatory, yet are nonbinding. *See* Hearne, *supra* note 2 ("[The principal author admits] that while 'the document cannot be binding or compulsory, it isn't voluntary either.'"). The authors apparently mean that although the document does not have the force of international law because it is not a treaty, its rules are written as mandatory, not voluntary. Thus, the *Norms* would impose mandatory obligations on corporations if they were incorporated into a binding legal instrument or if they ripened into customary international law.

6. *See id.*

7. United States Council for International Business, *UN to Review Proposed Code on Human Rights for Business*, Mar. 5, 2004, *at* http://www.uscib.org/index.asp?documentID=2846. In a letter to the editor of the *Financial Times*, Thomas Niles, president of the United States Council for International Business, explained,

> However well intentioned, the draft norms would, if adopted, create a new international legal framework, cutting across virtually every area of business operation, with companies, rather than the governments that negotiated them, responsible for implementing international treaties and conventions. Not only would this create conflicting legal requirements for companies operating around the world, it would also divert attention from much-needed efforts to improve the capacity of national governments to implement and enforce existing human rights laws. Finally, although the proposed norms are said to be "non-voluntary" (which presumably means obligatory), it is totally unclear who would have the responsibility for enforcing their implementation.

Thomas Niles, Letters to the Editor, *UN Code No Help to Companies*, FIN. TIMES (London), Dec. 17, 2003, at 18.

8. Alex Blyth, *Compromise Deal Reached on UN Norms*, ETHICAL CORP., Apr. 21, 2004, *available at http://www.ethicalcorp.com/content.asp?ContentID=1947*; Bernadette Hearne, *Proposed UN Norms on Human Rights Shelved in Favor of More Study*, ETHICAL CORP., May 3, 2004, *available at http://www.ethicalcorp.com/content.asp?ContentID=1981*.

9. By "private corporations," I mean those that are not owned or operated by governments. The term includes corporations whose shares are publicly traded. Indeed, as shown by the full title of the *Norms*, the obligations of corporations are no greater than those of other non-state actors engaged in business; if anything, they are potentially narrower. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 473–75 (2001) (discussing and rejecting individual responsibility as a

imposition of international legal obligations on private corporations. International law, as it exists today, includes norms that address the conduct of corporations and other non-state actors but, with very few exceptions, the norms do so by imposing an obligation *on states* to regulate non-state actors. Thus, for the most part, international law regulates such non-state actors indirectly. In very few circumstances, international law places obligations on non-state actors directly, but direct regulation of non-state actors remains a very narrow exception to the general rule that international law directly imposes obligations only on states and supra-national organizations. To the extent the Norms contemplate the existence of a significant array of norms directly applicable to private corporations, they do not accurately describe international human rights law as it currently exists. Even scholars who argue that international law places significant obligations on private corporations appear to be referring to indirect obligations, under the terminology employed here.[10] To the extent the Norms in this respect were meant to influence the future development of international human rights law, their adoption would indeed represent a notable shift in how international law regulates non-state actors.

To say that the direct regulation of private corporations by international law would be a change is not necessarily to conclude that the step should not be taken. International law imposes no conceptual obstacle to an agreement among states to impose obligations directly on private parties[11] (although there may be a semantic obstacle, not to mention serious challenges with respect to the implementation and enforcement of such obligations). The magnitude of the change is, however, a reason to think hard before taking the step. Part II explains the fundamental nature of the change to international law that would occur if that law were to begin to impose direct obligations on private corporations to any significant extent. I also consider the arguments that commentators have proffered in support of such a step and conclude that they are incomplete. Additionally, I explain why states would be very hesitant

substitute for corporate responsibility). I am inclined to agree with Ratner and with the authors of the Norms that, insofar as international law is concerned, nothing much turns on the corporate form. Thus, although I refer in the Essay to the obligations of corporations, the scope of corporate responsibility under international law is probably no different from that of other non-state actors who are engaged in similar activity.

10. *See, e.g.*, *id.* at 485, 488.

11. Here again, I agree with Ratner, who writes, "If states and international organizations can accept rights and duties of corporations in some areas, there is no theoretical bar to recognizing duties more broadly, including duties in the human rights area." *Id.* at 488.

to take the step. It thus makes sense to consider other ways to address the problem of corporate conduct that impinges upon the enjoyment of human rights.

Before proceeding, it is useful to stress that the question is not whether corporations should remain unregulated. Clearly, corporations should be regulated and they are.[12] Traditionally, however, the regulation of corporations, like that of all non-state actors, has been left to states. We generally expect states to protect their citizens from harms that might be caused to them by corporations by imposing legal obligations on corporations regarding the treatment of their employees, the protection of their environment, the protection of consumers, and the like. In recent years, however, reliance on national law has seemed inadequate. One problem is corruption in some governments, which has led to lax regulations or lax enforcement of regulations. Another concern, perhaps more serious, has been the phenomenal growth of some corporations, whose economic power some believe has come to dwarf that of many of the nations that are supposed to regulate them.[13] The corporations' economic power, and the poverty of many developing countries, has led some commentators to conclude that the governments of such countries, even if they would like to protect the interests of their citizens, will find it necessary to relax their regulations in order to attract foreign investment. The fear of a race to the bottom has caused some to propose that international law step in[14] and establish a

12. Even the staunchest believers in free marketers recognize the legitimacy and need for government regulation of business, although they argue that such regulation should be minimal. *See, e.g.*, Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, 17–18 (The responsibility of corporate managers is generally "to make as much money as possible while conforming to the basic rules of society, both those embodied in law and those embodied in ethical custom.").

13. *See, e.g.*, Menno T. Kamminga and Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law: An Introduction*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 1, 2 (Menno T. Kamminga and Saman Zia-Zarifi, eds., 2000) [hereinafter LIABILITY OF MULTINATIONAL CORPORATIONS]. *See infra* notes 79–84 and accompanying text.

14. A possible intermediate solution is to depend on the corporations' home states to regulate their corporations for the benefit of persons in the host state. *See* Kamminga and Zia-Zarifi, *supra* note 13, at 2, 10–11. This option is not the focus of this Essay, but I note that there is reason to doubt the home state's eagerness to burden its own corporations for the benefit of people in other states, unless required to do so by international law. *See* Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in LIABILITY OF MULTINATIONAL CORPORATIONS, *supra* note 13, at 80. Home states are more likely to impose such burdens to protect domestic constituencies, such as workers who fear their jobs will be lost to low-cost foreign labor. The imposition of such extraterritorial obligations on corporations operating abroad is thus not entirely unproblematic from a human rights perspective.

floor of duties for multinational corporations.[15]

This Essay does not question the existence of international law norms addressing the conduct of private corporations, or the need for more such norms. It does, however, contend that current international law does not *directly* impose a significant number of obligations on private corporations. I begin in the next Part by discussing the nature and significance of the distinction between direct and indirect regulation of private corporations by international law. As discussed below, international law norms that indirectly regulate non-state entities by requiring states to regulate such entities in particular ways are commonplace. International law norms that directly regulate non-state actors, while not unknown, are far less common. As discussed in Part II, the latter norms disempower states in an important though underappreciated respect and are thus far less likely to be adopted by states than the former.

I. THE HUMAN RIGHTS OBLIGATIONS OF PRIVATE CORPORATIONS UNDER EXISTING INTERNATIONAL LAW

It is commonplace to observe that the "classic model" of international law—under which only states have legal personality—does not accurately describe international law as it exists today. The most glaring departure from the classic model has been the recognition, since the emergence of an international law of human rights, that individuals have rights under international law.[16] My focus here is not on rights but on obligations. Although there are exceptions, it remains true today that, for the most part, the obligations imposed by international law are obligations of states. To a surprising extent, the classic model continues to prevail with respect to obligations.

