

THE INVISIBILITY OF THE TRANSNATIONAL CORPORATION: AN ANALYSIS OF INTERNATIONAL LAW AND LEGAL THEORY

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[Despite their profound influence upon international affairs, transnational corporations are more notable in their absence from international legal discourse, than in their presence. This article examines the anomalous position of the transnational corporation in international law and proposes reasons for its omission from international legal processes. It concludes that theoretical constraints and assumptions implicit in international legal discourse currently prevent it from accommodating an entity such as the transnational corporation. The author challenges these theoretical strictures and argues that international legal processes ought to be expanded to include groups and institutions whose participation is vital to the upholding of international law including, but not limited to, the transnational corporation.]

I INTRODUCTION

Como telas de arañas son las leyes, que prenden a las moscas y no al milano.
Laws, like the spider's web, catch the fly and let the hawk go free.

Spanish proverb.

The transnational corporation ('TNC')¹ does not have a concrete presence in international law. Rather it is an apparition, reappearing in many different forms and contexts — its actuality sifted through the grid of state sovereignty into an assortment of secondary rights and contingent liabilities.

Yet the global corporation has been described as 'the most powerful agent for the internationalization of human society'.² World corporate managers, it is said, 'are the first to have developed a plausible model of the future that is global.'³ Even those who take issue with such assertions do not deny the evidence of TNCs' worldwide power and influence.⁴

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¹ The term 'transnational corporation' is used interchangeably with the terms 'multinational corporation' and 'multinational entity or enterprise' ('MNE'). For the purposes of this essay, the first of these terms will be used to refer to 'a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy': Vernon, 'Economic Sovereignty at Bay' (1968) 47 *Foreign Affairs* 110, 114; adopted by Detlev Vagts, 'The Multinational Enterprise: A New Challenge for Transnational Law' (1970) 83 *Harvard Law Review* 739, 740.

² Aurelio Peccei, a director of Fiat during the 1970s and organiser of the Club of Rome, quoted by Richard Barnett and Ronald Muller, *Global Reach: The Power of the Multinational Corporations* (1974) 13.

³ *Ibid* 363.

⁴ Bernardo Cremades cautions that '[v]ery often when dealing with the subject of multinational companies, great giants are imagined where there are only windmills.'

Why then has international law traditionally not recognised the TNC as an international actor and a legal subject? Does this represent an attempt to shore up an out-dated legal order against the forces of change, or is it merely that international law is not conceptually equipped to deal with these obstreperous creatures? Is international law's approach towards TNCs ultimately self-defeating?

This article will endeavour to respond to these questions by examining first, the various limited ways in which the TNC can be characterised under current international law; secondly, the extent to which TNCs' conduct within this framework can be (yet is not) understood as violating fundamental international legal norms; and, finally, the extent to which the absence of the TNC from international legal discourse can be justified or explained by reference to a number of major theoretical approaches.

The purpose of this discussion is not to engage in either a sociological or moral critique of the injustice of the international legal order.⁵ Rather, it is to consider the theoretical adequacy or inadequacy of international law to fulfil the various descriptive, prescriptive and explanatory roles identified for it, with particular reference to the anomaly of the TNC. Ultimately it is submitted that if international law is to fulfil any or all of these roles and more importantly, if it is to have a continuing and a positive impact upon daily human endeavour, its processes must be opened up to all groups (including, but by no means limited to TNCs) with direct involvement in any field of human affairs with which these legal processes purport to deal. Improved access must be combined with a distribution amongst participating groups of the tools, information and resources necessary for contribution by these groups to be meaningful. Such sharing of legal tools and resources might ensure that expanded international legal processes do not merely replicate the power imbalances that currently paralyse or silence certain groups in international law.

II ENCOUNTERS WITH THE TRANSNATIONAL CORPORATION UNDER EXISTING INTERNATIONAL LAW

A *The Transnational Corporation as Juridical Individual and State National*

The TNC's role in international law is generally defined by reference to its alleged ties to a particular state. The juristic personality of the TNC was confirmed in the *Barcelona Traction, Light and Power Co Case* as analogous to that of individuals, that is, as a national of a state.⁶ This personality gives rise to a

He goes on to acknowledge, however, that '[t]hese conglomerates can indeed be of extraordinary importance ... in international economic life': Bernardo Cremades, 'Multinational Companies and International Commercial Arbitration' in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980) 83-4.

⁵ Koskenniemi identifies the 'sociological' and 'moral' approaches as two forms which criticism of statehood commonly takes: Martti Koskenniemi, 'The Future of Statehood' (1991) 32 *Harvard Journal of International Law* 397, 401.

⁶ *The Barcelona Traction, Light and Power Co Ltd Case (Belgium v Spain)* [1970] ICJ 3, para 70 (*Barcelona Traction*). Knop observes that the persistent recognition of an essential identity

right of diplomatic protection which may be exercised by the relevant state on a TNC's behalf.⁷ It may also give rise to state responsibility for conduct of a TNC in the state's own territory that impacts adversely upon another state so as to constitute a breach of international law.⁸

The 'traditional rule' attributes rights (and by implication, liabilities) with respect to a TNC to the state under the laws of which the TNC is incorporated and in the territory of which it has its registered office.⁹ In the *Barcelona Traction Case*, the International Court of Justice rejected the proposition that this rule might be qualified by a requirement of 'genuine connection' between the TNC and its state of incorporation.¹⁰ The Court did, however, seem to accept the possibility that links between the TNC might be 'weakened' or that facts might be sufficient to constitute a 'legal impediment' to the state of incorporation exercising its *prima facie* right of diplomatic protection.¹¹

The difficulties that result from these tenuous, uncertain and somewhat arbitrary protective links between TNCs and states have been comprehensively outlined by Christopher Staker.¹² For a corporation operating across many states' territories and through many legal systems, selection of a state of incorporation may be a matter of mere convenience — a decision made at a particular time for tax or other such reasons. The fact that this decision may have lasting signifi-

between states and juridical individuals 'renders problematic any consideration of the status of individuals and groups in international law, other than as part of a monolithic state': Karen Knop, 'Feminism and State Sovereignty' (1993) 3 *Transnational & Contemporary Problems* 293. As Vagts notes, 'to deal realistically with the [multinational enterprise], one must go beyond the conceptions of legal entity or surrogate-entrepreneur to an understanding of its internal structure': Vagts, above n 1, 751. Vagts suggests that the TNC 'is more usefully viewed as a coalition of persons with separate goals and differing capacities to influence corporate policy': Vagts, above n 1, 755; Richard Cyert and James March, *A Behavioral Theory of the Firm* (1963) 26-43.

⁷ *Barcelona Traction* [1970] ICJ 3, para 33.

⁸ State responsibility will only arise if the conduct of the TNC in breach of international law is imputable to a state. The law in this area is reflected in the ILC Draft Articles on State Responsibility: (1980) II *Yearbook of the International Law Commission* 30; (1986) II *Yearbook of the International Law Commission* 38, arts 1-3, 5-9, 11-2. See generally Gordon Christenson, 'The Doctrine of Attribution in State Responsibility' in Robert Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (1983) 321. The *Trail Smelter Arbitration (US v Canada)* (1938 & 1941) 3 RIAA 1905 represents one instance of state responsibility for a corporate agent; however, *Schering Corp v Iran* (1984) 5 Iran-US CTR 361, 370 highlights the limiting aspect of the requirement of imputability. In that case, acts of the Workers Council of Schering Iran, the Iranian subsidiary company of the claimant, could not be imputed to Iran because the company did not 'function as part of the state machinery' nor had it in fact acted according to governmental directives. See, eg, *Flexi-Van Leasing Inc v Iran* (1986) 12 Iran-US CTR 335, 349. Cf, however, the finding in *Foremost Tehran Inc v Iran* that the relevant company's actions were attributable to Iran because it had been influenced by government representatives on the Board of Directors who sought to implement government policy.

⁹ *Barcelona Traction* [1970] ICJ 3, para 70.

¹⁰ *Ibid.*

¹¹ *Ibid* paras 71-7. Though refusal by the state of incorporation to exercise its right of protection does not alone cause that right to vest in another state, it might result in the national state of individual shareholders of a TNC being able to exercise a right of protection on their behalf: *ibid* paras 78, 81, 97.

¹² Christopher Staker, 'Diplomatic Protection of Private Business Companies: Determining Corporate Personality for International Law Purposes' (1990) 61 *British Yearbook of International Law* 155.

cance at international law seems therefore ludicrous. Equally, states of incorporation and national states of shareholders may have neither the capacity nor the inclination to exercise the powers which international law confers upon them. The artificiality, inconvenience and potential injustice of this system of linkage between states and TNCs has been one of the motivating factors behind TNCs' enthusiasm for a global regulatory framework.¹³

Of perhaps greater concern is the fact that those injured at the hands of a TNC may rely upon no more than a fragile and contingent chain of responsibility between the TNC and a state to enable them to resort to international law. The very existence of this chain is dependent on the capacity of the injured party to impute the acts of the TNC to a particular state.¹⁴ Given the global, free-wheeling span of TNC operations, states are increasingly incapable or unwilling to exercise the sort of control necessary to substantiate a claim of imputability. A representative of the United States Government, for example, has stated that:

the US Government is not in a position to guarantee that its private sector will [or will not] perform in a [particular] way Our Government does not have — nor does it wish to have — that type of control over our private sector.¹⁵

Even those nations which, unlike the United States, openly proclaim their desire to exercise some control over their corporate 'nationals' frequently find it impossible to do so. The United Nations Centre on Transnational Corporations ('UNCTNC') has observed that:

[a] number of factors ... conspire to make purely national control systems variously evadable, inefficient, incomplete, unenforceable, exploitable, or negotiable ... with respect to transnational corporations.¹⁶

As a result, conventional principles characterising TNCs as nationals of particular states are of limited practical or theoretical utility. As John Kenneth Galbraith has said, 'those who would break ... up [the large corporation] and confine its operations within national boundaries are at war with history and circumstance.'¹⁷

¹³ Vagts explains corporate support for the notion of a global business regulatory framework as follows: 'As long as [governmental and political] barriers remain a significant variable, optimum decision making will be impossible': Vagts, above n 1, 764. In 1972, James P McFarland, Chairman of General Mills, speaking of 'The Corporation in 1990' called for the development of 'genuine government-business partnership[s]' to 'allow the orderly transition to a [multinational] corporate structure': Barnet and Muller, above n 2, 111.

¹⁴ See above n 8.

¹⁵ W Jopley Bennett (US Representative at the 2nd General Conference of the UN Industrial Development Organisation), (1975) 72 *Department of State Bulletin* 520. Note, however, that in other circumstances, the US Government has been more than willing to exert control over the private sector for its own political purposes: see below n 70.

¹⁶ UN Centre on Transnational Corporations ('CTC'), *Environmental Aspects of the Activities of Transnational Corporations: A Survey* (1985) para 51.

¹⁷ John Galbraith, *The Age of Uncertainty* (1977) 277.

B *The Transnational Corporation as Object of International Regulation*

The distinction between an object of international law and a subject, as explained by Bin Cheng, lies in the fact that international legal rights and duties (including the right to create international law) are directly possessed by and incumbent upon the latter. By contrast, an object of international law possesses only derivative legal personality.¹⁸

Having been characterised as individual nationals of states, rather than as independent entities, TNCs are clearly 'neither subjects nor quasi-subjects' of international law.¹⁹ Nevertheless, they are frequently objects of international legal regulation.

Numerous international organisations (themselves subjects of international law)²⁰ have addressed the conduct of TNCs and have produced guidelines, codes, resolutions, declarations, recommendations, principles, reports, charters and draft documents of various types directed towards TNC behaviour.²¹ Regional organisations, industrial and trade organisations and other multi-state groups have also sought to exert some influence over the activities of TNCs.²²

Foremost amongst these international regulatory efforts was ECOSOC's creation of the Commission on Transnational Corporations ('CTC') in 1974 and later, the UNCTNC as Secretariat to the Commission. The Commission was given a mandate (to be carried out primarily by the UNCTNC) to 'evolve' a 'set of recommendations, which, taken together would represent a code of conduct for governments and TNCs to be considered and adopted by the Council [that is, ECOSOC].'²³ In 1978, the first Draft Code of Conduct was issued²⁴ and successive drafts were produced in 1983,²⁵ 1988²⁶ and 1990.²⁷

¹⁸ Bin Cheng, 'Introduction to Subjects of International Law' in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects* (1991) 23.

