
Power and responsibility: why human rights should address corporate environmental wrongs

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I. Introduction

A. *The problem*

Deep in the Ecuadorian Amazon rain forest is a region known as the Oriente. It is teeming with life, supporting more biodiversity than perhaps any spot on the globe: 5 per cent of all species on earth live here, in an area smaller than the state of Alabama. The Cofan Indians have called this region home for centuries and, until a generation ago, their way of life had changed little from that of their ancestors. They lived in small clan groups in thatched hut villages. They hunted wild monkeys, turkeys and pigs with spears and blow guns. The biodiversity of the forest was stitched through the very fabric of their lives – from the grasses they used to build their huts to the animals they hunted for food, to the plants and herbs they used to heal the sick. Just to make a blow gun, a Cofan hunter would gather sixty different materials from the rich bounty of the rain forest.¹

But in 1972 life began to change drastically for the Cofan. Through a deal struck with the Ecuadorian government, Texaco came to the Oriente. Bulldozers began cutting roads through the thick forest. Oil rigs began pumping black crude through a pipeline that snaked its way 500 kilometres across the rain forest, up 13,000 feet through the Andes, and finally down to the sea. Then, strange things began to happen. Huge pools of bubbling black liquid appeared in remote areas of the forest. Rivers and streams ran black with oil. Trees withered and died. A Cofan hunter shot a wild pig with a blow gun, just as his ancestors had done for centuries, but found its body so soaked with oil that the meat was inedible. Tribe members began to complain of strange skin rashes and intestinal problems. Children were

¹ Joe Kane, *Savages* (New York: Alfred A. Knopf, Inc., 1996), pp. 33–5; Joe Kane, 'Battle for the Rain Forest', *Scholastic Update* 131 (8 February 1999), 6.

born with birth defects that made them so bowlegged they could barely walk. Cancer rates quadrupled.²

Complaints began coming from residents of the Oriente, but the weak and corruption-prone government of Ecuador, which derives half of its revenue from oil production, was unresponsive. It took decades before international investigations eventually began to reveal the enormous scope and depth of the harm that Texaco had wrought. By the time the company finished operations and left Ecuador in 1992, the pipeline had spilled 17 million gallons of crude oil into the forests and streams of the Oriente, half again as much as was spilled by the Exxon-Valdez in Alaska. But that was the least of it. For twenty years Texaco had been dumping more than 4 million gallons of waste water each day into hundreds of unlined pits throughout the region – an antiquated practice that has long been illegal in the United States. These pits left a lasting legacy, continuing to leach arsenic, lead and other cancer-causing chemicals into the rivers and creeks of the Oriente long after the company had left, producing levels of contamination in drinking water a thousand times higher than those allowed in the United States.³

Meanwhile, in another remote corner of the globe, the New Orleans-based mining company, Freeport-McMoran, has been under contract with the Indonesian government since the 1960s to operate copper, gold and silver mines in the forests of Papua New Guinea. The contract gives Freeport broad powers over the population, including quasi-governmental authority, like the power of eminent domain. It also promises ‘flexibility’ in the enforcement of Indonesia’s environmental laws – a promise that the Indonesian government has assiduously kept. Indeed, environmental enforcement has been so ‘flexible’ as to be virtually non-existent.

Freeport’s mining operations have deposited huge quantities of mine tailings and other toxic wastes directly into the region’s rivers and streams, leaving environmental devastation in their wake. The trees that the local people used to build houses and canoes have died off, the animals that people had hunted for food are gone, and in at least five documented incidents, people eating shellfish from rivers polluted by mine tailings have died of copper poisoning. In the 1980s and 1990s, when there were signs that the local people might protest, Freeport hired the Indonesian military to ‘protect their investment’, paying tens of millions of dollars as

² Judith Kimerling, *Amazon Crude* (Natural Resources Defense Council, Inc., 1991), pp. 43, 55–84; Eyal Press, ‘Texaco on Trial’, *The Nation* 268 (1999), 11.

³ Chris Jochnick, ‘Amazon Oil Offensive’, *Multinational Monitor* 16 (January/February 1995); Kimerling, *Amazon Crude*, pp. 31, 48.

well as providing helicopters and other equipment. The result has been brutal repression of any attempts to speak out against Freeport's operations. Torture, rape, murder, arbitrary detention and surveillance of local residents by Indonesian soldiers have all been documented.⁴

B. *Toward a solution*

These stories and others like them have been important drivers of the Corporate Social Responsibility (CSR) movement. Indeed, it is in response to damaging publicity over atrocities like these committed in the developing world that many transnational corporations (TNCs) have begun in recent years to adopt codes of conduct, promising to conform business practices to ethical standards that combine attention to short-term shareholder profits with a new respect and commitment to social and environmental values.⁵

But, as stories like these continue to emerge, there is increasing scepticism about the capacity of purely voluntary ethical codes to adequately address the problem. Additionally, there is a sense that the magnitude and profundity of such harms demands a stronger response, both functionally and rhetorically. Accordingly, the public debate surrounding environmental atrocities like these increasingly employs the language of human rights. There have been numerous pieces in the academic literature urging the application of human rights norms to TNCs.⁶ There have been a series of attempts in US courts to use the Alien Tort Claims Act (ATCA) to

⁴ Abigail Abrash, *Human Rights Abuses by Freeport in Indonesia: Observations on Human Rights Conditions in the PT Freeport Indonesia Contract of Work Areas with Recommendations* (Robert F. Kennedy Memorial Center for Human Rights, July 2002), available at www.mpi.org.au/campaigns/rights/human_rights_abuse_freeport_indo/.

⁵ See Doreen McBarnet, 'Human Rights, Corporate Responsibility and the New Accountability', in Tom Campbell and Seumas Miller (eds.), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations* (Boston: Kluwer Academic Publishers, 2004), pp. 63, 66–7.

⁶ See Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', *Yale Law Journal* 111 (2001), 443; Menno T. Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EU', in Philip Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), p. 553; Tom Campbell, 'Moral Dimensions of Human Rights', in Campbell and Miller (eds.), *Human Rights*, p. 11; Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (New York: Intersentia, 2002); Meno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (Boston: Kluwer Law International, 2000); Rebecca M. Bratspies, "'Organs of Society": A Plea for Human Rights Accountability for Transnational Business Enterprises and Other Business Entities', *Michigan State Journal of International Law* 13 (2005), 9.

hold TNCs responsible for human rights violations in connection with environmental harms.⁷ And a number of international instruments have actually begun to define (though not in binding terms) a set of specific duties imposed on TNCs by human rights norms.⁸

Certainly, there is an intuitive appeal to the idea of applying human rights norms against TNCs. It seems to provide some legal credibility to the sense of moral outrage that these incidents engender. And given that part of the problem stems from the inadequacy of domestic regulation, it seems desirable to try to shift the locus of enforcement from domestic to international regimes. Calling something an 'international human rights violation' begins to effect that shift.

