Who are today’s pirates?
Towards a regulatory framework for transnational corporations

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This dissertation is submitted in partial fulfilment of a Masters of Arts degree in Development and Emergency Practice at Oxford Brookes University.
Statement of Originality

This thesis is the result of my own independent work and investigation, except where otherwise stated. Other sources are acknowledged by explicit references.

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As this research did not involve human participants, no ethics review has been sought.

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This work provides an overview of the current issues with the regulation of transnational corporations. It discusses the different industries in which human rights abuses have been alleged to occur through illustrative examples of the extractive industry, the garment industry, plantation agriculture, the pharmaceutical industry, and the arms trade. It details the failure of existing mechanisms to ensure that corporations do not breach human rights, including solutions at the international level and the municipal level. It specifically details the problems with voluntary protocols and judicial solutions at the international level as well as dealing with shortcomings of territorial, national, and extraterritorial jurisdiction at the municipal level. It proposes a solution to the identified issues through the adoption of universal civil jurisdiction for corporate crimes and argues that such a system should be strengthened through the establishment of an incremental system of Export Credit Guarantees allowing preferential access to the European market. The proposed system is incremental in order to allow for a balance for the need for progressive action with the capacity of states to achieve said progression.
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“Who are today’s pirates?” asks United States Supreme Court Justice Stephen Breyer.1 Pirates, criminals deemed hostis humani generis,2 or the enemy of all mankind, have the distinction in international law of predating the modern international system in its entirety. Blackstone listed it as one of the three crimes against the law of nations.3 It is an act deemed so abhorrent that every nation may prosecute the offender. Such a crime is said to have erga omnes obligations, i.e. it is a breach of an international norm that is so egregious as to be an offence against all members of the international community, not just the directly affected state.4

In his concurrence with the Supreme Court’s unanimous decision in October 2012 that the Kiobel v. Royal Dutch Petroleum case was not admissible under the Alien Tort Statute (ATS),5 Breyer stated “[i]nternational norms have long included a duty not to permit a nation to become a safe harbour for pirates (or their equivalent)”6 arguing that nations are obliged to not protect those who have joined the ranks of hostis humani generis, namely the slaver, the torturer, the hostage taker and the perpetrator of genocide. However, it seems that there is another group who might also fit this description: transnational corporations.

On first inspection, it seems preposterous to equate the actions of modern corporations with the common conception of bloodthirsty corsairs, pillaging innocent ships, but, as ever, things are more complicated than they first appear. Social mores change greatly over time. The distinction between pirates and privateers, always murky, dates back to at least the Greeks;7 Sir Francis Drake was a hero to the English, but a villain to the Spanish.8 Slavery was considered both just and blessed by God in the antebellum American South.9 Cesare Beccaria’s 1754 work, entitled “On Crimes and Punishments”, decrying the use of torture for punishment was so controversial as to be added to the papal Index of Forbidden Books.10 The Irish kingdom’s strong tradition of hostage exchange continued into Tudor times;11 among the most famous of the Irish kings was Niall Naoighiallach, or Niall of the Nine Hostages.12 On hearing that Cromwell had, taking inspiration from the biblical tales of Joshua, put the town of Drogheda to the sword, every man, woman and child, the House of Commons passed a unanimous resolution signalling their approval of his actions.13

Perpetrating their crimes on the high seas, pirates were outside of the jurisdiction of the so-called “civilised” nations of the early modern international system that coalesced after the signing of the 1648 Treaty of Westphalia.14 The crime of piracy was afforded the status of universal jurisdiction, a crime that placed erga omnes obligations on all states to prosecute.15 This can be traced back even further; any state in mediaeval Italy could prosecute a brigand. Because the crime occurred outside of effective jurisdiction of any single state, it was within the jurisdiction of all. The crime was seen to be against the interests of all states.16 While it may, at first, seem somewhat tongue in cheek to argue that pirates and corporations

2 Technical terms, such as hostis humani generis, are also explained in the GLOSSARY.
5 Acronyms, such as ATS, are also explained in the GLOSSARY.
6 Kiobel v. Royal Dutch, 8.
10 Pinker, Better Angels, 279.
13 John O’Donovan, trans., Anáidh Rioghachta: Annals of the Kingdom of Ireland by the Four Masters, 2nd ed. (Dublin: Hodges Smith, 1856), 126-133.
14 Pinker, Better Angels, 333.
15 Malanczuk, Akehurst’s International Law, 9.
16 Ibid., 58.
even have in common a penchant for siting their headquarters in small Caribbean islands, such flags of convenience have ever been an escape from the rule of law.\(^{18}\) *Erga omnes* obligations ensure that there is some framework for redress in the wide variety of situations that can occur where legal persons, such as corporations, are outside of the effective *jurisdiction* of established states, but these solutions have, to date, been insufficient to preclude situations such as the Bougainville insurgency in Papua New Guinea, in which a local Rio Tinto mine was, at the very least a strong factor in the run-up to the insurrection. This is discussed further below.\(^{19}\)

This work addresses the question of why corporations breach human rights as well as how to curtail these breaches by identifying the kinds of rights breached, the reasons the breaches occur and what are appropriate, pragmatic solutions that can be achieved within a reasonable time frame, proposing that the solution required is the adoption of a plurilateral convention on the regulation of transnational corporations.

This thesis has seven sections. The introduction is followed by a section outlining the methodology adopted. One important implication of the approach chosen is that this work more closely reflects the framework of legal research than that of social science and, as such, does not feature a traditional literature review. Instead, extensive referencing to the relevant literature is included in all sections, providing the context to the arguments developed.

Next, the problem under examination is outlined in two sections. The first details the kinds of human rights abuses that corporations are implicated in. The abuses are described through a number of pertinent examples from different sectors, the extractive industry, the textile, clothing, leather and footwear (TCLF) industry, plantation agriculture, the pharmaceutical industry and the international arms trade. The examples chosen illustrate a cross-section of the different issues that arise, as the industries chosen cover a spectrum of the myriad rights that companies may breach directly, fail to uphold or be indirectly complicit in their breach by a third party. This is followed by an overview of the problems with existing solutions, detailing the shortcomings of the currently available solutions, covering *territorial, national* and *extraterritorial jurisdiction* at the national level and international treaties, voluntary protocols and judicial solutions at the international level.

The fifth section contains a description of the legal basis of an expansion of *universal jurisdiction*, the details of the proposed convention and a framework to ensure engagement by the stakeholder groups, explaining the value that the proposed solution has for each of the major stakeholder groups as well as explaining in some detail the rationale for the particular approach chosen. This is followed by an examination of the impact of the proposed solution on the example industries. A sixth section, on possible future work, describes some of the issues that arose during this

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\(^{18}\) Malanczuk, Akehurst’s International Law, 185.

\(^{19}\) Arms Trade
work that could not be sufficiently addressed herein. Finally, some concluding remarks discuss the overarching implications of the solution proposed in the context of the defined problem space, discussing in particular the political context of the situation and the approaches that must be taken in the modern political climate.
2. Methodology

2.1. Building a legal argument

International law is generally accepted as being derived from three principal sources; customary international law, international conventions are general principles of law. Customary international law is the oldest source and is viewed as being "primarily ... the actual practice and opinio juris of states," i.e. the stated convictions of states (opinio juris) and the actions that states take, which may conflict strongly with said convictions. International conventions, also known as treaties, often, but not exclusively, seek to codify states’ understanding of customary international law. Anything beyond the codification of customary international law is deemed to be progressive, and, as such, only binding on the parties of the treaty. General principles of law are the “principles of law recognised by civilised nations”, that are common to all legal systems and general legal logic, as well as some particular international law concepts. Judicial decisions and legal analysis can also viewed being sources of international law. So-called soft law, composed of the guidelines and non-binding protocols that are adopted by associations and international governmental organisations, are not legally binding. This is to say they are not de lege lata, or current law, but can develop a normative effect and as such can be a form of de lege ferenda, which is the law as it should be, or perhaps even will be in the future.

In building a legal argument, it is necessary to extend the existing rules and, towards this end, a number of different approaches can be employed. Rules can be extended by analogy, by the inference of broader principles and by borrowing principles from municipal law, the term used in international law for the domestic law of states. Arguments can also be made by precedent, which is an authoritative judgement from which the argument can be derived, though in international law, precedent is merely persuasive, not compelling.

2.2. Argument by analogy

Analogy in legal argument is “using ... examples in the process of moving from premises to conclusion”, e.g. the extension of universal jurisdiction to the crime of torture. Universal jurisdiction is especially important for crimes generally accepted as having erga omnes obligations, particularly those perpetrated by an agent of a state, who is generally immune from prosecution under the doctrine of sovereign immunity. In Filártiga v. Peña-Irala, Paraguayan nationals resident in the United States brought suit against the former Inspector General of the Police, alleging he had tortured a member of their family. The United States Court of Appeals decided that it could exercise universal civil jurisdiction because civil jurisdiction can exist outside of the territory where the acts were committed, especially if the act would be unlawful where it took place, without dealing with the implications of universal criminal jurisdiction, which crimes such as piracy have.

20 Malanczuk, Akehurst’s International Law, 35.
21 Continental Shelf (Libya v. Malta), 1985 I.C.J. 13
22 Malanczuk, Akehurst’s International Law, 44.
24 Malanczuk, Akehurst’s International Law, 48-51.
25 ibid., 54-55
26 ibid., 35
27 ibid., 48-49
30 Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
2.3. Arguments by inference and principles

Argument by inference is the concept of abstracting a general principle from specific rules, through inductive reasoning. While much of municipal law is codified, international law is renowned for its lacunae. Although it is generally accepted that judges in common law jurisdictions make, rather than discover law, the process of deriving the reasoning underlying an accepted concept of customary law has strong undercurrents of natural law, which is law derived from universal principles of justice. However the expansion of a specific example into a more general principle must still be accepted or rejected as law by the international community of states.

2.4. Argument by precedent

Precedent is fundamental to common law systems, providing the bedrock on which the judicial branch operates. However, while extremely common in Anglophone jurisdictions, it is not universal. International law courts often follow the reasoning laid out in previous cases but not bound to, as can be seen from the International Court of Justice’s (ICJ) rulings in the South West Africa cases. In 1966, the ICJ decided that South Africa’s duties as laid out in the Mandate under which it administered South West Africa, (Namibia), were owed to the League of Nations not its constituent nations, dismissing Ethiopia’ and Liberia’s case and effectively ignoring the precedent it had set in 1962. This change is generally attributed to a change in the makeup of the court. This greatly reduced the legitimacy of the court in the eyes of many developing states.