¹⁹ Francois Rigaux, 'Transnational Corporations' in Bedjaoui, above n 18, 121, 129. While the development of human rights law and the law of international criminal responsibility has accorded some independent international legal status to individuals, development in these areas has not encompassed the TNC: see the discussion of International Human Rights Law below, Part III(C).

²⁰ *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ 174, 178-9, 185 (*Reparations* case). See generally Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organisations' (1970) 44 *British Yearbook of International Law* 111.

²¹ These include the International Chamber of Commerce ('ICC'), the International Bank for Reconstruction and Development ('the World Bank'), the World Health Organisation ('WHO'), the International Labour Organisation ('ILO'), the Organisation for Economic Cooperation and Development ('OECD'), the UN Conference on Trade and Development ('UNCTAD'), the Food and Agriculture Organisation of the UN ('FAO'), the Economic and Social Council of the UN ('ECOSOC') and the International Confederation of Free Trade Unions ('ICFTU').

²² These include the European Community ('EC'), the Council of Europe, the Organisation of American States ('OAS'), the Japanese Business Council ('Keidanren') and the Japanese MITI Council on Industrial Structure.

²³ UN Department of Economic and Social Affairs, *The Impact of Multinational Corporations on Development and International Relations* (1974) 52. The mandate of the CTC was formulated in the context of calls by Chilean representatives in ECOSOC for comprehensive analysis of TNC activities in the wake of the International Telephone & Telegraph Company ('ITT') scandal (see below nn 31, 70) and in light of the emergence of a 'New International Economic Order': General Assembly Resolution ('GA Res') 3202 (S-VI) (1974). See generally Hans

Though consensus on a final Code was never achieved²⁸ the possibility of a new form of global regulatory scheme with TNCs as its object is currently being mooted. A 'fresh approach' was proposed at the 18th Session of the CTC in April 1992 — for the development of internationally agreed ethical principles in the form of 'Guidelines', drawing upon and synthesising existing codes of conduct and similar documents.²⁹

However, two factors undermine the legal significance of these efforts to contain or modify TNCs' activities. The unenforceable or voluntary status of international and other organisations' documents militates against both their efficacy and their importance.³⁰ Furthermore, responsibility for the negotiation and implementation of these documents and decrees remains with the traditional subjects of international law, namely states.

On a number of occasions, the United Nations General Assembly has turned its attention towards TNCs' collective activities — addressing them collectively, either to condemn their conduct in particular instances or to call upon them to comply with General Assembly Resolutions.³¹ Yet the apparently direct terms of the United Nations General Assembly's Resolutions can be qualified by reference to the Assembly's limited power, under Articles 10 and 11 of the United

Baade, 'Codes of Conduct for Multinational Enterprises: An Introductory Survey' in Horn, above n 4, 407, 414-6.

²⁴ CTC, Transnational Corporations: Codes of Conduct, Formulations by the Chairman, UN Doc E/C 10 2/8 (1978).

²⁵ CTC, Draft Code of Conduct on Transnational Corporations, UN Doc E/1983/17/Rev 1 (1983).

²⁶ CTC, Draft Code of Conduct on Transnational Corporations, UN Doc E/1988/39/Add 1 (1988).

²⁷ CTC, Draft Code of Conduct on Transnational Corporations, UN Doc E/1990/94 (1990).

²⁸ In February 1992, the UNCTNC was dismantled and its functions transferred to a new Transnational Corporations Management Division within ECOSOC: Helen Rosenbaum and Anthony Tabor (Australian Conservation Foundation), *Guidelines for Business: A Discussion Paper* (1994) 10. Finally in 1993, the Centre was 'quietly put down': 'Target Practice' (1993) 246 *New Internationalist* 15.

²⁹ Elizabeth Hayes, 'A Second Chance: A New Proposal for Global Business Guidelines Might Just Succeed Where the Failed UN Code of Conduct Could Not' (1993) 208 *World Consumer* 1-3. At the 19th Session of the CTC in April 1993, the 'Group of 77' Developing Countries produced an omnibus resolution which included support for the 'Guidelines' proposal: UN Doc E/C 10/1993/L.6. However, the United States, the United Kingdom, Germany, Denmark (on behalf of the EEC) and the ICC delegate strongly opposed such a proposal. The session concluded with an agreement for various organisations to make presentations to the Commission in the 1994 session.

³⁰ Hans Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises' in Horn, above n 4, 3, 8. The only code-type documents to take the more assertive form of 'Declarations' are those issued by the OECD and the ILO. The former are non-binding under the Convention of the OECD, art 5, and the latter have been described by the ILO itself as 'non-mandatory instrument[s]': ILO Governing Body, 205th Session, Doc GB 205/10/2 (1978) s 11; Doc GB 208/6/1 (1978) s 5.

³¹ For example, GA Res 38/36 A (1983) condemned the activities of all foreign economic interests operating in Namibia: V G Venturini, 'A Threat to Peace: Rio Tinto Zinc's Transnational Operation in the Market of Uranium and Synproducts', Conference on Conflict Resolution and Peace Studies, 30 December 1985, University of the South Pacific, Suva, Fiji Islands. GA Res 3514 (XXX) (1975) condemned corrupt practices, including bribery, by transnational corporations and requested ECOSOC to direct the CTC to make recommendations for their prevention. This followed United States Senate Hearings in 1974 and 1975 concerning allegations of massive interference in the domestic political processes of Chile by ITT, interference that helped to bring down the Allende Government: ECOSOC, Official Records, 53rd Session, 5 July 1972, 20, 22. See also below n 70.

Nations Charter. These provisions specify that the General Assembly can only 'make recommendations' to Member States of the United Nations and/or to the United Nations Security Council.

Thus, the effect of these international regulatory efforts is to affirm rather than challenge the assumption that it is a state's prerogative to deal with TNCs through its national legal systems. The only basis upon which such authority might conceivably be founded would be a developing customary law norm recognising the TNC as a legal subject — which assertion remains problematic, as will emerge from the ensuing discussion.

C *Customary Law Recognising the Transnational Corporation as a Potential Subject of International Law*

A number of scholars have canvassed the possibility of international organisations' Codes of Conduct (and equivalent documents) concerning TNCs evolving into customary international law.³² Though these codes are characterised as merely voluntary,³³ it has been suggested that states' ardent encouragement of TNCs' compliance may constitute either state practice or provide evidence of *opinio juris* in support of TNCs' international legal subjecthood.³⁴

The vast majority of provisions in the OECD Guidelines and the United Nations Draft Codes of Conduct address TNCs directly (in tone, albeit not in substance) rather than through the intermediary of a state.³⁵ Notably, the CTC has stated that non-binding Codes of Conduct may become

a source of law for national authorities *as well as for transnational corporations themselves*, since both can rely upon and utilise the Code to fill the gaps in the relevant laws and practices ... [and transnational corporations] *may help to shape pertinent legal principles* through their continuous practice.³⁶

Similarly, the General Assembly Resolutions mentioned above seem, at least at face value, to acknowledge TNCs' pivotal role in the realisation of the Resolutions' purpose.³⁷ Instances of states willingly granting TNCs an independent role in international legal affairs can also be cited.³⁸ On this basis, it might be argued

³² Karen Del Ponte, 'Formulating Customary International Law: An Examination of the WHO International Code of Marketing of Breastmilk Substitutes' (1982) 5 *Boston College International and Comparative Law Review* 377; Baade, above n 30, 11-3. For an account of the potentially rapid process of ossification into international custom, see Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian Journal of International Law* 23.

³³ Baade, above n 30, 8.

³⁴ The necessary elements of international custom, according to the Statute of the International Court of Justice (1945) art 38 (1) (b).

³⁵ Baade, above n 30, 8.

³⁶ CTC, Certain Modalities for Implementation of a Code of Conduct in Relation to Its Possible Legal Nature, UN Doc E/C 10/AC 2/9, 22 (1978) 8 (emphasis added).

³⁷ See above n 31.

³⁸ United States-based TNCs played a dominant and largely independent role in negotiations with Third World nations during the debt crisis of the 1980s. The United States Government made it clear that it regarded itself as uninvolved, notwithstanding the fact that the US Government's lax policy and legislative approach was identified as having contributed to Transnational

that Draft Codes of Conduct evidence emerging customary law conferring upon TNCs the status of subject at international law.

One weakness in this hypothesis, however, is the incapacity of international organisations to legally recognise other entities as subjects of international law. The power of recognition is one of the prerogatives of states.³⁹ International organisations may nevertheless play a role in the process of recognition by providing fora in which states can be seen to be supporting the characterisation of a particular entity or entities as legal subjects.⁴⁰ Arguably, this type of support is discernible in states' acceptance of the principles formulated by the various bodies referred to above.

A second and perhaps greater obstacle in the path of customary law's development in this area is states' general reluctance either to relinquish their traditionally dominant position in international law, or to acknowledge the effectiveness of law in the absence of a sovereign. As highlighted above, regulatory efforts to contain TNCs constantly refer back to the state as the locus of power and authority over TNCs. It is manifest that international law, particularly in the form of custom, is rooted in the traditional positivist notion that law is embodied in the will and command of a sovereign power.⁴¹ Furthermore, it would appear from the *ad hoc* and erratic way in which the TNC has been characterised at international law that 'the present legal framework has no comfortable, tidy receptacle' for an institution as dynamic, complex and expansive as the TNC.⁴² In this context, it seems difficult to attribute to states a will to elevate the TNC to the status of subject.⁴³

Banks' adoption of imprudent lending practices: CTC, *Transnational Banks and the International Debt Crisis* (1991) 71.

³⁹ Henry Schermers, 'The International Organisations' in Bedjaoui, above n 18, 67, 75. It is arguable that the ICJ 'recognised' the UN as a subject of international law in the *Reparations* case [1949] ICJ 174. However, the judgment of the Court relied upon the perceived intention of member states of the UN, as expressed in the UN Charter. The ICJ thus apparently regarded itself as merely confirming the international legal status already conferred upon the UN by states themselves.

⁴⁰ Cf the impact that admission to UN bodies has upon the formal coming into being and recognition of new states.

⁴¹ John Austin, *The Province of Jurisprudence Determined* (1954) 133-4. Austin regarded international law as no more than 'positive morality', yet the influence of his view of municipal law is discernible in the emphasis placed upon the 'will' of states — evidenced by state practice and *opinio juris* — in the formation of customary law.

⁴² Vagts, above n 1, 740.

⁴³ The TNC might alternatively be regarded as an independent actor by invocation of the municipal law 'state-action doctrine'. This doctrine renders private entities accountable for the infringement of constitutional or public rights where they are performing an equivalent role to that of a state entity. The doctrine is well-entrenched in both United States and Indian domestic law. On United States law, see, eg, *Marsh v Alabama* (1946) 326 US 501. In this case, the defendant company was prohibited under the 1st Amendment of the US Constitution from preventing Jehovah's Witnesses from speaking in the company-administered town or housing estate. On Indian law, see, eg, *Sukhdev Singh v Bhagatram* (1975) AIR (SR) 1331; *Ramana D Shetty v International Airport Authority* (1979) AIR (SC) 1628, 1640, where the rationale for invocation of the doctrine was described as follows: 'Activities which are too fundamental to the society are by definition too important not to be [treated in a manner equivalent to] government functions'. Art 38(1)(c) of the Statute of the International Court of Justice names 'general principles of law recognized by civilized nations' as a valid source of international law and the ICJ has elsewhere been willing to 'take cognizance' of municipal law in the corporate

D *The Transnational Corporation as a Contracting Party in Transactions Governed by International Law*

Notwithstanding the secondary status of TNCs under traditional international law, the Arbitrator in *Texaco Overseas Petroleum Co and California Asiatic Oil Co v The Government of the Libyan Arab Republic* described a number of instances in which a TNC is recognised as having 'specific international capacities'.⁴⁴ Specifically, the Arbitrator referred to the 'internationalization' of a contract between a TNC and a state, bringing the contracting parties within the purview of international law for the purposes of interpretation and performance of the agreement.