For purposes of our analysis, the classical position entails two distinct but related propositions: First, the primary rules of

15. Non-legal options have also been pursued. For example, nongovernmental organizations have sought to harness market forces to promote greater corporate respect for human rights. To this end, they have sought to publicize corporate conduct harming human rights and convince consumers not to purchase products from corporations implicated in such conduct. Other NGOs, and even governments and international organizations, have sought to promote voluntary codes of conduct for corporations. This Essay does not focus on these non-legal approaches to the problem. *See* Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963 (1996).

16. For a discussion of what it means to say that individuals now have rights under international law, see Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1087–97 (1992).

international law are addressed to states (and state officials), not non-state actors. Second, under the secondary rules of international law, only states incur responsibility for breaching the primary rules of international law.[17] These propositions do not hold true for all rules of international law today; there are exceptions to both propositions. The claim made by some scholars, and reflected in the Norms, that international law today imposes significant obligations directly on private corporations, if accurate, would represent a significant exception to the classical position.

Before examining the extent to which current international human rights law departs from the classic model by imposing obligations on private corporations, it is useful to clarify what is *not* meant by these propositions. The classic model does not insist that only state conduct can give rise to a violation of international law. For example, the secondary rules of international law recognize that "[t]he conduct of a person or group of persons" may give rise to international responsibility "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."[18] On this basis, it has been argued that the conduct of a corporation might give rise to a violation of international law "in failed states" if "there is a complete non-regulation of corporate activities" and infringement of human rights results from the corporation's activities.[19] Be that as it may, the responsibility that would result in such a case would the state's rather than the corporation's. In such circumstances, the conduct of the corporation would be attributable to the state for purposes of international law.[20] This is thus an application of, not an exception to, the classical position.

Similarly, the conduct of non-state actors can give rise to responsibility under international law "if and to the extent that the

17. The secondary rules of international law specify the legal consequences of a breach of the primary rules of international law. On the distinction between the primary and secondary rules of international law, see *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, Comment 1, U.N. Doc. A/56/10 (2001).

18. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, art. 9., U.N. Doc. A/56/10 (2001) [hereinafter *Draft Articles*].

19. NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 142 (2002).

20. *See Draft Articles*, *supra* note 18 (noting that conduct "shall be considered the Act of a State" under circumstances described).

State acknowledges and adopts the conduct in question as its own."[21] The most famous example of this principle was the seizure of the U.S. Embassy in Tehran and the detention of its personnel by Iranian militants in 1979. As the International Court of Justice held, the Iranian authorities' endorsement of this conduct gave rise to international responsibility for what would otherwise have been private conduct.[22] Again, however, the resulting international responsibility was that of Iran, not of the militants who perpetrated the seizure and detention.

Nor does the classical position maintain that the primary rules of international law do not address the conduct of private parties. Indeed, treaty provisions specifying that private conduct is either prohibited or permitted are commonplace. For example, the Convention on Combating Bribery of Foreign Public Officials contemplates the criminalization of bribery by any legal person (including a corporation). However, rather than criminalizing bribery itself, the Convention requires states to criminalize such bribery when done on their territory.[23] Similarly, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) expressly addresses the permissibility of race discrimination "by any persons, group, or organization," clearly covering discrimination by private corporations.[24] However, rather than directly impose on such organizations an obligation not to discriminate on the basis of race, it imposes *on states* the obligation to "prohibit and bring to an end" such discrimination.[25]

Even when a treaty's language seems to establish obligations of private parties, often what it really does as a matter of international law is require the states-parties to recognize the obligations set forth in the treaty. For example, the Warsaw Convention provides, inter alia, that "a carrier shall be liable for damage sustained [by] a

21. *Id.* art. 11.

22. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

23. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, arts. 1–2, 4, 37 I.L.M. 1, 4–5.

24. Convention on the Elimination of All Forms of Racial Discrimination, Sept. 28, 1966, art. 2(1)(d), 660 U.N.T.S. 195, 218 [hereinafter CERD].

25. *Id.* Similarly, the Convention on the Elimination of Discrimination Against Women, a treaty that the United States has not yet ratified, obligates states to take measures "to eliminate private discrimination against women." Convention on the Elimination of Discrimination Against Women, Dec. 18, 1979, art. 2(e), G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1979) (entered into force Sept. 3, 1981).

passenger" in certain circumstances.[26] The U.S. Supreme Court recently understood those words to "impos[e] liability on an air carrier" under the circumstances stated.[27] In reality, however, the Convention merely obligates the states-parties, when resolving disputes coming within its scope, to apply the Convention's substantive rules of liability. Strictly speaking, the Convention does not "impose" liability on an air carrier. Only a state can violate the Convention or incur international responsibility for a breach. Under the domestic constitutional law of some states, such as the United Kingdom, the treaty has no effect on private parties until implemented by the legislature.[28] In other states, the treaty may have domestic legal force by virtue of their domestic constitutional provisions. In the United States, the liability of air carriers is grounded in U.S. law by virtue of the Warsaw Convention combined with the Supremacy Clause, which declares that all treaties of the United States are the "Law of the Land."[29] Like other "private international law" instruments, the Warsaw Convention is understood to be addressed to the courts of the states-parties, imposing on them the obligation to resolve disputes in accordance with the treaty's provisions. Private parties actually incur such obligations by virtue of whatever domestic laws give domestic legal force to the rights and obligations contemplated by the treaty.

Treaties such as these are not an exception to the classic model. The primary obligations they impose are obligations of states, such as the obligation to take steps to prohibit particular private conduct or to give effect to specified liabilities. Private discrimination on the basis of race does not violate CERD; only the state's failure to prohibit and take other steps to eradicate such discrimination would constitute a violation. In the event of a breach of that obligation, only the state would incur international responsibility. Although the treaties do contemplate the imposition of obligations on non-state actors, they do not themselves directly impose international legal obligations on such entities. One might say that the treaties regulate private parties indirectly rather than directly.[30]

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26. Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention"), Oct. 12, 1929, art. 17, 49 Stat. 3000, 137 L.N.T.S. 11, 23.

27. *See* Olympic Airways v. Husain, 540 U.S. 644, 646, 655-57 (2004).

28. *See* J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 81–83 (10th ed. 1989).

29. U.S. CONST. art.VI, § 1.

30. *See* Joseph, *supra* note 14, at 78. One might also say that, with respect to private parties, the treaties are not self-executing. It is important to clarify, however, that the treaties

Though seemingly quite formal, the distinction between obligations imposed directly by international law and those imposed indirectly is of some importance to both states and to the non-state actors addressed by the norm. The significance to states is discussed in some detail in Part II. For corporate managers and directors, the difference is potentially crucial. Such managers and directors are legally required to advance the interests of shareholders within the constraints of the law. If international law imposes obligations on corporations only indirectly, then managers and directors need concern themselves, as a legal matter, only with the domestic laws of the states in which they operate (which would include any constitutional rules giving domestic legal force to international law norms).[31] Although a prudent corporation might want to ensure that it is complying with international norms even if they are not directly operative,[32] as a formal legal matter they need not do so except to the extent such norms have been given domestic legal force. Indeed, under a minority view of U.S. corporate law, corporate managers should not comply with such rules except to the extent it is profitable

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are non-self-executing as a matter of international law. This should be distinguished from the question whether the treaties are self-executing under the domestic law of any given state. As noted above with respect to the Warsaw Convention, some countries have constitutional rules that give domestic legal force to certain treaties upon ratification. In the United States, for example, a treaty that confers rights on private parties is directly enforceable in domestic courts by such parties, without any implementing legislation, if it is "self-executing" as a matter of U.S. law. (On the distinction between self-executing and non-self-executing treaties, see Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).) Whether a treaty is self-executing depends in part on the language of the treaty, for example, if the treaty's language purports to "act[] directly on the subject," *Foster v. Nielson*, 27 U.S. 253, 314 (1829), as does the language of the Warsaw Convention specifying the liabilities of air carriers. But the self-executing nature of a treaty under U.S. law should be distinguished from its self-executing nature under international law. Under the classic model, a treaty is never self-executing under international law with respect to the obligations of private parties. Such obligations are never imposed by the treaty itself, only by the domestic legal provision—be it statutory or constitutional—that gives the treaty domestic legal force. (To avoid possible confusion between the international and domestic doctrines concerning self-execution, I avoid reference to self-execution altogether in this Essay.)