2.5. Argument from non-legal evidence

Making arguments from non-legal evidence was famously pioneered by noted jurist Louis Brandeis. One of the more prominent examples of such a brief, was the case of Brown v. Board, which led to the desegregation of schools, based heavily on the evidence presented that segregation was psychologically damaging to black children. In Brandeis’ view, the “[l]aw should not exist for itself or be judged simply as an exercise of logic,” rather, “[i]t is properly used for the purpose of regulating men within society”. In many ways this is antithetical to the view of legal positivism; “whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits”. This distinction, between what the law is; based on abstract legal reasoning, and what the law should be; based on views of society, is of crucial importance to the argument in question.

32 Malanczuk, Akehurst’s International Law, 48
33 Ibid., 49
34 Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
35 Explained below, The International Court of Justice (ICJ)
38 Malanczuk, Akehurst’s International Law, 328–329
41 Ibid.
A corporation or company, hereinafter corporation, is a legal entity. It is not a person, but in municipal law a corporation has legal personality, that is, it has rights and duties under the law. What these are depends on the state in question; corporations in the United States have the right to religious convictions and the right to speech, in the form of money, but this appears to be the exception, rather than the rule. Generally, corporations can own property, can enter contracts and are registered in a state but do not have the right to vote and usually have some kind of limitation on their liability. While Fritz ter Meer and some associates were tried and convicted for their involvement in IG Farben’s collaboration with the Nazi regime’s use of forced labour, such prosecutions remain rare, as it is difficult to prove individual culpability. It is far more common for cases against corporations to be brought under civil than criminal law.

The concept of personality in international law has changed over time. In the seventeenth century, when all law was viewed as natural law, there was no clear distinction between municipal and international law, thus personality was not an issue. However, the move towards legal positivism, wherein the validity of a law depends upon its sources rather than its merits, which became dominant in the nineteenth century, perhaps reflecting a realist view of international relations, the conception arose that only states were recognised as having personality in international law. More recently, the increasing involvement of corporations in contract relationships with governments implies that they have some form of at least de facto personality under international law, however there is no clear consensus on legal personality more generally.

3. Corporations and Human Rights

3.1. Classes of rights

Since the Barcelona Traction case, there has been a question as to whether there exists an inherent hierarchy of rights. Meron argues that a hierarchy is of crucial importance for deciding conflicts of rights. Western nations, basing their approach on liberal political values and a culture of individualism have emphasised on civil and political rights over economic, social and cultural rights, whereas developing nations have a stronger focus on community rights. T.H. Marshall divided rights into two generations, viewing the civil rights of the eighteenth century and the political rights of the nineteenth century as first-generation rights and economic, social and cultural rights as second-generation rights. Karel Vasak argued this should be expanded to include a third generation; solidarity rights. Another distinction is between derogable and non-derogable rights. Derogable rights, which can be suspended under extreme circumstances, are inherently weaker than non-derogable rights. While the distinction between negative rights, the “liberty from”, and positive rights, the “liberty to”, is often viewed as important, Alston argues this distinction fails in practice. Instead, he argues, the distinction lies between rights that are justiciable, and those that are not. This distinction too has its
proliferation. It may be better to view rights as a spectrum from rights that are, relatively speaking, easier for a state to respect and uphold to rights that require more investment and enforcement. One interesting example of such an idea is the decision in the South African *Grootboom* case. In *Grootboom*, the court held that while the state could not be expected to fully bear the financial burden of upholding the plaintiff’s rights, there was an expectation of a minimum standard that must to be upheld. Such a minimum standard could then be expected to evolve incrementally over time, expanding with the level of the state’s development.

### 3.2. Evaluating abuses through case studies

In the course of the development of the “Protect, Respect and Remedy Framework”, Ruggie analysed all of the allegations of human rights abuses recorded by the Business & Human Rights Resource Centre between February 2005 and December 2007, recording 320 unique cases. These cases can be categorised in different ways, the rights affected, whose rights were affected, where the abuses happened and in which industry the abuses happened. An overview of these statistics can be seen in Figure 1. Clear trends emerge from this analysis: rights abuses are predominantly of communities and workers, rights abuses by corporations happen primarily in developing countries and rights abuses are particularly common in certain industries, predominantly the extractive and retail/consumer industries. While most breaches are direct, supply chain issues are also important, which is to say abuses that are not perpetrated directly by the corporation in question, but by another corporation further down the supply chain. This analysis allows for the identification of a number of illustrative examples, permitting more granular analysis.

#### 3.2.1. Extractive Industry

Covering both mining for minerals and oil and gas extraction, the extractive industry, fundamental to the industrial age, increasingly operates in areas far from their putative home state. The West’s insatiable demand for minerals has led to the displacement of indigenous communities, the destruction of livelihoods and more than one civil war. Two particularly notable examples are Rio Tinto’s involvement in suppressing the Bougainville insurgency in Papua New Guinea and Shell’s at the very least complicity, if not outright involvement, in the Ogoni insurgency in the Niger Delta. Both of these situations involved serious allegations of complicity, if not the direct involvement, of corporations in the systematic breach of human rights. In the intervening period, Corporate Social Responsibility (CSR) has become very important. CSR can be viewed as either an attempt to bring ethics to the corporate world, or, as an attempt by corporations to stave off onerous regulation. The approach taken appears to depend on the corporation. Another important issue is that of conflict minerals, such as the example of the illegal coltan (columbite-tantalite) in the Eastern provinces of

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55 Government of the Republic of South Africa and Others v Grootboom and Others, 2001 (1) SA 46 (CC)
**Affected Groups**
45% Communities
45% Workers
10% End users

**Region**
- Asia & the Pacific: 18%
- Africa: 28%
- Latin America: 22%
- Global: 15%
- North America: 7%
- Europe: 3%
- Middle East: 2%

**Sector**
- Extractive: 21%
- Retail & Consumer: 12%
- Pharmaceutical: 9%
- Infrastructure: 7%
- Financial: 15%
- Food & Beverage: 28%

**Direct vs. Indirect**
- Direct breaches: 59%
- Indirect breaches: 23%
- Supply chain: 18%
- Other: 41%

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60 Adapted from Ruggie, *Just Business*, 23
61 Adapted from Ruggie, *Just Business*, 24
62 Adapted from Ruggie, *Just Business*, 25
63 Adapted from Ruggie, *Just Business*, 27
World Coltan Reserves

64% Estimates put the DRC reserves at 64% known supply.

Bushmeat

3.5 million tons/annum is lost to poaching.

Pollution

Small scale mining causes huge damage to the local environment.

1. Coltan is illegally mined in the DRC.

2. The coltan is then smuggled to neighbouring countries.

3. Before being shipped abroad for processing.

4. It is then refined into capacitors and wires.

5. Which are used to make consumer electronics.

Figure 2: Coltan in the Congo


65 Ian Redmond, “Coltan boom, gorilla bust: the impact of coltan mining on gorillas and other wildlife in eastern DR Congo”, (Born Free Foundation, 2001), [Online].


68 Ibid.

69 Ibid.

70 Ibid.

71 Ibid.
the Congo, shown in Figure 2. The question of how a corporation can effectively regulate its behaviour in the absence of effective government fraught with difficulty. Conflict diamonds were seen as a major issue in the 1990’s. The adoption of the Kimberly process supposedly solved this issue, but this process is not without its critics. Another concern is the destabilising effects that resource extraction has on both the economy, through Dutch Disease, wherein the rest of the economy stagnates because the mineral export causes the state’s currency to rise, making other exports uncompetitive, and on the government of the state, by reducing the need to tax the population, reducing accountability. Collier identifies the presence of natural resources as one of the largest impediments to development. The human rights implications for the extractive industry are largely concerned with community and environmental rights; the industry is capital intensive and highly skilled, requiring few local workers. Especially important are the rights of indigenous people, Bougainville is administered by Papua New Guinea. This link is largely an accident of history, and as Bougainville receives little revenue from the extraction, there are definite questions about the endeavour’s legitimacy.

3.2.2. Textile, Clothing, Leather and Footwear Industry

One of the earliest sectors to be industrialised, the garment industry, also known as the Textile, Leather, Clothing and Footwear (TCLF) industry, has a long history of rights abuses. Engels’ “The Condition of the Working Class in England” lists many of the problems faced by the average worker employed at the Manchester cotton looms, long hours, poor living conditions, poor pay and a penchant for child labour. Slowly, however, social pressure and the rise of the labour movement secured the labour rights that European nations take for granted, the right to free association, the right to fair pay and the right to fair hours.

While Europe produced the majority of clothing and textiles from the eighteenth century until 2010, currently, the single biggest supplier of textiles and finished clothing to the world market is China, as can be seen in Figure 3. The ILO has shown that the average wages in both the clothing industry and the textile industry are far lower than the manufacturing industry average wage, at 35% and 24% lower respectively. Figure 4 shows a breakdown of selected states’ non-compliance levels with wage and working hour regulations.

While consumer pressure in developed nations has forced corporations to review their practices in the past, such as the campaign against Nike in the 1990s, these pressures are more likely to affect corporations that attract customers through cachet rather than value shoppers. It seems unlikely that Walmart in particular will be moved by accusations of not paying adequate wages overseas, as it does not pay adequate wages in its domestic market. Walmart received $6.2 billion in indirect subsidies from the
Figure 3: Leading Export States (Textiles and Clothing)

**Textile exports**
- 33% China
- 8% India & Pakistan
- 7% South Korea & Japan
- 5% Germany
- 5% United States
- 5% Italy
- 4% Turkey
- 33% Others

**Clothing exports**
- 38% China
- 5% Italy
- 5% Bangladesh
- 4% Germany
- 3% Turkey
- 3% Vietnam
- 3% India
- 39% Others

Figure 4: Labour rights abuses, selected countries

**Wage and benefits non-compliance**

- Minimum wages: 16% Haiti, 13% Jordan, 8% Nicaragua, 5% Lesotho, 3% Indonesia, 2% Vietnam, 3% Others
- Overtime wages: 70% Haiti, 9% Jordan, 39% Nicaragua, 17% Lesotho, 8% Indonesia, 14% Vietnam, 3% Others
- Paid leave: 59% Haiti, 12% Jordan, 17% Nicaragua, 21% Lesotho, 8% Indonesia, 13% Vietnam, 4% Others
- Social Security: 67% Haiti, 22% Jordan, 12% Nicaragua, 38% Lesotho, 6% Indonesia, 1% Vietnam, 2% Others
- Wage information: 77% Haiti, 13% Jordan, 22% Nicaragua, 36% Lesotho, 6% Indonesia, 1% Vietnam, 2% Others

**Working-time non-compliance**

- Leave: 94% Haiti, 42% Jordan, 31% Nicaragua, 7% Lesotho, 11% Indonesia, 1% Vietnam, 1% Others
- Overtime: 92% Haiti, 47% Jordan, 43% Nicaragua, 13% Lesotho, 11% Indonesia, 1% Vietnam, 1% Others
- Regular hours: 92% Haiti, 67% Jordan, 32% Nicaragua, 21% Lesotho, 16% Indonesia, 1% Vietnam, 1% Others

85 Adapted from ILO, Wages and Working Hours, 7.
86 Ibid.
87 Ibid., 19.
88 Ibid., 23.
US government in 2013. This is because it pays its employees so little that they are forced to rely on food stamps, federal housing assistance and state subsidised medical care. In the same year Walmart earned $16 billion in profit.