Such 'internationalization' is said to take place if the contract expressly refers to general principles of international law in its 'proper law clause', if it contains a clause referring the resolution of disputes to arbitration; or if the agreement falls within a 'new category' of 'economic development agreements'.⁴⁵

The doctrinal status of such TNC-state contracts is not absolutely resolved. Some jurists contend that an internationalised contract effectively enjoys the status of an international agreement and is subject to the international legal principles applicable to treaties, including the principle *pacta sunt servanda*.⁴⁶ Others contend that the contract operates in a distinct, self-contained legal environment, the principles of which are neither strictly international nor municipal.⁴⁷ These arguments have, in turn, been countered by the suggestion that agreements between TNCs and States ought to be governed solely by the law of the host state (that is, the state in which the TNC is operating), so that international law is only applicable to the extent that it has been incorporated into the domestic law of that state.⁴⁸ The latter proposition does seem inconsistent, however, with what was said in the *Texaco* case.

Irrespective of the doctrinal classification of the law governing internationalised TNC-state contracts, it does seem relatively settled that breach of such a contract may constitute a violation of international law and that the contract might otherwise be affected by the application of international legal principles. Indeed, a significant proportion of the jurisprudence of the Iran-US Claims Tribunal is premised on these assumptions.⁴⁹ Thus, the TNC might be regarded as an 'honorary' subject of international law for these limited purposes.

realm for the sake of consistency: *Barcelona Traction* [1970] ICJ 3. The possibility of this doctrine being incorporated into international law has not, however, been mooted yet in international jurisprudence: see generally Kapur, below n 63.

⁴⁴ (1977) 53 ILR 389, para 47.

⁴⁵ *Ibid* paras 42-5.

⁴⁶ *Topoco Arbitration* (1978) 17 ILM 629 (R Dupuy).

⁴⁷ R Jennings, 'State Contracts in International Law' (1961) 37 *British Yearbook of International Law* 156.

⁴⁸ F Mann, 'State Contracts and State Responsibility' (1960) 54 *American Journal of International Law* 572, 581.

⁴⁹ See, eg, *Questech Inc v Ministry of National Defence of Iran* (1985) AWD 191-59-1, in which the international treaty law doctrine of 'change of circumstance' was invoked to permit the post-revolutionary Iranian Government terminating a contract entered into with a US-based

E *The Transnational Corporation as a Consultant Participant in International Law-Making*

Beyond the context of ‘internationalised contracts’, the TNC has been notably absent from the majority of international fora in which principles potentially affecting their conduct have been formulated. Like a school child sitting outside a teacher’s office, the TNC has been told to wait quietly until the states’ work of international law is done. Exceptions to this general rule of exclusion do, however, exist.

Though reluctant to accord TNCs routine involvement in international legal discourse, states have deferred to the fact of TNCs involvement in world affairs in certain instances — absolving themselves of responsibility in negotiations surrounding international debt crises, for example.⁵⁰ Clearly, the ‘internationalization’ of contracts, already discussed, has resulted in TNCs becoming active as independent litigants in proceedings involving international law.⁵¹ Furthermore, the ILO has long required the participation of representatives of industry and labour organisations in all its activities. These representatives have a right to speak and vote independently of national government delegates.⁵² Similarly, executives of TNCs have served on advisory committees created to guide, inform and facilitate international legal negotiation in areas such as the Law of the Sea, the development of a United Nations Code of Conduct for Transnational Corporations and the General Agreement on Tariffs and Trade (‘GATT’).⁵³ Corporations established by groups of states, such as Eurofima, Eurochemic, the Mont Blanc Tunnel Co and the Mozelle Canal Co have also engaged in international legal dialogue.⁵⁴ Otherwise, direct TNC involvement in general international legal affairs has generally been restricted to the lobbying of governments.⁵⁵

A new model of TNC participation may, however, be emerging. The consultative process that led to the signing of the Chemical Weapons Convention in

TNC prior to the Revolution: Monroe Leigh, ‘*Questech Inc v Ministry of National Defence of Iran*’ (1986) *American Journal of International Law* 362.

⁵⁰ See above n 38.

⁵¹ Some of the many examples of such involvement are: *Amoco International Finance Corporation v Iran* (1987) 15 Iran-US CTR 189; *Mobil Oil Iran Inc v Iran* (1987) 16 Iran-US CTR 3; *Libyan American Oil Co (Liamco) v Government of the Libyan Arab Republic* (1981) 20 ILM 1; *BP Exploration Company (Libya) Ltd v Government of the Libyan Arab Republic* (1974) 53 ILR 297; *American International Group Inc v Iran* (1983) 4 Iran-US CTR 96; *Sola Tiles Case* (1987) 14 Iran-US CTR 223; *INA Case* (1985) 8 Iran-US CTR 373; *Lena Goldfields Arbitration* (1929-30) 1 Annual Digest of Public International Law Cases 258. See above nn 44, 49.

⁵² Constitution of the ILO, 15 UNTS 35, art 3(3). For a history of this unique system of representation, see Beguin, ‘ILO and the Tripartite System’ (1959) 523 *International Conciliation* 405.

⁵³ Jonathan Charney, ‘Transnational Corporations and Developing Public International Law’ [1983] *Duke Law Journal* 748, 751 n 4, 763 n 35.

⁵⁴ *Ibid* 762 n 31.

⁵⁵ *Ibid* 751.

January 1993 may represent a model for TNCs' direct engagement in the development and implementation of legally binding international principles.⁵⁶

Following the embarrassment suffered by the German Government upon revelation of the involvement of German-based chemical firms in the manufacture and export of base chemicals used in the Libyan Chemical Weapons Program at the Rabta facility, states' attention was drawn to the vital contribution TNCs of the chemical industry could make to ongoing negotiations for the conclusion of a chemical weapons ban.⁵⁷ This realisation led Australia to offer to host a government-industry conference to 'seek unqualified cooperation and support from the industry for the implementation of the Convention when it enters into force'.⁵⁸

Though the Convention itself is still formally addressed to states, requiring them to implement national measures in order to legally bind TNCs,⁵⁹ the attention given to TNCs' concerns in the formulation of verification and confidentiality procedures acknowledges the direct impact which TNCs have on international law and implies some reciprocal impact of international law upon TNCs.⁶⁰ It may be argued that states' acknowledgment of the *power* of TNCs in this instance does not indicate any *legal* capacity on their part. This series of events does, however, seem to point to a likelihood that TNCs may play a greater and more direct role in international legal affairs in the future.

III THE CAPACITY OF THE TRANSNATIONAL CORPORATION TO BREACH FUNDAMENTAL NORMS OF INTERNATIONAL LAW

In contrast to the dearth of international legal authority dealing with TNCs,⁶¹ there is an abundance of general literature describing the power that TNCs possess on the international plane. Indeed, analysis and criticism of the powerful position occupied by TNCs has been described as a 'growth industry' in itself.⁶² The undeniable conclusion reached by this 'industry' is that '[m]any multina-

⁵⁶ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons, opened for signature 11 January 1993, UN Doc CD1170 (1992) (not yet entered into force).

⁵⁷ 'Merchants of Death', *Time Magazine*, 10 September 1990, 42; Timothy McCormack, 'Some Australian Efforts to Promote Chemical Weapons Non-Proliferation and Disarmament' (1993) 14 *Australian Yearbook of International Law* 157, 165-6.

⁵⁸ McCormack, above n 57, 166; Gareth Evans, 'Summary Statement Issued After the Government-Industry Conference Against Chemical Weapons by the Conference Chairman' (September 1989) *Australian Foreign Affairs & Trade: The Monthly Record* 491-5.

⁵⁹ See above n 56, art VII.

⁶⁰ Australian Department of Foreign Affairs and Trade, (June 1991) *Peace and Disarmament News* 9-11.

⁶¹ *Barcelona Traction* [1970] ICJ 3, paras 46-7:

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, which are often multinational ... it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.

⁶² Stephen Kobrin, 'Multinational Corporations, Socio-Cultural Dependence and Industrialization: Need Satisfaction or Want Creation?' (1979) 13 *Journal of Developing Areas* 109.

tional corporations have become as least as powerful as some of the states in which they function',⁶³ a fact supported by statistical analyses: in 1989, the combined profits of the 17 largest TNCs exceeded the combined Gross National Product of the world's 41 poorest nations.⁶⁴ In 1993, TNCs allegedly controlled 70% of world trade.⁶⁵

Opposing characterisations of the TNC and the way in which it uses its evident power abound.⁶⁶ It is, however, beyond the scope of this article to attempt a comprehensive empirical assessment of the contributions made or harm created by TNCs worldwide. The following discussion will merely focus upon the *capacity* which at least some TNCs do have to violate fundamental norms of international law without incurring legal liability.

A *The Norm of Non-Intervention*

In the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, the ICJ observed that:

the principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference ... it is part and parcel of customary international law.⁶⁷

The Court stated that this norm embodied a prohibition against any intervention bearing on matters upon which a state is permitted, by virtue of its sovereignty, to decide freely. Such matters included 'the choice of a political, economic, social and cultural system, and the formulation of foreign policy'. The

⁶³ Ratna Kapur, 'From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations' (1990) 10 *Boston College Third World Law Journal* 1, 2. The modern role of the TNC as an independent power can be distinguished from that of the 18th and 19th century trading enterprise. The latter were 'specially chartered creations of the state' exercising 'quasi-governmental powers': Vagts, above n 1, 746 n 28. The power of the modern TNC can be regarded as 'quasi-governmental' in a different sense; ie, TNCs have frequently extricated themselves from states' webs of control and are wielding power and influence on a scale equivalent to or greater than that wielded by states themselves.

⁶⁴ Instituto del Tercer Mundo, *Third World Guide 1993/94* (1994) 75.

⁶⁵ 'Multinationals — The Facts' (1993) 246 *New Internationalist* 18.

⁶⁶ Madsen concludes that

[w]hat is right about the global enterprise is that it works ... the multinationals' principal contribution is unquestionably commercial, but they are also a growing counterforce to the extremes of nationalism ... they take on local nationals as leaders, work well with a stupefying variety of governments.

Axel Madsen, *Private Power* (1980) 242. An Annual Report of Matsushita Electrical Industrial Company echoes this view, stating that the corporation's objective is 'to strive to promote social welfare and enhance the overall quality of life.' Yet, as Lowe points out, Matsushita has been accused of dumping personal computers in US markets below cost to the detriment of local manufacturers' businesses and has been criticised for adhering to the Arab boycott against Israel: Janet Lowe, *The Secret Empire: How 25 Multinationals Rule the World* (1992) 202. In contrast to Madsen's assessment, numerous researchers have concluded that the sum total of TNCs' effect upon nations and their peoples — developing nations in particular — is a negative one: see the works cited by Kwamena Acquah, *International Regulation of Transnational Corporations: The New Reality* (1986) 61 nn 110-3.