But there are two big problems with trying to impose human rights norms directly on corporations. First, human rights have traditionally been defined solely against states.⁹ Some maintain that to view human rights as imposing duties on private corporations 'changes the very foundations of human rights.'¹⁰ Second, some of the bad things done by TNCs do not quite seem to fit our traditional notions of the kinds of injuries that constitute human rights violations.¹¹ When, for example, Freeport hires the Indonesian military to beat demonstrators to death, that looks very much like a human rights violation. But what about the people who died from eating poisoned shellfish? When Freeport dumps toxic mine tailings in the rivers with impunity, is that a human rights violation? Those people

⁷ See James Boeving, 'Half Full . . . or Completely Empty: Environmental Alien Tort Claims Post *Sosa v. Alvarez-Machain*', *Georgetown International Environmental Law Review* 18 (2005), 109; Hari M. Osofsky, 'Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations', *Suffolk Transnational Law Review* 20 (1997), 335.

⁸ Sub-Commission on the Promotion and Protection of Human Rights, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at www.unhcr.ch/html/menu2/2/55sub/55sub.htm; OECD Guidelines for Multinational Enterprises (2000), available at www.oecd.org/dataoecd/56/36/1922428.pdf. See generally Jägers, *Corporate Human Rights Obligations*, pp. 99–131.

⁹ See Campbell and Miller (eds.), *Human Rights*, p. 14; Ratner, 'Corporations and Human Rights', 465–6. There are a few exceptions. Human rights against genocide, war crimes and crimes against humanity have, since the aftermath of World War II, been enforceable against individuals: see Ratner, 'Corporations and Human Rights' at 466–8; Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Article 4, S. Exec. Doc. O, 81–1 (1949) ('[P]ersons committing genocide . . . shall be punished whether they are constitutionally responsible rulers, public officials, or private individuals').

¹⁰ Peter T. Muchlinski, 'Human Rights and Multinationals: Is there a Problem?', *International Affairs* 77 (2001), 31, 32.

¹¹ See Campbell and Miller (eds.), *Human Rights*, pp. 14–15, 22.

are just as dead as the people killed by the military, and their death evokes a similar sense of moral outrage. Intuitively, it feels like a human rights violation. But it doesn't fit as clearly into traditional categories of human rights because it is not the kind of thing that states typically tend to do. It is the kind of thing that corporations tend to do.

Most of the academics who have been urging the adoption of human rights norms against TNCs have approached the question primarily from the perspective of positive law.¹² That is, they have sought to answer the question, is this a human rights violation? by asking, is this something that could be treated as a human rights violation under currently existing standards and structures of international law? And for many who have posed that question, the answer has been: perhaps not yet, though international law is arguably moving in that direction.

But human rights are more than just a product of positive law. One of their 'prime roles' is also 'to provide a basis for criticism of positive law'.¹³ Accordingly, I would like to take a different approach by stepping back and asking the normative question, are the bad things that TNCs do things that we *should* treat as human rights violations? This requires us to ask, what are human rights, and what are the concerns and values that underlie them? What are the qualities that raise an injurious act to the level of a human rights violation? Do the acts described above committed by TNCs share those qualities? Is there a legitimate theoretical basis for arguing that the rubric of human rights should include claims by individuals against TNCs as well as claims by individuals against states?

In the remainder of this chapter I will argue that many of the environmental wrongs committed by TNCs *are* things that we should treat as human rights violations. Rights are at bottom a response to the problem of power. During the Enlightenment, when the idea of civil and political rights was born, states were by and large the biggest aggregations of power in society. Rights were therefore crafted to protect individuals from abuses of power by states. But today, TNCs often wield as much or even more power than many states, and the conditions of individuals'

¹² See, e.g., Kamminga, 'Holding Multinational Corporations Accountable'; Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993); Muchlinski, 'Human Rights'; Jägers, *Corporate Human Rights Obligations*; Dinah Shelton, 'Protecting Human Rights in a Globalized World', *Boston College International and Comparative Law Review* 25 (2002), 273. Indeed, some argue that international human rights cannot possibly be described or defined in other than positive law terms because there exists no international consensus on the moral or normative foundations for human rights. See Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990), p. 32.

¹³ Campbell, 'Moral Dimensions', p. 17.

lives are shaped as much by TNCs as by states. From this perspective, it seems obvious that TNCs are far more like states than like individuals, and thus should be located on the public rather than the private side of the public–private divide in assigning human rights and duties. The problem is that our legal and political discourse has become so permeated with the logic of welfare economics that we have come to reflexively envision social relations in terms of private actors competing in markets and to ignore distributions of wealth and power. But once we view rights through the lens of power rather than through the lens of welfare economics, the idea that human rights obligations should be imposed against TNCs begins to seem natural.

The remainder of this chapter proceeds in three further sections. Section II defines ‘human rights’, narrowing the argument to civil and political rights, and arguing that these rights have always been rooted in significant part in the perceived need to counteract the power imbalance between the individual and the State. Section III argues that, even though corporations are traditionally categorised on the private side of the public–private divide, the significant power wielded by TNCs makes that an awkward fit. TNCs often wield much the same kind of power as that wielded by states and, in such circumstances, human rights duties should be imposed directly on TNCs. Section IV describes the particular types of human rights claims that ought to apply against TNCs, discusses the extent to which such claims would provide protections not already available through the enforcement of common law rights, and considers the question of compliance.

II. The nature of rights

The term ‘rights’ can mean many things in many different contexts. Accordingly, it will be helpful to define the sense in which I use the term here. To begin with, it is useful to distinguish between two basic types of rights. On one hand, there are ‘human rights’. In this category, I lump together both international human rights and the constitutional rights that exist within domestic jurisdictions. These rights are traditionally understood as rights that individuals enjoy against government.¹⁴ On the other hand, there are ‘private rights’ that government enables individuals

¹⁴ See Rex Martin, ‘Human Rights and Civil Rights’, in Morton E. Winston (ed.), *The Philosophy of Human Rights* (Belmont, CA: Wadsworth 1989), pp. 75, 79–81.

to enforce against each other.¹⁵ Traditionally, these were the rights of tort and contract, although recently those common law rights have clearly been extensively supplemented by statutory rights.

There is, of course, no question that private rights can be asserted against TNCs (or against any corporation). My focus is rather on human rights. But that category can be further divided into at least two subcategories: civil and political rights arose out of the Enlightenment and form the basis for the US Constitution and the French Declaration of the Rights of Man. They are rooted in a conception of the person as an autonomous individual, and they stress the protection of individual autonomy and dignity from government interference. Economic and social rights, in contrast, trace their lineage to Karl Marx, and are rooted in the notion that government has affirmative obligations to protect individuals from deprivation of the basic material necessities of life. In addition to these two well-established categories, what some are calling a ‘third generation’ of human rights has also recently begun to emerge, protecting group rights to the preservation of cultural identity and self-determination.¹⁶

Second generation economic and social rights – or even third generation group rights – might at first blush seem more amenable to the accommodation of a right against environmental harm of the type I seek to promote here. Nonetheless, my argument focuses solely on civil and political rights. These are the rights with the longest historical pedigree and the rights that command the most respect and acceptance in the developed world.¹⁷ Since the developed world wields substantial power and influence in international law and is where most TNCs are rooted, culturally if not also physically, I have chosen to frame my argument around the kinds of rights that the developed world understands. Accordingly, in the following pages I attempt to construct a theoretical basis for the imposition of human rights duties directly on TNCs for environmental

¹⁵ See Peter Laslett (ed.), *Locke: Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), pp. 271–2, 357–63 (government’s purpose to protect rights of individuals against invasion by each other, but in serving that function, government necessarily accrues power, which it has duty to citizens not to abuse).

