BINDING CORPORATIONS TO HUMAN RIGHTS NORMS THROUGH PUBLIC LAW SETTLEMENT

BENJAMIN C. FISHMAN*

Recent settlements in the United States and France of human rights litigations against oil companies Unocal and Total have made it clear that litigation is a viable tool for holding companies to account for their involvement in human rights abuses abroad. This Note argues, however, that the Unocal and Total settlements inadequately reflect the public importance of the cases, which sought to force Unocal and Total to answer for their complicity in human rights abuses committed in Burma, and also represented a growing movement to legally bind corporations to human rights norms. The settlements undermine these efforts by failing to fulfill the goals of public law litigation—namely, the prospective intervention in ongoing situations of injustice and the articulation of public norms. Instead, by channeling much of the settlement funds into community development projects unrelated to the human rights abuses, and by failing to demand any fundamental changes in the defendant companies' conduct, the settlements replicate a pernicious element of contemporary "corporate social responsibility" efforts: the characterization of good corporate behavior as a matter of charity rather than as a matter of right.

This Note argues that future settlements of human rights cases against corporations can—perhaps more effectively than fully litigated cases—better reflect the promise of public law litigation by setting up legally binding systems to monitor corporate conduct. Such systems could effectively prevent the type of human rights-threatening behavior transnational corporations are most likely to commit. Furthermore, such monitoring systems would be norm-producing, insofar as they would continually elucidate how corporations threaten human rights, and would generate an evolving repertoire of ways to address such threats. In so doing, monitoring systems could serve as bases for NGOs' international human rights campaigns and as models for replication outside of the litigation context, thus further disseminating norms of appropriate corporate conduct.

INTRODUCTION

"About forced labour used by the troops assigned to provide security on our pipeline project, let us admit between Unocal and Total that we might be in a grey zone."[1] This quote is among the more damning pieces of evidence implicating oil companies Unocal and

 A.B., 1999, Brown University; J.D., 2006, New York University School of Law. I am grateful for the help of Professors Philip Alston and Olivier De Schutter who generously provided advice, encouragement, and the benefit of their experience. Thanks also to Susan Pappy, Shabnam Faruki, and Antoine McNamara for their valuable insights and thorough editing. Finally, thanks to the other members of the *New York University Law Review*, especially Jon Hatch, for their helpful suggestions and support.

[1] Doe I v. Unocal Corp., 395 F.3d 932, 942 (9th Cir. 2002) (quoting Letter from Hervé Chagnoux, Bus. Dev. Manager, Total S.A., to Unocal Corp. (Feb. 1, 1996)).

Total in massive human rights abuses—forced labor, and the murder and rape used to procure it—committed in constructing the Yadana natural gas pipeline in Burma.

The pipeline was built by a consortium in which Unocal and Total partnered with a Thai corporation and Burma's state-owned oil company.[2] The project ran through an area populated by armed ethnic groups.[3] The Burmese government, notorious for its use of forced labor,[4] heavily militarized the pipeline route in response.[5] These troops allegedly forced local villagers to work on and around the pipeline project.[6] According to a report produced by the International Labour Organization (ILO), describing Burmese forced labor in general:

> [P]enalties for failing to comply with forced labour demands were harsh. Punishments included detention at the army camp, often in leg-stocks or in a pit in the ground, commonly accompanied by beatings and other forms of torture, as well as deprivation of food, water, medical attention and other basic rights. Women were subject to rape and other forms of sexual abuse at such times.[7]

Litigation in the United States against Unocal, and in France against Total, focused on the degree to which the companies could be

---

[2] *Id.* at 937.

[3] THE BURMA CAMPAIGN UK, TOTAL OIL: FUELLING THE OPPRESSION IN BURMA 17 (2005), *available at* http://www.burmacampaign.org.uk/PDFs/total%20report.pdf (describing Burmese junta policy of "relocating" villagers in pipeline area in order to "eliminate threats from armed ethnic groups").

[4] The International Labour Organization documents pervasive forced labor in many sectors of Burma's economy: military camp construction, agricultural work, logging, and infrastructural projects such as roads, railways, bridges—and pipelines. *See generally* INT'L LABOUR ORG., FORCED LABOUR IN MYANMAR (BURMA) (1998), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm [hereinafter ILO REPORT]. The labor is "almost never remunerated nor compensated . . . but on the contrary often goes hand in hand with the exaction of money, food and other supplies as well from the civilian population." *Id.* at para. 532 (citations omitted).

[5] THE BURMA CAMPAIGN UK, *supra* note 3, at 13 ("In 1991, to 'secure' the area for TOTAL and other foreign oil companies, the entire pipeline region was militarized; thousands of troops renowned for their extreme brutality were drafted into [the] area . . . .").

[6] *See infra* text accompanying notes 61–63.

[7] ILO REPORT, *supra* note 4, at para. 292. In addition:

> Forced labourers, including those sick or injured, are frequently beaten or otherwise physically abused by soldiers, resulting in serious injuries; some are killed, and women performing compulsory labour are raped or otherwise sexually abused by soldiers. Forced labourers are, in most cases, not supplied with food . . . ; porters may receive minimal rations of rotten rice, but be prevented from drinking water.

Id. at para. 535 (citations omitted). Furthermore, "[t]he burden of forced labour also appears to be particularly great for non-Burman ethnic groups, especially in areas where there is a strong military presence." *Id.* at para. 534 (citations omitted).

held responsible for abuses committed during the pipeline's construction. In *Doe I v. Unocal Corp.*,[8] information gathered in discovery strongly suggested that both companies knew of the horrors accompanying the pipeline's construction.[9] Indeed, it appears they accepted the use of forced labor and human rights abuses in bringing to fruition, at lowered cost, their Burmese investment.[10]

The Unocal and Total litigations are two of the most well known in a growing family of cases seeking to hold transnational corporations (TNCs) legally accountable at "home" for their involvement in human rights abuses abroad. They are also the first both to survive motions to dismiss and to reach final resolutions—both through settlement.

These settlements were inadequate and should have better reflected the two primary ideals of public law litigation: the prospective remedying of systemic injustice and the articulation of public norms.[11] By directing much of their funds to local community development projects, the settlements mirrored one of the more problematic elements of the voluntary corporate social responsibility (CSR) movement, namely its tendency to encourage TNCs to perform extraneous charitable acts (e.g., building schools or community centers) rather than reform their harmful business practices (e.g., their security arrangements or environmental policies). Instead, future settlements can better reflect the ideals of public law litigation by implementing, in legally binding form, other more promising aspects of CSR, including independent third-party monitoring and empowerment of local communities. In other words, the settlement of human rights cases against corporations may be a way to fulfill the promise of both CSR and public law litigation.

---

[8] 395 F.3d 932 (9th Cir. 2002).

[9] *Id.* at 942. Unocal was well aware that pipeline security was provided by the Burmese military; in fact, a Unocal representative characterized the pipeline consortium as having "hired" the military to provide security. *Id.* at 938. Furthermore, clear evidence was presented that management of Unocal and Total knew of the sorts of abuses the Burmese military was likely to commit. President of Unocal, John Imle, said at a 1995 meeting with human rights organizations at Unocal's headquarters: "People are threatening physical damage to the pipeline"; "if you threaten the pipeline there's gonna be more military"; and "if forced labor goes hand and glove with the military yes there will be more forced labor." *Id.* at 941.

[10] In 1995, a Unocal representative wrote to the director of Total, Hervé Madeo, that both companies ought to be concerned with the questions of how to define forced labor and what the responsibility of the consortium might be with regard to it. *Id.* at 941. Nonetheless, a Unocal spokesman claimed that the company was satisfied with assurances by the junta that no human rights abuses were occurring. *Id.* at 942. In 1995, a consultant hired by Unocal reported to the company that "Unocal, by seeming to have accepted [the junta's] version of events, appears at best naive and at worst a willing partner in the situation." *Id.*

[11] *See infra* Part I.B.

Part I of this Note provides more background about transnational human rights cases against TNCs and shows that these cases can be comfortably situated in the field of public law litigation. One of the major goals of public law litigation is to articulate norms. Accordingly, Part I addresses how these cases have handled one of the important normative questions: How much active complicity in human rights violations is necessary for a finding of corporate liability? Part II measures the practice of voluntary CSR against the ideals of public law litigation, pointing out CSR's many weaknesses while demonstrating some of its potential. In particular, the analysis will focus on the promise represented by aggressive third-party monitoring groups such as the Worker Rights Consortium. Part III critiques the Unocal and Total settlements and then proposes a better settlement model, which might better protect communities against future human rights abuses. This protection would come from detailed, legally enforceable codes of conduct, and from independent monitors who would police compliance and make their findings public (and thus usable in global campaigns of nongovernmental organizations (NGOs)). The model has the potential to articulate norms through "spillover" effects (voluntary adoption by third parties of successful settlement regimes), NGO campaigns based on the independent monitors' reports, and legal enforcement of the settlements' terms. Finally, this Note discusses how these mechanisms might generate answers to the normative question posed above: What degree of corporate complicity is required for a finding of liability?

The proposed model strives to be true to the spirit of public law litigation while using, and improving upon, elements of CSR. These types of creative settlements may be the best method within the litigation context (perhaps even superior to full adjudication) of addressing the global problem of TNC-related human rights abuses.

I
TRANSNATIONAL CORPORATE HUMAN RIGHTS CASES AND PUBLIC LAW LITIGATION

A. The Body of Transnational Corporate Human Rights Cases

In recent years, in the United States and elsewhere, there have been several attempts to hold TNCs legally accountable for their involvement in human rights abuses. The worst and most common of these abuses occur in the extractive (oil and mining) sectors,[12] where

[12] *See* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Bus-*

TNCs frequently rely on soldiers or private security providers to guard infrastructure, repress protest,[13] or procure labor. Labor rights abuses in "sweatshops" operating within the apparel industry are also a much-noted problem.[14] Corporate involvement with human rights abuses has spurred major NGOs like Human Rights Watch[15] and Amnesty International[16] to create programs devoted to these problems. Setting aside the broader question of whether corporate investment in developing countries is generally beneficial,[17] it is clear that corporate involvement in human rights abuses is common.[18]

---

iness Enterprises, para. 25, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement [hereinafter *Interim Report*] (noting that extractive industry "utterly dominates" list of complaints regarding TNC-related human rights abuses).

[13] These protests are often reactions to environmental damage caused by the TNC. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386(KMW), 2002 WL 319887, at *2 (S.D.N.Y. Feb. 28, 2002) (involving allegations that Nigerian security forces committed abuses against Ogoni protestors of environmental damage caused by Shell); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (involving allegations that Indonesian security forces committed human rights abuses where there was indigenous protest against environmental damage associated with mines).

[14] *See Interim Report*, *supra* note 12, para. 26 ("Abuses of labour rights . . . constitute the core issue in apparel and footwear.").

[15] Human Rights Watch, Business and Human Rights, http://hrw.org/doc/?t=corporations (last visited July 7, 2006).

[16] Amnesty International, Economic Globalization and Human Rights, http://web.amnesty.org/pages/ec-index-eng (last visited July 7, 2006).