3.2.3. Plantation agriculture

Plantation agriculture is the main source for much of the world's raw materials, as well as numerous food crops. As an industry, it deals with issues of displacement, loss of livelihood and environmental destruction, issues it has in common with the extractive industry. Similarly, its dependence on a largely unskilled labour force leads to labour rights issues that are also seen by the garment industry.

However, there are specific issues raised in this sector, like that of how a corporation should behave when operating outside the nominal state's effective jurisdiction. The case of the Chiquita corporation in Colombia is very problematic; FARC, a left-wing militia, has had effective control of the region in which Chiquita operates for many years. Because the US government views FARC as a terrorist organisation, payments to FARC, which could be deemed taxes, are viewed as funding terrorism, leading to fines being levied on Chiquita.

Another important issue is that the production of raw materials is a primary industry sector, which yields little added value. The secondary sector, i.e. the processing of raw materials, and tertiary sector, i.e. the provision of services are more common in developed countries, as this is where most of the value is added. Cocoa production in West Africa is a clear example of the problems with primary sector industries. An overview can be seen in Figure 5. West Africa produces more than 60% of the world's cocoa supply, but 71% of the chocolate production is in Europe and North America. Cocoa is neither a native crop, nor one with large demand in Africa; the Middle East and Africa account for only some 4% of demand worldwide, raising critical questions about the right to develop.

While the data suggest that Fair Trade has been increasing in the cocoa industry, there are questions about the ethical motivation of Fair Trade and its efficacy. An extensive study has shown that Fair Trade coffee farmers in Ethiopia and Eritrea are less considerably well off than other local farmers who are not involved in Fair Trade. Other studies have questioned the degree to which corporations swallow the price premium charged and there is a perception that Fair Trade is unaffordable for the average consumer.

3.2.4. Pharmaceutical industry

Before the adoption of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) convention, during the Uruguay round of the General Agreement on Trade and Tariffs (GATT) negotiations in 1994, few developing countries had any protection for intellectual property rights (IPR). This was not unusual; most developed

90 Ibid
97 General Agreement on Trade and Tariffs, 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700.
99
Figure 5: Overview of the world cocoa industry

Cocoa Production
- 70% Africa
- 15% Latin America
- 15% Asia

Chocolate Production
- 36% North America
- 36% Europe
- 18% Asia
- 10% Rest of World

Chocolate Consumption
- 44% Europe
- 20% North America
- 17% Asia
- 19% Rest of World

West Africa Cocoa Production


101 Adapted from Candy Industry website, [www.candyindustry.com/articles/86039-global-top-100-candy-industries-exclusive-list-of-the-top-100-confectionery-companies-in-the-world]

102 Adapted from KPMG, The chocolate of tomorrow, 5.

103 Adapted from OECD Sahel and West Africa Club website, [http://www.oecd.org/swac/ourwork/cocoa-childlabour.htm]
countries adopted IPR late in their industrialisation. The adoption of TRIPS forced developing nations to adopt stringent intellectual property legislation, especially pertinent where access to medicines is concerned. The adoption of the TRIPS protocol greatly curtailed access to generic medicines from India, which Orsi credits with reducing the cost per person per year to $200 - $400, from $12,000 - $14,000 before the introduction of generic medicines. While the Universal Declaration of Human Rights (UDHR) recognises intellectual property as a human right, it must certainly be seen as being in conflict with the right of citizens of developing states to health. Furthermore, as Ostergard argues, there is an inherent division within intellectual property; a distinction must be made between different kinds of IPR depending on the effect that the created monopoly has; a monopoly on music publication rights does not have the same societal impact as a monopoly on production of antiretroviral medicines. This is because of TRIPS’ expansion of the generally accepted view of copyright as codified by the Berne Convention to patents on inventions. While the argument can be made that in the absence of IP protection there is no incentive to develop medicines, a review of empirical studies found that in most industries and in most circumstances its impact is slight and even occasionally negative. Although this review argues that the pharmaceutical industry specifically benefits from incentive driven patenting, studies on the pharmaceutical industry (Figure 6) have shown the vast majority of patents, 66%, are variations of existing drugs and 75% of the new medical entities are patented by publicly funded institutes, allowing private corporations to profit from public investment. As the pharmaceutical industry is driven primarily by profit concerns, rather than medical concerns, it develops the medicines seen as having the best return on investment.

Figure 6: US Drug Patents, 1993 -2004

67% Variations on existing drugs
33% New Molecular Entities (NMEs) of which:
  75% Publicly funded
  20% Standard NMEs
13% Priority NMEs

104 Adapted from Mariana Mazzucato, The Entrepreneurial State, (London: Anthem Press, 2013), 65.
106 Orsi, “TRIPS post 2005”.
107 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 27:2.
108 Ostergard, “Intellectual Property”.
3.2.5. Arms Trade

There is a well-established link between the conventional arms trade and civil war in the developing world. As can be seen from Figure 7, the five permanent members of the UN Security Council supply the vast majority of the global arms deliveries and an inordinately high percentage of arms sales are to developing countries. This level of trade seems somewhat at odds with their mandate of maintaining peace and security, and, arguably, creates a perverse incentive.

Collier argues that increases in a state’s military spending greatly increase the likelihood of conflict in a state. Another issue is that while in most states, a fractious military is dealt with through decreased arms spending, in Africa it is often dealt with through an increase in arms spending, further cementing the power of the military. Both of these issues are crucial to the idea of the conflict trap; that a state that undergoes a civil war has a 40% chance of it breaking out again within ten years. A crucial factor in this process is the government investing heavily in the military after the end of hostilities, thus perpetuating the cycle of violence. The human rights implications in this are much less direct than in other areas, but the destabilising effects of civil war have huge repercussions for neighbouring regions.

The Arms Trade Treaty was devised as a means towards dealing with this issue, however, the US has insisted that the treaty must not cover the tracing of ammunition and explosives, that it must not have any international monitoring. These stipulations greatly weaken the treaty. While the US is widely acknowledged to have the most sophisticated controls on export of arms to foreign states, it, like other states, regularly compromises its commitment to not export to states with poor human rights records for national security and commercial reasons. The US is also noted for granting favourable loans to other states to allow them to purchase weapons from it, indirectly subsidising its own arms industry.

3.3. Why do corporations breach human rights?

The question as to why corporations engage in, facilitate or profit indirectly from human rights abuses strikes at a fundamental issue with capitalism, corporations are motivated by economic rather than ethical concerns. In all corporations, there are three main groups of stakeholders, the owners, employees and customers. These groups have different aims; the consumer wants to maximise a balance of quality and price, the shareholder wishes to maximise return on investment and the employee wishes to maximise status and reward. To ensure that each of these groups is satisfied, it is necessary to align their incentives; a basic principle of economics is that people will only change their behaviour when there is an incentive to do so.
Worldwide Arms Deliveries (US$ ’000 000, 2014 $)\textsuperscript{122}

Developing World Arms Deliveries (US$ ’000 000, 2014 $)\textsuperscript{123}

Figure 7: Conventional arms deliveries, 1988 - 2011

Worldwide Arms Deliveries (% of Total)\textsuperscript{124}

Developing World Arms Deliveries (% of Total)\textsuperscript{125}


\textsuperscript{123} Ibid.

\textsuperscript{124} Ibid.

\textsuperscript{125} Ibid.
Corporations, in general, have limited legal liability, which means that the owners of the corporation are only liable for the value of their shares. One reason for this is to protect the small shareholder by avoiding situations such as the near collapse of Lloyd’s in the 1980’s, when individual backers were sent bills of liability. This is problematic particularly for corporations that have large numbers of shareholders, as it removes much of the moral hazard, the way people are more likely to take risks which will not have a direct cost. Small shareholders are particularly problematic, as they care about short-term benefit at the expense of long-term growth.

The consumer can be very helpful in forcing a corporation to change its approach, as was the case with Nike in the 1990’s. A more general example of this is the Sullivan principles that were initially directed at apartheid era South Africa and have since been expanded to cover corporations generally. Consumer pressure was extremely important in pressuring corporations to stop trading with the apartheid regime, but such consumer interest is largely fleeting and difficult to direct; like so many other issues it is subject to the churn of the news cycle.

Given the divergent, and often contradictory, aims of the three stakeholder groups, it is important that an impartial entity ensure that the externalities in the system are handled, for the public good. (An externality is a an action whose cost is born by someone other than the actor.) This is one of the classic roles of the state, and one that corporations deeply oppose, making the argument that intervention stops the market from functioning efficiently and that free trade is responsible for the massive levels of growth seen since 1945. However, there is mounting evidence that free trade is not the only, or even the main contributor to this growth. Standardisation has been shown to be far more important for growth. Additionally, the Foreign Corrupt Practices Act, seen as the gold standard for ensuring corporate behaviour overseas meets a certain standard, has been shown to be categorically failing and draws regular censure from the OECD.

However, when considering the actions of transnational corporations, i.e. those that have substantial holdings in multiple states around the world, the question as to how much regulation there should be pales in comparison to the complexity of the question who is responsible for regulation.

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126 Krugman, Economics, 584.
127 Ibid. 587-589.
128 Ruggie, Just Business, 5
132 Ibid.
Numerous mechanisms exist, both at the municipal and the international level, for holding persons subject to international law to account for their actions. Unfortunately, in the case of transnational and multinational corporations these mechanisms all suffer from some fatal defect, which greatly reduces their efficacy. The distinction between transnational and multinational corporations is that a transnational corporation is usually a single legal corporation that operates in multiple states, whereas a multinational corporation may have different aspects under the jurisdiction of different states, e.g. head-quartered in one state and incorporated in another.\textsuperscript{134} The distinction is unimportant for this work, hereinafter, both will be referred to as transnational corporations. International law solutions include those codified in international treaties, courts that have jurisdiction over international law and international organisations, including specialised UN agencies as well as other organisations, such as the Organisation for Economic Cooperation and Development (OECD), which can adopt voluntary protocols. Options for criminal prosecution at the municipal level depend on the kind of jurisdiction applied. For the purposes of this discussion, only territorial, national and extra-territorial jurisdiction will be examined.