31. I should note that the distinction between direct and indirect obligations of corporations under international law does not necessarily determine the liability of corporations in suits brought under the Alien Tort Statute. As interpreted in *Sosa v. Alvarez-Machain*, such liability results from a combination of international and domestic law—specifically, federal common law. 124 S. Ct. 2739 (2004). Whether corporations may be held liable under the Alien Tort Statute for violating international law norms that are indirectly applicable to corporations is beyond the scope of this Essay.

32. Prudence might dictate compliance with such norms on the theory that at least some nations will have given effect to their international obligation to regulate such conduct. Domestic law rules concerning the legal effect of international obligations are sometimes unclear. *See generally* Vázquez, *supra* note 30. It may also be economically prudent to abide by indirectly-applicable standards because their customers may care deeply about such norms and refuse to deal with businesses that violate them. *See* Cassel, *supra* note 15.

to do so.[33] If international law directly imposes obligations on corporations, on the other hand, the corporation will be potentially subject to enforcement action by international institution, either in existence or created after the fact.[34]

The most commonly proffered examples of international legal norms imposing obligations on corporations are in fact of the indirect variety that do not conflict with the classic position.[35] Thus, reference is often made to the European concept of *Drittwirkung*, under which certain provisions of the European Convention of Human Rights (ECHR) are understood to contemplate "horizontal effect," meaning that they apply as between private parties.[36] The European authorities demonstrate, however, that the state has the obligation in these circumstances to take steps to ensure that private parties behave in certain ways towards other private parties. As recognized by a prominent defender of the ECHR's horizontal effect:

> The opinions in favour of *Drittwirkung* show various degrees of commitment, but no one assumes that the Convention rights and freedoms have exactly the same legal force for private persons as they have for the States parties. Those rights may be applicable between private persons, but their extent will depend on the domestic law and the Convention's status therein. . . .
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> [I]f the ECHR is valid as between private parties, only States can be held responsible at Strasbourg. Defects

33. *See* Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1980) ("[M]anagers not only may but also should violate the rules when it is profitable to do so."). On this view, managers would have no duty under corporate law to abide by directly-applicable norms of international law not backed by enforcement sanctions, except insofar as the risk of creation of such sanctions in the future makes it unprofitable to ignore such rules. *But see* Cynthia Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1270 (1998).

34. *See* Joseph, *supra* note 14, at 87 (equating "binding direct international regulation" with the existence of international institutions with the power to enforce norms); Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 308–11 (noting that provisions that "allow for trial at both the national and the international levels . . . establish[] the truly *international* legal character of the crime," whereas provisions that "merely refer to the obligation of the parties either to try or to extradite alleged criminals . . . do not qualify . . . as crimes of a truly international character" (emphasis in original)).

35. *See, e.g.*, Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS, *supra* note 13, at 139, 172–178 (discussing as "International Treaties Creating International Crimes for Legal Persons" several treaties that require states to impose criminal penalties on corporations).

36. *See, e.g.*, JÄGERS, *supra* note 19, at 36–37; Ratner, *supra* note 9, at 471.

> in protection against violations by other individuals are to be construed as due to the State: the fault of domestic legislation, of the courts, or the administrative authorities. This *Drittwirkung* is indirect . . . .
>
> The legal position of the private party, the wrongdoer, is not affected; he is neither forced to repair the wrong nor is he punished. For that matter, punishment would probably be contrary to Article 7: *nulla poena sine lege previa*.[37]

Also frequently cited[38] is the decision of the Inter-American Court of Human Rights in the *Velásquez-Rodriguez* case.[39] However, in this watershed decision, the Inter-American Court recognized that the Inter-American Convention on Human Rights had a horizontal effect similar to that of the European Convention. It affirmed the responsibility of the state for its failure to prevent or punish private conduct that infringed human rights, but it did not hold that private individuals who inflict such injuries are guilty of violating the Convention.

Many norms of international law do not apply to non-state actors even indirectly. Establishing that certain norms have horizontal effect, and adding to the list of such norms, could well represent an important advance in the protection of human rights. Nevertheless, the recognition of an obligation on the part of states to impose obligations on private parties, including corporations, would not be a conceptual departure from the classic model. International law has long recognized that a state may agree to impose an obligation on itself to prevent or remedy injuries to private parties at the hands of other private parties. State responsibility for the denial of justice to aliens—recognized in international law since before the U.S. Constitution was adopted[40]—is an example of this sort of norm.[41]

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37. Evert Albert Alkema, *The Third-Party Applicability or "Drittwirkung" of the European Convention on Human Rights*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 33, 37–38 (Franz Matscher & Herbert Petzold eds., 1988).

38. *See, e.g.*, JÄGERS, *supra* note 19, at 147–48; Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law)*, 87 VA. L. REV. 1279, 1375 n.290 (2001); Ratner, *supra* note 9, at 470.

39. Velásquez-Rodriguez Case, Inter-Am. C.H.R. 35, O.A.S./ser./L/V/III19, doc.13 (1988).

40. *See* THE FEDERALIST NO. 80 (Alexander Hamilton).

41. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 cmt. a (1987) ("'[D]enial of justice' . . . refer[s] to injury consisting of, or resulting from,

Having clarified what the classic model does not deny, we are now in a position to consider what would count as an exception to the classic position. Easiest to identify are exceptions to the proposition that only states are responsible for breaches of international law. Obvious exceptions to this proposition include situations in which the international community has established mechanisms to adjudicate non-state actors' international responsibilities. This has happened in the context of international criminal law. The Nuremburg Rules, for example, provided for individual responsibility for crimes against peace, war crimes, and crimes against humanity.[42] Most of the prosecutions at Nuremburg were against state officials. Some prosecutions, however, occurred against the managers of certain corporations implicated in Nazi atrocities.[43] The corporations themselves did not face prosecution because the tribunal possessed jurisdiction only over natural persons.[44] Nevertheless, it has been argued the Nazi corporations were themselves guilty of violating the primary norms and escaped prosecution only because of a jurisdictional limitation of the tribunal.[45] In support of this conclusion, it has been noted that the military tribunal had the power to declare certain organizations to be criminal enterprises,[46] and certain corporations were declared such.[47]

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denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil [for which a state is responsible]."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Part VII, introductory cmt. (1987) ("International law has long held states responsible for 'denials of justice' and certain other injuries to nationals of other states.").

42. Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter] ("The following acts . . . are crimes . . . within the jurisdiction of the Tribunal for which there shall be individual responsibility . . . .").

43. *See* U.S. v. Krauch (the "Farben Case"), VIII Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952); U.S. v. Flick ("The Flick Case"), VI Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952); U.S. v. Krupp ("The Krupp Case"), IX Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950). *See also* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1309–10 (C.D. Cal. 2000) (discussing these cases).

44. *See* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 76 (2002). *See also* Nuremberg Charter, *supra* note 42, art. 6 (granting the tribunal authority "to try and punish persons . . . acting as individuals or members of organizations").

45. *See* Stephens, *supra* note 44, at 76.