[17] For a discussion of conflicting empirical reports regarding whether the presence of TNCs promotes or harms human rights, see William H. Meyer, *Activism and Research on TNCs and Human Rights: Building a New International Normative Regime*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 33–36 (Jedrzej George Frynas & Scott Pegg eds., 2003). *Cf.* Matthias Busse, *Transnational Corporations and Repression of Political Rights and Civil Liberties: An Empirical Analysis*, 57 KYKLOS 45, 56 (2004) (finding presence of TNCs promotes civil and political rights).

[18] It will not, however, always be possible to set aside the question of whether TNCs' presence in developing countries is beneficial. For example, the cases against Total (and to some extent Unocal) are inseparable from the divestment campaign against Burma led by Aung Sang Suu Kyi. *See* The Burma Campaign UK, TOTAL Climbdown on Burma Court Case (Nov. 29, 2005), http://www.burmacampaign.org.uk/pm/weblog.php?id=P187 (supporting settlement of case against Total and noting that it will not detract from divestment campaign); INFO BIRMANIE ET AL., TOTAL POLLUTES DEMOCRACY: STOP TOTALITARIANISM IN BURMA 30–33 (2005), *available at* http://www.fidh.org/IMG/pdf/mm0406 2005a.pdf (approvingly describing court cases against Total in report generally calling for divestment); *see also* Third Amended Complaint for Damages & Injunctive & Declaratory Relief at 30, Doe I v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (No. CV 96-6959-RAP (BQRx)), *available at* http://www.ccr-ny.org/v2/legal/corporate_accountability/docs/Third_Amended_Complaint.pdf [hereinafter Unocal Complaint] (demanding that Unocal pull out of Burma until junta ceases human rights abuses). In fact, one of the complaints in the Belgian case against Total was that the company provided "moral and financial support" to a regime that it knew committed massive human rights violations. Press Release, Actions Birmanie, Civil Action for Crimes Against Humanity and Complicity in Crimes Against Humanity Committed in Burma (Myanmar) Lodged on Thursday April 25 2002 in the Brussels Magistrates Court Against X, the Company

Transnational corporate human rights litigations, the most prominent of which have been brought by nonprofit NGOs,[19] seek to address this global problem.[20]

The bulk of these cases, of which *Doe I v. Unocal Corp.*[21] is a leading example, have been brought in the United States under the Alien Tort Claims Act (ATCA),[22] which allows foreign plaintiffs to bring suit in American courts for "torts" violating the "Law of Nations."[23] The corporate ATCA cases have alleged violations ranging from the universally recognized (e.g., slave labor, as in *Unocal*) to the more controversial and peripheral (e.g., reckless environmental degradation, as in "environmental human rights" cases such as *Flores v. Southern Peru Copper Corp.*[24] and *Aguinda v.*

TOTALFINAELF S.A., Thierry Desmarest and Herve Madeo (Apr. 25, 2002), http://www.birmanie.net/birma/ab112_ab290502.html [hereinafter Press Release, Actions Birmanie]. In other words, by doing business with, and thus propping up, a regime known for egregious human rights violations, Total committed a wrong for which the only solution would be leaving Burma. For that reason, there is a certain irresolvable tension between the kind of prospective relief through settlement advocated in this Note—which envisions TNCs' continued presence in host countries—and some of the goals of the political movements surrounding these litigations.

19 *See, e.g.*, Center for Constitutional Rights, Corporate Accountability, http://www.ccr-ny.org/v2/legal/corporate_accountability/corporate_accountability.asp (last visited July 7, 2006) (reviewing NGOs' litigation efforts); EarthRights International, Legal Programs, http://www.earthrights.org/legal (last visited Sept. 5, 2006) (same). Increasingly, however, these cases are being brought by the private plaintiffs' lawyers:

> As ATCA [Alien Tort Claims Act] jurisprudence became more established and courts confirmed that corporations could be sued for human rights abuses, the statute was "discovered" by plaintiff-side lawyers more accustomed to bringing shareholder derivative actions and mass tort litigation through the class action mechanism. . . . The arrival of these legal entrepreneurs marks the departure of ATCA-style litigation from the exclusive domain of pro bono and NGO litigators.

Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2314–15 (2004) (citations omitted).

20 For reviews of instances of corporate malfeasance, see INT'L NETWORK FOR ECON., SOC. & CULTURAL RIGHTS, CONSULTATION ON HUMAN RIGHTS AND THE EXTRACTIVE INDUSTRY (2005), *available at* http://www.escr-net.org/GeneralDocs/ESCR-NetonExtr.pdf, and GREENPEACE, CORPORATE CRIMES: THE NEED FOR AN INTERNATIONAL INSTRUMENT ON CORPORATE ACCOUNTABILITY AND LIABILITY (2002), *available at* http://www.greenpeace.org/international/press/reports/corporate-crimes-the-need-for.

21 395 F.3d 932 (9th Cir. 2002).

22 28 U.S.C. § 1350 (2000).

23 The scope of the "Law of Nations" was limited by the Supreme Court to norms no "less definite [in] content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted" in 1789, Sosa v. Alvarez-Machain, 542 U.S. 692, 725, 732 (2004), that is, "violation of safe conducts, infringement of the rights of ambassadors, and piracy," *id.* at 724. The Court thus set a high standard for the degree to which norms, recognized under ATCA, must be "specific, universal, and obligatory." *Id.* at 732.

24 414 F.3d 233, 266 (2d Cir. 2003) (finding right to clean environment not actionable under ATCA).

Texaco, Inc.[25]).[26] Another prominent corporate ATCA case[27] is *Wiwa v. Royal Dutch Petroleum Co.*,[28] in which plaintiffs alleged that Royal Dutch/Shell (Shell) supported Nigerian security forces in the violent repression of Ogoni villagers who had protested Shell's devastating environmental practices in the Niger Delta. Like *Unocal*, the *Wiwa* case has survived a motion to dismiss[29] and stands ready for trial—if it is not settled first.

Transnational corporate human rights litigation is not limited to U.S. ATCA cases. The Unocal litigation included California tort and statutory claims[30] that were resolved in the Unocal settlement.[31] Furthermore, along with the French case, another case was brought against Total in Belgium, under Belgium's now-weakened universal jurisdiction law (the case was recently dismissed).[32] Several transnational tort cases have been brought in the United Kingdom and Australia,[33] and many commentators believe similar litigation could spread to other European countries.[34]

---

25 303 F.3d 470, 480 (2d Cir. 2002) (affirming district court's forum non conveniens dismissal of environmental human rights claims).

26 Suits alleging violations of less universally recognized rights are likely to cease after *Sosa*. *See supra* note 23.

27 Other corporate ATCA cases include *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004) (plaintiffs accusing Chevron of providing helicopter to Nigerian security forces, who used it to fire upon, kill, and injure several Nigerian protestors), and *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1120 (C.D. Cal. 2002) (plaintiffs alleging that British and Australian mining operations incited civil war). For an overview, see Paul E. Hagan & Anthony L. Michaels, *The Alien Tort Statute: A Primer on Liability for Multinational Corporations*, *in* COMM. ON CONTINUING LEGAL EDUC., ALI-ABA, COURSE OF STUDY: INTERNATIONAL ENVIRONMENTAL LAW 121 (2005) (reviewing ATCA cases).

28 No. 96 Civ. 8386(KMW), 2002 WL 319887, at *2 (S.D.N.Y. Feb. 28, 2002).

29 *Id.* at *1.

30 Complaint, Doe I v. Unocal Corp., No. BC237980 (Cal. Super. Ct. filed Oct. 4, 2000), *available at* http://www.earthrights.org/files/Legal%20Docs/Unocal/statecomplaint2003.pdf. According to prominent lawyers in the field, "If the courts reject or limit the use of the [ATCA] in corporate cases, it is certain that many of these cases will instead be filed in state courts alleging state law claims." Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 221 (2005).

31 EarthRights International, Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers (Apr. 2, 2005), http://www.earthrights.org/legalfeature/historic_advance_for_universal_human_rights_unocal_to_compensate_burmese_villagers.html.

32 *La France Accusée de Faire Obstacle aux Sanctions Contre la Junte Birmane*, LE MONDE (Paris), July 4, 2005, http://www.lemonde.fr/cgi-bin/ACHATS/acheter.cgi?offre=ARCHIVES &type_item=ART_ARCH_30J&objet_id=908578 (subscription required).

33 *See* Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 456–58 (2001) (reviewing cases).

34 *See, e.g.*, Gerrit Betlem, *Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER

Although these cases have appeared in varied jurisdictional and doctrinal frames, they can all be grouped into a single litigation movement.[35] Some cases use common law tort, some international human rights, and some criminal law, but they are all "translations"[36] of one another, in that they share a common goal: to bind corporations to universal norms and to give these norms legal force and richer content through particularized application in domestic courts.

B. *The Cases as "Public Law Litigation"*

Public law litigation was first theorized by Abram Chayes[37] and Owen Fiss[38] in the late 1970s and has two goals: (1) intervening in

---

INTERNATIONAL LAW 283 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (exploring possibility of transnational litigation against TNCs in Dutch courts); Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 227 (Philip Alston ed., 2005) (reviewing possibilities in European Union for legal accountability of TNCs for human rights violations); *see also Interim Report*, *supra* note 12, para. 63 (noting that several countries that have integrated provisions of International Criminal Court statute "may have opened jurisdictional doors for [criminally] prosecuting firms domiciled in them for such crimes committed abroad").

35 These cases are often discussed together in the scholarship. *See generally* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004) (discussing cases in detail); Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002) (discussing possibilities and examples of ATCA-type litigation across different domestic legal systems).

36 *See* Stephens, *supra* note 35, at 4 (defining "translation" in context of domestic litigation of international human rights abuses as realization of common goals "through procedures appropriate to each national system").

37 Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

38 Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 3 (1979). The ideas expressed in *The Forms of Justice* form the background for the conception of public law litigation relied upon in this Note. Fiss's piece continues to be the paradigmatic work advocating for, and setting forth a model of, public law litigation. Today, however, this model may seem somewhat out of date, given the central importance of the "heroic" judge in Fiss's work and today's backlash against (progressive) "judicial activism." As one commentator has noted:

> The judge's role[, for Fiss,] is not only to see that justice is done to the politically disadvantaged, but also to hold up an image of justice to the larger community. The judge not only acts in the name of the people, but if successful, he brings the people to a new understanding of who they are and what justice requires of them.