¹⁶ See Winston (ed.), *The Philosophy of Human Rights*, pp. 4–5, 18–19; Tom Campbell, *Rights: A Critical Introduction* (New York: Routledge, 2006), pp. 5–10.

¹⁷ Moreover, the International Covenant on Economic, Social, and Cultural Rights (16 December 1966, S. Exec. Doc. D, 95-2 (1978), 993 UNTS 3) is written in less binding terms than the International Covenant on Civil and Political Rights (19 December 1966, S. Exec. Doc. E, 95-2 (1978), 999 UNTS 171). The former only calls on states to ‘take steps’ to achieve the enumerated rights ‘up to the maximum of available resources’. Henkin, *Age of Rights*, p. 20.

harms solely on the basis of the civil and political rights that are rooted in the Enlightenment tradition and exemplified by US constitutional law.

A. Human rights as mediators of power imbalance between the individual and the state

For civil and political human rights at the international or domestic level, the prototypical rights holder is the individual and the prototypical duty holder is the state.¹⁸ These rights come into play when for some reason we cannot trust the political system to protect certain individual interests through the usual forms of private law. Usually that occurs when there is some reason to worry about abuse of power by the state itself. In those instances, we cannot trust the state to police itself. We need some higher source of authority to act as a check on state power. Within domestic legal systems, that higher source of authority is the constitution. In international law, it is international human rights norms.¹⁹

A great deal has been written about the basis and justifications for civil and political human rights. For our purposes, it is sufficient to observe that two dominant strands of thought consistently emerge in efforts to identify the concerns and values underlying these rights. I will call them (1) the individual autonomy strand and (2) the power imbalance strand.²⁰ In the words of Richard Pildes, the individual autonomy strand ‘reasons out’ from the conception of the person.²¹ It views the integrity, dignity and autonomy of the individual as paramount, and as requiring the delineation of a sphere of immunity around each person within which the state cannot intrude. The power imbalance strand, on the other hand, ‘reasons in’ from actual experience with government practice and from the risk that government will abuse power.²² This strand views rights as providing a counterweight to the imbalance of power between the individual and the state.

¹⁸ See Campbell and Miller (eds.), *Human Rights*, p. 17.

¹⁹ See Ratner, ‘Corporations and Human Rights’, 466; Louis Henkin, ‘International Rights as Human Rights’, in Winston (ed.), *The Philosophy of Human Rights*, pp. 129, 131.

²⁰ See Amy Sinden, ‘In Defense of Absolutes: Combating the Politics of Power in Environmental Law’, *Iowa Law Review* 90 (2005), 1405, 1460–84.

²¹ Richard H. Pildes, ‘Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism’, *Journal of Legal Studies* 27(1998), 725, 729.

²² *ibid.*; see also Christina Brooks Whitman, ‘Emphasizing the Constitutional in Constitutional Torts’, *Chicago-Kent Law Review* 72 (1997), 661, 669 (constitutional rights ‘are defined with reference to the unique power that government has over those subject to its jurisdiction’).

Both strands emerge clearly from, for example, the vast literature on freedom of expression. One prominent view follows the individual autonomy strand, seeing freedom of expression as primarily aimed at protecting values of individual autonomy, self-realisation and self-fulfilment.²³ But another robust line of theory views freedom of expression as essential to countering the power of government – as providing a crucial check on the abuse of state power. Freedom of speech, freedom of assembly and association, and freedom of the press all serve this checking function, ensuring that the power of the state is not used to suppress information and ideas critical of government.²⁴

Both strands also animate criminal procedure rights. The power imbalance between the individual and the state is perhaps nowhere more vivid and palpable than when the individual is pitted against the vast power and resources of the state in a criminal proceeding. Accordingly, it is no surprise that four of the ten amendments that make up the US Bill of Rights are devoted to the rights of the criminally accused. Certainly, the individual autonomy strand is very much in evidence here, since a criminal proceeding involves possibly the most severe limitations conceivable on individual freedom and autonomy – imprisonment and even death. But the power imbalance strand is also prominent. Many criminal procedure rights are explicitly justified by courts and commentators in terms of the need to counteract the vast disparity of power between the state and the accused. These include the right to counsel,²⁵ the right against self-incrimination,²⁶ the double jeopardy guarantee,²⁷ and the beyond-a-reasonable-doubt standard,²⁸ to name a few. Through these various

²³ See Thomas Scanlon, 'A Theory of Freedom of Expression', *Philosophy and Public Affairs* 1 (1972), 204, 215–22.

²⁴ See Vincent Blasi, 'The Checking Value in First Amendment Theory', *American Bar Foundation Research Journal* (1977), 521.

²⁵ See *United States v. Gouveia*, 467 US 180, 189 (1984) (right to counsel aimed at correcting the imbalance of power between the government and the accused).

²⁶ See *Miranda v. Arizona*, 384 US 436, 460 (1966) (right against self-incrimination aimed at ensuring 'the proper scope of governmental power over the citizen . . . and maintaining a fair state-individual balance').

²⁷ See *Green v. United States*, 355 US 184, 187–8 (1957) ('The underlying idea [behind the double jeopardy clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety').

²⁸ See Andrew Ashworth, *Principles of Criminal Law* (New York: Oxford University Press, 1991), p. 74.

mechanisms, the procedural protections provided to criminal defendants operate to level the playing field between the individual and the state.

In the civil context as well, due process rights implicate both the individual autonomy strand and the power imbalance strand underlying civil and political rights. Certainly, the deprivation of an individual's life, liberty or property by the state implicates his or her individual autonomy. But we could say the same about a deprivation of life, liberty or property committed by any private individual. Why, then, do we raise such deprivations to the status of civil and political rights when they are committed by the state? The answer is that because of the power imbalance between the individual and the state, we are particularly worried that such deprivations will occur at the hands of the state, and that when they do the usual remedies will not be sufficient to redress them.²⁹ Due process, then, gives individuals something, when the state deprives them of life, liberty or property, that they do not get when another private individual commits such a deprivation – that is, procedural due process: notice and an opportunity to be heard. Procedural due process operates to shift power from the state to the individual by giving the individual the right to demand information and to participate in decision-making processes that affect her or him.

B. The nature of power

Thus, civil and political human rights are justified in part by the need to counteract the power imbalance between the individual and the state. But what is this thing called power? Perhaps the words of the Due Process Clause best capture what the framers of the US Constitution had in mind when they worried about power as wielded by government: the ability to 'deprive [persons] of life, liberty or property'. This implies the ability to alter the quality of people's lives or the conditions of their existence along all dimensions: physical (life), spiritual (liberty) and material (property). Certainly, one obvious reason that governments have this capacity is because they control the police and the military. They can literally call in the troops, put people in jail or, in some jurisdictions, even put people to death.