46. Nuremberg Charter, *supra* note 42, arts. 9, 10.

47. *See* JÄGERS, *supra* note 19, at 222–25; Andrew Clapham, supra note 35, at 166–171. *But see* Ratner, *supra* note 9, at 500 (suggesting that some of the World War II business defendants may have been held responsible because they were acting as agents of the German government, which may have "instructed them to engage in those violations"). There has been much debate about the circumstances in which international law imposes responsibility

If an international mechanism is established for enforcing an international norm against a non-state actor, then it may clearly be said that the international norm applies directly to non-state actors. Scholars have stressed, however, that the absence of such a mechanism does not necessarily establish the opposite.[48] A rule of international law imposing obligations directly on individuals and non-state actors, not backed by an international enforcement mechanism, could later become enforceable, for example, through the subsequent creation of an international tribunal with the power to impose criminal penalties, as occurred with the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.[49]

But identifying such norms is not an easy task. A specific statement in the relevant treaty indicating that the norms are directly applicable to private entities would do the trick. But the mere fact that the language of a provision appears to apply directly to private entities may not be dispositive, as the Warsaw Convention example shows. The fact that the Norms are addressed to corporations and phrased in imperative terms (e.g., "[t]ransnational corporations shall ensure equality of opportunity and treatment . . ."[50]) suggests that its authors intended directly to impose obligations on corporations, but such an intent could be rebutted by language or an unexpressed

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on private actors who aid and abet, or are otherwise complicit in, a state's violations of international law. *See Unocal*, 110 F. Supp. 2d at 1309–10 (discussing these cases); Brief for the United States as Amicus Curiae, *Doe v. Unocal*, 110 F. Supp. 2d 1294, rehearing *en banc* granted 395 F.3d 978, Nos. 00-56603, 00-56628, *available at* http://www.hrw.org/press/2003/05/doj050803.pdf; Andrew Clapham and Scott Jherbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339 (2001). My focus in this Essay is on the extent to which international law directly regulates wholly private conduct of corporations.

48. *See* JÄGERS, *supra* note 19, at 256–57.

49. Both tribunals have the temporal jurisdiction to impose criminal penalties for violations that occurred before their respective formations. *See* Statute of the International Criminal Tribunal for Rwanda, art. 7, S.C. Res. 955, U.N. Doc. S/RES/955 (1994), *available at* http://www.ictr.org/ENGLISH/basicdocs/statute.html (adopted November 8, 1994 and establishing temporal jurisdiction over all specified crimes occurring after January 1, 1994); Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 8, S.C. Res. 827, U.N. Doc. S/RES/827 (1993) (adopted May, 25, 1993 and establishing temporal jurisdiction over all specified crimes occurring after January 1, 1991). If the legal norms for which these tribunals have the power to impose penalties were not directly operative on individuals at the time the violations occurred, there would be a problem under the principle of *nulla poena sine lege previa*. On the other hand, the Rome Statute establishing the International Criminal Court defines the crimes for which prosecutions are possible and authorizes prosecutions only for crimes committed after the entry into force of the treaty. Rome Statute of the International Criminal Court, July 17, 1998, art. 11, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, *available at* http://www.un.org/law/icc/statute/romefra.htm.

50. *Norms*, *supra* note 1, art. 2.

understanding that the parties simply meant to obligate *states* to impose and enforce the contemplated obligations of private parties. On the other hand, an intent to make the obligations directly applicable could be shown by language indicating an intent to subject corporations to international enforcement mechanisms in the future. In the light of international law's general prohibition of retroactive legislation, future enforcement mechanisms can be applied to private corporate activity only if the norms themselves directly applied to corporations at the time of the conduct. Article 16 of the Norms, which provides that "transnational corporations . . . shall be subject to periodic monitoring and verification by United nations, other international and national mechanisms already in existence or yet to be created," is thus a strong indication that the Norms were intended to be directly applicable to private corporations. Do the Norms accurately reflect existing international law in this respect?

Some scholars argue that all human rights norms must be regarded as directly applicable to non-state actors because they have their basis in natural law—that is, they simply restate inalienable rights possessed by all persons. They argue that, if all persons have a right to life, it makes little sense to say that the right is violated when the conduct of a government official results in death, but not when the very same conduct by a private individual has that result. That international human rights law is indeed based on natural law is not universally accepted, however.[51] Even if it were, it would not follow that the obligations imposed by human rights instruments bind private parties as well as the state. In the United States, the natural-law origins of human rights were expressed in the Declaration of Independence and possibly alluded to in the Ninth Amendment, yet the Bill of Rights even today is largely understood to place obligations only on states. Indeed, until Reconstruction it was understood to apply only to the *federal* government. For the most part, the U.S. Constitution today is not understood to establish even indirect obligations on private parties in the manner of the European *Drittwirkung*.[52] That the rights are regarded as having their basis in natural law is not a reason to construe the instruments protecting those rights as imposing obligations on private parties directly rather than indirectly. That distinction can be understood to reflect a choice about how best to advance these natural rights. The natural-law basis

51. *See, e.g.*, Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 287, 352–53 (1999).

52. The Thirteenth Amendment, prohibiting slavery and involuntary servitude, is the notable exception. U.S. CONST. amend XIII.

of a right does not help us make that choice.

Some scholars rely on language from the Preamble to the Universal Declaration of Human Rights as establishing that human rights norms are directly applicable to non-state actors:

> The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance . . .[53]

Referring to this part of the Preamble, Professor Henkin, in an oft-quoted passage,[54] emphasized that "[e]very individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, and no cyberspace. The Universal Declaration applies to them all."[55] That is true, but it is important to keep in mind what exactly the Preamble expects of such individuals and organs: that they "promote" respect for the rights set forth in the Declaration by "teaching and education" and by supporting "progressive national and international measures." The language is thus consistent with the idea that legal obligations bind corporations only to the extent that further "national and international measures" are taken. Additionally, it should be kept in mind that the Declaration does not as such have binding force, and that the language in question appears in the *preamble* of that instrument. Many of the rights set forth in the Declaration are thought to have attained the force of customary international law, but even supporters of imposing international human rights obligations on corporations acknowledge that this portion of the preamble has not itself attained such force.[56]

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53. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). *See, e.g.*, Jordan Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 810–11 (2002).

54. *See, e.g.*, Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1, 13 (2003); Stephens, *supra* note 44, at 77.

55. Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17, 25 (1999).

56. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL OBLIGATIONS OF COMPANIES 61

Of the human rights that the Norms set forth as directly applicable to corporations, some are widely recognized as directly applicable to private individuals under existing international law. For example, the Norms provide that

> [t]ransnational corporations and other business entities shall not engage in . . . war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law or other international crimes against the human person as defined by international law.[57]

Some of the foregoing acts are widely recognized to be prohibited by international law to private as well as state actors. [58] Some scholars insist, however, that international law does not yet recognize *corporate* responsibility for the violation of these norms.[59] This appears to be a claim about the secondary rules of international law, rather than its primary rules.[60] It is unclear whether these scholars would also deny that the primary norms of international law that apply to individuals also apply to corporations.[61] Perhaps that is an incoherent question, as primary rules are designed to guide conduct

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(2002), *available at* http://www.ichrp.org/ac/excerpts/41.pdf (stating that the preamble to the UDHR has at best "indirect legal effect").

57. *Norms*, *supra* note 1, art. 3. The article also says that transnational corporations shall not "benefit from" such acts. In this respect, the Norms may go beyond what international law itself prohibits. *See Unocal*, 110 F. Supp. 2d at 1310 (holding that international law prohibits complicity in state violations of human rights norms, but defining complicity more narrowly than "benefit[ing] from").

58. *See* Nuremberg Charter, *supra* note 42 and accompanying text (discussing individual responsibility under the Nuremberg Charter for war crimes and crimes against humanity); *Unocal*, 110 F. Supp. 2d at 1307–09 (finding that norms against forced labor are directly applicable). On the other hand, the international-law prohibition of torture is generally understood to be directly applicable only to state actors. *See* Ratner, *supra* note 9, at 467–68 n. 81.