Paul W. Kahn, *Owen's Way: Heroism in the Law*, 58 U. MIAMI L. REV. 103, 106 (2003); *see also id.* at 103 ("[Fiss's] mission was to show that moral heroism was not an illegitimate seizure of power by judges but at the very heart of the law."). While continuing to rely on Fiss's articulation of the basic elements of public law litigation, this Note places less emphasis on the heroic role of the judge and explores instead how these goals can be reached through private settlement. For contemporary interpretations of Fiss's work, see Symposium, *Fiss's Way: The Scholarship of Owen Fiss*, 58 U. MIAMI L. REV. 1 (2003).

ongoing injustice whose effects extend beyond the named parties, and (2) articulating norms for future application.[39] Chayes contrasted public law litigation with "traditional" adjudication, which he characterized as being concerned only with a completed event that occurred between two discrete parties.[40] Under the traditional model, the plaintiff seeks a remedy that fairly approximates the gravity of his or her personal harm.[41] The "public law" model, on the other hand, involves not merely a dispute between private parties, but "a grievance about the operation of public policy."[42] The parties are "sprawling and amorphous," and the remedy functions not merely as compensation for past harm, but also as a prospective set of changes laden with consequences for a large group of people beyond the named parties.[43]

The transnational corporate human rights cases differ from the classic "public law" cases described by Chayes insofar as the latter were typically brought against government agencies, not private parties. Nonetheless, the former easily fit within the "public law" category. First, the corporate human rights cases address persistent and systemic problems which extend beyond any single past incident. The harms in question stem from the *ongoing* relationship between TNCs and states, whether that relationship involves routine and brutal state repression of anticorporate protest or the use of forced labor in constructing corporate infrastructure. Second, and consequently, those who bring the cases are not simply acting on their own behalf. Instead, they serve as representatives of the larger community affected by the particular defendant corporation; they may also be seen as representing the much larger group of developing country residents harmed by corporate malfeasance.

The risk of ongoing systemic harm requires that public law remedies operate prospectively to protect against future abuses. Damages alone are insufficient. First, damages tend to be much lower in other

---

[39] Public law litigation is also often characterized by its interrelationship with politics outside the courtroom. *See* Helen Hershkoff & Aubrey McCutcheon, *Public Interest Litigation: An International Perspective*, *in* FORD FOUND., MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD 283, 283 (Mary McClymont & Stephen Golub eds., 2000) ("Litigation can complement a broader political movement, or foster mobilization and encourage alliances that then produce political action."); *see also supra* notes 18–19.

[40] Chayes, *supra* note 37, at 1282–83.

[41] *Id.*

[42] *Id.* at 1302.

[43] *Id.* *But see* Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1324 (1995) (denying any clear demarcation between "traditional" private-party-driven adjudication and "public law" litigation).

countries than in the United States,[44] making them unlikely to serve as effective deterrents. Second, there is simply no acceptable level of harm. While damages may have some deterrent effect, they also allow for a cost-benefit analysis weighing the benefits of threatening human rights against the costs of expected damages. Thus, even after a damages award, a company might continue supporting abuses if it were cost-effective to do so. To counter this, the public law remedy seeks to prospectively protect victims from injustice.[45]

Furthermore, the remedy shapes the norm in question and gives it substance. In the context of antisegregation litigation, Fiss demonstrates the profound way in which the remedy changes the meaning and importance of the norm in question:

> Rights and remedies jointly constitute the meaning of the public value. The declared right may be one of "racial equality," but if the court adopts a "freedom-of-choice" plan as the mode of desegregation then the right actualized is the right to choose schools free of racial distinction (though subject to all the other restraints inherent in any process that relies on individual choice). A constitutional value such as equality derives its meaning from both spheres, declaration and actualization . . . .[46]

If remedies are limited to damages, there is no secondary elaboration of the norm as applied to real circumstances. Thus remedies in the transnational human rights cases should go beyond damages and seek to prospectively guide corporate conduct in order to protect future victims and more fully articulate the norms in question.

To Fiss, it was necessary to accord the central role in creating the public law remedy to judges.[47] In contrast, Chayes emphasized that public law remedies—such as desegregation consent decrees—would be "ad hoc," "flexible," and "not imposed but negotiated,"[48] although he assumed ongoing judicial involvement.[49] Today's courts, at least in the United States, are increasingly hostile towards ambitious 1970s-

---

[44] *See* Stephens, *supra* note 35, at 20 (noting that awards in some systems are only symbolic, not compensatory).

[45] *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 598 (1983) (noting that preference for injunctive relief rather than damages in public law cases is predicated on assumption that remedy should proactively "reduce the risk that the victims will suffer continuing harm").

[46] Fiss, *supra* note 38, at 52.

[47] Fiss argued that judges ought to be preeminent in creating remedies because: (1) judges are independent of the parties and political actors; (2) judges are required to *listen* to all parties regarding "the meaning of public values"; and (3) judges must justify themselves in writing. *Id.* at 12–14.

[48] Chayes, *supra* note 37, at 1302.

[49] *Id.* at 1298–1302.

style prospective equitable relief.[50] In such an environment, the goals of public law litigation may be better served by settling cases, provided that such settlements are constructed in light of public law ideals.

C. The Norms to Be Articulated

Again, a central goal of public law litigation is to articulate norms. What then are the norms in play in these cases? At the broadest level, the baseline norm is that corporations should not violate human rights.[51] Specifically, however, we must still ask: Which particular human rights norms should corporations be held to?[52] And how close must the connection between the TNC and the host state be for corporate liability to be found?[53] On this last question, U.S. courts have reached conflicting results.[54]

---

[50] *See* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 231 (2003) ("Through a series of decisions, the majority is developing a new theory of limitations on the equitable powers of the federal courts."). To secure injunctive relief, it is most often insufficient to demonstrate past harm; instead, a clear showing of likely future harm must be made. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109 (1998) (finding that equitable claim regarding corporation's statutory violation must be founded on "allegations of future injury [that are] particular and concrete"); *O'Shea v. Littleton*, 414 U.S. 488, 494 n.3, 495–96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.").

[51] This norm is itself contested, given the disagreement regarding the degree to which private actors are subjects of international law. *See* Philip Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 3, 19–25 (Philip Alston ed., 2005) (describing resistance of traditionalist international law practitioners to expanding category of international law subjects beyond states).

[52] Again, some have attempted to bring "environmental human rights" into the fold. *See, e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233, 237–38, 254–55, 266 (2d Cir. 2003) (rejecting environmental human rights claim). But after *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the sweep of international law justiciable under ATCA has been narrowed substantially. *See supra* note 23 (describing high standard set by Supreme Court).

[53] While this is arguably a "standard" and not a baseline "norm," it is nevertheless a central normative question with respect to corporate human rights violations. This is especially true in the extractive industry context (as opposed to, for example, the "sweatshop" context), where those most immediately responsible for human rights violations are agents of the host state, and corporate liability depends entirely on how complicity is defined. Other normative questions remain. To what degree should domestic courts assert extraterritorial jurisdiction? *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 107–08 (2d Cir. 2000) (rejecting motion to dismiss on forum non conveniens grounds). Should corporate parents be held liable for the actions of their wholly owned subsidiaries? *See, e.g.*, Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1240, 1246, 1250 (N.D. Cal. 2004) (denying defense motion for summary judgment based on theory of indirect liability, since genuine issues of material fact existed as to extent to which Chevron was "integrally involved" in actions and structure of Nigerian subsidiary).

[54] For scholarly arguments defining liability-creating "complicity," see Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24

The Ninth Circuit panel in *Unocal*, relying in large part on the International Criminal Tribunal for the former Yugoslavia (ICTY) case *Prosecutor v. Furundzija*,[55] promulgated a relatively open-ended "aiding and abetting" standard under which TNCs could be held accountable if the court finds "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."[56] The corporate defendant's "practical assistance" need not be a "but for" cause of the abuse in question, but it must make a "significant difference" in the commission of the abuse.[57] Under this standard, corporate liability can be found if the abuse "probably would not have occurred in the same way" without the corporation's behavior.[58]

HASTINGS INT'L & COMP. L. REV. 339 (2001) (describing different types of corporate complicity); Margaret Jungk, *A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 171 (Michael K. Addo ed., 1999) (suggesting framework for finding liability-creating corporate complicity); and Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91 (2002) (situating contemporary corporate complicity cases in history of corporate forced labor cases going back to Second World War).

55 Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999).

56 Doe I v. Unocal Corp., 395 F.3d 932, 947, 950 (9th Cir. 2002). While the panel opinion was voided by the Ninth Circuit's decision to hear the case en banc, 395 F.3d 978, 979 (9th Cir. 2003), it is nonetheless persuasive authority.

57 *Unocal*, 395 F.3d at 947, 950.

58 *Id.* at 950 (citations omitted). The standard applied by the Ninth Circuit panel in *Unocal* was said, in a Secretary General Special Representative's report to the U.N. Commission on Human Rights, to "conform closely to what is widely thought to be the current state of international law." *Interim Report*, *supra* note 12, para. 72.

Some, however, have promulgated a broader standard of corporate complicity. For example, the U.N.'s voluntary "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" states:

> Transnational corporations and other business enterprises shall not engage in *nor benefit from* war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 3, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) (emphasis added), available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument. Unocal benefited from forced labor, and so it would be liable under this standard, even without any knowledge—actual or constructive—of the abuse. Id.

A similarly broad complicity norm would hold that TNCs are liable when their presence props up rights-abusing states. See Press Release, Actions Birmanie, *supra* note 18 (reporting that such claim was made in Belgian case against Total). Some argue that companies should be considered complicit if they knew, or should have known, that abuses were committed in fulfilling a TNC-state joint project, or if they remain silent in the face of

Furthermore, the panel noted that constructive intent is sufficient for liability; neither "positive intention" to commit the abuse nor even knowledge of the "precise crime that the principal intends to commit" are required.[59] Instead, it need only be found that the defendant was "aware that one of a number of crimes will probably be committed" and that such a crime "[was] in fact committed."[60] The court found that (1) Unocal had "hired" the Burmese military to provide security along the pipeline;[61] (2) it knew or reasonably should have known that this "would assist or encourage the Myanmar Military to subject Plaintiffs to forced labor";[62] and (3) this forced labor would "probably" be accompanied by "acts of violence" such as murder and rape.[63] Under the Ninth Circuit test, therefore, Unocal could be held liable.[64]

The standard for accountability was also addressed in *Wiwa*, with a different result. Instead of applying the "aiding and abetting" standard, the Southern District of New York found that Shell had met a "joint action" standard, satisfied only when a "substantial degree of cooperative action" exists between TNCs and abusive governments.[65]

---

host country abuse. INT'L FED'N FOR HUMAN RIGHTS, POSITION PAPER: COMMENTS TO THE INTERIM REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES 10–11 (2006), available at http://www.fidh.org/IMG/pdf/business442a.pdf.

[59] *Unocal*, 395 F.3d at 950–51 (citations omitted).

[60] *Id.* (citations omitted).

[61] *Id.* at 952 (finding that evidence indicated Unocal had paid soldiers money and food in exchange for pipeline security).

[62] *Id.* at 953.

[63] *Id.* at 956. Judge Reinhardt, in concurrence, rejected the majority's reliance on the ICTY case and argued that "third-party liability" (that is, corporate liability for actions taken directly by the Burmese junta) could be found under the domestic tort law principles of "joint venture," "agency," and "reckless disregard." *Id.* at 963–78.