²⁹ See *Daniels v. Williams*, 474 US 327, 331 (1986) (acknowledging 'the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was "intended to secure the individual from the arbitrary exercise of the powers of government"').

But the direct application of physical force is not the only form that power takes. Perhaps more importantly, the power to alter the conditions of a person's life through direct physical force also implies the power to alter the conditions of his or her life through coercion. Thus, if A can alter the physical, spiritual or material conditions of B's life through the application of direct physical force, then it necessarily follows that A can also get B to do things that B would not otherwise do by *threatening* to alter the conditions of B's life. This is Robert Dahl's well-known formulation of the concept of power.³⁰ Thus, we pay taxes and stop at red lights at least in part because of the coercive power wielded over us by government (the threat of physical force).

Of course, I do not literally worry that a police officer will put a gun to my head if I run a red light or fail to pay my taxes. I worry instead about having to pay the traffic ticket or the fines or penalties that will likely be imposed if I fail to comply with the law. I suppose we can say that in some ultimate sense, all exercises of government power are backed up by the threat of physical force. Initially, my refusal to pay my traffic ticket would only result in further demands for monetary penalties, but eventually repeated refusals to pay could conceivably land me behind bars for contempt of court. But for most people in the modern world, physical manifestations of government power are far removed from daily life. Instead, for most of us most of the time, government power manifests itself in economic rather than physical terms. Government alters the material conditions of my existence by assessing taxes or imposing fines or penalties. And it exercises coercive power over me – getting me to do things I would not otherwise do – by threatening to impose economic penalties on me if I engage in certain activities (like running a red light).

But this description still fails to capture the full spectrum of government power in modern society. While the Enlightenment-era thinkers

³⁰ Robert A. Dahl, 'The Concept of Power', *Behavioral Science* 2 (1957), 201, 202–3. Subsequent critiques of Dahl's formulation have argued that power can take other subtler forms as well. See Steven Lukes, *Power: A Radical View* (2nd edn, New York: Palgrave, 2005), p. 167; Steven L. Winter, 'The "Power" Thing', *Virginia Law Review* 82 (1996), 721; Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–77* (New York: Pantheon, 1980). While these later and more complex understandings of the concept of power are important to any general investigation of the role of power relationships in society, because they are probably outside the realm of the conception of power that animated the Enlightenment-era architects of civil and political rights, and because Dahl's definition is sufficient to draw the analogy between state power and TNC power necessary for my argument here, I am confining my analysis to the narrower conception of power captured by Dahl's original formulation.

who first formulated civil and political human rights tended to conceptualise government power only in negative terms – as the capacity to *deprive* – the flip side of taking is giving, and government can exercise power as much through giving as taking away.³¹ This positive aspect of government power is far more difficult to ignore in the modern welfare state, where government largesse affects the conditions of its citizens' existence through countless programmes, regulatory schemes and initiatives that are intricately woven into the fabric of economic life. Farm subsidies, welfare payments, corporate bail-outs, tax-breaks and below-market mineral leases on public lands all look like government *giving* rather than *depriving*. But, at least in the economic realm, these are simply flip sides of a single coin. Thus, the distinction between depriving of a right and withdrawing a benefit is often difficult to draw – as is the distinction between ceasing to impose a deprivation and conferring a benefit. Does the termination of welfare benefits deprive the recipient of a right or withdraw a benefit?³² Does the conferral of a tax break confer a benefit or cease the imposition of a deprivation? Accordingly, the capacity to confer benefits that alter the physical, material and spiritual conditions of existence is an important aspect of government power and intimately related to the capacity to deprive.

And, like the capacity to deprive, the capacity to confer benefits also implies the power of coercion. That is, government may get me to do things I would not otherwise do by offering a benefit (as well as by threatening a deprivation). I may, for example, choose to buy rather than rent a house, in part because of the tax benefit conferred on me by the US government in the form of the mortgage interest deduction if I do so. Similarly, the promise of a tax benefit may cause a corporation to locate a plant in one location rather than another. While these examples seem relatively innocuous, the capacity to confer benefits – like the capacity to deprive – creates a significant potential for abuse of this coercive power, as when a

³¹ See Lukes, *Power*, p. 83 ('[T]here is really no reason for supposing that the powerful always threaten rather than sometimes advance, the interests of others').

³² See *Goldberg v. Kelly*, 397 US 254, 262 (1970) (rejecting right/privilege distinction). Even a more traditional form of property – like a piece of land to which I hold title – can be viewed as a benefit conferred by the state rather than a pre-existing right. My ability to possess, use and exclude others from the property, after all, exists only by virtue of the state's administration of a system of property rights definition and enforcement. See Joseph William Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000), p. 7. Under this view, a deprivation of that property by the state constitutes simply the withdrawal of a benefit rather than the deprivation of a right.

state social worker makes a teenage mother's continued receipt of welfare benefits contingent on her 'agreement' to undergo sterilisation.³³

Finally, government power affects us indirectly as well as directly. By influencing countless private decisions, government power shapes not only our relations with government itself, but our relations to other private actors as well. It affects how private resources are used and distributed in society, which in turn affects the physical, material and spiritual conditions of our existence: whether a polluting facility can locate in my neighbourhood, or whether an employer has to pay me a minimum wage.³⁴

States, of course, are not the only entities that exercise power in society. Private individuals exercise power over other private individuals all the time. When a mugger holds me up at gunpoint, he is exercising power over me. He is getting me to do something I would not otherwise do – hand him my purse – by threatening to alter the physical conditions of my life. When a private law firm offers me a pay cheque, it is getting me to do something I wouldn't otherwise do – go to work every day – by altering the material conditions of my life. But the framers of the US Constitution did not give me a constitutional right against the mugger or the law firm. Nor do international human rights norms give me such a claim.³⁵ Civil and political human rights do not generally address the myriad power imbalances that exist between private individuals.³⁶

Why do civil and political rights only apply to exercises of power by the state? What makes the power exercised by the state different from the power exercised by a private individual? The difference is that when the state itself exercises power over me, there is no higher authority – no one to whom I can appeal. When the mugger takes my purse, I can call on the superior power of the state to arrest the mugger and put him in jail. When the law firm fails to pay me, I can file a lawsuit, get a judgment against

³³ See *Cox v. Stanton*, 529 F 2d 47 (4th Cir. 1975).

³⁴ See Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (New York: Cambridge University Press, 1996), pp. 16–43.

³⁵ The only exception would be if the mugger's acts fell within the definition of genocide or crimes against humanity. See n. 9 above.

³⁶ Equal protection rights can be viewed as an exception – that is, they can be viewed as aiming to counteract power imbalances between private groups in society rather than between private individuals and government. See Ruth Colker, 'Anti-Subordination Above All: Sex, Race, and Equal Protection', *New York University Law Review* 61 (1986), 1003, 1007; Laurence H. Tribe, 'Constitutional Calculus: Equal Justice or Economic Efficiency?', *Harvard Law Review* 98 (1985), 592, 604. The equal protection clause, however, was not part of the original Enlightenment-era civil and political rights in the US Constitution. Moreover, the equal protection guarantee is subject to the state action requirement and so, as a matter of US constitutional law anyway, is limited to discrimination by the state.

the law firm, and, if necessary, get the sheriff to execute the judgment. But when a government soldier puts a gun to my head, there is no higher authority to whom I can complain.³⁷ The state is the final decision-maker. Human rights, then – whether they are international human rights or domestic constitutional rights – by standing outside of and above the apparatus of the state, serve to constrain the exercise of ultimate, final, unappealable power by the state.