59. *See, e.g.*, Presbytarian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp.2d 289 (S.D.N.Y. 2003) (Declaration of James Crawford and Declaration of Christopher Greenwood). *But cf.* Ratner, *supra* note 9, at 473–74 (discussing and rejecting arguments that norms applicable to individuals are not applicable to corporations themselves, as distinct from the specific individuals acting on the corporation's behalf).

60. In other words, these scholars do not appear to question the applicability of primary norms to corporations. They appear to maintain only that international law does not hold the corporation liable, as distinguished from the individuals who act on its behalf.

61. The conclusion that the primary norms do apply to corporations as well as private individuals derives some support from the decision of the U.S. Military Tribunal in Nuremburg stating that certain violations had been "committed by Farben." INT'L L. REP. (1948), at 675.

and only natural persons can act. These scholars do not deny that the primary rules that apply to individuals apply to individuals acting on behalf of corporations.

A full discussion of whether the violation of such primary rules by corporate actors gives rise to responsibility of the corporation under current international law is beyond the scope of this Essay. It does seem to me, however, that recognizing such responsibility involves no significantly greater conceptual departure from the classic model. First, corporations bear a stronger resemblance than individuals to the classic addressees of international law (states); like states, corporations are artificial "persons" comprising groups of natural persons. Second, and perhaps more important, corporations act through individuals and are owned by individuals. For purposes of liability, the corporation's owners (the shareholders) *are* the corporation. The question of corporate responsibility under international law thus boils down to the question whether the individuals who own the corporation can be held responsible for violations of international norms by those acting on the corporation's behalf. An affirmative response requires only a straightforward application of agency principles. Indeed, a principal point of the corporate form is to enable the principals (the shareholders) to limit their liability for the actions of the directors of the corporation (the agents). The law recognizes the corporation as a separate legal person, answerable to the law as such, as the price for limiting the liability of shareholders. To unravel this bargain now by insisting that corporations are not persons for purposes of liability under international law norms that concededly apply to natural persons would appear detrimental to the interests of the individuals who own the corporation and would be subject to individual liability on an agency theory if the veil were pierced. In any event, because recognizing corporate liability is equivalent to recognizing shareholder liability, it would represent no greater conceptual departure from the classic model than the recognition of individual responsibility under international law.

Some international obligations that the Norms require corporations to respect appear, at best, indirectly applicable to private parties under existing international law. For example, the Norms provide that "[t]ransnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage . . . ."[62] As discussed above, the international instruments addressing the

62. *Norms*, *supra* note 1, art. 11.

permissibility of bribery contemplate that states will prohibit certain conduct. They do not purport to regulate the conduct of private parties directly. The same is true of the international law prohibition of discrimination, embodied in article 2 of the Norms, as well as the labor standards that the Norms expect private corporations to respect[63] (other than the prohibition of forced labor[64]). As discussed above, CERD requires *states* to eradicate discrimination by private parties.[65] The ILO instruments on which the labor rights rest make clear that they are rights governments are required to recognize and protect.[66]

The Norms also require private corporations generally to

> respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression . . . [67]

Even scholars who support the imposition of human rights obligations on private corporations recognize that most civil and political rights are either only applicable to private corporations indirectly,[68] or are not intended to be operative on private parties at all.[69]

Some have argued that, to a greater extent than civil and political rights, economic and social rights are directly applicable to private parties, including corporations.[70] This argument, which relies primarily on conclusory statements of the UN Committee on

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63. The *Norms* require corporations to "respect the rights of children to be protected from economic exploitation" (art. 6), to "provide a safe and healthy working environment" (art. 7), to "provide workers with remuneration that ensures an adequate standard of living for them and their families" (art. 8), and to "ensure freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing . . ." (art. 9). *Norms*, *supra* note 1, arts. 6–9.

64. See *supra* note 58 and accompanying text, and *infra* note 76.

65. *See supra* note 24 and accompanying text.

66. *See, e.g.*, ILO Convention Fixing the Minimum Age for Admission of Children to Industrial Employment, Nov. 28, 1919, 38 L.N.T.S. 81 (entered into force June 13, 1921).

67. *Norms*, *supra* note 1, art. 12.

68. JÄGERS, *supra* note 19, at 71.

69. *See id.* at 51–69 (discussing several human rights obligations that do not apply to private parties, such as the rights to seek asylum and to nationality).

70. *See id.* at 71.

Economic and Social Rights,[71] seems counterintuitive. These rights are by their terms subject to "progressive" development. The Covenant on Economic and Social Rights provides that

> [e]ach State Party to the present Covenant undertakes to take steps . . . to the maximum extent of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[72]

The Covenant's requirement that the rights be achieved progressively and to the maximum extent of a state's resources means necessarily that the instrument leaves much to the discretion of the various states-parties. For example, what constitutes "just and favorable conditions of work," "fair wages," "a decent living," or "safe and healthy working conditions"[73] will turn in any given state on the balancing of a number of factors, and, particularly in the case of developing countries, on the need to attract foreign investment. Similarly, what constitutes "the highest attainable standard of physical and mental health"[74] in a given country will depend on the resources available to provide free health care through government or on calculations about the economic impact of requiring private employers to provide health care directly or through insurance schemes. It seems obvious that these judgments must be made by entities representing all segments of a society. It is difficult to understand how obligations of this nature could operate directly on private corporations. Is a corporation required to pay the maximum wages that it can afford? Is it to provide health care to its employees, or even to the surrounding community, to the maximum of its available resources? In determining how much of its resources are "available" for this purpose, do we take into account its need to make a profit in the international market in order to survive? If so, then it would appear that the Norms contemplate a distinction between adequate and excessive profits. This seems like a thicket into which it would be unwise for international law to wade.

Finally, some of the obligations the Norms would impose on private corporations appear not to be established in existing

71. *See id.* at 59, 68 (relying on the General Comment stating without elaboration that economic and social rights apply directly to private parties).

72. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 2(1), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

73. *Id.* art. 7.

74. *See id.* art. 12.

international law at all, except possibly at the regional level (to the extent we regard the European Union as a regime of international law). For example, the Norms require corporations to

> act in accordance with fair business, marketing and advertising practices and . . . take all necessary steps to ensure the safety and quality of goods and services they provide . . . . Nor shall they produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers.[75]

These matters are usually regulated by municipal law. The international standards referred to in the Commentary to the Norms are either aspirational or require state implementation.

In sum, the Norms go considerably further than existing international law in imposing human rights obligations on private corporations. They require private corporations to respect some rights that, under existing international law, are either (a) not widely recognized, (b) unprotected from private infringement, or (c) intended to be protected from private infringement through the domestic laws of the states-parties. With respect to economic and social rights, it is unclear how the rights could translate into obligations of private corporations. Even courts and commentators sympathetic to the project of direct application of international law to private corporations recognize that very few human rights norms apply directly to non-state actors under international law as it exists today.[76]

II. THE SIGNIFICANCE OF THE CONTEMPLATED CHANGE IN INTERNATIONAL LAW

The previous section demonstrated that existing international law does not depart significantly from the classic model by directly regulating the conduct of private corporations. Although a few

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75. *See Norms*, *supra* note 1, art. 13.

76. *See* Doe v. Unocal, 395 F. 3d 932, 945 (9th Cir. 2002) (Forced labor is "among the 'handful of crimes . . . to which the law of nations attributes individual liability,' such that state action is not required" (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794–95 (D.C. Cir. 1984) (Edwards, J., concurring).); Ratner, *supra* note 9, at 488 (noting that international law has "indirectly recognized duties upon corporations by prescribing international labor law, environmental law, anti-corruption law, and economic sanctions," and that "the European Union . . . has gone further, directly placing obligations on businesses."); *id.* at 485 (distinguishing the E.U.'s direct application of norms to private corporations from "the indirect sort of liability seen in the environmental and bribery conventions").

human rights norms apply directly to private parties, most such norms regulate private parties only indirectly, if at all. Recognizing this, prominent scholars have argued forcefully that international law should move in the direction of generally extending human rights obligations of states to private corporations[77] to the extent such obligations are susceptible to application to non-state actors.[78] In this Part, I argue that the case that has been put forward for the direct regulation of corporations by international law is incomplete.

