Militarised Commerce and Rights Violations in the Developing World: Is the International Legal System Adequately Protecting the Vulnerable?

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Abstract

The call of the Universal Declaration of Human Rights 1948, for every individual and every organ of society to promote respect for fundamental rights and freedoms, remains unrealised. This article notes the ever-growing power of the transnational corporation and examines the true cost of the military arrangements relied upon to protect these corporate interests. Evidence of associated gross human rights violations is presented with the intention of raising awareness of this oft-ignored problem and posing one central question: is the international legal system doing enough to safeguard the inalienable rights of some of the world's most vulnerable people?

1. Introduction

> The times now require you to manage your general commerce with your sword in your hands.
>
> – The director of the East Indies Company to his employees.[1]

Whether one chooses to quote Mary Robinson, the United Nations (UN) High Commissioner for Human Rights, or Spiderman, 'the greatest super hero [ever to] grace the pages of a comic',[2] the notion that with great power should come great responsibility has been espoused by the most authoritative of personalities.[3] It was this very ideal – mixed with elements of justice, guilt, fear and maybe even realpolitik – that prompted the first great surge of the human rights movement. After the Second World War demonstrated the horrors realisable by the dominant nation-state, the international community swore 'never again',[4] declared there to be such things as 'human rights' and determined that, by virtue of their vast influence, the powerful nation state was to be responsible for their promotion and protection. Since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, a vast array of international instruments have been agreed, imposing on states a plethora of legal obligations designed to further the goal of the United Nations' to 'reaffirm faith in fundamental human rights'.[5] More recently, individuals, too, have found themselves the subject of international

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[1] Quoted in Singer, *Corporate Warriors: The Rise of the Privatised Military Industry* (Cornell University Press: London, 2004) at 73.

[2] The very enthusiastic Harman, see http://www.silverbulletcomics.com/news/story.php?a=1068

[3] Robinson, *Second Global Ethic Lecture*, University of Tübingen, Germany (21 January 2002) – quoted in Weissbrodt and Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', (2003) 97 *American Journal or International Law* 901 at 901; Spiderman: quoted by Joseph, *Multinational Corporations and Human Rights*, seminar held at the University of Nottingham, 2006.

[4] Goldstone, quoted in 'Were They Just Obeying Orders?', *The Guardian*, 7 May 1996.

[5] Preamble, UN Charter.

law's resolve to end the era of impunity of the world's serious crimes.[6] For all the successes of this development, one glaring omission is today being noted with increasing frequency and volume: 'The creators of this ever-larger web of human rights obligations, however, failed to pay sufficient attention to some of the most powerful … actors in the world, that is, transnational corporations'.[7]

Without doubt, the rise of the corporation – and in particular, the novel status of the transnational corporation (TNC) – has provided a new focus for those seeking to attach responsibilities to those wielding power. Whilst some reject such regulation as an unjustified and unnecessary interference with the good work of international businesses, there is – at the very least – sufficient evidence of corporate wrongdoing and abuses of power to warrant a detailed examination of TNCs' activities and their effect on the rights of the world's most vulnerable peoples. Indeed, many very able scholars have researched, reported and presented on this very issue and I will draw readily from such work in this article.

Whilst the issue has attracted much attention generally, one issue has been somewhat neglected. In part due to its recent emergence, and partly because of its secretive nature, the phenomenon of 'militarised commerce' is directly and systematically tackled by almost none of the existing literature on the broader legal issue of corporate social responsibility. It is this gap in our understanding of the true nature and dangers of the TNC that this article will seek to fill. To do so, it will be necessary first to examine the current structure of the international legal system and consider how human rights might inform this article's analysis (part two). Secondly, the article will clarify our understanding of the term 'transnational corporation' and address the questions whether, and how, they should be regulated by international law (part three). Part four will concentrate on 'militarised commerce', explaining the phenomenon before turning to case studies to illustrate its impact on human rights in the developing world. Finally, elucidation of common themes highlighted by these examples will be used to inform hopes and designs for the future in the concluding chapter (part five).

In 1996, Douglas Cassel hailed the coming of 'a second human rights revolution', involving 'the responsibilities not of governments, but of private multinational corporations, which in many ways can be more powerful that most national governments'.[8] In the following pages, I hope to establish the necessity of such a monumental shift in the organisation of international law and to fill the gap thus-far left by the writings on this vitally important issue.

2. Human Rights in the International Legal System

It used to be a matter of dogma that international law is addressed only to states, and, therefore, imposes obligations and responsibilities upon states alone. Even under international human rights law, the main beneficiary of which is the individual, the state remains the primary duty-bearer.[9] Carolin Hillemans explains how this assumption springs from a Hobbesian view that '[t]raditionally, human rights were perceived as a contract between the sovereign State and its inhabitants'.[10] For this reason, references to

[6] Preamble, Rome Statute of the International Criminal Court 1998, 2187 UNTS 3.
[7] Weissbrodt and Kruger, supra n. 3, at 901.
[8] Cassel, 'Corporate Initiatives: A Second Human Rights Revolution?', (1996) 19 *Fordham International Law Journal* 1963 at 1963.
[9] Joseph, 'An Overview of the Human Rights Accountability of Multinational Enterprises', in Kamminga and Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International, 2000) 75.
[10] Hillemanns, 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights', (2003) 4 *German Law Journal* 10 at para. 9.

internationally accepted rights were widely seen as irrelevant to analyses of corporate activity. Indeed, as Fleur Johns writes, '[d]espite their profound influence upon international affairs, transnational corporations are more notable in their absence from international legal discourse, than in their presence'.[11] Today, however few can maintain that rights language is out of place in the company board room. Human rights duties are recognised as having a 'tripartite character', requiring the state to 'respect, protect and ensure the enjoyment of' each right;[12] even if TNCs are not required to observe international human rights law directly (see part three), the same responsibilities should reappear in the form of national legislation,[13] which they are bound to obey.[14] Another perspective goes even further, insisting that companies are legal constructs allowed to exist by virtue of state action; accordingly, a state should neither create nor tolerate a body that violates international human rights norms to which the state has given its approval.[15] Failing this, rights-language is used against the state, since it remains 'generally responsible under international law for all breaches of human rights obligations within its jurisdiction … when the violation of human rights is by a non-state actors, such as a corporation, if the state should have adopted legislation or taken other measures to ensure compliance with the state's international human rights obligations'.[16] References to rights are pervasive in today's analytical society; in the words of Sir Geoffrey Chandler, former head of the Amnesty International UK Business Group:

> ... the increased scrutiny of corporate behaviour by the media, consumer groups, community organisations, local and international non-governmental organisations, and the immediacy of global communications leave companies with little, if any, hiding place ... [In fact for a TNC] to go without a policy on human rights is to go naked into a dangerous world.[17]

The list of human rights issues potentially raised by the activities of TNCs is seemingly endless. In researching their 2002 report into the risks faced by companies operating conflict zones or in countries with poor human rights records, Amnesty International and the Prince of Wales International Business Leaders Forum looked at 'several industry sectors'[18] and concluded:

> The categories of human rights abuses that are covered include torture, disappearance, extra-judicial execution, hostage-taking, harassment of human rights defenders, denial of freedom of assembly and association, forced labor, bonded labor, child labor, forcible relocation, arbitrary arrest and detention, discrimination against women, and denial of freedom of expression.[19]

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[11] Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory', (1993-4) 19 *Melbourne University Law Review* 893 at 893.
[12] Joseph, supra n. 9 at 77; and Joseph, infra n. 65 at 9.
[13] *Association X v UK*, (1978) App. No. 7154/75, *14 Euro. Commission of Human Rights Dec. & rep.* 31, 32-34; McCorquodale, infra n. 16, 92.
[14] Muchlinski, 'Human Rights and Multinationals: Is There a Problem?', (2000) 77 *International Affairs* 31 at 35.
[15] Hillemanns, supra n. 10, para. 8.
[16] McCorquodale, 'Human Rights in Global Business', in Bottomly and Kinley (eds), *Commercial Law and Human Rights* (Aldershot: Dartmouth Publishers, 2002) 92, citing Article 2, ICCPR and Article 2, ICESCR.
[17] Chandler, as reported in Cowell, 'A Call to Put Social Issues on Corporate Agendas', *The NY Times*, 6 April 2000, – as quoted in McCorquodale, ibid. at 113.
[18] '…extractive, food and beverage, pharmaceutical and chemical, infrastructure and utilities, heavy manufacturing and defence, and IT hardware and telecommunications'
[19] Winston, 'Corporate Responsibility for Preventing Human Rights Abuses in Conflict Areas', in Frynas & Pegg (eds), *Transnational Corporations and Human Right*, (Palgrave Macmillan, 2003) at 81.

Since '[h]uman rights cover a broad spectrum',[20] a comprehensive discussion of all the conceivable norms that might apply to MNES 'would represent an enormous undertaking'.[21] Not every issue can be usefully addressed in an article of this length. For this reason we will focus only on three (associated) rights that are universally accepted as fundamentally important if human dignity is to be respected: the right to life; the right to liberty and security of person; and the right to a fair trial. This is not to say that the rights concerned with, *inter alia*, labour relations, the environment, child labour, health and self-determination are unimportant or irrelevant – they are, in fact, quite the opposite – it is a recognition that the rights chosen are the bedrock of other civil, political, economic and social rights, and are particularly vulnerable in the face of militarised commerce.

Baez *et al* introduce the right to life by noting that it 'has been called the most fundamental of all rights recognized in international law'.[22] Beyond guaranteeing that one's life won't be taken,[23] it 'encompasses the right to be free from actions that are injurious to the inherent dignity and security of the human being' and 'demands protection of the elements necessary for a human being's survival'.[24] It is non-derogable and must, therefore, be respected even in times of threats to national security.[25] The right to life features in every major human rights treaty,[26] which, combined, bind nearly every country in the world. The right is definitely part of customary international law and 'may well have achieved the status of *jus cogens*'.[27] Finally, 'the high degree of condemnation is reflected in the fact that international law mandates individual responsibility in such cases'.[28]

'Liberty and the security of person' are linked together in every one of the major human rights treaties,[29] and form the conceptual basis for an array of other international agreements, such as the Convention on the Rights of the Child 1989, the Convention on the Elimination of all Forms of Discrimination Against Women 1979 and the Convention on the Elimination of All Forms of Racial Discrimination 1965.[30] The International Committee of the Red Cross, in its recent examination of humanitarian law, has declared that '[a]rbitrary deprivation of liberty is prohibited'[31] under customary international law. The right to liberty and the security of person is not absolute; it is, instead, qualified in order to except punishment by the state following the satisfactory finding of guilt. This links us neatly to our third highlighted right.

The balancing of rights necessary to maintain an ordered and workable society is dependent upon the right to a fair trial. Amnesty International asserts that '[t]he right to a fair trial is a universal right, inherent in the human person';[32] it is a vital safeguard against the excessive and arbitrary use of public power. Based on the presumption of innocence and the

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[20] Chandler, 'Crafting a Human Rights Agenda for Business', in Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, 1999) 39.
[21] Baez, Dearing, Delatour and Dixon, 'Multinational Enterprises and Human Rights', (1999-2000) 8 *University Of Miami: International & Comparative Law Review* 183 at 227.
[22] Ibid. at 250.
[23] There is no consensus that this right prohibits capital punishment, abortion and/or the use of nuclear weapons: Baez *et al*., ibid. at 252.
[24] Baez *et al*., Ibid. at 250-2.
[25] Article 4, ICCPR.
[26] Article 3, UDHR; Article 6, ICCPR; Article 2(1), European Convention of Human Rights ('ECHR'); Article 4 (1), Article 4, African Charter on Human and Peoples' Rights (ACHPR) and, American Convention on Human Rights (ACHR).
[27] Baez *et al*., supra n. 21at 251.
[28] Ibid. at 252.
[29] Article 3, UDHR; Article 9(1) ICCPR; Article 5(1) ECHR; Article 6, ACHPR; and Article 7, ACHR.
[30] United Nations Population Fund (UNFPA) available at: http://www.unfpa.org/rights/language/right8.htm.
[31] Henckaerts, 'Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', (2005) 87 *International Review of the Red Cross* 175 at 207 (Rule 99).
[32] http://www.amnestyusa.org/international_justice/fair_trials/qa.html#1