⁶⁷ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (US v Nicaragua) (Merits)* [1986] ICJ 14, para 202 (*Nicaragua*). Rawls identifies non-intervention as a principle of justice amongst nations: John Rawls, *Theory of Justice* (1971) 378-9.

use of direct or indirect 'methods of coercion' to affect the free exercise of any of these choices constituted wrongful intervention in the Court's view.⁶⁸ The General Assembly's Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty also evidences the potential breadth of this prohibition and its proscription of at least some forms of non-forcible intervention.⁶⁹

In circumstances where overt governmental control or covert governmental influence over the practice and policy of particular TNCs is alleged, it may be possible to invoke the principle in its existing form (that is, only extended to states) to prohibit forcible or non-forcible intervention by the controlling state in the affairs of another state through the medium of a TNC.⁷⁰

However, TNCs may still impact adversely upon states' sovereign 'freedom of choice' acting independently of such control. The United States' Bureau of International Commerce has admitted that TNCs 'often know more about a country's inner struggles and politics sooner than [the government does] ... They often prefer to deal on their own and don't go to American embassies for help.'⁷¹

'Dealing on their own' has in the past included intervening in or subverting the political processes of host states by contributing directly to political cam-

⁶⁸ *Nicaragua* [1986] ICJ 14, para 205.

⁶⁹ GA Res 2131 (XX), 21 December 1965, GAOR 20th Sess Supp 14, 11 in (1966) 60 *American Journal of International Law* 662. Whilst recognising that this norm apparently applies to non-forcible as well as forcible intervention, Damrosch cautions that state practice is not consistent with a prohibition as broad as it is commonly assumed to be. States have tolerated and even encouraged transboundary political activity such as the exertion of economic leverage for political purposes and the funding of political campaigns in other states. Damrosch suggests that the drawing of a dividing line between legal and illegal non-forcible intervention depends upon the ability of people of the 'target' state to exercise free political choice — when intervention is such as to impede such choice, it is unlawful: Lori Damrosch, 'Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs' (1989) 83 *American Journal of International Law* 1. In contrast, Bowett focuses upon the intentions of the state engaging in non-forcible intervention as determinative of legality. Non-forcible intervention will be illegal, he concludes, whenever it is driven by 'improper motive or purpose': Derek Bowett, 'Economic Coercion and Reprisals by States' (1972) 13 *Virginia Journal of International Law* 1. Presumably, a purpose is 'improper' if it is inconsistent with the objects and purposes of the UN. In many instances, it is submitted, TNCs engage in non-forcible intervention for 'improper' purposes. In such cases, their conduct might in theory be characterised as contrary to international law: see below n 81 and accompanying text.

⁷⁰ This might apply either where a state encouraged a TNC or TNCs to intervene on its behalf in the affairs of another state, or where a state circumscribed the activities of TNCs so as to place economic and political pressure on another state. Examples of the former include: the CIA's offer to the Director of ITT of \$1 million to implement an 18-point programme of 'economic chaos' in Chile in order to stimulate a *coup d'état* against the Allende Government (see above nn 23, 31; Barnet and Muller, above n 2, 81-4) and clandestine governmental assistance given to transnationals such as Rio Tinto Zinc, Gulf Oil Corporation's subsidiary — Gulf Minerals of Canada and Anglo-American of South Africa to develop South African Nuclear technology in Namibia (see Venturini, above n 31, 31). Examples of the latter include the US Export Control Act (1964) and Trading With The Enemy Act (1964) preventing US-based TNCs from trading with communist nations during the Cold War and the Cuban Democracy Act (1992) prohibiting US-based TNCs and their foreign subsidiaries from trading with Cuba.

⁷¹ Madsen, above n 66, 31-2. According to the US Department of Labor, the US Government does not attempt to influence directly the social policies of US-based multinational enterprise subsidiaries abroad: UN International Labour Office, *Social and Labour Practices of Some US-Based Multinationals in the Metal Trades* (1977) 25. See also above n 15 and accompanying text.

paigns;⁷² bribing local government officials⁷³ or co-opting local elites.⁷⁴ Intervention has also taken the more indirect form of constructing financial networks to impede host governments' capacity to expropriate or nationalise corporate assets.⁷⁵ Intervention by TNCs has even involved an inversion of the traditional model of states intervening through non-state 'puppets'. Home states' agents (that is, the state of which the TNC is regarded as a national) have on occasions been prompted to intervene in other states' affairs at the behest of a TNC.⁷⁶

Transnational corporate activities may also significantly limit states' rights to determine their own socio-cultural fates. One manifestation of this is the effect which TNCs' operations have on consumption patterns and thus on private and public expenditure.⁷⁷ The UNCTNC has noted the profound and largely unchecked influence which TNCs have had on consumption patterns, employment practices and public attitudes through the production and marketing of their products worldwide.⁷⁸ Through their domination of the world's media, TNCs' strength in this regard is assured: up to 84% of radio advertising, 77% of television advertising and 60% of magazine advertising worldwide has been attributed to TNCs.⁷⁹

⁷² Japanese-based corporations, eg, contribute around US\$100 million each year to political lobbying in Washington DC: Pat Choate, *Agents of Influence* (1990). The success or failure of political campaigns is also, to a large extent, determined by the TNCs in control of the media: see below n 81 and accompanying text.

⁷³ In 1974, United Brands is reported to have offered the Honduran Minister of Economy and Commerce US\$1.25 million in return for a reduction in the Honduran export tax on bananas: Paul Harrison, *Inside the Third World: The Anatomy of Poverty* (1979) 349. See generally N Jacoby, P Nehemkis and R Eels, *Bribery and Extortion in World Business: A Study of Corporate Political Payments Abroad* (1977).

⁷⁴ In Venezuela, foreign oil companies are said to have 'done their utmost to identify their own interests with those of domestic interest groups and to foster conflicts between the government and the private sector by which their interests will benefit': Jeffrey Leonard, 'Multinational Corporations and Politics in Developing Countries' (1980) 32 *World Politics* 454, 466.

⁷⁵ The Volta River Dam Project in Ghana is one example of such a strategy of government-paralysis. According to an agreement reached with Kaiser Corporation and Reynolds Metals in the 1960s, the Government of Ghana was to meet half the cost of the dam and power station while the remainder would be financed by the World Bank, the US Agency for International Development and the US Export-Import Bank. Nationalisation of the project would therefore have set the Government of Ghana against a number of bodies whose assistance was considered vital to Ghana's economy: see Acquaah, above n 66, 69-70.

⁷⁶ In 1953, eg, the CIA orchestrated a *coup d'état* to overthrow Premier Mossadegh's Government in Iran which, in 1951, had nationalised foreign oil interests in Iran. The US objective is alleged to have been to allow US-based corporations re-entry into Iran. The CIA agent who directed the *coup* later became Vice-President of the Gulf Oil Corporation: Leroy Bennett, *International Organisations: Principles and Issues* (2nd ed, 1980) 365. See also below nn 86-7 and accompanying text for examples of states' support of intervention by TNCs.

⁷⁷ In 1990, eg, in response to protests by Soviet citizens angry at the shortage of cigarettes, the Mayor of Moscow explained the quandary in which he was caught: 'Now we have to take money from [public funds allocated to] medicine and buy cigarettes. Tomorrow invalids will appear on the streets because they will not be able to buy the important medicines they need'. Philip Morris and R J R Nabisco responded by agreeing to supply 34 billion cigarettes to the Soviet Union before the end of 1991, bolstering demand and entrenching their influence: "'Smokers' Revolt Succeeds in Moscow', *New York Times* (New York), 23 August 1990.

⁷⁸ CTC, *Transnational Corporations in World Development: Trends and Prospects* (1988) ch XIV, 'Socio-Cultural Impact', 219-26.

⁷⁹ Ibid 224; N Janus, 'Advertising and the Mass Media: Transnational Link Between Production and Consumption' [1981] *Media Culture and Society* 3; R Roncagliolo, *Publicidad: La Otra Cultura* (1987).

Admittedly, such forms of political, economic and cultural influence do not necessarily violate the international legal norm of non-intervention, even if exerted by a subject of international law. To insist that 'essentially artificial state boundaries be impervious to non-forcible political [economic or cultural] influence' may be unrealistic, even counterproductive, in today's world.⁸⁰ Nevertheless, non-forcible intervention that severely impedes the capacity of the people of the 'target' state to exercise their right of free choice or manifests utter disregard for the principles and purposes of the international legal order would seem to fall within the ICJ's conception of unlawful intervention.⁸¹ TNCs clearly have the capacity to intervene to this extent of their own accord, yet international law currently affords no means by which to restrain such infringement.

B *Peoples' Right of Self-Determination*

The right of 'peoples' to self-determination is enshrined in the United Nations Charter⁸² and has been repeatedly affirmed in the United Nations General Assembly⁸³ and in ICJ jurisprudence.⁸⁴

The propensity for TNCs to intervene in states' political, economic and cultural affairs, discussed above, reflects clear infringement of the right of self-

⁸⁰ Damrosch, above n 69, 48.

⁸¹ See above nn 67, 69. In some instances, TNCs' activities might also amount to forcible intervention, potentially at odds with the 'fundamental or cardinal' principle of non-use of force: *Nicaragua* [1986] ICJ 14, paras 188-90. 152 of the 500 leading US-based TNCs and 25 of the leading Japan-based TNCs are directly involved in the arms business: A Buzuev, *Transnational Corporations and Militarism* (1985) 29. This involvement might conceivably be in the nature of conduct identified by the ICJ in the *Nicaragua* case as contrary to the norms of non-intervention and non-use of force, namely, 'arming, equipping ... and supplying the Contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua': *Nicaragua* [1986] ICJ 14, para 292(3), (4). Moreover, TNCs' can be said to have a 'vested interest in growing militarism': Buzuev, above n 81, 27. This interest seems distinctly at odds with the peaceful purposes of the UN and with international law. Chomsky has suggested that 'business has always been troubled by ... the "unsettling specter of peace"', and it grasps at the hope that a capital-intensive and high-tech military will still provide, as General Edward Meyer assured, "a big business out there for industry": 'Radicalism in Ember', *The Economist* (London), 14 March 1988. *Contra* Eldridge Haynes, former Chief Executive Officer of Business International Corporation ('BINCO'), quoted in Alex Rubner, *The Might of the Multinationals: The Rise and Fall of the Corporate Legend* (1990) 88 (arguing that pacifism is in the corporate interest).

⁸² Arts 1(2), 55 and 56.

⁸³ Declaration on the Granting of Independence to Colonial Territories and Peoples, GA Res 1514 (XV) (1960); Principles Which Should Guide Members in Determining Whether an Obligation Exists To Transmit Information Called for Under Art 73(e), GA Res 1541 (XV) (1960); Programme of Action for the Full Implementation of GA Res 1514, GA Res 2621 (XXV) (1970); General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV) (1970). The right of self-determination was affirmed with respect to the Western Saharans in GA Res 40/50 (1985) (see below n 84) and was affirmed outside the colonial context with respect to Palestinians and South Africans in GA Res ES-7/2 (1980) and GA Res 33/24 (1978).

⁸⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ 16 (Advisory Opinion); *Western Sahara Case (Advisory Opinion)* [1975] ICJ 12. In the latter case Dillard J referred in a separate judgement (agreeing with the Court's conclusion) to 'the cardinal restraint which the legal right of self-determination imposes'.

determination as well as potentially violating of the norm of non-intervention. The conduct of TNCs frequently impacts directly upon particular peoples' capacity to exercise their right of self-determination within states. This impact has been especially detrimental to indigenous peoples' rights.⁸⁵

Reports of TNCs impinging upon indigenous peoples' right of self-determination are too numerous to catalogue here. However, the operations of Benquet Consolidated Mining Corporation in the Philippines and of Edward Callan Interests and Halliburton Geophysical Services in Peru serve as two paradigmatic examples. In the former case, the gold-mining operations of Benquet have devastated the livelihoods of thousands of Bontoc and Comote families, traditionally reliant upon small-scale gold-panning. With the aid of the Marcos Government in 1974 and 1975 and the Aquino Government in 1986, Benquet used armed guards to drive indigenous gold-panners away from the goldfields.⁸⁶ Similarly, Edward Callan and Halliburton — two Texas-based transnational oil companies — have invaded the lands of the Aguaruna and Huambisa peoples in the Upper Marañon River Basin in Peru, soliciting the assistance and protection of Peruvian troops in order to do so.⁸⁷

Even where armed force is not used and governments are not complicit, TNCs commonly gain leverage against indigenous peoples by disturbing traditional subsistence economies — rendering them economically dependent upon corporate offerings and thus pliable to the corporate will. In the North West Territories of Canada, for example, a 50% unemployment rate amongst the local indigenous population helped a German-based TNC to gain the consent of people of the nearby Inuit, Chipewyan, Metis and Anishable settlements to the establishment of the Baker Lake Mine. Ultimately the project will result in tailings being distributed over a 20 square mile area — threatening the destruction of those very settlements.⁸⁸

To paraphrase Judge Dillard in the *Western Sahara Case*, it is frequently the TNC which is determining the destiny of the people and their territory and not the people the destiny of the territory.⁸⁹

C *International Human Rights Law*

The Universal Declaration of Human Rights sets out a catalogue of civil, political, economic, social and cultural rights for which respect is to be promoted

⁸⁵ The status of indigenous peoples' rights of self-determination — always vulnerable to abuse — has been elevated by a number of recent initiatives: see, eg, the 1992 UN Conference on Environment and Development, Agenda 21, ch 26 (recognising 'The Role of Indigenous People and their Communities'); and the 1993 UN Draft Declaration on the Rights of Indigenous Peoples (see Marc Miller, *State of the People: A Global Human Rights Report on Societies in Danger* (1993) 83-8, 91-3). See also the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the General Conference of the ILO, 27 June 1989.