4.1. International Solutions

4.1.1. Conventions and protocols

The “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”, (the Norms) were an abortive attempt to create a binding legal treaty ensuring corporations would be held to a common international standard, as some states are either unwilling or unable to compel corporations, some of which are more powerful than states, to respect and uphold human rights.\textsuperscript{135} It sought, among other things, to make corporations subject to the UN’s human rights monitoring mechanisms. While the Norms was well intentioned, human rights advocates wished to adopt many provisions that were far too progressive for states and business interests to accept.\textsuperscript{136} In contrast, businesses were wary of the entire process,\textsuperscript{137} preferring to pursue voluntary codes of practice.\textsuperscript{138} In the end, without the strong, persistent backing of states, the Human Rights Commission chose not to adopt the convention.

Subsequent to the failure of the Norms, John Gerard Ruggie was appointed as the UN Secretary-General’s Special Representative for Business and Human Rights.\textsuperscript{139} During the course of his mandate, Ruggie developed a voluntary protocol that aims to “protect, respect and remedy” human rights,\textsuperscript{140} as compared with a state’s duties to “respect, protect and fulfil” human rights.\textsuperscript{141} While the framework is useful, it is effectively another form of corporate social responsibility, suffering from the issue identified above;\textsuperscript{142} its worth depends largely on the implementing corporation. Corporations that are ethically minded will choose to adopt the protocol,
allowing other, less scrupulous, corporations to take advantage of their competitors’ ethics to turn a profit. However, it must be said that such protocols, which can be seen as a form of *soft law* have an important to role to play in establishing norms that may become *de lege ferenda*, or future law.

4.1.2. International courts

*The International Court of Justice (ICJ)*

The ICJ, one of the six principal organs of the UN, is concerned primarily with adversarial cases between *sovereign* states and can also, by request from the UN General Assembly, UN Security Council, or one of the UN’s specialised agencies provide an advisory opinion on matters of international law.¹⁴³ The decentralised nature of international law and the issue of states’ interests have limited the court’s power; often both parties must consent to proceedings being brought and are unlikely to do so on issues that are central to their interests.¹⁴⁴ Further, decisions such as the South West Africa cases have harmed its credibility among developing states.¹⁴⁵ By statute, the ICJ only accepts states as parties to proceedings.¹⁴⁶

As such, it is not a suitable forum for the direct regulation of corporations, but can affect them indirectly through rulings that apply to states.

*The International Criminal Court (ICC)*

While the idea of a permanent international criminal court dates back to 1948,¹⁴⁷ the *Rome Statute*,¹⁴⁸ establishing the ICC, came into force in 2002.¹⁴⁹ The ICC’s effectiveness is limited by the fact that several key nations, including the United States, China and Russia are not parties to the *Rome Statute*. The court is empowered primarily with prosecuting international crimes; genocide, crimes against humanity, war crimes and the crime of aggression.¹⁵⁰ As of 2013, it had seven open situations, almost all of which were in Africa, and has not, as yet, dealt with any corporate cases. Given the severity of crimes the ICC is tasked to deal with, its slow progress in dealing with the cases it is examining and the political ramifications of its work, it seems unlikely to be a suitable forum for ensuring the legal accountability of corporations in the foreseeable future.

4.1.3. Specialised organs of the UN and other international organisations

*The World Trade Organisation (WTO)*

The WTO is one of the more recent specialised agencies in the UN system. Established by the Uruguay round of the General Agreement on Trade and Tariffs (GATT), completed in 1994,¹⁵¹ the WTO’s roots lie in the 1945 *Bretton Woods Agreement*.¹⁵² The WTO encompasses the GATT and the other general trade agreements, *e.g.* the TRIPS.¹⁵³ Although it seems a logical place to enforce the international behaviour of corporations, who are indirectly governed by the various international agreements on trade, the WTO system

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¹⁴³ UN Charter, Article 96.
¹⁴⁵ Ibid. 328-329.
¹⁴⁶ Statute of the ICJ, Article 34.
¹⁵⁰ Ibid.
¹⁵¹ Malanczuk, *Akehurst’s International Law*, 231
¹⁵² Ibid. 223-225, Bretton Woods Agreement, 1945
¹⁵³ Malanczuk, *Akehurst’s International Law*, 231
is in many ways, part of the problem, described above.\textsuperscript{154} As the \textbf{WTO} deals primarily with trade and tariff relationships between \textit{sovereign} entities, the behaviour of traditionally non-\textit{sovereign} entities such as corporations lies very much outside its purview.

\textit{The Organisation for Economic Cooperation and Development (OECD)}

The \textbf{OECD}, a group of developed nations, was established in 1948 and views itself as being committed to advancing the principals of democracy and the market economy. Given the \textbf{OECD}'s commitment to market economics, it is unsurprising that the \textbf{OECD} prefers a self-regulatory approach. It has a voluntary protocol that dates from the 1970s, which may have been adopted to forestall an obligatory framework being adopted by the \textbf{UN}.\textsuperscript{155} The protocols have been amended a number of times and while there is still no process for legal enforcement, it has complaint mechanisms, which are becoming more effective.\textsuperscript{156} Although the guidelines were initially only valid in \textbf{OECD} states, they have been expanded to cover the actions of \textbf{OECD} corporations in all territories.

\textit{The International Labour Organisation (ILO)}

The \textbf{ILO}, one of the oldest specialised agencies in the \textbf{UN} system, dating to the establishment of the League of Nations, has a tripartite structure, which represents the interests of business, labour and states. Its “\textit{Declaration of Principles Concerning Multinational Enterprises}”, dating to 1977 and amended in 2000, is, similar to the “Prospect, Respect, Remedy framework”, a voluntary protocol.\textsuperscript{157} It is wider in scope than the \textbf{OECD} protocol, also addressing governments, and employers’ and workers’ organisations.\textsuperscript{158} Because of its voluntary nature,\textsuperscript{159} it suffers from the same problems. Although it has a normative character, \textit{i.e.} it promotes guidelines that while not legally binding are at least expected to be generally adhered to, it does not address the fundamental issue highlighted above,\textsuperscript{160} that corporations are motivated by financial, not ethical concerns.

\textbf{4.2. Municipal systems}

International law allows municipal courts to exercise criminal jurisdiction through the invocation of a number of different principles, used to determine whether a given court is an appropriate forum for deciding the case in question. The question of permissive rules versus rules that impose duties is important, as established in the \textit{Lotus} case.\textsuperscript{161} A permissive rule allows a state to prosecute, whereas certain crimes, such as certain types of hostage taking \textit{require} prosecution.\textsuperscript{162} In principle, international law also allows for the exercise of civil \textit{jurisdiction}, as can be seen from the \textit{Filartiga v. Peña-Irala} case.\textsuperscript{163} The discussion herein of the \textit{territorial} and \textit{nationality} principles are concerned predominantly with criminal \textit{jurisdiction}, whereas the section on the \textit{extraterritorial} principle deals with civil \textit{jurisdiction}. 

\textsuperscript{154} The \textit{World Trade Organisation (WTO)}
\textsuperscript{155} Clapham, \textit{Non State Actors, 201.}
\textsuperscript{156} Ibid., 202
\textsuperscript{157} Ibid., 211
\textsuperscript{158} Ibid., 212
\textsuperscript{159} Ibid., 213
\textsuperscript{160} Why do corporations breach \textit{human rights}?
\textsuperscript{161} S.S. “\textit{Lotus}”, France v Turkey, Judgment, (1927) PCIJ Series A no 10, Malanczuk, Akehurst’s \textit{International Law}, 45
\textsuperscript{162} Rodley, \textit{Treatment of Prisoners}, 181
\textsuperscript{163} Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Malanczuk, Akehurst’s \textit{International Law}, 114
4.2.1. Territorial jurisdiction

The jurisdiction a state exercises over actions that take place within its territory would seem the best way to pursue a corporation for its human rights abuses. This is not always feasible. The “Montevideo Convention on the Rights and Duties of States” codifies sovereignty in international law as being predicated on a state meeting four criteria, that it exercise control of a territory and population, have a government and be able to enter into relations with other states.

The first three provisions of this convention are generally accepted as being a codification of customary international law. The fourth while more problematic, is not relevant to this discussion. This definition does not define what sovereignty is, merely what criteria a state must achieve in order to be deemed sovereign by other states, serving more as the criteria for recognition. Sovereignty can thus be viewed as something a state attains, but it appears that it is also something a state can lose. States may not have effective control over the entirety of their territory, they may be disinclined to prosecute corporations with whom they have partnership arrangements, or they may wish to present a business friendly atmosphere, in the hopes of securing foreign direct investment. These factors lead to an effective reduction in the state’s sovereignty, reducing its ability and incentive to execute jurisdiction.

External pressures

The modern international system has outlawed war except in limited circumstances and largely denied states the right to acquire territory by force. During the nineteenth century, imposing a state’s will on another state through the threat of force was considered acceptable, leading to the signing of the unequal treaties. These allowed the dominant state to exact generous, often exploitative, concessions from the weaker state. Such practice is now considered illegal and is outlawed by the UN Charter. However, a state can still exert hegemony on other states, such pressures having become threats of economic rather than military action. The Uruguay round of the WTO agreement forced developing nations to accept onerous intellectual property rights, remove protective tariffs for nascent industry and maintained US and European agricultural tariffs.

Additionally, developed nations, eager to secure foreign investment have attempted to woo foreign corporations with the establishment of Export Protection Zones (EPZs) which are nominally within their jurisdiction but feature lax enforcement of tax and labour laws. Nations that institute labour protection are in danger of losing crucial jobs to those that do not, creating a perverse incentive to remain “business friendly” and instigating a race to the bottom, a situation wherein “states compete with each other as each tries to underbid the others in lowering taxes, spending, regulation... so as to make itself more attractive to outside financial interests”.

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164 Montevideo Convention on the Rights and Duties of States, 165 LNTS 19; 49 Stat 3097
165 Malanczuk, Akehurst’s International Law, 79
166 UN Charter, Article 2:4; Malanczuk Akehurst’s International Law, 309.
167 Malanczuk, Akehurst’s International Law, 152.
is beneficial for the interests of corporations, but clearly detrimental to the interests of the local labour force.172

Internal pressures

States are also subject to internal threats to sovereignty, principally those of illegitimacy and weak government. The policy adopted in South America during the nineteenth century of uti possidetis juris, that the borders of the successor state would remain the same as that of the former colonial state was again adopted in the much more extensive decolonisation seen in the latter half of the twentieth century.173 This policy was argued to help minimise border wars by ensuring a lack of terra nullius in their aftermath. While it seems to have reduced state wars, the colonial borders reflect more closely the power balance at the time the agreements were drawn than the latent cultural boundaries, an example of which can be seen in Figure 8. From this figure, it can be seen that state boundaries have little to do with the underlying ethno-linguistic or religious divides, or climactic zones, making the construction of a unifying identity difficult to say the least. One are where this has important implications is the idea of self-determination. It is very difficult for regions with no unifying identity to coalesce into a nation state.