requirement that guilt be proven to a high standard in a public judicial hearing of an impartial and regularly constituted tribunal, the right boasts strong treaty-based authority[33] and is firmly grounded in customary international law.[34] Like the right to liberty and security of person, the fair trial guarantee is not protected as non-derogable under Article 4 of the ICCPR. However, suspension of these rights is lawfully tolerated only when such measures are strictly required by the exigencies of an officially proclaimed national emergency threatening the life of the nation and consistent with other obligations under international law.[35] As demonstrated by the House of Lords in *The Belmarsh Detainees case*, this three-fold test is not easily satisfied.[36]

3. Transnational Corporations and International Law: Regulation

There are as many terms for the type of firm with which this article is concerned as there are definitions for each separate term. Indeed, the UN 'has considered that no [one] definition of "transnational corporation" could be found anywhere in the literature on international law',[37] and the International Labour Organisation (ILO) Working Party has noted, 'major discrepancies persist in definitions'.[38] Whilst this article treats as generally synonymous the terms transnational corporation, multinational corporation and multinational enterprise ('MNE'), the various definitions ascribed to each label are worthy of note, if only to illustrate the complexity of the issue and the differing corporate structures that companies have concocted in order to improve efficiency, maximise profits and – at times – avoid the inconveniences of legal regulation. Definitions of such companies have been proffered by international bodies such as the ILO,[39] the Organisation for Economic Co-operation and Development (OECD),[40] and the UN itself.[41] Common to each, say Baez *et al*, are the considerations of ownership; location of production or operations; location of headquarters in relation to its operations; size; and percentage of sales made in foreign countries.[42] It will suffice, for our purposes, to note, as McCorquodale does, that 'the essential element of these corporations is that the distribution of power and control of them are arranged in ways that defy territorial boundaries'.[43]

It is this boundary-defying nature that has prompted calls for some form of international regulation of TNCs. This would require quite a change from the current position as the international legal system fails to recognise the TNC as a responsibility-holding subject.

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[33] Articles 9-11, UDHR; Article 9, ICCPR; Article 6, ECHR; Article 7, ACHPR; and Article 8, ACHR.
[34] Henckaerts, supra n. 31 at 195 (Rule 79) and 207 (Rule 100).
[35] Article 4, ICCPR.
[36] */a and Another v SSHD* [2004] UKHL 56: 'The discriminatory character of section 23 [ATCSA 2001] has the result that the section is incompatible with article 14 of the ECHR. Moreover, in my opinion, the [Derogation] Order fails to satisfy the criteria imposed by [ECHR] article 15 not only on the ground that section 23 goes further than "the extent strictly required by the exigencies of the situation" but also because its discriminatory effect deprives it of the requisite proportionality.' Per Lord Scott of Foscote, at para. 159.
[37] UN Sub-Commission on the Promotion and Protection of Human Rights, 'The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations', 10 June 1998, E/CN.4/Sub.2/1998/6, point 4 – as quoted by McCorquodale, supra n. 16 at 90.
[38] ILO Working Party on The Social Dimensions of the Liberalization of International Trade, GB.273/WP/SDL/1 (Rev 1) Session 273, Geneva 1998, para. 9 –cited in R. McCorquodale, supra n. 16 at 90 (fn.9)
[39] Para. 6, ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 1977, revised 2000.
[40] Article 1(3), OECD Guidelines for Multinational Enterprises 2000 (revised).
[41] Para. 1(a), Draft UN Code of Conduct on Transnational Corporations, 23 ILM 626 (1984).
[42] Baez *et al*., supra n. 21 at 187-9.
[43] McCorquodale, supra 19 at 91. See also, Weissbrodt and Kruger, supra n. 3 at 908.

Indeed, in the *Barcelona Traction, Light and Power Co Case*,[44] the International Court of Justice confirmed the juristic personality of the TNC as analogous to that of individuals, that is, as a national of a duty-bearing state.[45] As Johns tells us, 'the "traditional rule" attributes the rights and liabilities of the TNC to the state under the laws of which the company is incorporated and in the territory of which it has its registered office'.[46] Unfortunately, the 'artificiality, inconvenience and potential injustice of this system of linkage between states and TNCs'[47] is betrayed when states are unwilling or unable to exercise this supervisory role. The United Nations Centre on Transnational Corporations (UNCTC)[48] observed that '[a] number of factors … conspire to make purely national control systems variously evadable, inefficient, incomplete, unenforceable, exploitable, or negotiable … with respect to transnational corporations'.[49] Alternatively, states may be disinclined to control their registered TNCs, as demonstrated by one US representative: '[T]he US Government is not in a position to guarantee that its private sector will [or will not] perform in a [particular] way … Our Government does not have – nor does it wish to have – that type of control over our private sector'.[50]

Indeed, no dispassionate analysis could proceed to consider how best to regulate TNCs, without first questioning the assumption that these are dangerous entities whose power must be curbed. In an altogether unsurprising conclusion, William Meyer's test of the 'TNCs are bad vs. TNCs are good' theories,[51] determined that 'the empirical research … has produced results that are mixed … some TNCs do some good and [some] TNCs do much harm'.[52] It should not be ignored, when examining the abuses connected to TNC activity (part four), that their operations in the developing world can bring jobs for desperate citizens, investment to finance much-needed public services, improvements to infrastructure and technology, and cultural links to the developed world as yet unknown. As Geoffrey Chandler has said, 'corporate activity, leading to the creation of wealth, is the foundation of economic rights';[53] TNCs 'wield tremendous … power that, if harnessed correctly, could improve the quality of life for millions of people'.[54] We must remember these benefits when we consider taming the TNC.