The Southern District of New York has also used an "aiding and abetting" standard, albeit a stricter one than the test used by the Ninth Circuit panel. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), plaintiffs accused the Canadian oil company Talisman of constructing and providing infrastructure from which the Sudanese government could launch attacks on its own people. *Id.* at 299. The plaintiffs alleged that Talisman had worked with the Sudanese government "to devise a security plan for the oil concession areas," and "would discuss [with the government] how to dispose of civilians in those areas." *Id.* at 321 (citations omitted). The plaintiffs also alleged that Talisman knew the Sudanese government was using Talisman-constructed and -maintained roads and airstrips to launch "bombing and strafing attacks on civilians." *Id.* at 322 (citations omitted). The court found that these allegations met the "aiding and abetting" standard, *id.* at 322, 324, citing cases finding that third-party defendants had "acted in concert" with the state, had been a "co-conspirator" with it, or had "directed and aided" the state in violating rights, *id.* at 320–21.

[64] *Unocal*, 395 F.3d at 956.

[65] Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386(KMW), 2002 WL 319887, at *12–13 (S.D.N.Y. Feb. 28, 2002).

The court found this stricter standard satisfied by allegations that Shell recruited police and military to suppress protest against environmental damage and "provided logistical support, transportation, and weapons" to the police and soldiers, who, predictably, beat, raped, and killed protestors and members of their community.[66]

In re South African Apartheid Litigation[67] presented a third standard of complicity. In that case, plaintiffs accused corporations of violating the "Law of Nations" by continuing to do business in South Africa during apartheid. The court acknowledged:

> [The] defendants benefited from a system that provided a glut of cheap labor. Frequently, . . . defendants supplied resources, such as technology, money, and oil, to the South African government . . . . Not surprisingly, many of those resources were used by the apartheid regime to further its policies of oppression and persecution of the African majority.[68]

The court nonetheless found these facts insufficient to hold the companies liable. According to the court, there was no "joint action" under *Wiwa* because there was no active cooperation with state officials in suppressing an opposition group and because the standard could not be met by "indirect economic benefit from unlawful state action."[69] Further, the court explicitly rejected *Unocal*'s "aiding and abetting" standard, finding that such liability was not "universally accepted" in international law[70] and would thus run counter to *Sosa v. Alvarez-Machain*'s[71] mandate that lower courts engage in a "restrained understanding of new international norms."[72]

All of these decisions were made on motions to dismiss. If cases like *Wiwa* and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*[73] go to trial, district courts will have an opportunity to flesh out corporate complicity norms through the remedies accorded. But, as will be discussed in Part III, settlement of these cases could have the same effect. In contrast, as will be discussed in the next Part, voluntary CSR generally serves as a shield against the establishment of meaningful norms.

---

66 *Id.* at *2, *13.

67 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

68 *Id.* at 544–45, 551 (citations omitted).

69 *Id.* at 548–49 (citations omitted).

70 *Id.* at 549–50.

71 542 U.S. 692, 732 (2004).

72 *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 546, 550 n.12. In contrast, upon a motion to reconsider the 2003 *Talisman* holding on aider and abettor liability, *see supra* note 63, in light of *Sosa*, Judge Cote of the Southern District of New York found that the standard was still valid and could be applied to Talisman. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 334, 340–41 (S.D.N.Y. 2005).

73 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *see supra* note 63.

II
THE INADEQUACY (AND PROMISE) OF VOLUNTARY CSR

A. CSR as Antithetical to True Corporate Responsibility

As a means of controlling corporate behavior in the developing world, CSR stands in potential—but not necessary—tension with transnational legal liability. CSR is comprised largely of two things: (1) privately created codes of conduct, and (2) charitable corporate initiatives targeting local communities (projects such as building clinics, schools, and community centers).[74] Advocates of CSR often claim that it is good for business: Corporations and some NGOs reason that TNCs, reacting to public outcries,[75] will have to change course in order to meet the ethical demands of consumers and socially conscious investors.[76] Hence, companies, business associations, and NGOs have created codes of conduct as guidelines for corporations to follow to avoid bad press and NGO "shaming," and also as badges of good "corporate citizenship."[77]

CSR is highly problematic. Its effectiveness depends entirely on the willingness of consumers and investors to change their behavior as a result of positive or negative publicity—in other words, CSR will function only insofar as there is a "business case" for it.[78] In both its

---

[74] "According to one estimate, global spending by oil, gas and mining companies on community development programmes in 2001 was over US$500 million. Oil companies now help to build schools and hospitals, launch micro-credit schemes of local people and assist youth employment programmes in developing countries." Jedrzej George Frynas, *The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies*, 81 INT'L AFF. 581, 581 (2005).

[75] *See* Tim Bartley, *Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry*, 14 RES. IN POL. SOC. (POL. & CORP.) 211, 218 (2005) ("Companies adopted codes in the midst of domestic and international controversies about labor and human rights—when the threat of government regulation was heightened.").

[76] *See* Debora L. Spar, *The Spotlight and the Bottom Line*, FOREIGN AFF., Mar./Apr. 1998, at 7 (describing "race to the top" among corporations competing for "socially responsible" status).

[77] *See* Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT'L LAW. 69, 87–88 (2003) (stating that voluntary codes are adopted "to compete for consumers or investors by means of signalled respect for human rights standards in company operations . . . [and] reflect[ ] heightened public expectations that business will accept responsibility for the social impacts of operations").

[78] As Michael Blowfield and Jedrzej George Frynas note:

> [I]f consideration of a social, economic or environmental issue depends on there being a business case for such consideration, what happens to those issues where that case cannot be made? Is the paramountcy granted to the business case influencing which issues get addressed and which ones ignored? Can corporations, built on a western economic model, recognize values rooted in other cultures? Is CSR in some way allowing business to appropriate the meaning of ethics?

manifestations—codes of conduct and community development projects—what is important to the company is not actual performance, but rather creating an image or brand that will shape consumer or investor behavior. Moreover, the willingness of consumers and investors to pay a premium for corporate responsibility is likely meaningful only for companies with highly recognizable brands.[79]

A comprehensive study of 132 codes—created by corporations, business associations, international organizations, and NGOs—shows that most do not contain clear compliance monitoring systems.[80] Only 27.3% of codes created by international organizations or firms, 8.3% created by business groups, and 46.2% created by NGOs contained clear monitoring provisions.[81] Furthermore, even when they contain such provisions, 41% fail to state the monitoring party and 44% leave it to the firm itself.[82] Finally, only a small minority of codes provide significant sanctions for noncompliance.[83] Their vagueness and laxity have led many firms to sign on to voluntary codes, but at the cost of rendering them useless.[84]

Likewise, many of the community development projects lack substance or fail, and this failure may be a result of something worse than negligence. Even a commissioned Shell report noted that less than one-third of the community development projects it reviewed were successful.[85] Furthermore, Shell, which is currently building a pipeline in Nigeria, reportedly funds community development for only long enough to manufacture goodwill in the pipeline construction area; when a section is complete, the development budget for the area is cut off.[86]

Michael Blowfield & Jedrzej George Frynas, *Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World*, 81 INT'L AFF. 499, 512 (2005).

79 *See* Redmond, *supra* note 77, at 93 (arguing that sanctions for lack of code compliance will be ineffective for "firms that do not supply public markets directly").

80 Ans Kolk et al., *International Codes of Conduct and Corporate Social Responsibility: Can Corporations Regulate Themselves?*, TRANSNAT'L CORP., Apr. 1999, at 143, 152–53, 167–70.

81 *Id.* at 168.

82 *Id.*

83 The number is between 9% and 16%, depending on the code's source. *Id.* at 169. Sanctions might include a retail company terminating its relationship with a supplier subject to the code. *Id.*

84 *Id.* at 171.

85 Marina Ottaway, *Reluctant Missionaries*, FOREIGN POL'Y, July/Aug. 2001, at 44, 53.

86 Frynas, *supra* note 74, at 584–85. Furthermore, local "philanthropic gestures" may be used to placate local community leaders and to gain their "acquiescence in a controversial investment." These investments may "undermine the ability of aggrieved groups to make political demands which may threaten continued 'goodwill' on the part of the company." Peter Newell, *Citizenship, Accountability and Community: The Limits of the CSR Agenda*, 81 INT'L AFF. 541, 546–47 (2005).

Beyond "managing perceptions,"[87] CSR also serves as a weapon for TNCs to maintain freedom from meaningful regulation and restraint.[88] An empirical study of apparel industry codes[89] concludes that "[o]n the whole, a concern with displacing government regulation and deflecting external pressures—in both domestic and international settings—was central to the initial rise of codes of conduct."[90]

Consistent with TNCs' desire to be free of binding restraint is their tendency to shift the substance of corporate responsibility arrangements away from "core business practices"—namely labor and environmental policies—and toward "'civic virtue' activities aimed at 'needy communities'"[91]—i.e., charity. By focusing on corporate community development and training programs, corporations thus attempt to transform expectations that they will *revise* their behavior to meet the needs of local communities into expectations that they will *supplement* their current behavior with charity. By taking on the role of caregiver, corporations may be attempting to make the deprivation felt by local communities, for which the corporation may be largely responsible, appear to be a natural baseline.

Insofar as CSR creates a sense that the status quo of corporate activity in developing countries is natural or inevitable, it is antithetical to demands for justice, which entail a clear identification of who

---

87 Oil industry "insiders" reportedly opined that "CSR is a waste of time" and "is about managing perceptions and making people inside and outside the company feel good about themselves." Frynas, *supra* note 74, at 582 (citations omitted).

88 *See* Ronen Shamir, *Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony*, *in* LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 92, 94–95 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005) (arguing that TNCs have made concerted effort to undermine binding norms by focusing discourse of corporate responsibility around voluntary initiatives).

89 Bartley, *supra* note 75, at 216–17.

90 *Id.* at 220. Hank McKinnell, chairman and chief executive of Pfizer, is quoted as saying:

> If we're seen by the community as providing goods and services that enable people to live a happy, long life, society will want us to succeed. If they see what we're doing in education and sports programs, that's important. Otherwise, society will hope that we will fail. . . . If we continue to be disrespected by the public, it makes us a target. People will say, "regulate them."

William J. Holstein, *The Impact of Image on the Bottom Line*, N.Y. TIMES, Apr. 9, 2006, § 3, at 13.

91 Shamir, *supra* note 88, at 106. It should be noted that corporate "charity" is not merely an ideological ploy; it is also in some cases demanded by local communities:

> [CSR] projects are sometimes labelled as mere philanthropy . . . but in many developing countries—particularly in Africa—firms are expected to assist their local communities actively. When asked by the World Business Council for Sustainable Development how CSR should be defined, for instance, Ghanaians stressed local community issues such as "building local capacity" and "filling in when government falls short."

Frynas, *supra* note 74, at 582.

has power, a recognition that the way such power is exercised is not inevitable, and an insistence that those wielding power be held to account.[92] Public law litigation seeks to accomplish precisely that: By dredging up information and articulating norms, such litigation seeks to clarify defendants' actions and determine whether they violate the norms in question. In contrast, CSR propagates vague principles that do not demand precise behavior, thus suppressing the view that TNCs are powerful actors making important ethical choices that should be judged and constrained.