Those who have argued in favor of this step base their arguments primarily on the claim that private corporations have become increasingly powerful in recent decades, and that this increasing power has resulted in a deterioration of human rights.[79] The argument put forward is that the increased power of corporations in the international arena, and hence their increased ability to have a detrimental impact on human rights, must be met with increasing responsibilities under international law.[80]

Although both premises have been disputed, the disputes may be set aside for present purposes. With respect to the first point, advocates of imposing direct obligations on corporations often cite figures establishing that the fifteen largest corporations now have greater revenue than all but thirteen nation-states, and that General Motors, for example, is larger than the national economies of all but seven states.[81] Jagdish Bhagwati has disputed this claim,[82] and maintains that an apples-to-apples comparison reveals that only two of the top fifty economies are corporations.[83] Whatever the precise figures, we may grant that some multinationals have become powerful enough to exert significant pressure on many governments.[84]

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77. The most complete and forceful argument has been made in Ratner, *supra* note 9.

78. Thus, private corporations would have no duties with respect to functions typically performed only by governments, such as the granting of fair trials, but all other norms would be extended to private corporations within the sphere of their activities. *See* Ratner, *supra* note 9.

79. *See, e.g.*, Cassel, *supra* note 15, at 1963; Ratner, *supra* note 9, at 461–65.

80. *See, e.g.*, JÄGERS, *supra* note 19, at 5–6, 8–10; Joseph, *supra* note 14, at 78; Kamminga and Zia-Zarifi, *supra* note 13, at 6; Ratner, *supra* note 9, at 461; Stephens, *supra* note 44, at 56–58; Weissbrodt & Kruger, *supra* note 2, at 901, 921.

81. *See, e.g.*, Stephens, *supra* note 44, at 57.

82. JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 166 (2004). Bhagwati argues that because these figures compare corporations' sales volumes (rather than value added) to national GDP (which is a measure of value added) they compare apples to oranges. *See id.*

83. *See id.*

84. Bhagwati would still argue, however, that given the fierce competition among MNCs, weak nations may still play one giant corporation off against another. He cites the example of Poland choosing between Airbus and Boeing. *Id.*

The claim that multinationals are one the whole detrimental to human rights has also been disputed. William Meyer, for example, concluded from a multi-factored statistical analysis that the presence of MNCs is positively correlated with both civil liberties and political freedoms in developing countries.[85] Although there is by no means a consensus view on this point,[86] we may put this debate to one side as well. Even if multinationals are on the whole beneficial for human rights, there is no doubt that corporations sometimes have a detrimental effect upon human rights. By analogy, it may be admitted that states are on the whole beneficial to human rights. Indeed, according to our Declaration of Independence, governments were instituted among men in order to protect such rights.[87] Yet this fact has not deterred the international legal system from imposing obligations directly on states. The fact that state conduct sometimes significantly impinges upon human rights has sufficed to justify the imposition of human rights obligations on states. That corporations are on the whole good for human rights should be no greater reason to exempt corporations from international human rights norms.[88]

That corporations are powerful and their behavior is sometimes detrimental to human rights are necessary but not sufficient conditions for concluding that international law should directly impose human rights obligations on private corporations. Left out of the analysis has been any consideration of a key feature of international law that would be altered by a move to impose direct obligations on private parties to any significant extent. Legal commentary addressing whether international law should directly impose obligations on private corporations typically assumes that the imposition of such obligations on corporations either should be a matter of indifference to states, whose own powers and responsibilities would not be affected by such a development, [89] or

85. William H. Meyer, *Human Rights and MNCs: Theory versus Quantitative Analysis*, 18 HUM. RTS. Q. 368, 392 (1996).

86. *See, e.g.*, Stephen Hymer, *The Multinational Corporation and the Law of Uneven Development, in* ECONOMICS AND WORLD ORDER: FROM THE 1970'S TO THE 1990'S 113 (Jagdish N. Bhagwati ed., 1972) (arguing that MNCs are detrimental to the political and economic development of the Third World); Jackie Smith, Melissa Bolyard & Anna Ippolito, *Human Rights and the Global Economy: A Response to Meyer*, 21 HUM. RTS. Q. 207 (1999) (disputing Meyer's methodology and findings).

87. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[A]ll men are created equal . . . with certain unalienable Rights . . . [and] to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .").

88. Of course, if corporations rarely infringe human rights, then the time and resources necessary to develop international legal principles directly applicable to corporations may not be justified. Anecdotal evidence, however, suggests otherwise.

89. *See* Kamminga and Zia-Zarifi, *supra* note 13, at 6.

should be welcomed by states, whose own international legal burdens would be lightened if responsibilities were imposed on corporations.[90] As explained in the remainder of this Essay, however, the imposition of direct obligations on private corporations, backed by an effective international mechanism to enforce those obligations, would represent a significant disempowering of states. As such, it would be a fundamental change that states are likely to resist strongly. If direct obligations are imposed on states but not backed by an effective enforcement mechanism, the strategy is likely to fail and to trivialize international law in the process.

By imposing obligations on states, international law obviously disempowers states; it makes unlawful certain conduct in which states might like to engage. Thus, if a treaty requires states to pass minimum wage legislation, it legally disables them from permitting a lower wage to be paid. As discussed in the introduction, the effort to articulate norms addressing the conduct of corporations is driven by the belief that some states cannot be counted on to protect the interests of their citizens. The articulation of norms that would regulate corporations would clearly diminish state sovereignty in the sense that states would no longer be permitted to impose conflicting regulations. But this sort of diminution of state sovereignty is inherent in international law, even as classically understood.

States are disempowered in an additional but underappreciated respect by the *direct*, as distinguished from indirect, imposition of international obligations on non-state actors.. The point is counterintuitive. One would have thought that the classic model disfavored states by subjecting them to international obligations and responsibility, and that a departure from the classic model would therefore favor states insofar as it would extend regulation to private entities. But, paradoxically, the classic model serves in an important way to *empower* states. Although international law requires states to comply with their obligations, the fact that international law makes states and only states responsible for violations gives states effective control over compliance with these obligations. To understand this paradoxical aspect of the classic model, assume that international legal norms operated directly on individuals—both state and non-state

90. *See* In re Agent Orange Product Liability Litig., __ F. Supp. 2d __, 2005 WL 729177 *39–40 (E.D.N.Y. 2005) (Declaration of Kenneth Howard Anderson Jr.). Anderson argues that imposition of obligations on corporations would be undesirable from the standpoint of controlling behavior because it fragments responsibility for such behavior, dilutes accountability, and lets states morally off the hook. If that were the case, however, one would expect states—who still hold a monopoly of international law-making—to welcome the direct imposition of obligations on corporations. Their reaction to the Norms suggests that they are hesitant to move in this direction.

actors—and included an effective enforcement mechanism, such as criminal penalties sufficient to deter private parties from violating their obligations. Under this model, violations of international law would rarely occur.[91] More importantly, states would have no control over whether violations occurred. Violations would result from calculations of individuals regarding factors such as the magnitude of the penalty and the risk of detection and prosecution.

Compare international law under the classic model: because only the state can be held responsible, the state can insist that its nationals conform their conduct to international law only to the extent the state, through its legislature or otherwise, has instructed them to do so. Because individuals incur no personal responsibility for violating international law, they would be deterred from doing so only to the extent the state has "implemented" such law by imposing domestic penalties. Under such a regime, it is prudent for an individual to do whatever the state asks him to do. The classic model, in other words, permits the state to hold individuals harmless for violations of international law; control over compliance with international law rests ultimately with the state.