According to some – mostly, it must be said, those tied to corporate interests – non-legal, self-imposed codes of conduct represent an acceptable way of promoting corporate responsibility for human rights without stepping on too many corporate toes.[55] This is not a new idea, but has evolved from experiments such as the Sullivan Principles, used to deflect TNC disinvestment from the apartheid-ridden South Africa of the 1970s and 1980s, the MacBride Principles in Northern Ireland in the 1980s,[56] the Slepak Principles, relating to

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[44] *Belgium v Spain* [1970] ICJ Reports 3, at para. 70.
[45] Johns, supra n. 11 at 894.
[46] Ibid. at 895.
[47] Ibid. at 896.
[48] This body no longer exists.
[49] Para. 51, UNCTC, 'Environmental Aspects of the Activities of Transnational Corporations: A Survey' (1985) – as quoted by Johns, supra n. 11 at 896.
[50] Jopley Bennet (US Representative at the 2nd General Conference of the UN Industrial Development Organisation) (1975) 72 *Department of State Bulletin* 520 – as quoted by Johns, supra.11 at 896.
[51] Meyer, 'Activism and Research on TNCs and Human Rights: Building a New International Normative Regime', in Frynas and Pegg (eds), *Transnational Corporations and Human Rights* (Palgrave Macmillan, 2003) 34.
[52] Ibid. at 48.
[53] Chandler, supra n. 20 at 39.
[54] Baez *et al*., supra n. 21 at 229.
[55] 'A code of conduct is a written policy or statement of principles intended to serve as the basis for a commitment to particular conduct': Wawryk, infra n. 59 at 53.
[56] Cassel, supra n. 8 at 1970-2.

human rights in the Soviet Union,[57] and the Miller Principles for US firms working China.[58] These codes create higher expectations of corporations and provide victims and interested parties with the ammunition of entitlement-orientated language with which to contest violative business activity. As Wawryk has said, internal company codes, industry association codes and NGO codes of conduct share the common advantages of being more flexible, cheaper, quicker to draft and easier to adopt than legally binding measures.[59] Cassel deems the growth of corporate commitments to human rights 'impressive', but concedes they are far from universally adopted.[60] There is hope that this trend of assuming voluntary, market-driven statements of intent is indicative of TNCs taking issues of ethics and human rights more seriously.[61] However, implementation and enforcement will be lacking if these codes are no more than empty words designed to deflect negative human rights-based criticism:

> In general, only a selected few among private corporations are likely to willingly submit to new responsibilities without being legally compelled to do so. On the few occasions when corporations assume responsibilities outside of a legal framework, it has either been because of social pressure or in reaction to errors, scandals or accidents involving the corporation concerned. These reactive responses are generally transient and not particularly rigorous in character.[62]

Whether such a cynical conclusion is warranted will be considered below as part of the thematic analysis of the case studies (See Section 5). It is sufficient, for now, to again quote Geoffrey Chandler and note why a cautious suspicion of these codes of conduct remains prudent: 'There are codes in plenty, but it is worth remembering the comment of that indefatigable report-writer, Florence Nightingale, who said that "reports are not self-executive". The same is true of codes. Codes have no meaning unless they are translated into action and unless that action is monitored and audited'.[63]

So should regulation take a legally binding form? Peter Muchlinski points out that whilst some find it 'almost inconceivable' to argue against the extension of human rights responsibilities to TNCs, there are 'a number of strong arguments against it'.[64] First is the argument of Milton Friedman that the notion of rights-based control of businesses is a 'fundamentally subversive doctrine' in a free society, in which 'there is only one social responsibility of business … to increase its profits so long as it stays within the rules of the game'.[65] When executives commit corporate funds for social responsibility, says Friedman, they 'wrongfully usurp the funds of their shareholders, or possibly of their customers, or even of their employees'.[66] Second, TNCs are bound only to obey the law and should leave governments to regulate on matters of social importance; third, TNCs are powerless to protect

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[57] Casteñeda and Montalván, The Arcos Principles available at: http://www.sigloxxi.org/Archivo/arcos-i.htm.
[58] McCorquodale, supra n. 16 at 99.
[59] Wawryk, 'Regulating Transnational Corporations through Corporate Codes of Conduct', in Frynas and Pegg (eds), *Transnational Corporations and Human Rights* (Palgrave Macmillan, 2003) 73.
[60] Cassel, supra n. 8 at 1974.
[61] Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing: Oxford, 2004) at 7-8: Joseph cites like-company codes such as the Apparel Industry Partnership Initiative (US) and the Fairwater Campaign (Australia), and cross-industry codes such as the Ethical Trading Initative (UK).
[62] Addo, 'Human Rights and Transnational Corporations – an Introduction', in Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, 1999) at 11.
[63] Chandler, supra n. 17 at 41.
[64] Muchlinski, supra n. 14 at 35 – much of this paragraph draws on this source.
[65] Friedman, 'The Social Responsibility of Business is to Increase its Profits', *NY Times*, 13 September 1970, Magazine at 32 - quoted in Cassel, supra n. 8 at 1977.
[66] Cassel, supra n. 8 at 1977.

civil and political rights; fourth, the 'free rider' problem results in the conscientious corporation losing both competitively and business opportunities to less scrupulous TNCs; and finally, NGOs may unfairly skew regulatory efforts to further their own particular campaigns or interests. Whilst these arguments present reason to pause, they fail to establish the inadvisability of regulating TNCs according to human rights principles. Muchlinski ably rejects each argument, pointing to changes in both the general perception of the TNC and its functions, and the wider reaction to global economic integration.