While the colonial states, backed by the resources of their industrial heartlands and global maritime networks, were able to project power across the seas to the extents of their empires, some of the weak, inexperienced and divided administrations that succeeded them have been unable to exercise Weberian sovereignty,174 that is to maintain a monopoly on the legitimate use of force, to the extents of their nominal territory. This has led to the development of pales, similar to that around Dublin in the late Middle Ages,175 wherein the national government directly controls the capital city and some other areas, but much of the country lies outside of the government’s effective jurisdiction, a situation which can lead to the development of a de facto polity which while not fully meeting the Montevideo definition of sovereignty, has many of the trappings of a state, further reducing the sovereignty of the nominal state.

A government can also become illegitimate by losing either its accountability or through a lack of identification with a group of the population with the government. When it derives the majority of its income from a source other than taxation, deriving its income from mineral rents or from foreign aid, the government is less accountable.176 The implicit link between taxation and accountability is another example of moral hazard; people care more about what the government is doing when it is spending their money. Collier asserts that mineral resources can directly increase the risk of a civil war, giving the example of Laurent Kabila, in what was then Zaire.177 Foreign aid has a destabilising effect on the economy in two ways, it can destroy local markets, such as happens regularly when grains are dumped on countries with food security issues and it can also increase the likelihood of a coup d’etat.

173 Malanczuk, Akehurst’s International Law, 152-163.
176 Collier, Bottom Billion, 46.
177 Ibid., 21.
Figure 8: Different views of central Africa

178 All maps herein are used for illustrative purposes only. Adapted from [http://www.zonu.com/detail-en/2009-11-07-10911/Africa-climate-zones.html]


180 Adapted from United States. Central Intelligence Agency, Library of Congress Geography and Map Division, [Online], [http://hdl.loc.gov/loc.gmd/g8201e.ct001294]

181 Adapted from [http://afreedom.com/group/maps/forum/topics/3766518:Topic:1618]
As well as losing its accountability, a state can lose its legitimacy through the emergence or resurgence of another identity within the population. The post-colonial borders in Africa do not reflect the numerous different ethno-linguistic and religious divides within a state, as well as other divisions introduced by the former colonial master. All identity is constructed; Graeber gives the example of the Tsimihety, in Madagascar. The Tsimihety, whose name means “those that do not cut their hair” are now considered a separate ethnic group but began as a schism within another ethnic group, the Sakalava. The Tsimihety rebelled against a particular custom, refusing to cutting their hair in mourning on the death of the king as a sign of civil disobedience. These differences can be exploited for political gain leading to the creation of dangerous rifts within society, as was the case in Rwanda. If the government has already been de-legitimated in the view of the people, the emergence or resurgence of a putative identity can be very dangerous, especially if the government handles it poorly, which can lead to a civil war.

A de facto polity can emerge whenever a state ceases to exercise jurisdiction over an area of its territory, either due to an inability to project power to the limits of its territory or through the creation of an insurgency movement. This polity may, over time, become a state in its own right or may, like FARC in Colombia exist in a state of quasi-statehood for an extended period of time. Much of such a polity’s legitimacy is drawn from the government’s lack of legitimacy rather than from the social contract. The “taxes” that plantation agriculture firms pay and the “licenses” that the extractive industry purchases fund these questionably legitimate polities. Such funds are difficult to distinguish from extortion and it seems unlikely that much of this income is spent on the social services needed for the upholding of the social contract. Another issue is that when such a polity arises due to a direct conflict with the nominal state, the presence of outside influences can lead to a protracted conflict. In particular the supply of funding and material to combatants in civil war situations has been shown to prolong them by years, especially if such a conflict becomes a proxy conflict in the struggle for dominance between great powers, such as was the case for numerous civil wars during the Cold War.

4.2.2. National jurisdiction

National jurisdiction is the jurisdiction that states have over their citizens, including corporate citizens. As many transnational corporations are head-quartered in developed nations, this would seem an effective enforcement mechanism but in reality there are numerous stumbling blocks. In Sahu v. Union Carbide Corporation, a US court ruled that a parent corporation could not be held liable for the actions of subsidiaries are run at arms-length. Additionally, in the international system, there are conflicts of interest; trade policy and foreign policy are quite closely linked and large corporations often have inordinate influence on their governments. One example of this is the example of different OECD states approach to

184 Maurer, “Chiquita”.
185 Ibid.
186 Pinker, Better Angels.
187 Ruggie, Just Business, 43; Sahu v. Union Carbide 548 F.3d 59 (2d Cir. 2008).
bribery; states have been reluctant to rein in corporations, fearing a reduction in competitiveness. Finally, there is the issue of flags of convenience, originally a problem for shipping. The modern system of corporate registration makes it quite simple for a company to re-register in a more permissive state. Many corporations are already doing so for tax reasons, were states to enforce human rights legislation on corporate nationals, it seems likely that many would leave, depriving states of vital tax revenue, reducing the incentive for states to enact such legislation.

4.2.3. Extraterritorial jurisdiction

*Extraterritorial jurisdiction* is a situation in which a state decides it has *jurisdiction* in matters that happened outside its territory, for crimes that did not involve its nationals. Since the 1983 decision in the *Filartiga vs. Peña-Irala* case, the Alien Torts Statute (ATS) appeared to be a viable avenue for *extraterritorial* civil suits to be brought. This faith was strengthened by Unocal’s decision to settle with the Burmese villagers who had sued it under the ATS for its actions related to the construction of the Yadana gas pipeline project. However, as in the *Sosa vs. Alvarez-Machain* decision before it, the court ruled unanimously in October 2012, in the *Kiobel vs. Royal Dutch Petroleum* case that the statute did not apply. These decisions firmly established the court’s view that, however egregious the breaches, the United States judicial system was not the correct forum in which to pursue claims of this nature, arguing that for the US court system to make decisions of this nature could impact foreign policy, which remains the exclusive domain of the political branches. Even had this decision not ruled out this kind of suit, such a precedent could be damaging to international order, given its political implications.

188 Weisman, "Foreign Corrupt Practices Act".
189 Filartiga v. Peña-Irala, described above, *ARGUMENT BY ANALOGY*.
190 Doe v. Unocal, 395 F. 3d 932 (9th Cir. 2002).
193 Ibid.
Whether it is a lack of legal enforcement, which limits the effectiveness of the voluntary protocols, a lack of incentive, which cripples national *jurisdiction*, a lack of effective *jurisdiction*, limiting the enforcement of *territorial jurisdiction* or a lack of *personality*, which constrains existing judicial solutions, all of the current solutions for the regulation of transnational corporations have proven ineffective. Although a solution such as the *extraterritorial* Alien Tort Statute could address the problems, the *precedent* of unilateral declaration of *extraterritorial jurisdiction* is, politically speaking, fraught with problems. However, another path is available, namely *universal jurisdiction*. As argued below,\(^{194}\) both the analogy with the torture convention and the logical underpinnings of the justification for *universal jurisdiction* in general, *i.e.* that which is outside effective *jurisdiction* of any is by default within the *jurisdiction* of all, allows for the establishment of *universal jurisdiction* for the pursuit of transnational corporations when they are operating in areas that are outside of the effective *jurisdiction* of a state, a number of examples of which have been described above,\(^{195}\) at least in the case of civil *jurisdiction*.

*Universal jurisdiction* alone will not, however, solve this problem. At a minimum, a convention to codify its precepts is needed and, as can be seen from the process of adopting the convention against torture, described above, the process of adopting an international convention is politically difficult. Often, the need to achieve widespread agreement weakens the effort; if an attempt is too progressive it will fail to garner sufficient support, while if it is too conservative it is largely worthless beyond the political resumés of its sponsors. Even when a treaty is signed, states may refuse to ratify it, as was shown by the example of the *Rome Statute*, or ratify with *reservations*, insisting that particular requirements do not apply to them.

There is also a need for states to view the adoption of any proposed solution as being in their interest; that the benefits of acceding to the convention clearly outweigh any potential problems that accession would cause. International law can be established quite quickly when there are clear incentives. An example of this is the rapid adoption of the concept of exclusive economic zones in the decades after 1945.\(^{196}\) However, potential law without clear benefits to all states or against the interests of particular states can languish in ambiguity. A clear example of the pitfalls of this approach can be seen in the process behind the *Convention on the Rights of Migrant Workers*. Adopted in 2003 it has been ratified by 47 of the 64 signatories,\(^{197}\) the vast majority of whom are primarily states of origin for migrant workers. Furthermore, while *normative* treaties attempt to codify existing understanding of *customary international law*, anything viewed by a state as progressive is, initially at least, binding only on the parties of the treaty and, while it may, over time, become *customary international law*, this process can be
quite protracted. Any proposed solution must take into account all of these issues.

5.1. Establishing universal civil jurisdiction for human rights

As described above,198 the development of **universal civil jurisdiction** for the crime of torture is, in some ways, based by analogy on the precedent of piracy. This universality means that any state may, in lieu of extradition, exercise the right to prosecute an alleged torturer for crimes committed, regardless of where they were committed. Piracy has **permissive universality**, *i.e.* a state is permitted but not required to prosecute, whereas some other crimes based on this precedent have **compulsory universality**, *i.e.* states are obliged to prosecute, such as hostage taking.199 This group of crimes is one of a number of exceptions to the general rule that international law concerns itself solely with the actions of states. The development of **universal civil jurisdiction** for crimes of torture has been tested in a number of occasions and is arguably accepted as **customary international law**.200

While some aspects of human rights law were certainly progressive at the time of the declaration of human rights, and, it may be argued that many proposed rights are still very progressive, it has been generally accepted that certain core aspects of human rights are now deemed to be **customary international law**.201 Although it is generally accepted that certain key rights have, as described above in the section on human rights, clearly established **erga omnes** obligations, the traditional view is that the state is the primary arbiter of what is and what is not permissible under national law, based on a realist view of inviolable **sovereignty**.202 However the argument of **sovereignty as responsibility**, wherein **sovereignty** is dependent to a degree on legitimacy in the eyes of the governed, clearly moves towards a much wider definition wherein it seems logical that all human rights that are accepted internationally must slowly gain the same **erga omnes** obligations.203 Although it might seem that **derogable rights** are an exception to this, suspension is a privilege reserved for states; others who breach such rights must still be liable to prosecution.

Onuf argues that there that the principle of **sovereignty** is based on three key pillars,204 the respect afforded to an institution of government, its capacity to rule and its recognition that all authority is wielded on behalf of the population and for their benefit. All of the scenarios described in the preceding section on failures of effective **territorial jurisdiction** breach one or other aspect of this definition of sovereignty. Building on this, the doctrine of “responsibility to protect” affords primary responsibility to uphold human rights to the state but argues that when a state refuses to fulfil its responsibility the community of states is obliged to intervene.