Defenders of direct international law obligations for corporations might well respond: "So much the better if direct regulation and enforcement against non-state actors makes international law more effective. We have taken the step with respect to the norms prohibiting war crimes and crimes against humanity; let's now take the step for other international human rights norms." But this response overlooks another paradox of international law: violations of its legal norms have a jurisgenerative effect. While holding states responsible for their violations, international law paradoxically recognizes that violations of such norms may over time produce the crystallization of a new norm of international law. In this limited sense, international law actually countenances violations, or at least recognizes that they sometimes have value. Violation of existing norms permits the evolution of international law over time.

As noted, the classic model (coupled with the absence of effective enforcement mechanisms) makes violations of international law possible by effectively empowering states to require their officials and nationals to behave in contravention to international legal norms. A shift to a model of private party liability accompanied

91. This is true because I have hypothesized an effective enforcement mechanism. I consider below the possibility of imposing international human rights obligations directly on states without establishing an effective enforcement mechanism. I leave aside entirely very large questions about what sort of mechanisms would be effective.

by effective international enforcement mechanisms would remove the power of states to determine whether and when such international legal norms will be obeyed. To the extent that we believe in the gradual evolution of international legal principles, therefore, a move away from the classic model would involve the loss of a potentially valuable escape valve. While it is appropriate to dispense with the escape valve for norms that are clearly not going to be reconsidered, such as those prohibiting war crimes and crimes against humanity, shutting the valve is less appropriate for less firmly established norms. In any event, the possibility that the violation of a particular legal norm might be regarded as justifiable under certain circumstances will likely lead state leaders to resist the imposition of direct private duties backed by an effective enforcement mechanism.[92]

The fundamental nature of the change to international law that would occur were it to impose direct obligations on private parties to any significant extent can be appreciated by noting that a similar shift was perhaps the most important change made by the Framers of the U.S. Constitution.[93] Before the Constitution's adoption, the United States was governed by the Articles of Confederation. Under the regime established by the Articles, the central government could act only upon the States of the Union, much as international law under the classic model operates only on states. The central government lacked the power to address its directives to the individuals living in the States. The arrangement was regarded as defective because the central government's directives to the States were frequently violated, and there was no mechanism to force the States to comply. The Founders addressed this problem by giving the central government the power to address its laws directly to individuals within the States. They also created an effective mechanism for enforcing the federal obligations of such individuals by providing for federal courts with

92. It is true that the leaders of states sometimes favor adhering to international human rights norms in order to entrench the norms and thus tie the hands of successors whom they may not trust. This is frequently a reason why states adopt human rights instruments in the aftermath of a particularly brutal dictatorship. *See, e.g.*, Stacie Jonas, *The Ripple Effect of the Pinochet Case*, 11 HUM. RTS. BRIEF 36, 36 (2004) (describing several advances in the application of human rights law after Pinochet left power, such as a vast increase in the number of cases brought and a reinterpretation of amnesty law); *Galtieri Arrested in Argentina on Human Rights Abuse Charges*, DEUTSCHE PRESSE-AGENTUR, July 11, 2002, *cited in* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 527 (2002) (discussing increased human rights enforcement in Argentina). This is not inconsistent with the point made in the text. Current leaders might favor entrenching human rights obligations because they do not trust their possible successors, but they will do so only if *they themselves* believe that violations are never justifiable.

93. For elaboration of the points addressed in this paragraph, see Vázquez, *supra* note 16.

jurisdiction over disputes concerning federal legal obligations. (In the Framers' view, the central government's power to direct its laws to individuals was closely linked to the possibility of effective enforcement mechanisms, as they believed that norms addressed to States as political bodies could not be effectively enforced through judicial tribunals.[94])

The shift urged by those supporting direct regulation of corporations under international law is similar to the change that transformed the flawed Articles of Confederation regime into a genuine national government. In the Founders' view, the difference between a regime in which norms operate on states and one in which norms operate directly on individuals was what distinguished an international regime from a national one. They frequently described the Articles of Confederation as a "mere treaty" precisely because the central government lacked the power to act directly on individuals,[95] and they asserted that, by giving the central government the power to legislate for individuals, they were creating a nation.[96]

A similar transformation may be occurring in Europe, where under the doctrines of Direct Effect and Supremacy, the European Union can create legal obligations that trump conflicting municipal laws and apply directly to individuals.[97] With acceptance by the European Court of Justice and the EU member states, these doctrines are now the cornerstones of the EU's legal system,[98] rendering the legal relationship between member states comparable to that between federal states.[99] According to some observers, member-states within the EU are no longer governed by an international law regime, but by a constitutional government.[100]

No one is advocating the creation of a global legislative body with the power to legislate for corporations. The proposal is for states themselves to agree that certain human rights norms are directly operative on and enforceable against private corporations. Nevertheless, the elaboration of such norms and the creation of an international institution to enforce the obligations directly against private parties would be a major step in the same direction. The

94. *See id.* at 1104.

95. THE FEDERALIST NO. 33 (Alexander Hamilton).

96. *See id.*

97. J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413–16 (1991).

98. Ratner, *supra* note 9, at 485.

99. Weiler, *supra* note 97, at 2413.

100. *Id.* at 2407 , 2407 n.10.

elimination of the power states now possess to determine if and when to comply with international obligations offers a striking parallel to the change that brought into being a nation in North America, and that some argue is doing the same in Europe. The parallel between the proposal that international institutions articulate and enforce significant human rights obligations on private corporations and the structural change that transformed the United States from an international to a national regime, and may be in the process of doing the same in Europe, illustrates the fundamental nature of the proposed departure from the classic model, which in turn suggests that the proposal should be approached with caution.

This concern would likely not be allayed if the instrument imposing direct obligations on private corporations were to omit an international enforcement mechanism. As discussed above, a key difference between a direct and an indirect international obligation is that the former may be enforced in the future by yet-to-be-created international institutions. (Indeed, the Norms expressly contemplate the creation of such institutions.) The prospect of such enforcement may well be sufficient to induce compliance by private parties, in which case states would be effectively deprived of their control over compliance.

But the omission of an effective enforcement mechanism is perhaps more likely to have the opposite effect. Yet-to-be-created institutions will come into being only if states decide to create them. For the reasons discussed above, states might be expected to be reluctant to create such institutions. If so, then it is likely that an instrument directly imposing international legal obligations on private corporations but not establishing an international enforcement mechanism would remain without international enforcement mechanisms for the foreseeable future. The existence of international legal norms not backed by effective international enforcement mechanisms would hardly be a novelty. We are accustomed in international law to legal obligations not backed by coercive sanctions of the Austinian sort. But there is reason to suspect that norms not backed by coercive sanctions would be more problematic when addressed to private parties than when addressed to states.

While states have been known to violate international legal norms, as Professor Henkin has famously asserted,[101] "[i]t is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the

101. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).

time."[102] A variety of theories have been advanced to explain why nations comply with international legal norms in the absence of coercion.[103] These theories suggest that international legal norms addressed to non-state actors are far less likely to be observed in the absence of effective enforcement mechanisms.

Under the classic model, international legal norms are made by states for states. The community of states, though larger than it was a mere generation ago, consists of very few "members" compared to the number of natural and legal persons that exist in a single state, let alone in the world. This community of states thus resembles a club, and compliance with the rules of international law might be thought of as the price of membership. Moreover, the substantive rules of international law for the most part bind only those states that have agreed to them. (This is particularly true of treaty-based norms. Since the proposal under consideration appears to contemplate the establishment of obligations for corporations through treaty, it is appropriate to focus on this form of international law.) There is probably some pull towards compliance that derives solely

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102. Some commentators have responded that, to the extent this is true, it merely reflects the fact that international law to a large extent requires states to do what they would do in the absence of international law. If that were the whole explanation for behavior that conforms to international legal norms, however, the effort to advance corporate respect for human rights by elaborating international legal norms on the subject would be chimerical. I shall assume that the existence of international legal norms pertaining to a matter does, at least sometimes, cause states to behave in conformity with the norm even in the absence of an enforcement mechanism.