Three factors have challenged the theoretical basis for detaching private business from international law, according to Andrew Clapham.[67] First, the 'emergence of fragmented centres of power' has seen the TNC elevated to the same plane as governments, extending 'the individual's perception of authority, repression and alienation beyond the apparatus of the state'. Indeed, in 2000, the Institute for Policy Studies reported that 51 of the top 100 economies in the world were actually corporations and that the top 200 TNCs had a combined revenue greater than the combined GDPs of all states excluding those of the top ten countries.[68] Secondly, the blurring of the division between public and private – seen in public-private-partnerships and the development of 'identity politics' – has weakened the notion of the private corporation, free from social or public obligations. Finally, and most significantly, individuals today see the TNC as operating beyond the reach of democratic governments and seeking to exert power over public policy through supranational bodies – such as the European Union or the World Trade Organisation – free from any system of accountability that might represent other, equally valid, interests. When coupled with fears about violative and harmful business activities, '[i]t follows that MNEs must be subjected to human rights responsibilities, notwithstanding their status as creature of private law, because human dignity must be protected in every circumstance'.[69]

If globe-spanning companies cannot be trusted to regulate their own activities, standards must be imposed upon. This can be achieved through i) regulation by the 'host' state; ii) regulation by the 'home' state; iii) the imposition of international obligations on states; or, iv) the imposition of international obligations directly on TNCs.[70] Firstly, the ('host') states in which TNCs operate – especially at the extraction and production stages – tend to be developing nations that are desperate for the company's investment and unwilling or unable to question the business activities of these huge firms, which are often relatively much stronger in terms of both economic muscle and political influence. TNCs often dictate the terms of their engagement with a state and have even been known to draft the legislation they want passing (BHP in Papua New Guinea) or mastermind coups to remove inhospitable governments (ITT in Chile and United Fruit Co. in Guatemala).[71] This pressure to offer invitingly lenient human 'red tape' has led to a regulatory 'race to the bottom', with developing states refusing to fetter the discretion of powerful TNCs.

Regulation by the TNCs' country of registration (the 'home' state) has proved similarly unworkable due to the practical difficulties of monitoring such activities, and the reluctance of both home and host state to countenance such extraterritorial 'interference'. The home state is not yet liable under international human rights law for the actions of its non-government citizens abroad and so has little incentive to put its TNCs at a competitive disadvantage by imposing a regulatory burden on them.[72] Extraterritoriality remains controversial, with real fears of developed states disguising 'judicial imperialism' or protectionist policies as human

[67] Quoted in Muchlinski, supra n.14 at 39-40.
[68] Joseph, supra n. 61 at 1.
[69] Muchlinski, supra n. 14 at 40.
[70] McCorquodale, supra n. 16 at 92-113.
[71] Ibid. at 97.
[72] Joseph, supra n. 61 at 12.

rights enforcement.[73] Whilst the idea of universal jurisdiction has been flirted with, it has failed to take hold. Belgium, notably, enacted a law enabling prosecutions in its courts for extreme human rights violations anywhere in the world, regardless of the nationality of the perpetrators or victims. TotalFinaElf, the French energy giant, was being investigated under these provisions over allegations of complicity in forced labour in Myanmar, which could have resulted in the criminal prosecution of the company. The government recently, however, amended the law, grounding it in the less contentious jurisdictional principles of territoriality and nationality and forestalling any criminal action against TotalFinaElf.[74]

The traditional state-focus of international law would seem to make our third option – obliging states to prevent TNCs violations of human rights – the natural route to compliance. The problem with this approach is that of enforcement; obligations for abuses within their jurisdiction have long been imposed on states through major international treaties and customary international law[75] but there has been little sign of attempts to hold TNCs to account. No international body has demonstrated both the authority and willingness to bring teeth to these well-intentioned rules of attribution and liability. This, of course, is no reason to abandon the principle of state responsibility – every effort should be made to induce states to fulfil their legal duty and protect those in their charge. Muchlinski implores us, when considering direct obligations on TNCs, not to downplay the continuing responsibility of states but to remember that '[i]n all the major cases of reported corporate abuses of human rights, the host state was prominently and actively involved. It should not escape full blame for situations that it has primarily created … [any developments] must not absolve states from the responsibility for putting into place effective regulatory systems for the protection and promotion of [human rights]'.[76]

So we turn to the fourth possible avenue: the imposition of human rights obligations directly on TNCs. Trends in different branches of international law suggest that, conceptually, no leap of faith is required for the discipline to evolve past its statist origins and embrace the TNC. Indeed, TNCs' desire to distance themselves from international law and the regulation it might bring is ironic in the face of their eagerness to work themselves and their interests into what Baez *et al* call 'the emerging law of the world economy'.[77] Even when they have lacked procedural rights, TNCs' interests have been instrumental in shaping international law:

> Even though international law theoretically pertained only to relations among states, a significant part of what the United States and many European states concerned themselves with in their international relations was how their own corporations were faring at the hands of other states. Although corporations had little, if any, formal doctrinal role, a central concern of international law throughout much of the nineteenth and early twentieth centuries was the activities of MNEs… [marked by] gun-boat diplomacy.[78]

By influencing the policies of the World Trade Organisation, for example, and operating under its legal protection, TNCs have flourished alongside strict, enforceable rules on trading goods and services and on intellectual and industrial property ownership rights, designed to enable and promote trade. The success of the TNC, and the whole process of globalisation, have been, in part, thanks to these rules – and related developments such as the proposed

[73] Ibid. at 12.
[74] Ibid. at 13-4.
[75] McCorquodale, supra n. 16 at 93.
[76] Muchlinski, supra n. 14 at 44.
[77] Baez *et al*., supra n. 21 at 195.
[78] Ibid. at 212.