This is not to justify or condone invasion under the guise of humanitarian intervention. Unilateral intervention to protect a nominally oppressed minority has a somewhat twisted history,
dating at least to the Russian Empire’s intervention in the Crimean Peninsula to protect the rights of local Orthodox Christians, sparking the Crimean War.\textsuperscript{205} The United State’s recent experience in Iraq shows that, in the intervening century and a half, no one has quite figured out how to remedy the problems that triggered the intervention in the chaos that invariably follows the ensuing war. However, there are a number of options available short of full-scale invasion that can be considered: the responsibility to prevent, the responsibility to react and the responsibility to rebuild.\textsuperscript{206} In his analysis of the cause of civil wars, Collier shows that there are a number of key issues that are strong predictors of the outbreak of war in developing states featuring strongly amongst them is the availability of easy funding, such as mineral rents or aid,\textsuperscript{207} factors that are linked both to a reduction in governmental accountability and to an incentive for violent change of government.\textsuperscript{208} The influence of superpowers on civil war is also important and has dropped off precipitously since the end of the Cold War.\textsuperscript{209}

It is clear that all interventions must be carefully planned and strategic, to avoid worsening the situation. Judicial intervention to allow for civil suits, to be brought against corporations for their behaviour overseas is, it is argued, such an intervention. In attempting to ensure the behaviour of corporations follows some basic standards of human rights, states can curtail at least some of the excesses that have stopped much of the developing world from escaping Collier’s traps.\textsuperscript{210}

\textbf{Universal jurisdiction} based on \textit{erga omnes} obligations removes some of the political problems, but as can be seen from the admittedly short history of the ICC, there is a justifiable perception that it is not applied fairly and in truth largely reflects the balance of power in the current international system. It is a sad fact of the current international system that dictators are generally only held responsible for their transgressions after they have lost all allies amongst the major powers, such would certainly seem to have been the case for Muammar Qaddafi. That the proposed jurisdiction is civil mitigates some of these issues, as cases can be brought by non-state actors. Additionally, while there is a strong basis in international law for the application of universal jurisdiction for crimes committed by transnational corporations and a clear need to prosecute them, there are still many political problems with such a situation.

It must be said the argument for universal civil jurisdiction to regulate corporations is not particularly novel, there is ready opposition in the literature.\textsuperscript{211} Macklem argues that because of the polycentric nature of international law, that the current solutions should be sufficient and that there are no clear standards to implement. The current solutions are not sufficient and attempts to create clear standards have failed, precisely because of international law’s polycentric, consensus based nature. Taking the

\begin{thebibliography}{9}
\bibitem{205} Pinker, Better Angels.
\bibitem{207} Collier, War Guns and Votes.
\bibitem{208} Collier, Bottom Billion, 46.
\bibitem{209} Pinker, Better Angels, 304.
\bibitem{210} Collier, Bottom Billion, 21.
\bibitem{211} Macklem, "Universal Jurisdiction".
\end{thebibliography}
view that international law is, in effect, what states say and what can be derived from their practice, universal civil jurisdiction to regulate the overseas behaviour of corporations will only become international law if and when there is clear international consensus among states that it should be international law. As such the next section will address the problem of states’ interests in this matter.

5.2. The proposed framework

The myriad issues that must be taken into account when designing a regulatory framework for transnational corporations mean great care must be taken. It must be binding, to avoid the problems of voluntarism. It must avoid the pitfalls of excessive consensus and establish a strong, progressive basis. At the same time, it is essential that the convention not push for developments that are too progressive and do not enjoy clear support from states. In order to balance the level of progression, an incremental approach should be adopted. The convention must not allow reservations, in order to ensure that all states are on a level playing field and that the treaty is not weakened by state practice. Additionally, while the expansion of universal jurisdiction for individual liability can effectively deal with certain rights, the issue of compliance can be costly for rights such as education and housing. Finally, given the strictures imposed by the above requirements, it is of utmost importance that the convention provide strong positive incentives to accede to the treaty, as well as costs on parties that do not join it. This is because any progressive measures therein will be binding only on ratifying states.

5.2.1. Proposed Framework

It is proposed that, in addition to a convention codifying universal civil jurisdiction for the prosecution of transnational corporations, it is necessary to also adopt a number of plurilateral additional protocols to existing conventions. All of these additional protocols should be annexed to each other, such that signing any of the additional protocols requires the signing of all of the additional protocols, similar to the way the Statue of the ICJ is annexed to the UN Charter. It must also be included within the treaty that it must be signed without reservation, essential to prevent the treaty’s efficacy being diminished by states that view it as counter to their short-term interests. Such an approach will diminish some of the issues that arise from the pluricentric nature of international law.

It is thought best that different standards be contained within additional protocols to the relevant existing conventions, e.g. that standards stipulating labour rights be an additional protocol to the main ILO agreement, similar to the optional protocol to the Convention Against Torture, which expands upon the original convention. Such protocols would initially address a core set of agreed rights and be expanded incrementally over time, at predetermined intervals, to increasingly strong protections. The protocols would initially address a subset of the spectrum of human

212 Malanczuk, Akehurst’s International Law, 281-282.
213 Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/195.
rights and expand over time to include more rights. Allowing a grace period for new states would allow other states to join later without the requirements becoming too onerous.

Although the World Trade Organisation has, in recent decades, pursued a strongly neo-liberal agenda, to the detriment of developing nations, it is thought the use of economic incentives is the best way to balance the costs of implementing labour rights to developing nations. As such the vast majority of the incentives would be developed through preferential access to markets for states that are involved in the system, generally called Export Credit Guarantees. Such a system would need to be used in conjunction with a supply chain audit, such as was implemented by Nike, would ensure that every step of the process meets all necessary human rights. Again, the use of phased and incremental increases in the rights covered in return for correspondingly preferential rates on imports can serve to create incentives for states to join the system. Should the system prove successful, it would be possible to subsequently expand it to include requirements for divestment, such as the policy adopted by the Norwegian Sovereign Wealth fund in divesting shares in Walmart. As discussed above, the Sullivan principles were effective in putting pressure on the government of South Africa. These guarantees could initially cover a small number of sectors and be expanded over time. The current WTO structure allows for member states to sign additional protocols and by providing preferential access to the European Union (EU) market as an incentive, developing states could be enticed to participate. The EU is the largest economic entity by Gross Domestic Product (GDP) in the world, and is also a very prosperous region, comprising a large number of industrialised countries, as well as a number that are currently industrialising, largely the former Warsaw Pact states. As an economic entity, this group of nations has enormous potential influence on world trade allowing the proposed solution to leverage the economic power of the EU area to ensure government compliance with human rights. The Council of Europe, of which all EU states are members, also has an agreed standard for human rights, codified in the European Convention on Human Rights, which could serve as a de facto minimum standard in the absence of state regulation. This would likely serve as an incentive for said state to pass its own, less onerous, set of laws.

Roger’s model of the diffusion of innovation, shown in Figure 9, describes the way in which ideas become acceptable in a society. Different sections of the society will have varying openness to new ideas and over time ideas become more palatable to the population. To put it another way, there is nothing so powerful as an idea whose time has come, to paraphrase Victor Hugo. One of the principal failings of the abortive Norms Convention was that it was overly progressive, that it attempted to codify all of the possible rights. This approach failed because states were not yet ready to accept all human rights as binding on corporation. In effect, the different

215 Clapham, Non State Actors, 197
216 Ruggie, Just Business, 17.
217 Ruggie, Just Business, 93.
stakeholders can be seen to represent different portions of the curve; the human rights advocates are too progressive and the corporations are quite regressive. States generally try to represent the views of the population, but given the unfortunate effect of money on politics, governments are often closer to corporations as they should be. As such it is necessary to adopt ideas that are within the Overton Window. The Overton Window is the set of policies that are currently feasible, i.e. those that are only slightly more progressive than the mean of the population. Ideas that are too progressive have little chance of taking hold and focussing on them, while laudable is short sighted. In terms of Roger’s model this might be seen as the junction between the early adopters and the early majority.

In effect, this is an argument in favour of idealism tempered with pragmatism, focussing on the changes that can be made now, without precluding more progressive change from being made in the future. As can be seen from the example of female genital mutilation in certain Ethiopian communities, wherein the population is recorded as transitioning from 97% in favour to 95% against the practice over the course of eight years, progressive change can occur quite quickly.

This set of conventions allows for a steadily more progressive approach to be adopted over time, taking into account the fact that the law will move faster in certain areas than in others. Additionally, such an approach allows the conventions to augment the voluntary protocols and to adopt over time the more acceptable provisions included therein. While this approach limits the number of states that are initially parties to the agreement, it is argued that the

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Figure 9: The diffusion of innovation

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221 Adapted from Rogers, Diffusion, 410.
approach will preclude the problems of the current race to the bottom.

Incentives

In order to encourage participation in the convention, it is necessary to ensure that the convention is in the interests of the states. In order to do so, incentives to join and penalties for not joining can be provided. As far as possible, the benefits of joining must outweigh the costs. There are aspects of this issue that closely resemble the theoretical iterative prisoners’ dilemma problem in game theory. In such a problem, while in an individual round it is better to betray the other side, careful analysis has shown that in the long term, it is better to cooperate, for mutual benefit. This is not to say that all states will chose to join such a convention, merely that there are genuine incentives for those that choose to join. Combining these arguments, there is a need to provide incentives for adoption of legally binding protocols by both the customers and the producers of goods, for in effect the entire problem can be viewed as an economic problem. Simply put, the industrial world requires raw materials, which it processes into manufactured goods that are then sold to consumers.

Developing states

In the above description of the extant solutions, the World Trade Organisation was viewed as being part of the problem, because of the additional protocols that have been signed, particularly the Uruguay round, which imposed onerous burdens on developing states, especially in the realm of intellectual property rights. No industrialised state had previously accepted such provisions before reaching maturity. One way to provide incentives for states to join such a convention would be to provide time-bounded exemptions to participating states from specific aspects.

Additionally, the heavy reliance of certain states on the garment industry makes it an ideal sector for an initial pilot scheme. The European Union comprises 27% of the world market for apparel as can be seen from Figure 10.