⁸⁶ Miller, above n 85, 78.

⁸⁷ Ibid.

⁸⁸ Ibid 75. See also Julian Burger, *Report from the Frontier: The State of the World's Indigenous People* (1987).

⁸⁹ See above n 84.

by 'every individual and every organ of society'.⁹⁰ This broad statement is, however, qualified by reference to the International Covenant on Civil and Political Rights ('ICCPR'),⁹¹ the Optional Protocols to that Covenant⁹² and the International Covenant on Economic, Social and Cultural Rights ('ICESCR').⁹³ These documents attribute sole responsibility for realising individuals' human rights to States Parties. By implication, these documents also assume the state to be the primary violator of human rights — a manifestation of liberalism's preoccupation with the minimal state.⁹⁴

Evidence suggests, however, that the safeguarding of individuals exclusively from and through the state does not accord with the reality of individuals' vulnerability to non-state actors, particularly transnational corporations.⁹⁵ As Janet Lowe observes, 'the changing structure of business is being felt most keenly at the personal level.'⁹⁶

In addition to the human right of self-determination, discussed above, TNCs have shown themselves to be able and willing to violate individuals' other rights including the right to work (and to do so in just and favourable conditions);⁹⁷ to form and join trade unions;⁹⁸ to life⁹⁹ and to enjoy the highest attainable standard of physical and mental health.¹⁰⁰

⁹⁰ Universal Declaration of Human Rights, GA Res 217A (1948) Preamble.

⁹¹ ICCPR, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 1976).

⁹² Optional Protocol to the ICCPR, adopted by GA Res 2200 A (XXI) (1966) (entered into force 23 March 1976 in accordance with art 9); Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, adopted by GA Res 44/128 (1989) (not yet entered into force).

⁹³ ICESCR, 6 ILM 360; adopted by GA Res 2200A (XXI) (1966) (entered into force 1976).

⁹⁴ The 1990 Summit Meeting of the Heads of State or Government of States participating in the Conference on Security and Cooperation in Europe ('CSCE') adopted the Charter of Paris for a New Europe, proclaiming that '[r]espect for human rights is an essential safeguard against an over-mighty state': 45 UN GAOR Annex, 4-5, UN Doc A/45/859 (1990). Liberalism's focus upon limitation of the state, without regard for non-state actors' impact upon individuals' rights, actually reifies the existing state-oriented legal order and might thus be perceived as an attempt to augment state power. The theoretical inadequacies and inconsistencies of the liberal approach will be discussed further below.

⁹⁵ See above n 63 and accompanying text.

⁹⁶ See Lowe, above n 66, 141.

⁹⁷ Universal Declaration, art 23; ICCPR, art 7. One case in point is that described by Jair Antonio Meneguelli, President of a Brazilian Workers Union (*Sindicato dos Trabalhadores nas Industrias Metalurgicas, Mecanicas e de Materiel Eletrico de Sao Bernardo de Campo e Diadema*) in a letter to the European Transnationals Information Exchange ('TIE-Europe'). During 1981-1982, Volkswagen fired 15,363 workers from their plant in Sao Bernardo de Campo without paying them the compensation guaranteed by domestic labour legislation. After legal action was commenced, those workers involved in litigation were offered reinstatement on condition that they drop their law suits — effectively denying the remainder of retrenched workers any remedy for breach of their legal rights — a further denial of rights enshrined in the Universal Declaration and ICCPR: (1982) 12 *TIE-Europe Newsletter* 33. Another tragic example is the plight of Ovambo labourers in the Rossing Corporation's open-pit uranium mine in Namibia, who live in 'neo-colonial housing villages[...] ... work under an apartheid management system ... [and] are exposed to high levels of radiation from radon gases': Miller, above n 85, 77. See also below n 99 regarding substandard work conditions.

⁹⁸ Universal Declaration, art 23(4); ICESCR, art 8(1); ICCPR, art 22(1). In 1975, workers at Coca Cola's Guatemalan bottling plant were summarily dismissed because of their attempts to form and register a union for the plant. Only after a 5 year campaign of public pressure and consumer boycotts did the Coca Cola managers reach an agreement with the International Union of Food and Allied Workers' Associations: (1982) 117 *New Internationalist* 20. Employees of IBN have

Whether or not international legal systems are at all capable of restraining TNCs from committing such violations is arguable. The United Nations-appointed Group of Eminent Persons, considering the role of TNCs, concluded that the political power of states' governments to prevent violation of human rights remained paramount by virtue of their legitimacy and their powers of enforcement.¹⁰¹ Others argue that the TNC is 'accountable to no-one — a political power without responsibility, a state within and above the state.'¹⁰²

Yet even assuming the capacity and political impetus to do so, states frequently do not stop TNCs from infringing human rights. Aside from the fact of TNCs powers of influence over states (discussed above), certain mechanisms of restraint may simply not be viable for states — developing nations in particular. Lack of resources may undermine states' capacity to negotiate effectively with TNCs, to monitor and investigate their actions, or to provide support to countervailing forces. The imposition of regulatory measures such as joint ventures or licensing and management agreements may similarly be beyond the means of governments desperate to use foreign investment to fulfil their own national goals.¹⁰³ Moreover, states themselves may be engaged in repressive practices

not been so successful. Of the corporation's 400,000 employees in 120 countries, scarcely 2% are unionised: David Kusnet, 'Battling Big Blue', *Multinational Monitor*, March 1987, 16.

- ⁹⁹ Universal Declaration, art 3; ICCPR, art 6(1). WHO and UNICEF have estimated that 1.5 million infant deaths per year could be averted by proper breast-feeding, a practice discouraged by the marketing strategies of major TNCs who distribute free and low-cost infant formulae. Breaches by Nestle, Wyeth Pharmaceuticals Pty Ltd and Mead-Johnston/Bristol-Myers (US) of the WHO International Code on the Marketing of Breastmilk Substitutes (Doc WHA34 22 at 3, Annex (1981)) have been documented by community action groups in the Philippines, South East Asia and Pakistan: Baby Food Action Group, Community Aid Abroad, *Beating the Bottle* (1993). The maintenance of substandard health and safety conditions and the industrial accidents that inevitably result from this also represent infringements of the right to life. The escape of deadly gas from Union Carbide's pesticide plant in Bhopal, India, resulting in the death of over 2,000 people and injury of over 200,000 others in December 1984 is one highly publicised example. This incident prompted calls for the integration and development of international law to prevent such occurrences: Todd Howland, 'Can International Law Prevent Another Bhopal Tragedy?' (1987) 15 *Denver Journal of International Law and Policy* 301; Kapur, above n 63. See generally D Dembo, C Dias, A Kadwani and W Morehouse, *Nothing to Lose but Our Lives: Empowerment to Oppose Industrial Hazards in a Transnational World* (1988).
- ¹⁰⁰ Universal Declaration, art 25; ICESCR, art 12. Research by national laboratories in India showed that of all drugs marketed by TNCs in India between 1968 and 1979, 20% were substandard. Instances of TNCs 'dumping' unsafe, insufficiently tested, inadequately labelled or substandard pharmaceuticals in developing countries are well-documented. Use of the drug Dipyron, eg, may cause a potentially fatal blood disease, agranulocytosis. For this reason it has never been available in the United States and has been banned or withdrawn in Australia, Sweden and the United Kingdom. Nevertheless, it is (or has been) sold without prescription or warning in Brazil, Costa Rica, Kenya, Thailand and Columbia: CTC, *Transnational Corporations in the Pharmaceutical Industry of Developing Countries* (1984) 31, 33.
- ¹⁰¹ Report of the UN Group of Eminent Persons (appointed under ECOSOC Resolution 1721 (LIII) (1972)), *The Impact of Multinational Corporations on the Development Process and on International Relations* (1974) 14. Cf L Van Wachem (Chairman of Royal Dutch Shell) quoted in Lowe, above n 66, 117. Note that some writers would make states' international legitimacy conditional upon adherence to international human rights norms in the acquisition and exercise of domestic political power: see the discussion of 'new liberalism' below nn 109, 131-3 and accompanying text.
- ¹⁰² Venturini, above n 31, 58.
- ¹⁰³ The merits and demerits of various host-state strategies of containment are discussed by Vagts, above n 1, 756-8, 776-85.

violating human rights which are then perpetuated by the explicit or implicit collusion of TNCs.¹⁰⁴

It has been suggested that the emergence of transnational corporate power heralds a new era of community empowerment — that TNCs may actually represent a more effective mechanism than either national government or international law for giving effect to the individual rights of all people.¹⁰⁵ Yet evidence of such empowerment remains slight. Relationships between corporations and individuals, those of producer-consumer and employer-employee are characterised by their imbalance in favour of the former. Even as shareholders, individuals have a strictly limited capacity to influence TNCs' conduct and decisions.¹⁰⁶

Thus, human rights law does not currently provide individuals with winning 'trump cards' against corporate conglomerates.¹⁰⁷

IV INTERNATIONAL LEGAL DISCOURSE AND THE ANOMALY OF THE TRANSNATIONAL CORPORATION

A *The Role of the Transnational Corporation: Liberalism's Dilemma*

Professor Wolfgang Friedmann identifies traditional international law as 'a law of coexistence composed for the most part of rules of mutual abstention'.¹⁰⁸

This description is supported by Article 2 of the United Nations' Charter, in which the principle of states' 'sovereign equality' is affirmed. The central tenets of international law are, therefore, also the linchpins of the liberal doctrine of politics. International law of sovereign equality is 'a law of religious and ideological pluralism, moral scepticism, economic instrumentalism and legal objectivism.'¹⁰⁹

¹⁰⁴ Matthew Lipman, 'Transnational Corporations and Repressive Regimes: The Ethical Dilemma' [1985] *Columbia Western International Law Journal* 542.

¹⁰⁵ Craig Smith asserts that '[t]he federal government has forfeited its responsibility for many of the problems that face [states] today ... We are starting to witness the development of a consensus-based approach to problem solving through a coalition of civic, corporate and non-profit leaders': Jonathan Lloyd-Owens, 'Corporate Giving', *Intersect*, Autumn 1990.

¹⁰⁶ Vagts, above n 1, 753. For shareholder activism to become the norm, it would be necessary to 'create inexpensive, non-confrontational ways for that to happen' and for shareholders to have access to detailed information about the operations of the corporation, its subsidiaries and its sub-contractors: Sarah Teslik (Executive Director of the Council of Institutional Investors) in Judith Dobrzynski, 'If Stockholders Bang On Boardroom Doors, Open "Em"', *Business Week*, 3 December 1990.