B. CSR's Potential

That said, some applications of voluntary CSR have proven to effectively and meaningfully constrain corporate behavior, principally through the use of independent third-party monitors.[93] The best example is the Worker Rights Consortium (WRC), an organization founded by unions and NGOs that inspects factories producing apparel for participating universities.[94] The WRC monitors factories to make sure they are in compliance with its code of conduct, which includes provisions for a living wage, women's rights, and a right to organize.[95] The consortium conducts in-depth investigations of factories, makes unannounced visits, and relies on direct complaints by workers and local NGOs.[96] The WRC also makes efforts to educate workers about the content of its code of conduct and makes all its reports public.[97] WRC monitoring is far more ambitious and

---

92 Susan Silbey contends that before anyone can demand "justice," they must be able to identify a "recognizable and powerful other." Susan S. Silbey, *"Let Them Eat Cake": Globalization, Postmodern Colonialism, and the Possibilities of Justice*, 31 LAW & SOC'Y REV. 207, 228 (1997). Silbey argues that many "globalization narratives"—a category that might easily include the image of the benevolent, charitable TNC—conceal underlying social facts with an image of mysterious and inevitable "progress," a concealment that "erode[s] the possibilities of justice." *Id.* at 227–28. *See also* Newell, *supra* note 86, at 542 ("Notions of 'responsibility' tend to confer on business the power to set the terms of its own conduct," whereas "[t]he notion of accountability . . . lays bare the power relations which the seemingly benign language of 'responsibility' . . . seeks to deny or obscure.").

93 *See* César A. Rodríguez-Garavito, *Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala*, 33 POL. & SOC'Y 203, 214 (2005) (arguing that since neither corporate self-monitoring, nor monitoring by commercial firms employed directly by companies, are credible, "it is with regard to third-party monitoring that the most consequential debates and experiments are taking place").

94 Dara O'Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 POL. STUD. J. 1, 17 (2003).

95 *Id.*

96 Rodríguez-Garavito, *supra* note 93, at 216.

97 *Id.* at 218; O'Rourke, *supra* note 94, at 17.

resource-intensive[98] than other apparel industry monitoring and therefore has not been widely adopted.[99] Nevertheless, it serves as a model of CSR's promise.

III
THE PROBLEMS AND POTENTIAL OF SETTLEMENT

Like the dominant strand of CSR, settlements of cases like *Unocal* and *Wiwa* have the unfortunate potential to reinforce the corporation-backed image of the TNC as philanthropic and virtuous. Nevertheless, settlements can come closer to the ideals of public law litigation by developing and implementing a normative vision of TNCs that takes into account their role in the broader context of human rights abuses in developing countries. This can be achieved by incorporating the best elements of CSR into the settlement context.

A. A Critique of the Unocal and Total Settlements

The post-settlement statements issued by Unocal and Total confirm that TNCs will attempt to use settlements, as they use CSR, to promote their image as caregivers rather than as responsible parties.

The precise terms of the settlement are undisclosed, but it has been reported that Unocal agreed to pay $30 million, which includes compensation to the plaintiffs as well as funding "to improve living conditions, health care, and education in the pipeline region."[100] After settling, Unocal continued to deny responsibility for the alleged human rights abuses.[101]

The Total settlement awarded each of the eight Burmese plaintiffs €10,000 and set up a €5.2 million fund to be disbursed over six months to the victims. After six months, surplus funds were to go towards regional social and economic aid programs already put in place by Total.[102] Like Unocal, Total categorically denied any

---

[98] WRC monitoring is "so resource intensive—investigators conduct up to 200 interviews over a week-long period— . . . that it is very hard to envision replicating it on a large scale. The WRC has issued about a dozen factory reports so far." Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 366 n.212 (2005) (citations omitted). The replication of intensive monitoring would be made easier, however, if settlement funds were made available for this task in individual cases. *See infra* Part III.B.1.

[99] *See* Rodríguez-Garavito, *supra* note 93, at 216, 219.

[100] Paul Magnusson, *A Milestone for Human Rights*, BUS. WK. ONLINE, Jan. 24, 2005, http://www.businessweek.com/magazine/content/05_04/b3917113_mz017.htm.

[101] *Id.*

[102] Pascal Ceaux & Jacques Follorou, *Total Va Indemniser Ses Accusateurs*, LE MONDE (Paris), Nov. 30, 2005, at 3.

involvement in the alleged human rights abuses;[103] in fact, it claimed to have settled for "humanitarian reasons."[104]

These statements, along with the commitments to further community development projects, are consistent with the primary critique of CSR: that it serves as an ideological veil, creating the appearance of philanthropic benevolence and reducing the perceived need for legal constraint. Like Total, which claimed to have settled "for humanitarian reasons," Unocal declared that its settlement "reaffirm[ed the] principle that the company respects human rights in all of its activities."[105] Accordingly, Unocal "commit[ed] to enhance its educational programmes to further this principle."[106] In effect, both defendants suggest that the settlements should induce feelings of gratitude rather than vindication.

Furthermore, Unocal's agreement to use some of the settlement money "to improve living conditions, health care, and education in the pipeline region"[107] undermines a normative vision of corporations as being *bound* by norms, as opposed to being *entitled* to dispense charity. The Total settlement is even more disturbing in this regard, given that the money not disbursed to victims will be redirected into already operational Total community development projects.[108] As charged by three human rights NGOs, the Total settlement amounts to a "financial deal which . . . enables Total to pay for a good public image."[109]

The above argument should not be taken to imply that Total's community development projects are necessarily ineffective. In fact, a study included in a joint publication by the U.N. High Commissioner for Human Rights and the U.N. Global Compact asserts that Total's "Socio-Economic Program"[110] is quite successful and is supported by

---

[103] Martin Arnold, *Total Pays Euros 5.2m in Burma Case*, FIN. TIMES (London), Nov. 30, 2005, at 32.

[104] *Total Pays 5.2 Mln Eur to Settle Claims of Forced Labour Use in Myanmar*, FORBES.COM, Nov. 29, 2005, http://www.forbes.com/markets/feeds/afx/2005/11/29/afx2357438.html.

[105] Lisa Roner, *Unocal Settles Landmark Human Rights Suits*, ETHICAL CORP., Dec. 20, 2004, http://www.ethicalcorp.com/content.asp?ContentID=3312 (subscription required).

[106] *Id.*

[107] Magnusson, *supra* note 100.

[108] Ceaux & Follorou, *supra* note 102.

[109] Press Release, Info Birmanie et al., Info Birmanie, the Ligue des Droits de L'Homme (LDH) and the International Federation for Human Rights (FIDH) Denounce the Agreement Reached Between Total and the Sherpa Association (Dec. 1, 2005), *available at* http://www.reports-and-materials.org/FIDH-press-release-Total-settlement-1-Dec-2005.pdf.

[110] The program includes supporting health and education, and disbursing microcredit loans. Corporate Engagement Project, *Second Field Visit Report: Yadana Gas Transportation Project*, *in* U.N. GLOBAL COMPACT OFFICE & OFFICE OF THE U.N. HIGH COMM'R

the local community.[111] Nevertheless, this sort of corporate image improvement contradicts the original goal of the public law cases brought against Total and Unocal.[112] To be consistent with the public law model, the resolution of these cases—even in settlement—should set up systems protecting against future abuses similar to those alleged. These systems should generate norms that highlight TNCs' past responsibility and create models for future rights-respecting behavior. A settlement that simply supports charitable projects that are extraneous to the alleged abusive behavior does not achieve these goals.[113]

The next two sections will address how future settlements in corporate human rights cases can fulfill the two prongs of public law litigation: providing prospective protection against injustice and articulating public norms.

B. Settlements as Protection Against Future Abuses

To better protect against future TNC-connected injustices, public law settlements can borrow the most effective aspects of CSR, particularly the independent monitoring mechanisms described above.[114] Furthermore, monitoring would enforce prophylactic codes of conduct that would operate flexibly[115] and address behavior beyond minimal standards of legality.[116] Finally, the codes would guard against the power imbalance inherent in flexibility by protecting communities' ability to organize and be heard.[117]

FOR HUMAN RIGHTS, EMBEDDING HUMAN RIGHTS IN BUSINESS PRACTICE 131, 134 (2004), *available at* http://www.ohchr.org/english/about/publications/docs/EHRBP.pdf.

111 *Id.* (finding that Total's local development program "appears to benefit nearly everyone" in area around pipeline).

112 Plaintiffs in *Unocal* initially requested "injunctive and declaratory relief, including, but not limited to, an order directing defendants to cease payment to [the Burmese junta], and an order directing defendants to cease their participation in the joint enterprise until the resulting human rights violations in the Tenassarim region cease." Unocal Complaint, *supra* note 18, at 30.

113 Of course, one reason why defendants settle is to avoid an admission of culpability. Nevertheless, even in the absence of a culpability finding or an admission, settlements that focus on creating prospective systems to avoid future abuse would implicitly underline the defendant corporation's responsibility for previously having failed to take such necessary measures.

114 *See infra* Part III.B.1; *supra* text accompanying notes 93–99.

115 *See infra* Part III.B.3.

116 *See infra* Part III.B.2.

117 *See infra* Part III.B.4.

1. *Independent Monitoring*

Independent monitoring has already been incorporated in the settlement of a suit involving sweatshop labor;[118] however, monitoring would take on a different character in the extractive industry framework of cases like *Unocal* and *Wiwa*. Monitoring is relatively straightforward in the sweatshop context, where it consists mostly of factory visits and worker interviews.[119] In the extractive industry context, the process might be more difficult and amorphous, and it would likely require visits to surrounding communities and in-depth interviewing of residents and local leaders.[120] Independent and credible NGOs with similar preexisting programs, such as Human Rights Watch or Amnesty International, could perform the monitoring.[121] Of course, the NGO would have to agree to monitor, but it could be compensated with settlement funds.[122] Another alternative could be preex-

[118] In that case, several apparel manufacturers, including the Gap, were sued based on the sweatshop conditions of their suppliers in the U.S. territory of Saipan. Doe I v. The Gap, Inc., No. CV-01-0031, 2001 WL 1842389 (D. N. Mar. I. Nov. 26, 2001); Does I v. The Gap, Inc., No. CV-01-0031, 2002 WL 1000068 (D. N. Mar. I. May 10, 2002). The final settlement awarded a $20 million payout to the 30,000-member plaintiff class and set up an independent monitoring system. Nikki F. Bas et al., Clean Clothes Campaign, Saipan Sweatshop Lawsuit Ends with Important Gains for Workers and Lessons for Activists (Jan. 8, 2004), http://www.cleanclothes.org/legal/04-01-08.htm. This was apparently the first time such a monitoring system was backed by legal sanctions. *Id.* The settlement created a legally binding code of conduct, much more detailed than the vague code that had previously been adopted by the Saipan Garment Manufacturing Association. *See* Erin Geiger Smith, Note, *Case Study:* Does I v. The Gap, Inc.*: Can a Sweatshop Suit Settlement Save Saipan?*, 23 REV. LITIG. 737, 754–55 (2004). An independent body was to monitor the code and was empowered to both take complaints about code violations and recommend steps to remedy these violations. *Id.* at 756–59. The original settlement stipulated that repeated violations would automatically lead to a suspension of business relations between defendants like the Gap and the Saipan manufacturers, but the terms were later revised to make this suspension discretionary. *Id.* at 759–60. In addition, the settlement initially proposed several well-respected monitors—including the ILO and independent auditor Verité—but ultimately only a small panel of retired judges could be agreed upon. Bas et al., *supra*. Finally, as some of the factories went bankrupt, the original $4 million budget for four years of monitoring decreased, *id.*, and the monitoring system was ultimately reduced to "one-day audits with none of the followup inspections and checking of remediation that had marked out the agreement as something special." Halina Ward, *The Interface Between Globalisation, Corporate Responsibility, and the Legal Profession*, 1 U. ST. THOMAS L.J. 813, 848 (2004). For these reasons, the monitoring system has been a disappointment. Nevertheless, the Saipan settlement may be "far more creative than any adjudicated resolution of the case could have been." *Id.*

[119] O'Rourke, *supra* note 94, at 23.