OECD Multilateral Agreement on Investment – which have proved 'far more favourable to commercial freedom than in restraint of it'.[79] Increasingly loud calls are being made for human rights factors to be incorporated into this international trade law mechanism, to force those with large economic stakes to take interest.[80] Whilst not quite hoisted by their own petard, such regulation as subjects of international law is 'not only justifiable in law ... but [is] also a consequence of the growing importance in society of the modern private corporation'.[81] In the words of Kofi Annan: '[t]ransnational companies have been the first to benefit from globalization. They must take their share of responsibility for coping with its effects'.[82]

International criminal law, too, appears to be on the cusp of applying to the private corporation. After the horrors of World War Two, the International Military Tribunals were highly critical of certain corporate activity, bringing prosecutions against senior managers of many firms for complicity in war crimes: the *Zyclon B Gas case*, *US v Friedrich Flick*, *US v Von Weizaecker*, *US v Alfried Krupp*, the *Roechling Case* and, most famously, the *I.G. Farben* case.[83] The last of these has been described as 'the first time that a court attempted to impose liability on a group of persons collectively in charge of a company for crimes, or complicity in crimes, committed during times of war'.[84] Whilst these reactions to corporate wrongdoing were channelled through individual criminal responsibility, Muchlinski stresses that, 'as established by the Nuremberg Tribunal, corporate responsibility for war crimes and crimes against humanity may be possible'.[85] Although this claim is supported only by the fact that the Gestapo and 55 other Nazi organisations were declared to be criminal in nature – and not on evidence more detached from the state realm – it does refute claims that liability cannot stretch to an entire organisation. Whilst calls to include legal persons in the personal jurisdiction of the *ad hoc* International Criminal Tribunals and the International Criminal Court have not succeeded,[86] each have witnessed the growth of the notion of 'complicity', in terms of both authority and scope. This concept has opened the door to the kind of civil litigation against TNCs, for their human rights abuses, that is so increasingly evident today (under the US Alien Tort Claims Act (ATCA), for example).[87]

The most obvious branch of international law to look to for the protection of human rights is, of course, international human rights law. Its origins show much promise, with the UDHR proudly proclaiming, back in 1948, that it is the responsibility of 'every individual and every organ of society… to promote respect for these rights and freedoms and… to secure their universal and effective recognition and observance';[88] whether intended at the time of drafting or not, this certainly includes the socially-influential TNC of today's world. Furthermore, the post-war emphasis on the principle of self-determination 'brought to the forefront a new subject of international law, namely "peoples" … [as t]he almost exclusively

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[79] Addo, supra n. 62 at 12.
[80] Baez *et al*., supra n. 21 at 210-1.
[81] Addo, supra n. 62 at 12.
[82] Annan, 'Help the Third World Help Itself', *Wall Street Journal*, 29 November 1998, at 28.
[83] 'Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law', A joint project of the International Peace Academy and Fafo, (2004)at 16; see also Hillemanns, supra. n.10 at para. 14.
[84] Ibid. at 16.
[85] Muchlinski, supra n. 14 at 40.
[86] Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in Kamminga and Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International, 2000) 139.
[87] 'The Akayesu complicity standard may have value in civil litigation against corporations…', Amann, 'Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights', (2000-1) 24 *Hastings International and Comparative Law Review* 327 at 336.
[88] Preamble, UDHR [emphasis added].

state-centred character of international law doctrine began to breakdown'.[89] International human rights law is today concerned with the state, public bodies, individuals, peoples, opposition groups, national liberation movements and – to a growing degree – TNCs.

Whilst the international community has addressed this newest category of concern through many texts seeking to influence their behaviour, the 'most comprehensive proposed outline of human rights duties for TNCs'[90] is the recent 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' ('Norms').[91] Drafted by the sessional Working Group on the Working Methods and Activities of Transnational Corporations,[92] the Norms were unanimously approved on 26th August 2003 by the United Nations Sub-Commission for the Promotion and Protection of Human Rights. The approach taken in drafting the Norms represents a significant departure from previous assumptions on how best to deal with corporations and their impact on human rights: 'the Norms overturn two paradigms that have to date dominated the discourse on corporate social responsibility: namely that all initiatives should be voluntary and that there is no "one size fits all" model to cope with the different situations facing businesses'.[93]

This shift in policy, criticised by some business representatives (for example the International Organisation of Employers and the International Chamber of Commerce),[94] was a reaction to the failure of previous measures to have a discernible impact on TNCs' attitudes and behaviour. At the intergovernmental level, the 1976 OECD Guidelines for Multinational Enterprises and the 1977 ILO Declaration of Principles Concerning Multinational Enterprises and Social Policy,[95] both recently revised, were admirable in their intention but did not purport to contain any legally binding norms and as such were largely ignored by businesses.[96] Previous UN efforts were similarly unsuccessful. The 'Draft UN Code of Conduct on Transnational Corporations'[97] was drafted in 1984 under the auspices of the now-defunct UNCTC but agreement was never reached as to whether it would provide mandatory requirements or voluntary guidelines for TNCs. The project was stymied both by the North-South conflict and the Cold War. Finally, Secretary-General Annan's Global Compact initiative, proposed at the 1999 Annual Meeting of the World Economic Forum,[98] called upon major TNCs 'to observe fundamental workers' rights, human rights and environmental standards'.[99] The Compact's entirely voluntary nature led to it being joined by only 1,000 TNCs out of a total number of approximately 75,000, with some seemingly doing so 'merely for public relations purposes' and without changing their business practices at all.[100]

The Norms are designed to elucidate TNCs' responsibilities and to identify issues for all interested parties for reference when formulating company policies, government legislation, NGO plans, and other such programmes. They are intended to evolve into a binding instrument,[101] and expressly envisage enforceability of its standards by 'national courts and/or international tribunals, pursuant to national and international law'.[102] Their

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[89] Baez *et al*., supra n. 21 at 212-3.
[90] Joseph, supra n. 61 at 10.
[91] E/CN.4/Sub.2/2003/12/Rev.2 (2003).
[92] Prompted by Resolution 1997/11 of the Sub-Commission on the Promotion and Protection of Human Rights.
[93] Hillemanns, supra n. 10 at para. 4.
[94] Ibid. at para. 4.
[95] The OECD Guidelines for Multinational Enterprises, revision: 2000, OECD; Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 3rd ed., 2001, ILO: Geneva.
[96] Muchlinski, supra n. 14 at 36.
[97] 23 ILM 626 (1984).
[98] Annan, 'Address at the World Economic Forum', Davos, 31 January 1999, SG/SM/6448 (1999).
[99] Hillemanns, supra n. 10 at para. 38.
[100] Ibid. at para. 6.
[101] Ibid., para. 2.
[102] Para. 18, Norms.