III. Positioning transnational corporations within the public–private divide

Civil and political human rights, then, are the mechanism by which law mediates the power relationship between the state and the individual, or, more generally, between the private and public realms. Where does the TNC fit in within this structure? In general, the treatment of corporations in both domestic and international law is premised on the notion that they are private, not public, entities – that is, that they are more like individuals than like states. This follows naturally from the economic world view, which dominates current conceptions of law in general and corporations in particular.³⁸ Under this view, corporations are participants in the free market, accountable only to shareholders. Like individual people, they are rational profit maximisers competing in the market. This now dominant conception of social relations places corporations in general (including TNCs) squarely on the private side of the public–private divide. That is, they are analogised to and categorised with individuals rather than states. Accordingly, with respect to human rights, they are treated as rights holders rather than duty holders.³⁹

³⁷ See *Bivens v. Six Unknown Federal Agents*, 403 US 388, 394 (1971) ('[W]e may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance . . . [but] the mere invocation of [government] power by a . . . law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police, and a claim of authority to enter is likely to unlock the door as well').

³⁸ See Cynthia A. Williams, 'Corporate Social Responsibility in an Era of Economic Globalization', *UC Davis Law Review* 35 (2002), 705, 711–14; Kellye Y. Testy, 'Linking Progressive Corporate Law with Progressive Social Movements', *Tulane Law Review* 76 (2002), 1227; Lawrence E. Mitchell, *Corporate Irresponsibility: America's Newest Export* (New Haven: Yale University Press, 2001).

³⁹ The US Supreme Court has held that corporations are 'persons' entitled to assert constitutional rights. See Daniel J. H. Greenwood, 'Markets and Democracy: The Illegitimacy of Corporate Law', *University of Missouri-Kansas City Law Review* 74 (2005), 41, 59. The European Court of Human Rights has also held that corporations possess rights to property, free speech, a fair trial and privacy. See Michael Addo, 'The Corporation as Victim

But if we think about the values and concerns that underlie civil and political human rights, under either the individual autonomy or the power imbalance strand of rights jurisprudence, the TNC seems an awkward fit on the private, rights-holder side.⁴⁰ From the perspective of the individual autonomy strand, a TNC is certainly not a human being with needs for bodily integrity, self-realisation, self-fulfilment and so on, and thus hardly seems an appropriate rights holder. Indeed, Joseph Raz rests his theory of rights in part on the Kantian condition that the individual rights holder's well-being is of 'ultimate value', or 'an end in itself' – a condition that clearly applies to human beings but is problematic as applied to TNCs. In order to make his theory fit with the reality of existing legal doctrine, he tacks on corporations (or 'artificial persons') as an additional category of rights-holders, almost as an afterthought.⁴¹ But the very fact that they need to be added as a separate category only serves to highlight the lack of fit between corporations and the fundamental concept of rights-holder.

The fit seems awkward from the perspective of the power-imbalance strand as well. It has become almost cliché these days to observe that many TNCs wield more economic power than most nations.⁴² And even with respect to 'the ability to wield physical force, corporations are as powerful as . . . government[s]: private security forces employ more people than public police departments.'⁴³ But if TNCs are really as powerful – or more powerful – than many states, does it make sense to put them on the private side of the divide? Given the extraordinary power wielded by TNCs, would it not make more sense to put them on the other side – to treat them as duty-holders vis-à-vis the human rights claims of individuals, just as states are?⁴⁴ After all, while the state was viewed as representing the greatest aggregation of power and therefore the greatest threat to individual liberty

of Human Rights Violations, in Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Boston: Kluwer Law International, 1999), pp. 187–97.

⁴⁰ See Greenwood, 'Markets and Democracy', 55, 87.

⁴¹ Joseph Raz, 'On the Nature of Rights', in Winston (ed.), *The Philosophy of Human Rights*, pp. 44, 45.

⁴² See Kammaing, 'Holding Multinational Corporations Accountable', p. 553.

⁴³ Greenwood, 'Markets and Democracy', 58–9.

⁴⁴ See Clapham, *Human Rights*, p. 137 ('[T]he definition of the public sphere has . . . to be adapted to include . . . new centres of power . . . such as . . . multinationals . . . that the individual now perceives [as sources of] authority, repression, and alienation'); Shelton, 'Protecting Human Rights', 315; Campbell and Miller (eds.), *Human Rights*, p. 18; Peter Muchlinski, 'International Business Regulation: An Ethical Discourse in the Making?', in Campbell and Miller (eds.), *Human Rights*, pp. 81, 91.

and autonomy at the time the Bill of Rights was drafted, cannot we now say that TNCs are wielding power on the same scale as states?⁴⁵

Accordingly, under both the individual autonomy and the power imbalance strands of human rights jurisprudence, TNCs may be more appropriately treated as duty holders (like states) than as rights holders (like individuals).⁴⁶ This argument has a certain intuitive appeal, but to test its legitimacy, we must carefully consider two questions. First, do states wield power over TNCs in the same way they wield power over individuals? Second, do TNCs wield power over individuals in the same way that states do?

In one sense, a state's control over the military and the police creates power over corporations within its jurisdiction of the same or similar kind that states wield over individuals. The state has the power to fine a corporation and to put its officers in jail. This implies the concomitant power to force a corporation to comply with regulatory restrictions on its activities through the threat of such sanctions. Indeed, since a corporation itself exists only by virtue of a benefit conferred by the state, the state that has incorporated it also has the power to disband it. This, however, assumes that the corporation is incorporated, headquartered and doing business all within one state. As TNCs become more and more international, they become more difficult for individual states to control.⁴⁷ Certainly, where a TNC does business in a host state, but is incorporated and headquartered in a separate home state, the host state's ability to exert power over the TNC is substantially diminished.

As the last section explored, a state may exert power through positive as well as negative incentives. Thus, it may exert power over a corporation by offering tax-breaks, subsidies or leases to mineral rights on public lands. The strength of this power, however, depends on the wealth of the state. Developing nations are often cash poor and desperate for foreign investment.⁴⁸ TNCs, on the other hand, often wield wealth that dwarfs the GNP of the developing country with which they are negotiating. Thus, in the developing world, power in the form of the capacity to offer money and/or valuable resources may often flow in the opposite direction, from

⁴⁵ See Ratner, 'Corporations and Human Rights', 461.

⁴⁶ While the application of human rights norms to TNCs is frequently described as giving human rights 'horizontal effect,' or '*Drittwirkung*' (see Jägers, *Corporate Human Rights Obligations*, p. 38), my argument in effect reconceptualises the relationship between individuals and TNCs from a horizontal to a vertical orientation.

⁴⁷ See Ratner, 'Corporations and Human Rights', 463; Kamminga, 'Holding Multinational Corporations Accountable', p. 553.