[120] This would resemble ongoing projects of NGOs concerned with the human rights impact of TNCs. For a list of reports based on this methodology, see Human Rights Watch, Business and Human Rights, Publications, http://hrw.org/doc/?t=corporations_pub (last visited July 7, 2006).

[121] *See supra* notes 15–16 and accompanying text.

[122] To bargain for a serious settlement, plaintiffs must likely have prevailed against defendant's motion to dismiss. While potential damages will differ in each case, the

isting independent monitors, like the WRC: Even though such monitors have typically only worked in the apparel industry, they may be willing to expand their repertoire to communities affected by extractive activity.

2. *Monitoring of a Code Broader Than Bare Legal Prohibitions*

To borrow again from CSR practice, the monitor would police compliance with a code of conduct, whose content would be agreed upon as part of the settlement negotiations.[123] Since the goal of such a code would be to protect against future complicity in abuse—that is, since it would operate prophylactically—it could be useful to cover behavior that does not in itself violate established human rights norms, in order to address the context in which human rights violations arise.[124] For example, in a case involving environmental human

---

Unocal settlement might at least give an indication of the expected damages. Thus, having prevailed against a motion to dismiss, the bargaining power of plaintiffs—and the communities they represent—is increased by tens of millions of dollars, discounted by the chances of winning on the merits. Therefore, plaintiffs should be able to bargain for prospective changes in corporate behavior that cost the TNC an amount in this range. In the Saipan settlement, four years of independent monitoring was slated to cost $4 million. Bas et al., *supra* note 118.

Bargaining for prospective nonmonetary relief in settlements would obviously require accepting reduced direct cash payments. This presents an ethical dilemma for the lawyer, whose primary obligation is generally understood to be towards her named clients. While the dilemma is not easily resolved, it must be kept in mind that, in public law cases, named clients represent only part of a larger "constituency," i.e., the group of people affected by the abuse in question. The ideal public law settlement addresses the needs of the entire group, and this is done most effectively through prospective, nonmonetary relief. This could be a problem in cases brought by plaintiffs' lawyers, who work on a contingency fee and are thus less likely to pursue anything other than monetary remedies. *See* Herbert M. Kritzer, *Fee Arrangements and Negotiation*, 21 LAW & SOC'Y REV. 341, 344–45 (1987). For a skeptical view of the ability of public interest lawyers to represent broader "constituencies" successfully, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

123 This was done in the Saipan case. *See supra* note 118 (discussing inclusion of monitor in *Gap* settlement).

124 In fact, the potential for settlements to incorporate wider norms than those recognized by courts is one reason why several scholars have defended the practice of settlement, even in public law cases. *See, e.g.*, Malvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 644–45 (1976) (arguing that, unlike adjudication, which generally treats "one norm as not only subordinate but totally invalid," private-party negotiation may take account of wide array of potentially conflicting norms); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2674–75 (1995) (arguing that adjudication, by producing "binary win-lose results," fails to "recognize the ambiguities and contradictions in modern life," while settlement may "offer greater expression of the variety of remedial possibilities in a postmodern world"); Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 968 (2004) (arguing that "[s]ettlement has an important and constructive role to play in the pursuit of justice, the development of social norms, and the strengthening of social bonds").

rights—claims that often go officially unrecognized—a negotiated settlement might contain provisions giving effect to these rights.[125] Indeed, in a case like *Wiwa*, settlement provisions dealing with environmental issues might be necessary to protect officially recognized human rights, given that the abuse alleged in *Wiwa* stemmed from the brutal government response to protest against environmental damage.

The negotiated code must also address the security practices of the corporation. Here it might follow the lead of the Voluntary Principles on Security and Human Rights (Voluntary Principles), a code for the extractive industry negotiated among the United States, the United Kingdom, and leading extractive industry firms.[126] The Voluntary Principles call upon firms, prior to commencing any extractive project, to carry out risk assessments of the prospective location by consulting local civil society actors and government sources to uncover the details of local conflict.[127] They also call upon firms to investigate the human rights record of any official or private group providing security, and to "consult regularly with host governments and local communities about the impact of their security arrangements on those communities."[128]

Whereas the Voluntary Principles ask corporations themselves to perform these consultations, settlements should require the independent monitor to carry this out. As under the Voluntary Principles, any successful independent monitoring scheme would need to ensure that the company's security arrangements be made "transparent and accessible to the public."[129] Furthermore, settlements would ideally include a commitment by the defendant corporation to provide the monitor with interview access to local corporate management *after* any violent incident involving security.

---

125 *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 255, 266 (2d Cir. 2003) (rejecting environmental human rights claim). *But see* SOC. & ECON. RIGHTS ACTION CTR. FOR ECON. & SOC. RIGHTS v. NIGERIA, NO. 155/96 (AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS 2001), *available at* http://www1.umn.edu/humanrts/africa/comcases/155-96.html (finding that by pursuing and not controlling oil development by Shell, Nigeria violated human right to clean environment).

126 Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org (last visited June 26, 2006).

127 *Id.*

128 *Id.*

129 *Id.*

3. *Flexibility in the Code*

The contexts that produce human rights abuses are varied and unpredictable. It is thus crucial that settlement codes be written flexibly so as to be able to adapt to these changing circumstances.[130]

For example, one report states (without explaining further) that the Burmese soldiers providing pipeline security to the Unocal/Total consortium use forced labor[131] to help them meet their "daily needs."[132] If this is true, one obvious solution is for the companies to pay their security forces enough to meet their needs, and such payment could be required by a settlement code. If such problems persisted, the monitor could require the companies to hire outside private security that would be less likely to engage in human rights abuse. This shift in approach could be written into a flexible code whose terms are provisional and responsive to changing circumstances.

Shell's behavior in Nigeria could similarly be addressed by a flexible settlement code. Shell's Nigerian subsidiary had hired a private company to serve as security for an oil installation near the town of Odioma. This company subcontracted out to a second company, which in turn subcontracted with an Odioma-based armed youth

---

130 Such flexibility draws from proposals made by advocates of "governance" or "experimentalism." For a review of this literature, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004). These commentators support replacing "top-down" regulation with more ad hoc, provisional, and participatory governance mechanisms that can respond to dynamic change and unexpected consequences. *Id.* at 373–76. These mechanisms invite the involvement of multiple "stakeholders" in developing norms to respond to a complex and unpredictable reality. *Id. See generally* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (arguing that privately negotiated, flexible, and context-specific mechanisms, operating in shadow of judicial oversight, can best address modern employment discrimination).

131 There is some disagreement among NGOs regarding the continuing existence of forced labor in the Yadana pipeline region. The Corporate Engagement Project (CEP) asserts that, in its field visits to the pipeline area, it has found no evidence of forced labor within the "pipeline corridor" (a swath of land between ten and fifteen kilometers wide surrounding the pipeline). Corporate Engagement Project, *supra* note 110, at 132, 139. CEP acknowledges, however, in a report on a subsequent visit to the pipeline area, that forced labor, in service to the Burmese soldiers providing pipeline security, may be taking place just outside the corridor. CORPORATE ENGAGEMENT PROJECT, FIELD VISIT REPORT: YADANA GAS TRANSPORTATION PROJECT 5–6 (2005), *available at* http://cdainc.com/publications/cep/fieldvisits/cepVisit16MyanmarBurma4.pdf. A report by EarthRights International is more unequivocal, asserting that, based on its investigations, forced labor continues to take place in the pipeline "region." EARTHRIGHTS INT'L, SUPPLEMENTAL REPORT: FORCED LABOR ALONG THE YADANA AND YETAGUN PIPELINES (2001), *available at* http://www.earthrights.org/files/Reports/supp.pdf.

132 CORPORATE ENGAGEMENT PROJECT, *supra* note 131, at 5.

group.[133] This armed group allegedly killed twelve members of a neighboring community[134] that contested the ownership of the land on which Shell's installation was built.[135] In response to the killings, the army raided Odioma, killing seventeen and burning several houses.[136] It is not clear that the youth group's attack was tied up with its employment as security for Shell, but this can only have exacerbated the conflict between the neighboring communities. A code set up to address the behavior of Shell in the region should be responsive to such intricate local circumstances. For example, a code could, in response to the Odioma incident (or in anticipation of it), prohibit the unreviewed delegation of duties by hired security personnel; furthermore, the code could require that security forces not include members of groups involved in local conflicts.

4. Remedying Power Imbalance Through "Enabling Rights"

A flexible code might tend increasingly to favor corporate interests, given the obvious bargaining imbalance between corporations and surrounding communities.[137] This is a difficult problem and would require constant vigilance by those who originally brought the case, who must therefore be involved in any subsequent code negotiations. The settlement must also ensure democratic participation within the local community:[138] The greater the democratic input from

---

133 AMNESTY INT'L, NIGERIA TEN YEARS ON: INJUSTICE AND VIOLENCE HAUNT THE OIL DELTA § 3.3–3.4 (2005), *available at* http://web.amnesty.org/library/Index/ENGAFR440222005.

134 *Id.*

135 *Id.*

136 *Id.* § 3.0.

137 Plaintiffs and their communities face structural bargaining power disadvantages. First, the state, as a partner in extractive industry projects, may try to repress opposition to TNC activity with armed force. TNCs can also gain bargaining power by threatening to abandon the area in which they invest. This may lead to a "divide and rule" strategy in which corporations exploit divisions in the community regarding whether it would be better for the TNC to stay or go. *See* Niamh Garvey & Peter Newell, *Corporate Accountability to the Poor? Assessing the Effectiveness of Community-Based Strategies* 30–31 (Inst. of Dev. Studies, Working Paper No. 227, 2004), *available at* http://www.drc-citizenship.org/docs/publications/accountability/Working_Papers/Wp227.pdf (describing "divide and rule" strategy). Furthermore, plaintiffs and their communities are likely to be less educated and confident, and will thus have to rely more on representatives. "[A] lack of literacy and technical skills can reduce the ability of communities, both to engage in meaningful dialogue with corporations and to challenge them about issues of impact on the environment and human health." *Id.* at 26.