¹⁰⁷ Ronald Dworkin, 'Part Three: Liberalism and Justice' in *A Matter of Principle* (1985) 198: [T]he liberal, drawn to the economic market and to political democracy for distinctly egalitarian reasons, finds that these institutions produce inegalitarian results unless he [or she] adds to his [or her] scheme different sorts of individual rights. These rights will function as trump cards held by individuals.

¹⁰⁸ Wolfgang Friedmann, *Revue Belge de Droit International* (1970-71) 6.

¹⁰⁹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) 130. It is, as John Stuart Mill demanded, directed towards 'the individuality of power and development' — the individuality in question being that of the state: John Stuart Mill, *On Liberty* (1859) 261, quoting Von Humboldt. Even those who propose a liberal theory of international law focusing upon the individual person continue to rely upon the apparatus of states to maintain respect for individual rights: Thomas Franck, 'The Emerging Right to Democratic

Central to liberal doctrine are two institutions identified as best able to articulate its concerns — the free economic market and the system of representative democracy.¹¹⁰ Both of these institutions require international law to abdicate responsibility for the TNC. The TNC is a creature of private law — ‘a typically democratic method of law-making ... characterised as the sphere of private autonomy’.¹¹¹ Non-regulation of the TNC might thus be regarded as an incident of belief in representative democracy.

Similarly, the free market requires that the economic pursuits of TNCs remain, as far as possible, unhindered by government or law, in order for the distribution of social resources to follow producer-consumer patterns of exchange. The TNC is thus a creation of free market ideology and its autonomy a manifestation of the democratic ideal.

Increasingly though, the TNC threatens to distort these very institutions. The disproportionate power of this particular juridical individual enables it to control both ends of the exchange paradigm — either directly, by transferring goods between different limbs of its corporate body, or indirectly, by wielding its considerable influence and economic clout. This disproportionate power may also enable the TNC to intervene, directly or indirectly, in the democratic process.¹¹²

Liberalism thus lies at either end of the ‘problem’ of unrestrained corporate power on the international plane. Liberal democratic philosophy and its faith in the state as the unit of political organisation best able to engender compromise between human beings’ liberty and their equality (that is, between individual freedom and the requirements of communal existence)¹¹³ is both the root of this problem and motive for its resolution. The primacy of state sovereignty requires that states are the only subjects of international law. Yet TNCs’ spreading power and the ever more intrusive activities of home-states seeking to regulate them are perceived as threats to state sovereignty.¹¹⁴ Liberalism is facing a monster of its own making.

Governance’ (1992) 86 *American Journal of International Law* 46; Fernando Tesón, ‘The Kantian Theory of International Law’ (1992) 92 *Columbia Law Review* 53. See below nn 131-3 and accompanying text for discussion of the shortcomings of this ‘new liberalism’.

¹¹⁰ Ronald Dworkin, ‘Liberalism’ in Stuart Hampshire (ed), *Public and Private Morality* (1978).

¹¹¹ Hans Kelsen, *The Pure Theory of Law* (1967) 282.

¹¹² See above nn 72-6 and accompanying text.

¹¹³ Duncan Kennedy, ‘The Structure of Blackstone’s Commentaries’ (1979) 28 *Buffalo Law Review* 204, 212. Liberals’ uncompromising faith in the capacity of the state to reconcile this ‘fundamental contradiction’ is exemplified by Thomas Franck’s assertion of a ‘right to democratic governance’ in emerging international customary law: see Franck, above n 109.

¹¹⁴ See above nn 63, 102 and accompanying text. Curiously, similar rhetoric surrounds the conduct of TNCs as attaches to the more controversial actions of the UN — in both contexts, the international is regarded as a threat to the national. Cf the United States’ concern that submission to ICJ jurisdiction following the *Nicaragua* case would undermine its sovereignty, with concern that the freedom granted TNCs after the Uruguay Round of GATT talks would lead to ‘further dislocation and loss of sovereignty’ for nations of the Developing World: Thomas Franck, *Judging the World Court* (1986) 55-71; Wayne Ellwood, ‘Multinationals and the Subversion of Sovereignty’ (1993) 246 *New Internationalist* 4, 7. In both instances the practical consequence of an external body’s intrusion upon states’ dominion for the people within those states seems to be a secondary consideration, if indeed it is considered at all. ‘Sovereignty’, in such discus-

As Noam Chomsky observes:

Liberal thought kind of broke on these rocks of rising corporate capitalism ... The same standard libertarian ideal that made you opposed to an absolutist state made you opposed to capitalism.¹¹⁵

However, the prospect of incorporating the TNC into the international legal order poses a number of difficulties for liberal theory. First, extending some international legal status to the TNC would appear to legitimise the power of *de facto* power. The rationale for permitting self-defence and collective action through the United Nations lies in a denial that *de facto* power converts into *de jure* authority. This denial is essential to maintaining law's appearance of neutrality and objectivity, which in turn is a source of its apparent authority.¹¹⁶

Secondly, recognition of the TNC as a state-like actor in international law would jeopardise either the liberal notion of individual liberty or of individual equality. If the TNC was acknowledged by international law as a composite entity capable of curtailing individuals' liberty then the system would effectively be sanctioning the exercise of a legal authority not conferred by political process. The choice of a consumer (to purchase the products of a particular TNC) would be equivalent to the choice of a voter, in that both would ultimately confer legal legitimacy upon a prescribed entity. Even though individuals may already, practically speaking, be under the 'rule' of corporate managers, legal recognition of this 'rule' would be inconsistent with the liberal belief that the processes of a democratically-elected government ought to be the only legitimate means of curtailing individual liberty.¹¹⁷ If, on the other hand, international law was to maintain the legal fiction of the TNC as individual, then the elevation of the TNC to the status of subject, or some other special status in international law, would defy the principle of formal equality fundamental to the classic liberal doctrine of law.

Thirdly, it would seem to be difficult, if not impossible, to engage the TNC in international legal discourse without undermining the traditional notion of law as a field distinct from the political or economic disciplines — a notion that is essential to the notion of government by law, not by men. Fitzmaurice contends that:

the value of the legal element depends upon it being free of other elements, or it ceases to be legal. This can only be achieved if politics and similar matters

sions, comes to represent an assurance of governmental power. Thus, attacks upon the TNC are not always congruent with genuine concern for the people whose interests the attackers purport to defend.

¹¹⁵ Noam Chomsky, quoted by Fred Gardner, 'Roamin Noam in Marin', *Anderson Valley Advertiser*, 20 March 1991.

¹¹⁶ Koskenniemi, above n 109, 445. See Roberto Unger, *The Critical Legal Studies Movement* (1986) 5-8, for an account of Critical Legal Scholars' critique of objectivism.

¹¹⁷ Jonathan Charney points out that such recognition would also strike at the positivist conviction that only nation states have the governmental structure necessary for the enforcement of legal norms: Charney, above n 53, 784.

are left to those whose primary function they are, and if the lawyer applies himself with single-minded devotion to his legal task.¹¹⁸

As Venturini states, 'multinational business is international politics'.¹¹⁹ Were TNCs to be incorporated into the international legal order, issues such as the definition and identification of the TNC would arise, threatening to lead international lawyers astray — out of the exclusive zone of law and into the wilds of politics and economics.¹²⁰ The very existence of such an exclusive zone and the related notion of government by law, not by people, would openly be called into question.¹²¹

Finally, entry of the TNC into the international legal order might upset the social contract theory of individuals voluntarily agreeing to belong to 'comfortable, safe and peaceable' communities in order to gain 'greater security against any that are not of it'.¹²² The entrance of too many non-state participants into the international legal system might, it is feared, result in a neo-medieval form of anarchy, such as that which plagued pre-Renaissance Europe.¹²³

The role of the TNC in international affairs, set against its minimal role in international law, thus highlights the incoherence and inconsistency that plagues traditional international legal doctrine. This doctrine cannot ensure that which it purports to defend (that is, individual persons' sovereignty or liberty) without detracting from its own guarantees (of individual corporations' sovereignty or liberty). The TNCs' situation also points to a dissonance between the two central principles upon which the liberal state is founded. Belief in the free market has permitted the growth of an entity capable of overshadowing the political power of the state. Representative democracy has, to a certain extent, been superseded by the sheer force of the market.

Moreover, the solution which the current system has proposed merely replicates these inconsistencies. The notion of 'Guidelines for Global Business' appeals to a common global understanding of 'good business' in order to counteract the negative effects of economic globalisation upon individual states' freedom. Yet, the very notion of developing overarching global principles has what might be perceived as negative, totalitarian implications. In order to avoid these, the Guidelines maintain a voluntary status, referring the matter back to the will of governments. Ironically, it was the fact that this will could not be exercised freely that prompted regulation in the first place. To invoke the descriptive terms of Walter Ullmann and Martti Koskenniemi, the international

¹¹⁸ Gerald Fitzmaurice, 'Transactions of the Grotius Society' in *The General Principles of International Law: Considered from the Standpoint of the Rule of Law* (1957) 92 II *Recueil des Cours de L'Academie de Droit International* 1, 149. Vagts suggests that insistence upon the separateness of economic and legal discourse, research and thinking has resulted in lawyers' 'unsophisticated and erroneous' understanding of the multinational enterprise: Vagts, above n 1, 744.

¹¹⁹ Venturini, above n 31, 2.

¹²⁰ Charney, above n 53, 779.

¹²¹ David Kairys, 'Law and Politics' (1984) 52 *George Washington Law Review* 243, 248-9.

¹²² John Locke, *Two Treatises of Government* (1st published 1690, 1924 ed) 164.

¹²³ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (1977) 254-5.

law surrounding TNCs is characterised by ‘descending’ and ‘ascending’ patterns of justification, mediating between contradictory objectives and concerns, and ultimately avoiding the very fact of TNCs’ transnational existence.¹²⁴

B *Some Responses to This Dilemma: Realism, Relativity and the Right to Democratic Governance*

Rather than striving to rationalise the marginal position of the TNC in international law by reference to the necessity of corporate individual freedom for proper operation of the market, realist scholars would maintain that, beyond certain limited circumstances, international law is simply irrelevant to TNCs’ activities.

Acheson, for example, would probably regard discussion of the TNC’s potential inclusion into the international legal order as a manifestation of international lawyers’ ‘arrogance’ and their desire to impose ‘the sovereign equality of shared subjectivities’ upon international affairs.¹²⁵ Realists would prefer, in lieu of such didacticism, an acceptance that states will determine how to deal with TNCs according to their own political designs and in service of their individual national interests. The relegation of transnational business outside the margins of international law may result in ‘fewer and less ambitious norms’ but these norms will be capable of implementation and will be efficacious when implemented.¹²⁶

In proposing that which purports to be a pragmatic approach, realists nonetheless fail to acknowledge the difficulties which states face in actually putting their political will into practice, when confronted by the omnipotence of TNCs. Even assuming that national interest is a worthwhile goal,¹²⁷ the single-minded pursuit of it is, as has been discussed above, frequently an impossibility.

Anthony Carty similarly rejects the notion of a comprehensive and unmitigated rule of law. Carty advocates a ‘relative’ role for international law, where its authority ‘rests upon the quality of its argument rather than upon a pseudo-objective professionalism’.¹²⁸ Carty suggests that by fulfilling such a relative role, international law might ‘offer guidance’ as to the nature of principles

¹²⁴ Walter Ullmann, *Law and Politics in the Middle Ages: An Introduction into [sic] the Sources of Medieval Political Ideas* (1975) 30-1; Koskenniemi, above n 109, 41.

¹²⁵ D Acheson, ‘The Arrogance of International Lawyers’ (1968) 2 *International Law* 591, 591-9 extracted in Burns Weston, Richard Falk and Anthony D’Amato, *International Law and World Order* (1980) 362.

¹²⁶ J Watson, ‘State Consent and the Sources of International Obligation’ (1992) 86 *American Society of International Law* 108.

¹²⁷ See Gerry Simpson, ‘False Harmonies and Tragic Ironies: Human Rights in the New World Order’ (September 1991) *International Legal Section Journal* 5, for a discussion of how little the pursuit of national interest contributes to the realisation and protection of human rights.