103. The analysis that follows combines elements of several compliance theories, each of which might be regarded as falling in the "rationalistic instrumentalist strand that views international rules as instruments whereby states seek to attain their interests in wealth, power, and the like." *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2632 (1997). The analysis below is admittedly sketchy and oversimplified. For more thorough expositions of rationalistic instrumentalist theories of compliance with international law, see HENKIN, *supra* note 101; Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002), and sources cited in Koh, *supra*, at 2632 nn.171–174. Application of such theories to hypothetical international law norms that operate directly on private corporations is a subject meriting further research.

Professor Koh has argued that the rationalistic instrumentalist explanation for state compliance with international law is incomplete. *See* Koh, *supra*. Some of the complementary theories he identifies, however, seem to me to fit within the rationalistic instrumentalist strand, properly understood. For example, Koh identifies "constructivism" as a distinct strand, yet a key insight of at least one version of constructivism is that "'states follow specific rules, even when inconvenient, because they have a longer-term interest in the maintenance of law-impregnated international community.'" Koh, *supra*, at 2634 (quoting Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach, in* REGIME THEORY AND INTERNATIONAL RELATIONS 49, 59 (Volker Rittberger ed., 1993)). I have included this "longer-term interest" among the rationalist instrumentalist reasons why states comply with rules of international law.

from the fact that the state itself agreed to be bound by the rule. Furthermore, the rules of international law reflect each state's judgment that it has more to gain from other states' compliance with the rule than what it has to lose by complying itself. Compliance is thus often a reflection of self-interest.

But what if circumstances arise making it advantageous for the state to violate the rule? To determine its true self-interest, the state would then have to ask itself whether the short-term gain that would result from violation is outweighed by various types of potential losses it could suffer if it violated the rule. First, because under international law a state's breach of one obligation justifies an injured state's breach of its own legal obligations toward the violating state,[104] the violating state would have to weigh in the analysis its vulnerability to countermeasures. Such countermeasures may well wipe out the benefit expected from the violation. Second, breach of a rule of international law will affect the state's reputation for keeping its promises. A state's reputation for breaching international obligations could be expected to deter other states from entering into potentially beneficial treaties with it. Third, as noted, violations of international legal norms lead over time to the weakening of the rule, and ultimately to its passing. The state must thus consider the extent to which it benefits from the rule and the extent to which its violation would contribute to its demise. Finally, the state must consider the general benefits that it derives from the existence of the international legal system as a whole. Because the very existence of this system depends to a significant extent on the willingness of states to comply with their obligations, a cavalier attitude towards international legal obligations threatens the entire edifice. To be sure, a state may face circumstances that would lead a rational leader to violate a particular rule of international law even after taking all of the foregoing into account. Violations might also result from miscalculations or irrationality on the part of a state's leaders. Nevertheless, the constellation of factors discussed above will frequently lead a state to forego the short-term gains it expects from violating the rule.

These reasons for expecting a significant degree of compliance by states with their international legal obligations in the absence of compulsion do not apply equally to private individuals. Private individuals are typically regulated by municipal legal systems, and coercion is a universal feature of such systems.[105] That is not

104. *See Draft Articles*, *supra* note 18, arts. 22, 49.

105. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 195 (1961); JOSEPH RAZ, PRACTICAL REASON AND NORMS 158 (1975).

because most people are prone to law-breaking and must therefore be deterred through coercion; it is because some people are prone to law-breaking and, in the absence of a mechanism for deterring free riding by this segment of the population, the rest will soon lose their disposition to comply. Additionally, even though in democratic states the rules are made by the peoples' representatives, it is not the case—as it is in international law with respect to treaties—that persons are only bound by the rules to which they agreed. People are bound by laws even if their representative voted against the law. We do find more voluntary compliance with respect to contracts than in other contexts,[106] but the proposal to place international legal obligations directly on corporations does not contemplate obligations of a contractual nature. (That is, indeed, one reason to expect less voluntary compliance with treaties by private parties than by states, as treaties are a type of contract between states.) International obligations imposed by treaty on private parties would not necessarily reflect the judgment of those bound by the rules that the rules are beneficial to them in the long term. Moreover, the long term is much shorter for an individual than for a state. Reputational considerations will be less of a constraint where the society consists of thousands or millions of persons than where it consists of 191.[107] Concerns that a person's violation of the law will cause the entire legal system to fall apart will also be less of a constraint on a given individual than on a state in the international community.

In one respect, corporations are more like states than individuals: they are abstract entities with a potentially unlimited life span. Other attributes of corporations, however, suggest that they are likely to comply with legal obligations only to the extent that it is in their economic interest to do so. In particular, their need to survive in the marketplace would appear to make it likely that they would comply with norms that prescribe conduct that is not independently in their economic interest only to the extent the penalties attached to a violation alter the economic calculus. If so, then international legal norms that operate on corporations but are not backed by sanctions are very likely to be violated. The result will be that human rights would not be advanced and international human rights law will be

106. Contract law scholars have concluded that compliance with contract terms in the business community is relatively unaffected by the ultimate legal enforceability of the contract. Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996).

107. This is the number of UN member states. *See* Press Release, United Nations, List of Member States, UN Press Release ORG/1317 (Sept. 26, 2000), *available at* http://www.un.org/Overview/unmember.html (last updated April 24, 2003).

trivialized.

In sum, it appears unlikely that states—which retain a monopoly of international law-making—will agree anytime soon to extend to corporations the obligations currently imposed by international law on states, backed by an effective international enforcement mechanism. Such a regime would disempower states by removing the power they currently enjoy to control their citizens' compliance with international law. On the other hand, a regime of direct obligations not backed by an international enforcement mechanism seems likely to be ineffective. Adopting such a regime would not enhance human rights, but would trivialize international law.

CONCLUSION

If, as this Essay suggests, it is unlikely that states will agree to a wholesale extension of current human rights obligations to private corporations backed by an international enforcement mechanism, and if the creation of such obligations without an enforcement mechanism would do little for human rights, a number of other legal strategies remain for protecting the interests of those adversely affected by corporate conduct. One possibility would be an agreement imposing discrete human rights obligations on private corporations, such as the obligation to refrain from torture. Whether states would be willing to extend certain human rights obligations directly to non-state actors will likely depend in large part on the strength of their conviction that violations of the obligation should never be condoned. Another possibility would be to impose more significant obligations on private corporations indirectly—that is, by requiring states to enact and enforce such obligations.

Whether agreements of either type would be feasible or wise are entirely separate questions. As noted above, those concerned about corporate conduct in developing countries that impinges upon human rights have turned their attention to international law because of the perceived unwillingness or inability of the governments of those countries to control the large multinationals that are harming their citizens. Although few would shed tears over the circumvention of governments unwilling to protect their own citizens, such circumvention is not entirely unproblematic and is likely to be resisted. An alternative would be to focus on eliminating corruption and promoting democratic governance. The international community has taken steps in both areas; undoubtedly much more should be done. But even if bad governments were made good, there would

remain the discrepancy in economic power between large corporations and small governments, and the feared race to the bottom. A race to the bottom is, of course, a collective action problem, and an obvious solution to a collective action problem is an international agreement. But is a global convention imposing human rights obligations on corporations the answer? The states facing the collective action problem are the developing countries confronting large multinationals. Perhaps the best solution would be an agreement by developing countries regarding standards for multinationals operating in their territory. That is among the many questions I leave for another day.