138 According to the Corporate Engagement Project, a potentially promising democratic structure is in fact already in place in the "pipeline corridor" around the Yadana pipeline. Villages in the corridor elect Village Communication Committees (VCCs) that "operate[ ] on a voluntary basis and [are] designed to serve as a bridge between the company and the local community. . . . The VCC is elected by the community themselves and is open to the candidacy of all." Corporate Engagement Project, *supra* note 110, at 134–35.

the community, the less likely it is that corporate- or self-appointed community "representatives" will sell out community interests. Creating channels of community voice should therefore be a key goal of any code-monitoring scheme established by settlement.[139]

In the context of sweatshop monitoring, commentators have argued that "enabling rights" (rights that empower and enhance the voice of workers and communities), including the right to unionize and collectively bargain, should be prominent in any governing code.[140] Again, implementing such "enabling rights" might be more complex in the extractive industry context, which affects a potentially broader and more amorphous group of people—including those who might be used for forced labor and those who might be harmed by environmental damage or violent suppression of protest. A first step in ensuring "enabling rights" to this larger group would be the establishment of democratic community representation, vis-à-vis both the monitor and the corporation.[141] In addition, the monitor would have to duly investigate any complaints from community members or local NGOs. Simultaneously, the monitoring group should work to educate members of local communities about the content of the code and the underlying human rights at issue in the original litigation.

Finally, negotiated settlements should protect freedom of expression. Currently, in the interest of a "non-disruptive operating environment," many "Memoranda of Understanding" between TNCs and communities promise jobs and community development—which often fail to materialize—in return for an end to local protest.[142] Peaceful protest is a prime tool for collective action in the extractive industry context,[143] just as unionizing is in the apparel industry context. Neither, therefore, should be discouraged in a settlement agreement.[144]

---

139 Such channels of community voice would mitigate one problem identified with the monitoring of codes of conduct, namely that such monitoring "protects" rather than "empowers" the code's beneficiaries. *See* Jill Esbenshade, *The Social Accountability Contract: Private Monitoring from Los Angeles to the Global Apparel Industry*, LAB. STUD. J., Spring 2001, at 98–99. Esbenshade, in fact, distinguishes between "[n]ew models of independent monitoring," which may empower workers, and monitoring by private firms hired and paid by the apparel company, which she criticizes. *Id.* at 101–03, 115–16.

140 *See* Rodríguez-Garavito, *supra* note 93, at 215 (arguing that codes should protect enabling rights by including clause "unambiguously guaranteeing freedom of association and the right to collective bargaining").

141 *See supra* note 138.

142 AMNESTY INT'L, *supra* note 133, § 1.2.

143 *See supra* text accompanying note 13.

144 Rodríguez-Garavito emphasizes that the collective bargaining protections in monitored codes of conduct will only be effective if accompanied by "contentious politics" such as "[i]nformation campaigns, boycotts, [and] teach-ins." Rodríguez-Garavito, *supra* note 93, at 212.

Under the proposed settlement scheme, the independent monitor would therefore not only investigate corporate behavior but would also police the integrity of the monitoring system itself. In this way, the settlement would ensure that local communities are heard, both when bringing complaints about corporate conduct and when participating in negotiations of the governing code.[145]

C. *Settlements as Norm-Enunciating*

Again, the twin goals of public law litigation are to (1) prospectively intervene in ongoing injustice, and (2) articulate norms that define the limits of acceptable behavior. The last subsection argued that a settlement could accomplish the first goal by providing independent monitoring of compliance with a flexible code of conduct that would extend beyond bare prohibition of human rights abuses, and by protecting the "enabling rights" of the affected communities. How, then, would such a settlement serve to articulate norms?

To Fiss, settling public law cases is problematic in that it robs the judge of the opportunity to declare norms.[146] Not only can the judge

---

[145] To further protect against bargaining differentials, a settlement could require that all changes be reviewed by the judge who heard the original case.

[146] As Fiss writes:

> [The role of adjudication is] not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.

Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984). Critics also argue that settlement undermines the information-generating value of full adjudication, especially when settlement terms are kept secret. *See* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648–58 (1995); *see also* Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 108 n.24 (1986) ("[T]rials, but not settlements, are held in public, are conducted in accordance with rules of evidence, involve the formal presentation and argument of issues of law and fact, are subject to appeal, and are often decided by judges who rationalize their rulings in written opinions.").

It should also be noted that some of the problems Fiss and Luban associate with settlement were mitigated in *Unocal*. First, important legal precedent was (almost) created: The Ninth Circuit panel opinion is often cited as setting forth a well-reasoned definition of corporate "aiding and abetting" liability. Although the Ninth Circuit's decision to rehear the case en banc voided the official precedential value of the panel opinion, it remains persuasive authority. While Fiss might object that en banc review of the panel decision would have been a valuable public law articulation, the decision to settle can be seen as an effort to *preserve* a (helpful) articulation of public values. In fact, it has been hypothesized that the imminent en banc review may have in part driven the *Unocal* plaintiffs to settle. Anthony J. Sebok, *Unocal Announces It Will Settle a Human Rights Suit: What Is the Real Story Behind the Decision?*, FINDLAW, Jan. 10, 2005, http://writ.news.findlaw.com/sebok/20050110.html. The panel opinion was "an important victory for the human rights community because it clearly established that in the Ninth Circuit . . . individuals or corporations could be held liable for 'aiding and abetting' human rights abuses. An *en banc* reversal of this holding would, conversely, have been a blow to the human rights community." *Id.*

no longer write a final opinion,[147] she also cannot formulate injunctive relief so as to give real-life content to the norms in question.[148]

However, it is precisely when applying norms to complex real-world circumstances that one might doubt the wisdom of privileging the judge.[149] Indeed, some commentators have argued that judicially declared norms acquire their richest real-world meaning if their application is carried out by private parties operating "in the shadow" of legal coercion.[150] Susan Sturm writes, in the context of anti-discrimination law:

> For Fiss, the judiciary's role is to unilaterally elaborate equality norms . . . and then impose those "truths" on noncompliant bureaucrats. Law [for Fiss] is about rule elaboration and enforcement with the judiciary bearing a special institutional responsibility for determining and implementing public rules. . . . However, any theory of discrimination that is sufficiently clear to provide guidance . . . cannot deal adequately with the varied, complex, and shifting dynamics and normative meaning of group-based discrimination. These kinds of complex structural problems resist diagnosis and remediation through centralized, unilateral, logic-driven directive.[151]

To Sturm, the real work of articulating norms through application ought to happen through the negotiations of involved parties.[152] The judge should provide guidance through background principles and impose a "legally enforceable obligation to correct the problem," without providing the actual solution.[153]

Furthermore, to address Luban's concern, discovery took place in the *Unocal* case, and much information was made public; in fact, information gained in discovery was important in developing the case against Total in France. E-mail from Véronique van der Plancke, Researcher, Université Catholique de Louvain, to Olivier De Schutter, Professor of Human Rights, Université Catholique de Louvain (June 29, 2006, 22:15:23) (on file with the *New York University Law Review*).

147 However, even in settled cases, the judge may write norm-enunciating opinions on motions to dismiss.

148 *See* Fiss, *supra* note 38, at 52.

149 *See, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1089 (2004) (arguing that resolution of public law cases should be flexible "experimentalist" remedies whose content arises from stakeholder negotiations); Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 69–81 (2003) (arguing that courts in public law cases, in particular discrimination cases, ought to act as catalysts to formulation of remedies and norms by involved parties).

150 Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

151 Sturm, *supra* note 149, at 53–54.

152 *See id.* at 75 (arguing that courts ought to "focus less on getting it right all by themselves" and should instead foster "sustained and publicly accountable problem solving by non-legal actors").

153 *Id.* at 67.

Public law settlement should not only solve problems case by case,[154] but also generate generalizable norms. There are at least three ways in which the settlements described above could exert generalized normative pressure: (1) "spillover" effects, where a settlement puts pressure on other corporations to change their behavior; (2) transnational advocacy based on reported violations of the settlement-created code; and (3) further litigation arising from breach of the settlement terms.

1. Spillover Effects

If a settlement were supported by NGOs and the press, and were successful at creating more humane, democratic, and transparent corporate/community relations, other corporations might be pushed to opt into a similar system—a process that has been called a "spillover"[155] or "pull"[156] effect. For example, the Fair Labor Association (FLA), an apparel industry monitoring group headed by both industry and labor/NGO representatives, chose to tighten its monitoring policy after pressure from the less industry-friendly WRC.[157] The WRC's "high credibility" led the FLA to shift from confidential monitoring reports, industry-paid monitors, and announced visits, to the public dissemination of report summaries, independent monitors,[158] and unannounced visits.[159]

The Voluntary Principles have had similar spillover effects. They now appear in two legally binding agreements signed by British Petroleum.[160] Furthermore, any extractive industry project receiving loans of over $50 million from the International Finance Corporation is currently required to adopt the Voluntary Principles.[161]

---

154 *See generally* Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993) (arguing that trend toward handling workplace discrimination complaints within firm, through internal dispute resolution rather than litigation, leads to replacement of civil rights legal discourse and conception of *rights* with vague standard of fairness and general norms of good management).

155 *Interim Report*, *supra* note 12, para. 52.

156 Rodríguez-Garavito, *supra* note 93, at 219.

157 *Id.*

158 *See id.*

159 O'Rourke, *supra* note 94, at 11.

160 One is a Host Government Agreement between a British Petroleum-led oil consortium and three countries (Azerbaijan, Georgia, and Turkey) through which an oil pipeline will run. *Interim Report*, *supra* note 12, para. 50 & n.16. The second is an agreement signed between British Petroleum and the chief of the Papua police, with regards to the construction of a natural gas project. *Id.*

161 *Id.* at 13.

Much as the WRC monitoring system and the Voluntary Principles have served as models, a successful settlement scheme might be imitated by third-party companies, acting under pressure from NGO campaigns or "socially responsible" institutional investors.

2. *Advocacy*

Even in the absence of specific spillover effects, pressure exerted by NGO campaigns and institutional investors could itself be a key mechanism for the dissemination of norms. Such campaigns could be sparked by an independent monitor's finding of noncompliance with the settlement code.[162] Publicized violations might then galvanize human rights campaigns.[163]

Violating an agreed-upon code, especially a legally binding settlement code, would potentially be more embarrassing for a company than other kinds of unethical conduct, because the company would be seen as going back on its word.[164] Furthermore, violating a settlement-created code, in contrast to a voluntary code, would be more damaging to the company's reputation, given that the former would be less vague[165] and contain details that would make noncompliance far more obvious.

Moreover, once a code violation has been reported, NGO publicization of those findings would not only amplify the monitor's normative determination, it would also help to articulate which of the settlement's norms resonate broadly.[166] It will become clear which norms concern the public after NGOs build resource-intensive campaigns around reports of noncompliance that strike them as particularly offensive. Campaigns that are successful with the public and the

---

[162] Such a finding would only be effectively norm-generating, of course, if it were made public. This would contrast with the confidential workplace discrimination internal dispute resolutions described by Edelman et al., *supra* note 154, at 524 (noting "private and discreet" nature of internal resolution).