⁴⁸ See Ratner, 'Corporations and Human Rights', 459–60.

the TNC to the state. That is to say, the TNC may have more of an ability to get the state to do things it would not otherwise do than vice versa.⁴⁹

The relationship between Texaco and the government of Ecuador provides an instructive example. On the one hand, Ecuador exercised positive power over Texaco, offering it concessions to state-owned land on which the oil company could search for oil. Additionally, Ecuador exercised negative power, imposing taxes on Texaco's operations, collecting royalties and requiring the company to invest in infrastructure, including roads and airports, as a *quid pro quo* for access to Ecuadorian oil reserves. On the other hand, substantial power ran in the other direction as well. Texaco had the money, technology and expertise necessary to explore and drill for oil. These were resources that the Ecuadorian government did not have and desperately needed. In order to transform its oil reserves into much-needed cash, Ecuador was dependent on outside investment from a company like Texaco. And Ecuador – with a national debt that had by 1991 grown to a staggering \$12.4 billion (more than its GNP) – desperately needed the revenue that oil development could bring.⁵⁰

Thus, Ecuador had sovereignty over its territory and the oil reserves within its borders and therefore had at least the formal power to deny Texaco access or set conditions on its access. But Texaco had the capacity to make vast sums of money for the Ecuadorian government – money that the government desperately needed. For Texaco, this translated into the power to push back against Ecuador's demands for royalty payments, taxes and environmental controls.⁵¹ Thus, the power relationship between Texaco and the government of Ecuador was complicated, with substantial power running in both directions and Texaco arguably wielding even more power than the state of Ecuador.⁵² This relationship looked nothing like

⁴⁹ See Jägers, *Corporate Human Rights Obligations*, pp. 8–9. Cf. Hari Osofsky, 'Litigating Energy's Externalities: A Modern Westphalian Geography of Corporate Responsibility' (2005), available at ssrn.com/abstract=796204 (analysing complex and changing regulatory relationship between TNCs and nation states in context of climate change litigation).

⁵⁰ Kimerling, *Amazon Crude*, p. 46.

⁵¹ *ibid.*, p. 43. The Ecuadorian government's dual role with respect to Texaco as both regulator and business partner created an inherent conflict of interest. This is a common feature of oil development in the developing world. See Robert Dufresne, 'The Opacity of Oil: Oil Corporations, Internal Violence, and International Law', *New York University Journal of International Law and Politics* 36 (2004), 331, 355–6.

⁵² For a nuanced historical portrait of the complex power relationships between developing nations and the companies to which they have granted concessions for natural resource extraction, see Rebecca Hardin, 'Concessionary Politics in the Western Congo Basin: History and Culture in Forest Use', Working Paper Series: Environmental Governance in Africa (World Resources Institute, 2002). See also Dufresne, 'The Opacity of Oil'.

the prototypical relationship between the state and the individual that forms the basis for civil and political human rights.

In answer to the first question, then, there seems little doubt that states – particularly cash-poor, developing nations – do not wield power over TNCs in anything like the way states typically wield power over individuals. This indicates that it may be inappropriate simply to equate TNCs with individuals by placing them on the private side of the public–private divide. But is it appropriate to place them on the other side – to treat them the same as states, with human rights duties toward individuals? This brings us to the second question, do TNCs wield power over individuals in the same way that states do?

Applying the definition of power developed in the last section, there can be no question that Texaco exercised power over the Cofan. By poisoning their water and destroying the animals and plants that provided them food, shelter and subsistence, Texaco unquestionably altered the physical, material and spiritual conditions of the Cofan's lives. Indeed, some have called the results of the ecological destruction wrought by Texaco's operations 'cultural genocide'.⁵³ And the same has been said of Freeport-McMoran's impact on the people of Papua.⁵⁴ The company drastically altered the conditions of the Papuans lives both through the ecological destruction it wrought on the resources they depended on and – to the extent that Freeport is found to be a causal agent in the military repression of the Papuans – through the torture, rape, murder and detention of Papuan citizens.

To say that these TNCs exercised power over the people of Ecuador and Papua is probably relatively uncontroversial. But the crucial question is whether the *kind* of power exercised by the TNCs is the same *kind* of power that is typically exercised by states, and therefore the same kind of power that civil and political human rights were created to counteract. In the last section, I argued that what makes state power different from private power, and what necessitates the mechanism of human rights to curtail and control state power, is the fact that it is ultimate and final – there is no higher authority to whom one can appeal. This appears to have been true of the power exercised by Texaco and Freeport over the people of Ecuador and Papua. When the tribes of the Oriente organised and petitioned the Ecuadorian government to stop Texaco from poisoning the land and water on which they depended for life, the government –

⁵³ *ibid.*, p. 34 (Cofan tribe reduced from 15,000 to 300 during Texaco's tenure).

⁵⁴ *Beanal v. Freeport-McMoran*, 969 F Supp. 362, 366 (E. D. La. 1997).

itself dependent on investment by foreign oil companies for half its revenue – did not respond.⁵⁵ When government troops paid for by Freeport tortured, raped and killed those who attempted to speak out against the corporation's activities in Indonesia, there was no higher authority to which the people of Papua could appeal.

In sum, while states may wield some power over TNCs, it is not anything like the prototypical power dynamic that exists between government and the individual. While states have some power over TNCs, TNCs often wield considerable power back against states, particularly when those states are developing countries in desperate need of revenue to pay off staggering debt. Accordingly, it is inappropriate simply to put TNCs in the same category as individuals for the purposes of analysing human rights. Moreover, in some circumstances at least, TNCs wield power over individuals that looks very much like the kind of power that states wield over individuals and that civil and political human rights were created to counteract. Specifically, this is true where a TNC has the ability to alter the physical, material or spiritual conditions of existence for individuals and those individuals have no higher authority to which they can appeal.

There are two circumstances in which we find TNCs exercising final, ultimate authority of this kind. The first occurs where the state has become so weak and/or corrupt as to be non-functional. It therefore fails to regulate corporate behaviour, and in some instances the TNC may even become the *de facto* provider of state services.⁵⁶ The second circumstance occurs where the TNC has so much power and influence within the domestic government that it essentially controls state decision-making. These circumstances, or combinations of the two, are widespread in the developing world today. Where these circumstances exist, TNCs are exercising state-like power over individuals, and therefore should be subject to human rights duties in order to prevent abuses of that power.⁵⁷ The imposition of such duties is not some radical new departure from existing human rights norms, but is entirely consistent with values and justifications that underlie our traditional and hallowed conceptions of civil and political rights.

⁵⁵ Only after Texaco made the decision to leave in 1992 did the government in Ecuador begin to take some steps to oppose Texaco, though these were largely symbolic and ineffective.

⁵⁶ See Ratner, 'Corporations and Human Rights', 500.

⁵⁷ TNCs may also be centrally involved in human rights violations where they work in concert with a state. Those acts, however, are reachable under the state action doctrine as applied to existing interpretations of human rights. See *Kadic v. Karadzic*, 70 F. 3d 232 (2nd Cir. 1995).

IV. Defining and enforcing the human rights duties of transnational corporations

It is one thing to say in general terms that the civil and political human rights held by individuals should be viewed as imposing duties directly on TNCs, but what particular rights are we talking about? And how can such rights be enforced? This section addresses these questions.