content – or at least their interpretation – is also expected to evolve, changing with standards as they develop over time,[103] whilst remaining flexible in their application, based on companies' 'respective spheres of activity and influence'.[104] The Norms do not purport to make new law, but rather restate and codify existing rules and obligations as found in treaties and international customary law, much like the UN OCHA's 1998 Guiding Principles on Internal Displacement.[105] The Norm's preamble provides a non-exhaustive list of 31 treaties and other international instruments that already bind the 'officers and people working for' TNCs and other business enterprises;[106] like the Guiding Principles, the Norms are accompanied by a detailed commentary indicating from which binding source each norm derives ('the Commentary').[107] The text affirms the right to equality of opportunity and freedom from discriminatory treatment; workers' rights; consumer protection; and, environmental protection. Most interesting for our purposes, the Norms also demand respect for the right to security of persons and require TNCs not to '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'. Importantly, the same section expressly applies human rights norms and professional standards to TNCs' security arrangements.[108] Finally, Section E of the Norms articulates the duty to respect national sovereignty and human rights, including a call to respect economic, social and cultural rights; an expansive prohibition on bribery of public figures or bodies; and the proscription of 'any activity which supports, solicits, or encourages States or any other entities to abuse human rights'.[109]

The Norms have been 'mostly welcomed by all interested parties',[110] and even hailed as a 'landmark step for holding businesses accountable for their human rights abuses'.[111] Clearly, the extent to which this praise is justified, and the Norms gain authority and influence, will have a major bearing on this article's conclusions.

4. The Militarisation of Commerce: Case Studies

The old adage that 'business is a risky business' has taken on a chilling new truth since TNCs began to expand their business activities into the poorest parts of the planet. Faced with fierce global competition and an increasingly deregulated environment, TNCs have sought to maximise profits by establishing operations in the developing world, 'where countries are often resource rich, regulatory requirements (and associated costs) may be weak or non-existent, and labour is relatively cheap'.[112] In many such states, TNCs have had to endure the continuing serious civil unrest and horrendous human rights atrocities that existed before their

[103] Hillemanns, supra n. 10 at para. 7.
[104] Para. 1, Norms.
[105] UN Office for the Co-Ordination of Humanitarian Affairs, 'Guiding Principles on Internal Displacement' (1998).
[106] Preamble, Norms.
[107] Sub-Commission on the Promotion and Protection of Human Rights, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/38/Rev.2 (2003).
[108] Paras 3 and 4, Norms.
[109] Paras 10-12, Norms.
[110] Hillemanns, supra n. 10 at para. 4; see also Weissbrodt and Kruga, supra n. 3 at 903.
[111] Ibid. at 901.
[112] Clough, 'Not-So-Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses', (2005) 11 *Australian Journal of Human Rights* 1 at 1.

arrival as well as confront the fresh, and sometimes violent, opposition aroused by the injection of international corporate interests. Whereas the greatest threat posed to TNCs operating in the world's poorest countries used to be the possibility that their property would be nationalised and seized by the local government,[113] today 'the real risk to investment located in the developing world is from violence directed at their employees or facilities'.[114] Indeed, since TNC operations are often both a critical factor in local frustrations and a crucial strategic national asset, companies' locations can easily become 'the epicentre of conflicts'.[115] Despite these fears, risky business ventures into unenticing places offer the prospect of an 'investment bonanza';[116] as 'The Economist' has noted, '[t]he world viewed from the boardroom is a nasty place'.[117] Rather than withdraw, TNCs have responded to this violent threat by developing security arrangements to protect their personnel, infrastructure and other interests. Unlike the British East India Company of the 18th and 19th centuries, which had its own 'military secretary',[118] such undertakings will usually exceed the company's capabilities and these security services must be obtained from some external source. Thus we find ourselves with a new phenomenon: that of 'militarized commerce'.

'Militarized commerce' is a phrase coined by Professor Craig Forcese, who defines it as 'the acquisition by companies of military services from military or para-military forces as security for firm operations and includes assistance granted these troops in return for protection'.[119] This provides the conceptual basis of the second half of this article; in order to maintain some clarity of focus, a moment should be taken to note what is not included. We are not concerned with the commercialisation of military endeavours – that is, the contracting of private military firms by states to carry out tasks traditionally reserved for state forces.[120] Nor will we consider those human rights abuses, attributable to TNCs, which have no nexus to military (re)actions of hired forces.[121] Whilst these excluded concerns are covered more extensively in the existing literature, this article aims to examine this specific and thus-far neglected issue.

TNCs do, of course, have every right – indeed a duty – to protect their property from harm and, moreover, to make every effort to safeguard their workers' rights – notably the rights to life, liberty and security mentioned above. Whilst this article does not aim to generalise all security arrangements as inappropriate and disproportionately harmful, there is a growing body of evidence that the rapidly increasing trend towards militarised commerce is throwing up serious human rights violations. In the following pages we will explore such allegations and consider the validity of TNC defences, including insistence of necessity, claims of incomplete knowledge or control, contentions that documented abuses did not occur on company premises, or reliance on the corporate veil separating a parent corporation from

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[113] 'In the 1960s and 1970s, for example, BP and Exxon lost oil fields in Venezuala and Iran, and the firm Anglo-American lost its mines in Zambia' in Singer, infra n. 114 at 80.
[114] Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell Univ. Press, 2004) at 80.
[115] Ibid. at 81.
[116] Ibid. at 81.
[117] 'Corporate Security: Risk Returns', *The Economist*, 20 November 1999 – as quoted in Singer, supra n. 114 at 81.
[118] Ortiz, 'Embryonic Multinational Corporations and Private Military Companies in the Expansion of the Early-Modern Overseas Charter System', 47th Annual ISA Convention (2006) at 15.
[119] Forcese, 'Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses', (1999-2000) 31 *Ottawa Law Review* 171 at 175.
[120] For an excellent analysis of the important reasons for and ramifications of this trend, see Singer's seminal study, supra n. 114.
[121] For example, see Baez *et al*., supra n. 21: disgusting working conditions and inadequate wages in Haiti: Disney, Wal-Mart, K-Mart, H.H. Cutler/VF at 237-241; child labour in India's carpet, diamond, glass and footwear industries at 241-4; Serious violations of labour regulations and child labour in Pakistan and (Nike in) Vietnam at 244-9.