¹²⁸ Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986) 131. Carty’s theory seems to lie somewhere between the ‘unreflective pragmatism’ and the ‘conceptual pragmatism’ described by Nigel Purvis, ‘Critical Legal Studies in International Law’ (1991) 32 *Harvard International Law Journal* 81, 83-6. Carty draws heavily upon the insights of Critical Legal Studies. His notion of the ‘real’ is, therefore, markedly different from and expanded upon the reality assumed by Acheson or Watson: see above nn 125, 126.

enunciated by state *and non-state actors*.¹²⁹ Carty's thesis does not, however, make it clear how the TNC and other non-state actors are to be engaged in legal processes and how the behaviour of TNCs and/or statements by managerial representatives of TNCs might yield 'principles' to which international law could respond. Perhaps most importantly, Carty's theory does not investigate the processes by which such principles are enunciated and the way in which power can be reasserted and maintained through them.

Ultimately Carty does not 'question the assumptions of neutrality and universal applicability' which are implicit in traditional international legal discourse and which threaten to pervade Carty's expanded discourse.¹³⁰ Carty's refusal to tackle the issue of power and its unequal distribution through international legal discourse undermines the persuasive force of his 'alternative' view as a means of constraining or redirecting transnational entities.

New forms of liberalism recently proposed in international legal practice and theory ostensibly overcome the shortcomings of an exclusively 'statist' perspective and move towards substantive realisation of the twin aspirations of human rights and democratic governance.¹³¹ Knop regards this approach as a 'rhetorical scaffolding' around which it might be possible to construct additional requirements of non-discrimination and gender-consciousness in international law.¹³² I would argue, however, that scaffolding is all that 'new liberalism' can hope to provide. It renovates the façade of liberal doctrine without investigating the fault lines in its foundations. It demands that states raise the flags of 'democratic legitimacy' and human rights in order to participate in the international system, without considering what this process actually achieves for those who work in the flag factory. It provides no assurance of meaningful democratic participation for individuals nor of the defence of their rights against non-governmental, transnational entities capable of evading or influencing democratically 'legitimate' governments.¹³³

¹²⁹ Ibid.

¹³⁰ Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 644.

¹³¹ See Franck and Tesón, above n 109. See also the authorities cited by Knop, above n 6, 301 n 25.

¹³² Knop, above n 6, 302.

¹³³ It is submitted that the limitations of the 'new' liberal viewpoint are particularly evident in Tesón's response to the feminist critique: Fernando Tesón, 'Feminism and International Law: A Reply' (1993) 33 *Virginia Journal of International Law* 647. Tesón seems to read the feminist critique primarily as an allegation of gender conspiracy in international law, thus refusing to take account of the structural imbalances of power and generic processes of exclusion highlighted by feminism and the way in which these are entrenched and perpetuated by international law and law-making. Tesón states bluntly (665) that '[i]t cannot be seriously maintained that [international legal] norms operate overtly or covertly to the detriment of women'. From this standpoint, Tesón is clearly unwilling to scrutinise the reality of power distribution within and between 'democratically legitimate states'. In fact, he suggests that it would be 'counterproductive' to strive for 'perfect (or even near perfect)' regulation of powerful private entities that commit crimes or other injustices against individuals within states. The taking of 'reasonable' legislative steps is sufficient, regardless of how ineffectual these steps are to constrain or direct TNCs and other private actors (663-4). Tesón criticises feminist analysis as 'impoverished and simplistic' for its alleged reliance upon a 'pervasive, sinister, trans-generational, yet invisible cabal' (669-70). Yet the view of the world and its 'great pervasive

C *The Feminist Insight: The Public/Private Divide and the Place of Transnational Corporations*

One way of challenging the naturalness of TNCs position beyond international law's purview is to employ feminism's analytical model of the 'public' and 'private' spheres.¹³⁴ In seeking to fulfil its objective of highlighting and breaking down gender inequality,¹³⁵ feminism reveals that:

[t]he public realm of the workplace, the law, economics, politics and intellectual and cultural life, where power and authority are exercised, is regarded as the natural province of men; while the private world of the home ... is seen as the appropriate domain of women.¹³⁶

At international law, this distinction 'implies that the private world is uncontrolled [t]he myth that state power is not exercised in the "private" realm allocated to women masks its control [over women].'¹³⁷

With respect to the TNC, the normative implications of this dichotomy are twofold. At the national level, the 'natural' association of the 'rational' worlds of business, law and politics with the masculine gender means that men are accorded and continue to dominate the 'public' positions of power, both in the management of TNCs' various national branches and in the national regulatory institutions that purport to constrain those TNCs.¹³⁸ This gendered allocation of power disguises the fact that women make up a significant proportion of the cheap, accessible and relatively pliant labour forces upon which TNCs depend.¹³⁹

injustices' which Tesón presents appears similarly basic and one-dimensional. The 'only remedy' he states, 'is to get rid of tyrants and secure human rights' (651). This 'remedy' sounds somewhat more like the ending to a television sit-com than a solution to the world's problems.

¹³⁴ See generally Jean Bethke Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (1981); Eva Gamarnikow *et al* (eds), *The Public and the Private* (1983); Carol Pateman, 'Feminist Critiques of the Public/Private Distinction' in Stanley Benn and Gerald Gaus (eds), *Public and Private in Social Life* (1983) 281; Katherine O'Donovan, *Sexual Divisions in Law* (1985). Note, however, the criticisms that have been made of this dichotomous approach. See, eg, Joan Scott, 'Deconstructing Equality-Versus-Difference: Or, The Uses of Poststructuralist Theory for Feminism' (1988) 14 *Feminist Studies* 33. It is arguable that the definition of women's inequality in terms of subordination to men, rather than by reference to separate societal spheres, is an approach better able to 'detect, explain and alter women's oppression beyond a legalistic analysis, and ... [to generate] a creative vision of society': Christine Boyle *et al*, *A Feminist Review of Criminal Law* (1985). The public/private approach nevertheless provides a useful analytical framework for examining the way in which international law can operate to mask subordination.

¹³⁵ An approach openly conceded to be 'permanently partial': Sandra Harding, *The Science Question in Feminism* (1986) 194.

¹³⁶ Charlesworth, Chinkin and Wright, above n 130, 626.

¹³⁷ *Ibid* 627.

¹³⁸ For example, of the 25 'meganationals' which Lowe identifies as the world's most powerful corporations, all have male Chief Executive Officers: Lowe, above n 66, 44-5.

¹³⁹ The employees of Triumph International, eg, a German-based multinational with branches in 48 countries, are 95% female: Urban Rural Mission — Christian Conference on Asia, *Minangkabau!: Story of People vs TNCs in Asia* (1981) 39. In 1977, according to ILO sources, women made up 20% of foreign multinationals labour force in Chile, 23% in Mexico, 31% in India and 23% in Kenya. These figures encompassed workers in some or all of the mining, manufacturing, transport, trade, agriculture, construction and services industries in those countries: UN

At the international level, however, the operations of TNCs are relegated to the inner sanctum of states' private affairs upon which international law does not intrude.¹⁴⁰ The effect of this is to grant those men performing ostensibly 'public' roles of great influence worldwide, an international anonymity that allows for their continued exercise of power without international accountability.¹⁴¹ As Janet Lowe vividly describes:

somewhere offstage in the darkened wings is a group of men who influence government officials, determine whether a local economy prospers or withers, and, too often, have a say over whether we live or die The worker may never see, speak to, or even partially understand the person who can reconfigure her or his destiny with a single telephone call, the dictation of a memo, or a simple lifting of an eyebrow to the appropriate vice president.¹⁴²

Interaction between the public and private realms and the changing characterisation of each thus serves to conceal (and so to perpetuate) women's confinement to subordinate roles within and beneath the TNC. The alternate inclusion and exclusion of the TNC from the public domain at the national and international levels, helps to preserve a split-level legal environment in which the TNC has flourished at the expense of many, particularly those who are otherwise powerless or marginalised in society.¹⁴³ Women are by no means the only group whose subordination can be associated with the shifting boundaries of the public and private realms.¹⁴⁴

Martti Koskenniemi has contemplated a '[r]ethinking of contexts' so as to 'imagin[e] social institutions which no longer permanently privilege some voices under a category of statehood which has no particular value by itself.'¹⁴⁵ Merely amplifying the corporate voice in an international legal context and making the TNC visible to international law would not, however, be enough according to

International Labour Office (Geneva), *Women Workers in Multinational Enterprises in Developing Countries* (1985) 14.

¹⁴⁰ UN Charter, art 2(7), provides that '[n]othing contained in the present Charter shall authorise the United Nations to intervene in matters essentially within the domestic jurisdiction of any state'.

¹⁴¹ See below, n 143.

¹⁴² Lowe, above n 66, 37.

¹⁴³ Charney recognises that TNCs 'benefit from their international non-status. Non-status immunizes them from direct accountability to international legal norms and permits them to use sympathetic national governments to parry outside efforts to mold their behaviour': cf Charney, above n 53, 767. Engle similarly observes that 'some, particularly some who have a lot of power, see being outside the grip of public international law as positive and liberating': Karen Engle, 'After the Collapse of the Public/Private Distinction: Strategizing Women's Rights' in Dorinda G Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (1994) 10.

¹⁴⁴ Indeed some writers are prepared to lay at least partial responsibility for the plight of the world's starving outside the door of TNCs' private offices. According to Berg, TNCs of the food industry have taken 'blatant advantage of nutrition consciousness' to produce what has been described as 'commerciogenic malnutrition': Alan Berg, *The Nutrition Factor: Its Role in National Development* (1973); Derrick Jelliffe, 'Commerciogenic Malnutrition' (1972) 30(9) *Nutrition Review*; Barnett and Muller, above n 2, 182.

¹⁴⁵ Koskenniemi, above n 109, 499. As Charlesworth points out, Koskenniemi's view here is apparently discarded in a later article (Koskenniemi, 'The Future of Statehood', above n 5): Hilary Charlesworth, 'Subversive Trends in the Jurisprudence of International Law' (1992) *Australian and New Zealand Society of International Law Proceedings* 8 n 35 ('ANZSIL Proceedings').

feminist analysis. Formally recognising TNCs as social institutions on the international plane may serve to strengthen and legitimise, rather than to challenge, the unequal and exploitative power relationships that exist within and about them. A '[r]ethinking of contexts' would only survive feminist impugnement if it involved a genuine acknowledgment of the experience of women and other invisible participants in the 'private' processes of these social institutions.¹⁴⁶

D *International Law as Policy-Oriented Process Incorporating the Transnational Corporation*

Perhaps the only major theory of international law that clearly marks a point of entry for the TNC to international legal discourse is the 'policy-oriented process' approach developed by Myres McDougal and Harold Lasswell and subsequently attributed to the 'New Haven School' of international legal theory.¹⁴⁷

McDougal's vision of international law is one of a 'comprehensive global process of authoritative decision' directed towards the realisation of 'goal values of international human dignity.'¹⁴⁸ This vision is 'comprehensive' in the sense that it rejects arbitrarily-defined notions of the legal subject and identifies individual human beings as the important actors in community process.¹⁴⁹ International law, moreover is recognised as only one of many interlocking social and community processes that can contribute to the realisation of such 'goal values'. Accordingly, it must be oriented within and between these.

McDougal is, therefore, prepared to take note of the decision-making authority of any entity with which individuals are affiliated: 'nation-states, international governmental organizations, political parties, pressure groups and private associations - [all] forms of associations through which individuals cooperate to achieve fulfillment of their demands.'¹⁵⁰ The disparate activities of these groups are organised, according to McDougal's strategy, by outlining 'arenas of decision' and identifying participants, available procedures and perspectives (demands, identifications and expectations) within those 'arenas'.¹⁵¹ Within each

¹⁴⁶ However, as Knop observes, 'feminist scholarship in international law has not yet set itself the task of rethinking state sovereignty, preferring to work within or — perhaps more aptly — around it'. Knop calls upon the 'functional' or 'policy-oriented' school of international legal theory as one means of recognising 'overlapping identities and multiple forms of participation': Knop, above n 6, 332, 334-41.