Another important issue for the regulation of corporations is a re-examination of the Iron Law of Wages. Normally attributed to Ricardo, the argument is that in a balanced economy, labour will demand only the minimum price needed for subsistence, in the absence of government intervention. This can, again, be seen as another example of the race to the bottom requiring government intervention. The Keynesian approach would be to invest in social protection, to improve the life of the worker, which strengthens the social contract and, as argued above, increases the legitimacy of the government. However, the neoliberal economic policies pursued by the US government has led to a system that, rather than pushing the minimum wage above the Ricardian equilibrium point, in fact, pushes it below it. As described above, Walmart made a
profit of $16 billion and received an indirect subsidy of $6.6 billion from the US government. This approach is very much the opposite of that adopted by Henry Ford, termed efficiency wages. Ford argued it was essential for him to pay his workers enough to buy his cars, otherwise who would? Corporations such as Walmart are paying their employees so little that its employees are below the poverty line, leading to a massive increase in social inequality. This is just one example of the ways in which neo-liberal economic policies have led to a massive surge in income equality in the United States and led to vastly slower growth of important indicators of development, such as the Human Development Index. The average citizen of the Indian state of Kerala has a longer life expectancy than the average African American. Structural inequalities inherent in the neo-liberal economic system of developed states have led to a huge increase in inequality. The evidence from the policies adopted in post-communist states in the nineties is further proof of the problems inherent in the neo-liberal system. Continuing to follow such policies will not lead to the development that producer countries are seeking.

Developed states

In the last three decades, with the rise of the neo-liberal economic model, much of the production which had been centred in developed economies, i.e. economies which had reached at least stage four of Rostow’s model of development, an overview of which can be seen in Figure 11, has been outsourced to economies which have not reached this stage. This process of de-industrialisation, and can in many ways be viewed as the postulated fifth stage envisaged by Rostow. De-industrialisation has previously occurred in India in the seventeenth and eighteenth centuries. India at the time was a non-

Figure 10: World garment retail by region

- 28% Western Europe
- 21% North America
- 13% Japan & South Korea
- 10% Eastern Europe & Turkey
- 25% Rest of World

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228 Krugman, Economics, 656
229 Galbraith, History of Economics, 270
231 Ibid.
233 Stiglitz, Price of Inequality.
235 Adapted from ILO, Wages and Working Hours, 8.
industrial economy and this is, as such, not particularly relevant to the current discussion.\footnote{237}

This de-industrialisation is effectively caused by an \textit{arbitrage}, which is making a profit from a geographic difference in costs.\footnote{238}

The total cost of labour, transport and insurance that derives from producing goods in the developing world is less than the cost of paying developed world wages. It is the sum of individual choices: corporations are attempting to reduce their costs and maximise their profits, and, in the absence of corrective regulation will minimise any cost centre possible to fulfil their goal of maximising the return on investment for share holders.

The development of workers’ rights in industrialised nations was a long, slow process that took place over the long course of the industrial revolution and, as can be seen from the differences between working conditions in different industrialised nations is not a completed process. However, currently industrialising nations tend not to have such protections, reducing the cost of labour. This is not to say that labour protection is the sole difference when comparing the labour cost of two economies; numerous other factors such as the cost of living and the local tax structures also greatly affect it. Also, the argument can be made that this is a principal factor in the labour cost, and if left unchecked will lead to a roll back of such hard won labour protections in industrialised nations who will be unable to compete, the \textit{race to the bottom}.

From this perspective, it can be argued that it is very much in the European Union’s interest to slow and even reverse the process of de-industrialisation, acknowledging that any reversals would be temporary at best as Schumpeter’s principle of \textit{creative destruction}
also known as Schumpeter’s gale, wherein the economy is constantly creating new jobs and destroying old ones, and the rise of automation are both clearly indicating that, in the longer term, the concept of unskilled work in factories will become a much more marginal part of the economy than it has been previously. In many ways this is not surprising, given that the existence of a large unskilled working class appears to be very much a feature of an industrialising economy.

It has been established above, in the section on human rights that it is in the interest of the communities and of the workers of developing nations to ensure strong human rights protections in developing nations. However, it is also essential to create incentives for the governments of these nations to prioritise the implementation of strong human rights protections, to avoid the race to the bottom caused by the current system of perverse incentives that have resulted from foreign direct investment, especially in the system of export processing zones.

Corporations

Few of the incentives for corporations are positive. That does not mean that they will not be effective. The introduction of regulation will ensure that corporations no longer have to choose between ethical and financial motives, as the law will ensure the ethical path is taken. The incentive combination of the universal jurisdiction and the prospect of divestment will pressure corporations that are head-quartered outside of Europe will be as vulnerable to suits as those inside it. The possible implementation of restrictions on investment in corporations that continue to operate in jurisdictions that fail to meet the standards required, will force the large pensions and mutual funds that are based within the European market to divest themselves of shares in corporations that do not abide by the terms of the conventions.

Additionally, the creation of a regulatory framework and the introduction of civil liability for crimes that would not previously covered by any jurisdiction introduces moral hazard to the calculations required for corporations, ensuring that they have, in effect, skin in the game. This allows the problem of divergent aims of different stakeholders to be unified by handling the externalities of the system, which are costs of an action are born by someone other than the actor.

5.2.2. The merits of implementing through the European Union

It can be argued that such a system runs the risk of creating a competitive disadvantage for the European market relative to the American and the Chinese markets. However the Chinese market is not and will not be anywhere near as affluent, on a per person basis, as the European Union (EU) for a number of years to come. It is, however, argued, that much as California is a large enough market to dictate the standards for emissions for much of the United
States,\textsuperscript{240} the EU is an important enough, and rich enough, market to ensure that suppliers may be driven to accept the constraints. The principal advantage to pursuing such a convention through the European Union is that unlike standard international law which is decentralised, lacking in enforcement formalised mechanisms, the European Union has centralised decision making structures, allowing it to act in a more coordinated and cohesive manner.\textsuperscript{241}

An additional advantage of pursuing such a system through the EU rather than through an organisation such as the OECD is that it avoids the problems of American influence. While the creation of the United Nations and the reconstruction of Europe through the Marshall Plan and the Bretton Woods System would not have been possible without the backing and support of the Americans,\textsuperscript{242} the current American attitude towards the international system is problematic to say the least. While corporations have personality in municipal law, they do not usually have all of the rights that individual are entitled to. However, American courts have established a number of worrying precedents in recent years as regards the distinctions, and lack thereof, between individuals and corporations. In the Citizen’s United case, the US Supreme Court established that money was a protected form of speech and that corporations,\textsuperscript{243} entitled by the first amendment to free speech were entitled to “speak” freely, through the means of unlimited political donations, a premise expanded in the McCutcheon case.\textsuperscript{244}

In the Hobby Lobby case,\textsuperscript{245} the US Supreme Court established that corporations were entitled to religious beliefs, allowing them to refuse to obey other laws that conflicted with their religious beliefs. In the Sulu case, the US 2nd Circuit of Appeals ruled that corporations were not responsible for subsidiaries run at arms-length,\textsuperscript{246} allowing corporations to profit from overseas actions, without risk of retribution.

Additionally, the US and Europe have very different views on a number of important human rights issues. The torture convention could not include prohibitions on capital punishment, as this is still legal in the US. It is not legal in any European Union state. The current negotiations on the Arms Trade Treaty have been limited by the American insistence that there be no limits on domestic ownership of small arms, no tracing of ammunition, no limits on international sales and that there be no international organisation mandated to ensure compliance. Additionally, the US Senate largely refuses to ratify international treaties; the Convention on the Rights of the Child has been ratified by every state except the US, Somalia and South Sudan.\textsuperscript{247} There have also been some worrying decisions by the US Supreme court when it comes to obeying existing treaties, as can be seen from the decisions in the Alvarez-Machain case,\textsuperscript{248} where the US government abducted a Mexican citizen from Mexico after Mexico refused to extradite him.

\textsuperscript{241} Malanczuk, Akhurst’s International Law, 96.
\textsuperscript{242} Ibid., 223.
\textsuperscript{243} Citizen’s United v. Federal Electoral Commission
\textsuperscript{244} McCutcheon v. Federal Electoral Commission.
\textsuperscript{245} Burwell v. Hobby Lobby.
\textsuperscript{246} Sulu v. Union Caribde
5.3. Evaluating the proposed framework

In considering how the proposed system will work, it is useful to evaluate it through the illustrative examples examined earlier. The proposed framework is not a panacea; it is intended as an iterative framework that can be built upon over time. The different issues presented by the different industries help in identifying problems that can and cannot be dealt with in the initial phase and how future developments could build upon the initial proposal.

5.3.1. Extractive industry

The problems of the extractive industry are particularly intractable; its products are largely raw materials that undergo several levels of processing before becoming a consumer product. Another issue is that mines are often outside of the effective jurisdiction of states. The Kimberly process was adopted because the concern over conflict diamonds was bad for the reputation of diamonds. The reputation of coltan is less of a priority for the average consumer. The attempts of the Norms Convention to bring corporations under the auspices of the UN’s human rights monitoring mechanisms and the use of supply chain management would both be useful in managing the supply of materials. Isotope tracking has been suggested to deal with the general issue of conflict materials. However, given the lack of consumer facing products it is likely that such developments would be future expansions, implemented after proving success with other industries.

5.3.2. Plantation agriculture

Plantation agriculture provides both raw materials, such as rubber and cotton, and consumer products, such as coffee. The non-consumer products again would be reliant on supply chain management. Fair Trade attempts to address these problems in a voluntary way by leveraging consumer pressures. While well intentioned, it has its problems, as mentioned above. Chief among these, from an effects point of view is the assertion that farmers who are in Fair Trade cooperatives may be worse off than those who are not in the collectives. As such, there is a need to ensure a level playing field. The use of export credit guarantees allows for labour rights to be enforced consistently, stopping the race to the bottom. Sectors such as the cocoa industry, which involve large number of European manufacturers, would also be prime candidates for initial pilot schemes.

5.3.3. Garment industry

The strong dependence of a number of countries on garment exports, as shown in Figure 12, as well as the widely reported issues in the garment industry make it an ideal candidate for initial pilot schemes. This is especially pertinent as Europe provides 27% of the world market for garments and was the largest production bloc for garments until 2010. As such, these industries are a useful testing
ground for a scheme to investigate whether de-industrialisation can be slowed down, giving EU governments the time to put in place transition plans to smooth the effects of Schumpeter’s gale. The implementation of export credit guarantees would allow for the incremental introduction of labour rights, possibly by phasing in minimum wage laws and working hour restrictions over a number of years, an accelerated version of the slow progress seen in developed nations over the course of the industrial revolution.

5.3.4. Pharmaceutical industry

As specified above, the issues with the pharmaceutical industry are somewhat different to those seen in the other industries listed. These issues primarily affect end users and are placing onerous burdens on states that have reached a stage in their development where the positive effects of intellectual property legislation outweigh the effect it is having on the health care system. The recent example of European pharmaceutical companies refusing to supply American states with drugs for use in lethal injections is a hopeful sign that European corporations would be amenable to relaxing the restrictions on generic drugs for states that signed up to the proposed framework, which would prove a powerful additional incentive to states to join. Given the relative health expenditures per capita between developing and developed nations, it seems that it is very much in pharmaceutical industries interest to see more states joining the ranks of the industrialised states.