A. Definition

Clearly not all the rights enforceable against states are relevant in the context of TNCs. A TNC is unlikely to act in the role of criminal prosecutor, for example. Thus, the whole range of criminal procedure rights that make up so much of the lexicon of traditional civil and political rights are unlikely to be applicable against TNCs.⁵⁸ There may be some need, then, for a 'creative adaptation' of human rights norms to the context of TNCs.⁵⁹

My aim here is not to exhaustively catalogue all of the specific rights that could apply against TNCs, but rather to simply sketch a few broad categories of rights that may be appropriate in light of the above analysis. There are three rights that have a long pedigree in the civil and political rights tradition and seem like particularly good candidates for applying against TNCs that engage in environmental wrongs in the circumstances defined above. Free expression is one such category. Where TNCs are making decisions that have widespread and significant impacts on the health and welfare of the surrounding community – like a decision to build a polluting facility or to engage in environmentally destructive extractive activity – the same concerns that underlie free expression rights against states are implicated. In such circumstances, human rights norms should ensure a free flow of ideas – including ideas critical of the corporate decision-makers. TNCs should have a duty, for example, not to suppress free expression among employees and community members aimed at publicising information relating to the environmental impacts of the TNC's facilities. Acts or threats of violence against demonstrators and those who speak out against a TNC's practices would clearly constitute

⁵⁸ TNCs may, however, sometimes act in concert with government officials in a prosecutorial role, as Shell Oil did in Nigeria (see n. 57 above), in which case such rights might be logically applied against them. See Ratner, 'Corporations and Human Rights', 492–3.

⁵⁹ Campbell and Miller (eds.), *Human Rights*, p. 18. See Jägers, *Corporate Human Rights Obligations*, pp. 48–74.

such suppression. But so could less violent tactics, like economic reprisals against outspoken employees.

Similar concerns weigh in favor of recognising procedural due process rights against TNCs. Thus, TNCs should have a duty to provide information to employees and community members before making decisions that may affect the physical, spiritual or material conditions of their lives, and a duty to allow employees and community members to participate in such decision-making by presenting information and arguments to corporate officials. Where, for example, a TNC is considering building a facility that may cause pollution or other environmental degradation, these rights would impose certain procedural due process obligations on the TNC for the benefit of employees and community members. At a minimum, these should include the duty to turn over information about the potential harms the facility may cause. A stronger version of such rights would require the TNC to allow employees and community members to participate in decision-making by, for example, presenting arguments and evidence relevant to the decision. This could occur either through a procedure akin to notice and comment rule-making or through some type of formal hearing. Additionally, due process might require the TNC to prepare and distribute for public comment an environmental impact statement, demonstrating that the decision-makers have adequately considered potential environmental impacts of and alternatives to the proposed facility.

Procedural rights like these are a common feature of environmental law, both domestically and internationally.⁶⁰ Such rights play an important role in promoting environmental protection. Existing laws, however, differ from what I am suggesting here in that they impose duties directly on government and only indirectly on corporations. Thus, a government agency is usually charged with gathering information from private corporations and then distributing it to the public. Additionally, the decision-making processes in which individuals are given the right to participate are usually those of the government itself, which may be deciding whether, for example, to grant a permit to a private corporation to build a polluting facility. But where government is dysfunctional or beholden to a more economically and politically powerful TNC, such procedural rights against the state are of little use. For such rights to be meaningful, the

⁶⁰ See Claudia Saladin, 'Public Participation in the Era of Globalization', in Romina Picolotti and Jorge Daniel Taillant (eds.), *Linking Human Rights and the Environment* (Tucson Ariz: University of Arizona Press, 2003), p. 57.

duties must be imposed directly on the real decision-maker, which in such circumstances is the TNC itself.

Finally, rights to personal security – to life and bodily integrity – should also apply against TNCs.⁶¹ Such rights would certainly apply where a TNC hires a security force to beat demonstrators,⁶² just as the assault of an individual by a police officer constitutes a clear violation of traditional civil and political rights. In my view, however, such rights should also apply in certain instances of indirect, unintentional harm – where, for example, a TNC causes environmental harm that results in significant adverse health impacts to members of the surrounding community.

In this second scenario, the TNC certainly exercises power over those harmed by the pollution – it alters the physical, material and spiritual conditions of their lives – and where the state is non-functional and/or the TNC controls state decision-making, this is the kind of power that I argued in the last section should trigger human rights norms. But not all exercises of power by the state constitute human rights violations, nor should all exercises of power by a TNC.⁶³ The state does not violate my rights every time it assesses a tax against me or issues me a traffic ticket, as long as it follows appropriate procedures. Nor are my human rights violated when a state employee driving negligently causes her car to crash into mine. The question is whether there has been an *abuse* of power.⁶⁴ The US Supreme Court has answered this question in the context of constitutional rights by looking at the mental state of the state official causing the injury. Generally, the Supreme Court has found that something more than negligence – deliberate indifference or gross negligence – is necessary in order for an unintentional injury caused by a state official to rise to the level of the kind of abuse of power necessary for a violation of constitutional rights.⁶⁵

⁶¹ See Cristina Baez, Michele Dearing, Margaret Delatour and Christine Dixon, 'Multinational Enterprises and Human Rights', *University of Miami International and Comparative Law Review* 8 (1999), 183, 255; *Ingraham v. Wright*, 430 US 651, 673–4 (1977) ('Among the historic liberties . . . protected [by the Due Process Clause] was a right to be free from . . . unjustified intrusions on personal security' including 'bodily restraint' and/or the infliction of 'appreciable physical pain').

⁶² The practice of TNCs – particularly those engaged in extractive industries in the developing world – hiring private security forces and/or government military units to repress political opposition to their operations and protect their facilities is widespread. See Dufresne, 'The Opacity of Oil', 335–8, 344–5.

⁶³ See Ratner, 'Corporations and Human Rights', 472.

⁶⁴ See *Daniels v. Williams*, 474 US 327, 332 (1986).

⁶⁵ See *Estelle v. Gamble*, 429 US 97, 104 (1976) ('deliberate indifference' to prisoners' medical needs rises to level of constitutional rights violation); *Youngberg v. Romeo*, 547 US 307, 322 (1982) (conduct of state mental hospital employee must constitute a 'substantial departure

If we were to apply a similar standard to TNCs, then, a human rights violation might be found where environmental harm caused by a TNC could be traced to gross negligence and/or deliberate indifference by TNC officials.⁶⁶

While US constitutional law provides a useful analogy, it need not, of course, be binding in this context. Certainly, an argument can be made that, at least in some situations, negligence itself may rise to the level of the kind of abuse of power that ought to constitute a human rights violation where certain other factors are present.⁶⁷ Thus, where the harm is severe, long-lasting and widespread – as was the environmental destruction wrought by Texaco in the Amazon and Freeport in Papua – mere negligence might rise to the level of an abuse of power. Additionally, where the power exercised was unique to the TNC – the power to create widespread environmental devastation, for example, as distinguished from every citizen's 'power' to cause a car accident – abuse of power might be found even where the responsible officials exhibited a less culpable mental state.