¹⁴⁷ See generally W Michael Reisman, 'The View from the New Haven School of International Law' (1992) 86 *American Society of International Law Proceedings*.

¹⁴⁸ Myres McDougal, 'International Law, Power and Policy: A Contemporary Conception' (1953) 82 I *Recueil des Cours de L'Academie de Droit International* 133, 167-8, 190-1.

¹⁴⁹ Myres McDougal, Harold Lasswell and W Michael Reisman, 'Theories About International Law: Prologue to a Configurative Jurisprudence' (1967-68) 8 *Virginia Journal of International Law* 188.

¹⁵⁰ Myres McDougal, Harold Lasswell and Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (1980) 179.

¹⁵¹ See McDougal, above n 148, 165-91 especially 172-9; Myres McDougal and W Michael Reisman, 'International Law in Policy-Oriented Perspective' in Ronald St John MacDonald and Douglas Johnston (eds), *The Structure and Process of International Law: Essays in Legal*

arena 'community prescriptions' will be 'formulate[d], invalidate[d] and appl[ie]d' through various levels of decision.¹⁵² In this way will 'the peoples of the world, clarify and implement their common interests with respect to all values.'¹⁵³

Clearly such a process encompasses TNCs' participation, as an entity to which individuals are affiliated. At face value then, this theory appears to resolve difficulties that arise from TNCs current position under international law.

However, Julius Stone has noted that McDougal's notion of 'authoritative decision' is transposed directly from the municipal sphere to the international, without attention being given to theoretical problems that result. Stone doubts whether international law has 'any general decision-making process yielding effective and authoritative decisions concerning distribution of values.'¹⁵⁴ Even if such processes are identifiable, the questions posed by Philip Allott remain unanswered by the New Haven School, namely, if law 'is laid open to an explicit battle of interests and values, who is then to be master? ... [I]s the finding of the law to become an endless, actual or simulated, process of negotiation?'¹⁵⁵ According to Critical Legal Scholars, international law already constitutes an endless process of negotiation, so this feature in itself is not necessarily objectionable.¹⁵⁶ However, as Allott implies, McDougal's approach may lay international law open to 'mastery' by those who already possess substantive power. McDougal himself recognises that the groups he proposes to engage in policy-oriented process are 'highly malleable instruments'.¹⁵⁷

Though the New Haven approach claims to provide for 'participation by each individual member of the community',¹⁵⁸ its failure to address structural dominance and exclusion that may hinder some individuals' participation in decision-making processes undermines the validity of its claim. McDougal's viewpoint has been described as a 'natural projection of his view of Western

Philosophy, Doctrine and Theory (1983) 103 ('Policy-Oriented Perspective'); McDougal, Laswell and Chen, above n 150, 170.

¹⁵² McDougal and Reisman, 'Policy-Oriented Perspective', above n 151, 119-21.

¹⁵³ Myres McDougal and W Michael Reisman, 'The Changing Structure of International Law: Unchanging Theory for Enquiry' (1965) 65 *Columbia Law Review* 810, 823-8, 835.

¹⁵⁴ Julius Stone, *Visions of World Order: Between State Power and Human Justice* (1984) 22.

¹⁵⁵ Philip Allott, 'Language, Method and the Nature of International Law' (1971) 45 *British Year Book of International Law* 79, 116-7, 121-31.

¹⁵⁶ See above, nn 109, 117, 125. Koskenniemi's criticism of McDougal for reducing the 'critical normative force' of international law seems at odds with Koskenniemi's own conclusion that the indeterminacy of international law — its mediation between conflicting postulates and priorities — is not necessarily a sign of weakness, but may actually be the source of its persuasive force: see also below n 167. Koskenniemi does not satisfactorily explain why policy-oriented international law could not perform a similar, albeit expanded role: Koskenniemi, above n 109, 176. Perhaps Koskenniemi's dislike of the McDougal/Laswell approach can be ascribed to a belief in 'the continuing vitality of statehood as the ultimate value of the international legal system': Koskenniemi, 'The Future of Statehood', above n 5, 397.

¹⁵⁷ McDougal, Laswell and Chen, above n 150, 179. See also Vagts' comments (above n 6) regarding individuals' differing capacity to influence TNC activity.

¹⁵⁸ Jordan Paust, 'The Concept of Norm: Toward a Better Understanding of Content, Authority and Constitutional Choice' (1980) 53 *Temple Law Quarterly* 226.

municipal legal orders.¹⁵⁹ Aside from the euro-centric implications of this 'natural' projection, 'policy oriented process' might easily perpetuate the 'lopsided' structure of Western legal process. McDougal's approach cannot easily be distinguished from the 'overwhelmingly masculine structures of international law-making and the related development of principles which exclude women's [and others'] voices and concerns'.¹⁶⁰

The TNC poses a particular challenge to legal theory in this regard. A number of scholars have argued for the establishment of parallel institutional structures for ethnic and cultural groups in international law.¹⁶¹ Isabelle Gunning contends that 'non-national entities which marshal broad support may have the right to participate in the creation of custom'.¹⁶² But, it might be asked, what of entities that do not marshal such support; entities that may in fact pursue interests in conflict with those of individuals or groups? If TNCs are not engaged in legal processes, then the current problems arising from their 'object' status will persist.¹⁶³ Yet, if they are so engaged, how will the disproportionate power they possess be constrained, redirected or redistributed? McDougal might identify 'power, respect, enlightenment, [and] wealth' as amongst those qualities which the majority of human beings value,¹⁶⁴ yet he fails to demonstrate how such individual aspirations, embodied in the corporate profit-motive, can be reconciled with other 'community prescriptions' in the decision-making process. The 'policy-oriented process' theory does not satisfactorily explain how the latter might acquire sufficient weight to counterbalance the former.¹⁶⁵

¹⁵⁹ Stone, above n 154, 20.

¹⁶⁰ Charlesworth, above n 145, 10.

¹⁶¹ Denise Reaume, 'Moral and Legal Responses to the Multi-Cultural, Multi-Ethnic State' (1993) 15 *Rechtstheorie* 251, 255.

¹⁶² Isabelle Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights' (1991) 31 *Virginia Journal of International Law* 211, 220-1. I would argue that Gunning's approach does not overcome the problems latent in statism, but merely extends statist qualities to other entities, namely non-governmental organisations. Gunning adopts Arendt's understanding of power as an 'end in itself' in the formation of political communities, in order to argue for legal recognition of the legitimacy of non-governmental organisations. While recognition of entities with substantive influence would ostensibly redistribute legal power on the international plane, Gunning's critique does not examine the way in which power is distributed or the way in which interests are represented within these 'political communities'. If Gunning's reasoning is transposed to the TNC, the likelihood of such an approach masking internal concentrations and abuses of power becomes particularly evident: see generally Hannah Arendt, *On Violence* (1970) 42-52, and the discussion of Arendt and Gunning in Knop, above n 6, 311-5.

¹⁶³ Kapur, above n 63, provides no solution here. While his argument (that 'multinational corporations have become at least as powerful as some of the states in which they function and ... must therefore be held accountable ... to the same extent as states') makes sense, he does not explain how effective accountability can be developed or imposed.

¹⁶⁴ Stone, above n 154, 27, states that McDougall might identify such qualities.

¹⁶⁵ Vagts concludes that the TNC is 'basically a coherent organization with a narrow range of economic motivations': Vagts, above n 1, 756. 'Community prescriptions' feature prominently in the press releases and mission statements of most TNCs, but are not necessarily manifest in their conduct: see above n 66.

V CONCLUSION

The subjugation of human lives to the influence or control of corporate actors on the international plane is a matter of contemporary concern for many. Yet international law and legal theory have apparently not yet responded to this concern. Transnational corporate conduct can be understood as violating fundamental norms of international law. Yet international law currently provides no means by which to consistently and directly treat them as such. This article has sought to demonstrate that the constraints upon international law in this regard are not so much extra-legal, as implicit within its theory and discourse.

Classic liberal theory confronts in the transnational an embodiment of conflict between its two central tenets and is theoretically paralysed. Those theories that claim to remedy this paralysis are ultimately afflicted by the same condition. Realism champions national interest without investigating whose interests this actually embodies; without considering the forces or entities that influence its formulation or alternatively obstruct its implementation. A relative approach threatens to replicate power imbalances already discernible in international law. 'New' liberalism imagines a morally and democratically 'legitimate' state without examining how or why this state will be any more likely or able to achieve substantive realisation of individual rights than states in their current form.

The feminist and 'policy-oriented process' schools of international legal theory do, however, suggest a way out of this paralysis, indicating that international law is not necessarily incapable of dealing with the reality of transnational corporate power. Feminists reveal theoretical structures and boundaries which hamper inclusion of non-state actors in the international legal order and conceal global concentrations of power and patterns of subordination. Policy-oriented process envisages the participation of non-state actors (such as the TNC) in a discourse concerned with the recognition and realisation of human values — a discourse that carries the potential to transcend boundaries and dismantle structures bared by feminism.¹⁶⁶ Implementation of the sort of structural revision which these analyses propose is, I would argue, the only way in which international law can hope to provide a meaningful framework for comprehending and conducting international human affairs in the contemporary world.

In order to construct such a framework, however, it may be necessary to go beyond these theories' existing limits, to explore ways of both expanding participation in international law and redistributing the resources (theoretical, informational and material) necessary to make participation meaningful. Rather than recognising power as a prerequisite of involvement (as Gunning sug-

¹⁶⁶ Knop identifies 'policy-oriented process' as one of a number of perspectives that suggest how feminism might reconceive sovereignty and how women might participate more fully in international law-making. She recognises however that this theory remains problematic from a feminist point of view for reasons similar to those discussed above nn 152-63 and accompanying text: Knop, above n 6, 339, 341.

gests¹⁶⁷), I propose the recognition of direct involvement in a given field or 'arena' of human affairs as grounds for contributing to (and being confined by) international legal processes concerning that field. Identification of such fields would be along the lines of the 'policy-oriented' approach. Those regarded as directly involved in a particular field might include the employees of TNCs operating in the relevant industry or area and the indigenous peoples of affected (or potentially affected) territories. Yet, unlike that described by McDougal and his colleagues, the process I envisage would necessarily involve acknowledgment of the nature and relative power (structural and substantive) of these participants. It would then rest with those participating in the process in question to formulate procedures to ensure that all actual or potential participants are adequately represented and are able to have impact upon its outcome.

Clearly, definition of 'fields' and 'participants' in those fields would be a dynamic and continuing process. In the more broad, general processes of international law it might also be an abstract and approximate one. Nevertheless, international legal practice does contain models for the widespread involvement of disparate state and non-state groups.¹⁶⁸ Such models might indicate a starting point for reform. Moreover, the turning of international legal attention to those whose lives and interests are affected by, or who play a role in the substantive outcomes of its decisions and processes, might in itself engender enthusiasm and commitment amongst those previously excluded from international legal practice and a greater willingness to negotiate amongst those already included.

Obviously this proposal is embryonic. Its purpose is not so much to provide a finite solution as to emphasise the need for international legal discourse to address the concentration of social, political, economic and legal power in particular hands and the implications of this for all people. The necessity of doing so is manifest in the spectral existence of powerful TNCs in international law. Some commentators laud the indeterminacy of international law as the subtle secret of its success. If indeed international law has and can continue to be successful, it is a success that ought to be shared by all. Before counting its laurels, international law must first consider for whom it is succeeding and for whom it is not.

¹⁶⁷ See above n 162.

¹⁶⁸ See, eg, Gray's discussion of the 'bottom-up' consultations (involving participants from a grass-roots community level upwards) conducted in the preparation of a draft treaty for the prevention and treatment of land desertification: Mark Gray, 'International Treaty Monitoring: Desertification', ANZSIL Proceedings (1994) (forthcoming). Refer also to the collaborative process that preceded signature of the Chemical Weapons Convention, above nn 56-60.