[163] *See* Kathryn Sikkink, *Transnational Advocacy Networks and the Social Construction of Legal Rules*, *in* GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 37, 39 (Yves Dezalay & Bryant G. Garth eds., 2002) ("Advocacy networks espousing norms also promote norm implementation by publicizing the existence of legal norms and documenting rule-breaking behavior.").

[164] *See* Rodríguez-Garavito, *supra* note 93, at 204, 223–24 ("[A] key factor enhancing the impact of TANs [transnational advocacy networks] is the possibility of using institutionalized procedures and rules to which target actors have publicly agreed.").

[165] *See* Kolk, *supra* note 80, at 171.

[166] *See* Sikkink, *supra* note 163, at 42 ("The construction of cognitive frames [that condition the way citizens and officials interpret events] is an essential component of networks' political strategies, and when they are successful, the new frames *resonate* with broader public understandings and are adopted as new ways of talking about and understanding issues.").

press will demonstrate what kind of underlying corporate conduct offends broadly.[167]

Of course, the main marker of success with respect to campaigns against corporate malfeasance is consumer response, and the question is whether the offending company will be punished in the marketplace. While campaigns geared at consumers can be very successful,[168] consumer response may be fickle and unpredictable.[169] Therefore, one cannot rely entirely on campaigns directed at consumers to determine the norms that should bind TNCs. It is here that a legally binding settlement distinguishes itself from CSR.

3. *Adjudication*

Since the settlement would be enforceable as a contract,[170] violation of the code could lead to a breach of contract suit and thus loop back into the adjudicatory framework.[171] Therefore, although the relevant norms would initially be articulated through private negotiation, they could ultimately be interpreted through adjudication. Such adju-

---

[167] The publicization of monitor reports by NGOs not only serves the purpose of disseminating and testing norms in the public sphere, but also serves the related purpose of creating a reliable source of information regarding the vicissitudes of corporate relationships with communities. This information can be used by anticorporate campaigners, investors, and corporations striving to manage their investments. This counters—at least as to the settlements advocated here—critics who argue that settlement stymies the information-generating function of full litigation. *See supra* note 146.

[168] *See generally* Spar, *supra* note 76.

[169] As Cynthia Estlund notes, a crucial part of effective monitoring of transnational corporations is "consumer solidarity" with workers and other human rights victims. Estlund, *supra* note 98, at 368. This dependence on the "fickle sympathies of comparatively rich consumers" renders monitoring schemes vulnerable. *Id.* at 369–70. Consumer response is even more unreliable when the company in question does not have a recognized brand or does not produce consumer goods. *See* Redmond, *supra* note 77, at 91 (noting that corporate codes of conduct are concentrated among retailers of "consumer goods with high brand recognition and low production costs"); *see also* Robert McCorquodale, *Human Rights and Global Business*, *in* COMMERCIAL LAW AND HUMAN RIGHTS 89, 112 (Stephen Bottomley & David Kinley eds., 2002) (noting that consumer pressure on companies has been "piecemeal and inconsistent"); Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425, 437–38 (2004) ("[T]he fact that Talisman participated only in upstream operations—it did not own refineries or gas stations—appeared to reduce the potential impact of consumer boycotts or other protests related to the human rights situation in Sudan.").

[170] *See* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 595 (2005) (noting that U.S. courts, in promoting settlement, increasingly encourage "the entry of contracts as a means of concluding litigation without adjudication").

[171] It would make sense for breach of contract actions to be brought only upon findings of repeated or egregious code violations. For less serious or isolated violations, the monitor could impose fines or deadlines for remedying behavior. If the company allowed the deadline to lapse, a breach of contract action could be brought.

dication could both reinforce the credibility of settlement-generated norms and add an overlay of judicial norm articulation.

First, such adjudication would necessarily review the monitor's findings, since no breach could be found unless the monitor's report were found to be credible. Such a vindication of credibility would give monitors' future findings far more persuasive force than reports by monitors or NGOs not backed by legal endorsement.[172]

Second, such adjudication would allow the reintroduction of judicial norms. While the judge would primarily be giving force to privately created terms, there would still be room for the judge to express and apply more general norms. When interpreting a contract, "[i]n choosing among . . . reasonable meanings . . . , a meaning that serves the public interest is generally preferred."[173] Thus courts could articulate public norms through their interpretation of the settlement terms.

D. Settlement and the Complicity Norm

As described in Part I.C, one of the norms at issue in transnational corporate human rights cases is the degree of involvement corporations must have with abusive state actors in order to be held liable. How might this normative question play out in the context of the settlements advocated here?

There are once again some parallels with Fiss's school desegregation example. As Fiss pointed out, there is an important difference between remedying an equal protection violation through mandated desegregation and remedying it through "freedom-of-choice" plans.[174] The latter implies a formalistic view of equal protection that required local governments to change the law on the books but permitted them to continue tolerating—or even promoting—the same segregated system that existed prior to *Brown*.

When the Supreme Court found one freedom-of-choice plan unconstitutional,[175] it held that equal protection required the "dismantling of well-entrenched dual systems."[176] In so doing, the Court recognized segregation as "an integral part of a larger social system of

---

[172] Furthermore, such an adjudicated finding would weigh heavily in factual disagreements, such as the one between EarthRights International and the Corporate Engagement Project regarding whether forced labor exists in the region around the Yadana pipeline in Burma. *See supra* note 131 (describing disagreement).

[173] RESTATEMENT (SECOND) OF CONTRACTS § 207 (1981); *see also* Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533, 593–96 (2005) (discussing use of public policy in interpreting contracts).

[174] Fiss, *supra* note 38, at 52.

[175] Green v. County Sch. Bd., 391 U.S. 430, 441–42 (1968).

[176] *Id.* at 437.

racial apartheid, in which blacks were separated from whites in order to perpetuate white supremacy and reinforce black inferiority."[177] Active desegregation, on the other hand, attacked the structural entrenchment of racism and served as more than a cosmetic solution. This shift reflected a recognition that a narrow focus on the specific constitutional harm—laws on the books setting up dual school systems—was insufficient to address structural inequality and thus failed to give full meaning to the equal protection norm.

Similarly, some remedies in the transnational corporate human rights cases might provide only cosmetic resolutions, and therefore fail to "destabilize"[178] the entrenched relationships that spawn human rights abuses. The degree to which settlements succeed in this destabilization will help to define what we conceive of as rights-threatening corporate complicity. For example, a code requiring only that a company refrain from explicitly encouraging excessive force reinforces the norm that "aiding and abetting" liability is not recognized in international law.[179] In contrast, an ideal settlement would address the structural entrenchment of TNCs in environments that threaten human rights, and would thus reinforce an open-ended "aiding and abetting" standard that recognizes constructive intent.[180]

CONCLUSION

Public law litigation, such as the transnational corporate human rights cases discussed above, seeks to remedy systemic injustice and articulate norms. When Fiss wrote *The Forms of Justice*[181] in support of such litigation, there was a sense that a progressive federal judiciary (with Justices Brennan and Marshall as standard bearers) might be counted on to remedy systemic rights violation.

Today, since judges are increasingly reluctant to grant equitable relief,[182] this is far less likely. For this reason, the ideals of public law litigation are arguably better served through creative settlement than through full adjudication. Such settlements would include the creation of preemptive codes; the aggressive monitoring of those codes; the involvement of communities and local NGOs; and efforts to per-

177 Reginald Oh, *Discrimination and Distrust: A Critical Linguistic Analysis of the Discrimination Concept*, 7 U. PA. J. CONST. L. 837, 858 (2005).

178 *See* Sabel & Simon, *supra* note 149, at 1020 (arguing that role of courts in public law litigation is to "destabilize" harm-generating systems and to leave more detailed remedial action to affected private parties).

179 *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004).

180 *See* Doe I v. Unocal Corp., 395 F.3d 932, 947–53 (9th Cir. 2002).

181 Fiss, *supra* note 38.

182 *See supra* note 50 and accompanying text.

suade consumers, NGOs, and judges to give force to the norms expressed in those codes. Such settlements would be more effective than damages both in preventing future abuse and in developing normative principles. Furthermore, they are not unrealistic: Independent monitoring has already featured prominently in a transnational corporate litigation settlement,[183] and that model can be improved upon. While it has been implicit in this Note that it is largely up to plaintiffs' public interest lawyers to strive for these improvements, there is a role for judges as well, insofar as it may be necessary for judges to approve the content of settlements.[184]

The settlements of the Unocal and Total cases are, by the standard articulated above, inadequate. Neither involves any commitment on the part of the defendant corporation to change its practices or to engage with affected communities in formulating dynamic and responsive norms. On the contrary, by diverting attention to commu-

---

[183] *See supra* note 118.

[184] While it is beyond the scope of this Note to explore judicial approval of settlements in various national systems, it should be briefly noted that such a judicial role in the class action context is provided for in the United States and in international human rights regimes.

In the United States, federal judges can approve class action settlements "only after a hearing and on finding that the settlement . . . is fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(1)(C). This is quite an open-ended standard that gives leeway to sympathetic judges to guide settlements in the direction proposed here. *See* Chris Brummer, Note, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1059–60 (2004) (noting that, in Rule 23(e) decisionmaking, "[r]elevant considerations . . . include factors such as the likely benefits of the settlement to affected class members, the stage at which the settlement was reached, the substance and amount of opposition to the settlement, and even the likelihood of success at trial"). It is perhaps unrealistic, however, to expect most judges to proactively engage with the substantive details of class action settlements. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1055 (2002) (noting that "[w]ith limited knowledge, some judges simply presume the settlement to be fair, adequate, and reasonable"). Because judges cannot always be counted upon to protect adequately the long-term interests of the communities affected by corporate human rights abuses, it is, in the litigation context, in the hands of the plaintiffs' lawyers to do so.

To a greater extent than Rule 23(e), international human rights instruments focus the adjudicatory body's attention on the substantive human-rights-promoting content of settlements. *See* American Convention on Human Rights art. 48(1)(f), Nov. 22, 1969, S. EXEC. DOC. F, 95-2 (1978), 1144 U.N.T.S. 143 ("The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention."); International Covenant on Civil and Political Rights art. 41(1)(e), *opened for signature* Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (similar language); Convention for the Protection of Human Rights and Fundamental Freedoms art. 28(b), Nov. 4, 1950, 213 U.N.T.S. 221 (similar language). Such provisions may serve as a model for domestic judicial action regarding the settlement of human rights cases. For a critical appraisal of settlements in the Inter-American system, see Patricia E. Standaert, Note, *The Friendly Settlement of Human Rights Abuses in the Americas*, 9 DUKE J. COMP. & INT'L L. 519 (1999).

nity development projects, the settlements take on the worst aspects of CSR: They reinforce the view that corporate ethics is a matter of charity and not a matter of responsibility. The lawyers handling the next case to come down the line—perhaps *Wiwa*[185]—have a chance to do better.

---

[185] *See supra* notes 28–29 and accompanying text.