5.3.5. Arms trade

The international arms trade effect on human rights is far less direct than those of the other industries here, but without curtailing the arms industry, the political instability that causes so many problems
in the developing world will likely remain endemic. Additionally, it is an industry that is very much core to the American economy, American military procurement in 2010 was $140 billion, dwarfing the $40.6 billion international arms trade in conventional weapons. As such, it seems unlikely that the US would curtail its overseas sales, given the importance of the military to the economy. While the European contribution to this trade could be curtailed, or become contingent on spending limits as a percentage of GDP and adherence to human rights guidelines, a deeper analysis of the Grimmett Report suggests that much of the American sales to developing nations is to certain key nations. Without a reduction in US arms sales this problem is likely to remain for the foreseeable future.
The scope of any work must, by necessity, be limited; numerous divergent issues arose that could addressed sufficiently. These include investigating the relationship between human rights and the social contract and expanding the proposed framework to address environmental concerns.

6.1. Human rights and the social contract

The theoretical underpinnings of human rights are still strongly based on concepts of natural law, founded on conceptions of universality that may not exist. Different cultures have very different approaches to key issues. On examining the long history of the development of the social contract, the idea that human rights may be an implicit attempt to codify the latest iteration of the social contract is a subject bearing further investigation. Such research would require a deeper understanding of Dworkin’s rejection of positivism and a pragmatic, incremental approach to further developing and progressing the social contract and a re-examination of the rejection of natural law, examining the idea that it is an attempt to codify implicit social mores.

6.2. Expansion to environmental concerns

The failure of the international system to deal with the growing problems of anthropogenic climate change, i.e. change caused by humans, is one of the greatest problems of the modern era. Much of the problem seems to be caused by externalities, which the pluricentric international system seems singularly unequipped to handle. Numerous climate treaties have been signed with great fanfare, with little reduction in the pollution generated. It is thought that much as the EU market can be leveraged to ensure the progressive adoption of human rights, the described system of export credit guarantees to augment a cap and trade system could be used to ensure that both developed and developing nations adopt meaningful strategies to deal with these issues. It seems pertinent to paraphrase the words of Wendell Barry; one does not inherit the world from one’s parents; merely borrow it from one’s children.

Developing nations do not yet fully support the full spectrum of rights enjoyed by those in the developed world, but this is no excuse for the abuses that happen. The standard of reasonable expectation set in the South African *Grootboom* case allows for a move beyond dogmatic arguments as to how rights should be decided. Working from the basis of the Ruggie study a deeper examination was conducted using illustrative examples from the extractive industry, the garment industry, plantation agriculture, the pharmaceutical industry and the arms trade have shown the depth and breadth of the problem. These issues span a variety of industries and have disparate causes, but there are some key underlying themes that can be abstracted, most important of which is that, in spite of numerous attempts voluntary self-regulation is not sufficient to handle the scale of the issue.

This issue is especially important, as it is the core of the argument presented by business interests against any binding process, that the market will fix it, that regulation stops growth. However, as shown from the examples listed above, *e.g.* as the complete failure of the Foreign Corrupt Practices Act, it does not work. This is because the incentives are misaligned, corporations operate entirely on economic incentives. In order for them to obey ethical concerns, these concerns must be aligned with their economic incentives. The only feasible way to accomplish this is through some form of regulation. Voluntary protocols are only adopted by corporations that already have an incentive to behave, or worse to appear to behave, in an ethical manner.

It must also be said that previous attempts, such as the Norms, to adopt binding to solve this issue have failed. The reason for this is that they have attempted to be overly progressive, to make changes that are not feasible in the current climate. Additionally, there is the problem of states’ interests. The Norms convention did not provide any real incentive to change and the interests of the state parties were too disparate to provide a clear path to solving this.

The race to the bottom that exists between developing nations is eroding what little rights they currently have, especially in Export Protection Zones. This race is caused by a combination of external pressures from developing nations and economic competition from other developing nations. There are also internal pressures, wherein a state is either unable to prosecute corporations for their misdeeds, because of a lack of capacity or because of a lack of incentive.

To solve the issue of bringing corporations to task for their misdeeds, one solution is to accept the idea that universal civil jurisdiction exists for crimes committed by corporations. This is not a novel idea. The reason it has not been adopted is, arguably, that states see no incentive to adopt it. As such, it is important to devise a system that would encourage states to engage with a system of compulsory export credit guarantees to ensure that there are clear
and strong benefits to partake in the system. It is proposed that this be pursued through the leveraging of the European market given its size and importance in the world economy. By making the proposed system incremental and through the use of annexed protocols, without reservations, it is hoped that some of the issues common to international conventions, such as reservations and provisions that are weakened by compromise, can be mitigated.

Another strength of the incremental approach is that it allows for progression to occur in a measured fashion. This can be done by establishing a reasonable minimum standard, as discussed in the Grootboom case, and establishing deadlines by which such a standard can be expanded. By making use of the Overton window, the set of policies that are possible in the current political climate, and aligning states’ presumed longer term goal of providing a more legitimate accountable government with their shorter term goal of ensuring strong economic growth, it is thought that states can move towards escaping the traps outlined by Collier.\textsuperscript{255}

Corporations stand to benefit greatly in the longer term, but will certainly oppose this in the short term. There are numerous political obstacles to the implementation of what is, admittedly an audacious plan. This does not mean that it should not be done, just that it is difficult to accomplish. A fundamental question that must be asked is what is the law? Is it what the legal positivists claim, rules without context that are judged solely on the merit of their history? Or is it, as Brandeis suggests, a way of ensuring that society is what men want it to be? This approaches the system outlined by Rawls in Theory of Justice, particularly the idea of the veil of ignorance, which is a society devised such that everyone in it has an equal chance to succeed.\textsuperscript{256}

Finally, it must be noted that the proposed system may fail. This is certainly a possibility. The author makes no claims to clairvoyance. This is not, however, a reason not to attempt it. In the words of Samuel Beckett: “[e]ver tried. Ever failed. No matter. Try again. Fail again. Fail better.”\textsuperscript{257} That is to say more is learned from not succeeding than from succeeding. Venture capital companies expect on average one in five projects to succeed.\textsuperscript{258} Large-scale government research is often happy with a success rate of one project in ten.\textsuperscript{259} Development is a complex process and will certainly require complex solutions. Whether the solution proposed will solve the problem is uncertain. What is certain is that the current system is broken.

\textsuperscript{255} Collier, Bottom Billion
\textsuperscript{258} Mazucatto, Entreprenurial State, 48.
\textsuperscript{259} Ibid.
8. Glossary

8.1. Technical Terms

**arbitrage** making a profit from a geographic difference in costs

**common law jurisdiction** jurisdictions were judges can make law

**compulsory universality** states are obliged to prosecute

**creative destruction** also known as Schumpeter’s gale, that the economy is constantly creating new jobs and destroying old ones

**customary international law** the oldest and strongest source and is viewed as being “primarily ... the actual practice and opinio juris of states”, i.e. the stated convictions of states (opinio juris) and the actions that states take, which may conflict strongly with said convictions

**de lege ferenda** the law as it should be

**de lege lata** current law

**derogable rights** rights that can be suspended under extreme circumstances

**Dutch Disease** wherein the rest of the economy stagnates because the mineral export causes the state’s currency to rise, making other exports uncompetitive

**erga omnes** a breach of an international norm that is so egregious as to be an offence against all members of the international community, not just the directly affected state

**externality** a situation where the costs of an action are born by someone other than the actor.

**extraterritorial jurisdiction** a situation in which a state decides it has jurisdiction in matters that happened outside its territory, for crimes that did not involve its nationals

**general principles of law** “... principles of law recognised by civilised nations” that are common to all legal systems and general legal logic, as well as some particular international law concepts

**hostis humani generis** enemy of all mankind

**international convention** also known as treaties, often, but not exclusively, a codification of states’ understanding of customary international law

**Iron Law of Wages** that, in the absence of intervention, wages will tend to subsistence level once labour supply matches labour demand

**jurisdiction** a court’s authority to hear and decide a case

**legal positivism** wherein the validity of a law depends upon its sources rather than its merits

**moral hazard** the way people are more likely to take risks which will not have a direct cost

**municipal law** the term used in international law for the domestic law of states

**national jurisdiction** the jurisdiction that states have over their citizens, including corporate citizens

**natural law** law derived from universal principles of justice

**negative rights** rights that can be seen as the liberty from

**non-derogable rights** rights which cannot be suspended under any circumstance

**opinio juris** the stated convictions of states
Overton window the set of policies that are currently feasible, i.e. those that are only slightly more progressive than the mean of the population

permissive universality a state is permitted but not required to prosecute

personality an entity that has rights and duties under the law

polity an entity which, while not fully meeting the Montevideo definition of sovereignty, has many of the trappings of a state

positive rights rights that can be seen as the liberty to

precedent an authoritative judgement from which the argument can be derived

primary industry industry that produces raw materials

progressive anything in an international treaty that goes beyond the codification of customary international law

race to the bottom a situation wherein “states compete with each other as each tries to underbid the others in lowering taxes, spending, regulation... so as to make itself more attractive to outside financial interests”

reservation a state’s insistence that particular stipulations of a treaty does not apply to it

Schumpeter’s gale creative destruction

secondary industry an industry that processes raw materials into manufactured goods

soft law the guidelines and non-binding protocols that are adopted by associations and international governmental organisations that are not legally binding, but can develop a normative effect and as such can be a form of de lege ferende, which is the law as it should be, or perhaps even will be in the future

sovereign being predicated on a state meeting four criteria, that it exercise control of a territory and population, have a government and be able to enter into relations with other states

terra nullius land that has no sovereign, uncommon in the modern world

territorial jurisdiction the jurisdiction a state executes over actions that take place within its territory

tertiary industry the provision of services

universal civil jurisdiction universal jurisdiction over civil offences

universal criminal jurisdiction universal jurisdiction over criminal offences

universal jurisdiction a crime that placed erga omnes obligations on all states to prosecute

uti possidetis juris that the borders of the successor state would remain the same as that of the former colonial state

Weberian sovereignty the ability to maintain a monopoly on the legitimate use of force in a territory
8.2. List of acronyms

ATS  Alien Tort Statute
CSR  Corporate Social Responsibility
DRC  Democratic Republic of the Congo
EPZ  Export Protection Zone
EU   European Union
FARC Revolutionary Armed Forces of Colombia
GATT General Agreement on Trade and Tariffs
ICC  International Criminal Court
ICJ  International Court of Justice
ILO  International Labour Organisation
IPR  Intellectual Property Rights
OECD Organisation for Economic Cooperation and Development
TCLF Textile, Clothing, Leather and Footwear
TRIPS Trade-Related Aspects of Intellectual Property Rights
UDHR Universal Declaration of Human Rights
UN   United Nations
US   United States (of America)
WTO  World Trade Organisation
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