Defining the actual contours of the rights that might be asserted against TNCs obviously raises deep and complex issues that need far more development than I have space for here. I have simply tried to suggest some of the broad outlines that such an analysis might follow.

B. Enforcement

Even if the imposition of human rights duties on TNCs for environmental harms can be justified as a matter of theory, what difference would it make

from professional judgment, practice, or standards' to violate constitutional rights); *Doe v. New York City Department of Social Services*, 709 F 2d 782, 790 (2nd Cir. 1983) (calling *Youngberg's* professional judgement standard 'essentially a gross negligence standard' and applying it to mistreatment of child in foster care).

⁶⁶ US courts have generally applied standards lower than intent – like deliberate indifference, recklessness or gross negligence – only in custodial situations like prisons and mental hospitals, otherwise requiring a showing of actual intent in order to find constitutional liability. In *County of Sacramento v. Lewis*, 523 US 833 (1998), however, the Supreme Court clarified that the basis for this distinction is not the fact of custody per se so much as the fact that prison and hospital officials generally have time to deliberate before taking action, unlike, for example, police officers conducting a high speed chase. *Lewis*, 523 US at 851. Under this logic, the actions of the officials of a TNC that result in environmental degradation – typically actions taken with ample forethought over the course of many years – would clearly fall within the ambit of the deliberate indifference or gross negligence standards even though those harmed are not in the custody of the TNC.

⁶⁷ See Christina Brooks Whitman, 'Emphasizing the Constitutional in Constitutional Torts', *Chicago-Kent Law Review* 72 (1997), 661, 689–90.

in practice? Does a human rights approach present advantages over other approaches to CSR in terms of gaining actual compliance by TNCs? One might well ask, why bother? Why not simply leave TNCs on the private side of the public-private divide and rely on private rights and consumer pressures in the marketplace to temper corporate conduct? After all, if a TNC hires security guards who beat up a demonstrator, surely the demonstrator has a tort claim for assault and battery against the TNC, regardless of whether any human rights duties apply? And surely the private market itself provides an incentive for TNCs to avoid involvement in activities that in the age of internet communications are likely to produce negative publicity and hurt their image among consumers?

While negative publicity campaigns aimed at TNCs committing environmental atrocities have certainly had some effect, prompting some TNCs to adopt corporate codes of conduct and to discontinue particularly offensive activities, such effects are necessarily limited. Corporate codes of conduct are entirely voluntary, and when ethical behaviour requires sacrificing profits, ethics is unlikely to win out.⁶⁸ Moreover, such publicity campaigns depend largely on cash-strapped and overextended NGOs to monitor and publicise TNC activities and so are unlikely to occur in every instance in which they are warranted. Finally, such campaigns are most effective against high-profile, brand-driven products, but may be far less effective against firms that don't depend on a prominent public image.⁶⁹ Thus, to the extent that a human rights approach offers the possibility of supplementing market incentives with formal court enforcement, it offers distinct advantages.

Additionally, even in the absence of formal enforcement mechanisms, the recognition of human rights duties against TNCs may have a positive effect on corporate behaviour. In addition to directly proscribing particular activities, law serves an expressive function, both reflecting and shaping societal values.⁷⁰ In today's world, the language of human rights carries a universally recognised moral force.⁷¹ Accordingly, in those instances where NGOs do have the resources to generate publicity regarding atrocities like those of Texaco in Ecuador and Freeport in Indonesia, the ability

⁶⁸ See Mitchell, *Corporate Irresponsibility*. ⁶⁹ See Muchlinski, 'Human Rights', 39.

⁷⁰ Jane B. Baron and Jeffrey L. Dunoff, 'Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory', *Cardozo Law Review* 17 (1996), 431, 487-90; Christopher Stone, 'The Law as a Force in Shaping Cultural Norms Relating to War and the Environment', in Arthur H. Westing (ed.), *Cultural Norms, War and the Environment* (Oxford: Oxford University Press, 1988), pp. 64, 65.

⁷¹ See Campbell, *Rights*, p. 3.

to condemn such actions in the language of human rights lends a weight and moral authority to such accusations that is likely to intensify public pressure against these TNCs.

Finally, while formal enforcement against TNCs faces many hurdles, enforcement of human rights is ultimately far more likely to be effective than enforcement of private rights. The environmental atrocities committed by a TNC may well constitute common law torts, but, in the circumstances in which the human rights duties I have proposed apply (the non-functional state and the TNC-controlled state), the host government is by definition not adequately enforcing private rights against TNCs. Private rights are therefore of little use. There is a need for some outside authority to impose duties on TNCs. And in order for such an outside tribunal to act with credibility, it needs some universally accepted source of substantive law, like human rights.

But what tribunal outside the host state could enforce human rights duties against TNCs? Existing institutions offer two possibilities: (1) courts in the TNC's home state enforcing a domestic statute that incorporates international law principles, like the US ATCA, or (2) an international human rights tribunal. Under current law, obstacles exist to the prosecution of human rights claims against private parties in these fora, but reconceptualising substantive human rights norms in the way I have suggested here could be a first step toward breaking down those barriers. If, as I have argued, environmental atrocities committed by TNCs fit within traditional understandings of civil and political human rights as mechanisms for counteracting power imbalance, then there is perhaps some hope that some such claims might some day fall within the scope of the 'present day law of nations' recognised as actionable under the ATCA, even under the narrow reading of that concept recently provided by the US Supreme Court.⁷² Since the state action requirement under the ATCA only applies to the extent that the law of nations defines the human rights standard at issue solely against states,⁷³ the reconceptualisation of human rights norms that I urge here could also conceivably provide a rationale for loosening or eliminating that requirement. Even if the US ATCA continues to be read narrowly by the courts, domestic courts in other home countries could conceivably provide fora for such claims.⁷⁴ Similarly, this new understanding of human rights norms provides an argument for

⁷² *Sosa v. Alvarez-Machain*, 542 US 692, 749 (2004).

⁷³ See *Kadic v. Karadzic*, 70 F 3d 232 (2nd Cir. 1995).

⁷⁴ See Jägers, *Corporate Human Rights Obligations*, pp. 203–12.

altering the procedural requirements of the European Court of Human Rights and other human rights tribunals that currently recognise only claims against state parties.⁷⁵

V. Conclusion

This chapter has attempted to construct a normative justification for the imposition of human rights duties on TNCs that commit environmental wrongs in the developing world. Under the now near-hegemonic worldview of welfare economics, TNCs are analogised to individuals competing in the marketplace and thus placed squarely on the private side of the public–private divide. If we step outside of the economic world view, however, and recognise the extent to which the normative justifications for civil and political human rights have traditionally been rooted in a perceived need to counteract the imbalance of power between the individual and the state, it becomes clear that it is frequently far more appropriate to treat TNCs as ‘like states’ than ‘like individuals’. Accordingly, at least where one of two sets of factual circumstances exist, human rights duties should be imposed directly on TNCs for environmental harms (1) where the state has become so weak and/or corrupt as to be non-functional, or (2) where the TNC has so much power and influence within the domestic government that it essentially controls state decision-making.

⁷⁵ See Clapham, *Human Rights*, p. 91.