its subsidiaries' liabilities. The following case studies are divided according to Forcese's two sources of security force provision: i) national armies and ii) private military firms.[122]

A. Involvement of Host State Armed Forces in TNC Security Operations

The fervid desire of many developing states to attract the investment of these corporate organisations has not only resulted in the aforementioned deregulatory 'race to the bottom' but a very accommodating stance on the provision of security for TNC activities in their territory. Worryingly though, these countries are often characterised as 'less stable regions where justice is dished out at the whim of dictators, corporate law is a work in progress and corruption is rampant',[123] and have governments who have no respect for human rights, especially those of rival factions. The states in which some of the largest TNC upstream operations are located read like a who's who of notorious human rights abusers: Burma (Myanmar), Nigeria, Sudan, Colombia and Sierra Leone, to name only a few. Given this context, allegations that state-run TNC-security operations have led to serious violations of (*inter alia*) the rights to life, liberty and security of person, and a fair trial require thorough investigation.

Burma is ruled by the military dictatorship of Senior General Than Shwe. The State Peace and Development Council (SPDC),[124] which operates a strict police state, has outlawed 'virtually all' opposition political activity (including the democratically elected National Coalition Government of the Government of Burma),[125] and 'has committed persistent and egregious human rights abuses against its population'.[126] Whilst the SPCD continues to receive economic support from China, India and Thailand,[127] sanctions from the US and the EU have ensured that the state is increasingly reliant on wealth created within its borders. Significant oil and gas reserves in the country have attracted massive corporate investment projects from abroad. The most important of these was the building of the Yadana Pipeline, stretching from the Yadana gas field 60 miles off the south coast of Burma in the Andaman Sea to the Thai border,[128] a distance of roughly 250 miles.[129] The pipeline was constructed pursuant to a joint venture by TotalFinaElf ('Total') (31.25%), Unocal (28.25%),[130] PTT-EP (25.5%),[131] and the state-owned Myanma Oil and Gas Enterprise (15%) and represented a total investment of approximately US$1 billion.[132] The pipeline was running at full capacity as of early 2001[133] and could now be providing Burma's military junta with up to US$400 million every year.[134]

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[122] Forcese, supra n. 119 at 175. Forcese labels such entities 'private military companies' (PMCs). They might also be referred to as 'private security companies' (PSCs).
[123] Howlett and Drohan, 'Canadian Miners Living Dangerously', *The Globe and Mail*, 26 July 1997, B1.
[124] Previously known as the 'State Law and Order Restoration Council' (SLORC).
[125] Human Rights Watch: Burma Overview, available at: http://hrw.org/english/docs/2006/01/18/burma12268.htm.
[126] Forcese, supra n. 122 at 178.
[127] HRW, supra n. 125.
[128] Total in Burma available at: http://burma.total.com/en/gazier/p_2_2_2.htm.
[129] EarthRights International and the Southeast Asian Information Network, 'Total Denial: A Report on the Yadana Pipeline Project in Burma', July 1996, 11.
[130] As of 10 August 2005, Unocal became a wholly owned subsidiary of Chevron available at: http://www.chevron.com/news/unocal_agreement/.
[131] Petroleum Authority of Thailand Exploration and Production.
[132] Total in Burma, supra n. 128.
[133] Ibid.
[134] EarthRights International and the Southeast Asian Information Network, supra n. 129, 11.

An 'integral' part of the investment deal was the security guarantee provided to the TNC consortium by the SPDC.[135] Burma has been at civil war for over four decades,[136] and the gas pipeline passes through areas under each of the government's three security-categorisations: free fire (no state control), mixed control and total control.[137] The two flanks of SPDC's 'Operation Natmin', running from December 1994 to July 1995, were to secure the pipeline route and to remove resistance forces. This involved the forcible relocation of thousands of civilians and the execution of military offensives against armed ethnic groups.[138] The immediate relevance of this and other such operations in the pipeline region on the rights considered in part two are clearly illustrated by this excerpt from the 'Total Denial' report:

> Violations of the right to life and of the integrity of the person have taken the form of summary executions by the army … [SPDC] arbitrarily executed at least ten Karen villagers from Ein Da Ya Za Village which is located on the pipeline route … [others were] physically abused … None of these people were ever charged with any crime or offense. Likewise, not one received a trial, a hearing or even an informal opportunity to defend him or herself before being executed.[139]

Appearing before the US District Court, under the ATCA, Unocal representatives claimed that as a 'passive investor', removed from decisions or activities related to security projects, it could not be held liable for the documented violations of international human rights law:[140] 'In short, because it was motivated by profit, not malevolence, Unocal argued that it should not bear any financial responsibility for the undisputed abuses suffered by plaintiffs'.[141] Whilst the Court found that '[t]he evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefited from the practice',[142] and 'held, for the first time, that [TNCs] could, in principle, be directly liable for violations of human rights under the Alien Tort Claims Act',[143] it found in Unocal's favour, declaring that the legislation required direct participation by the defendant company in the wrongful acts.[144]

Unocal, of course, did not act alone in Burma. Total could not be similarly tried under the ATCA as it was not held to be subject to US federal jurisdiction;[145] prosecutions under Belgium's universality law had to be dropped when the government bowed to pressure to amend its legislation.[146] On its website, Total notes the 'controversy and misperception' that surrounds its presence in Burma, but offers answers to frequently voiced criticisms levelled at the firm. Total insists it has neither participated in nor has knowledge of human rights violations perpetrated in the country and that instead it has 'trusting relationships' with the local villages.[147] It denies that there is a popular resistance against the firm's operations, even

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[135] Ibid. at 12.
[136] Ibid. at 24.
[137] Ibid. at 25.
[138] Ibid. at 26.
[139] Ibid. at 36-7 – the report also gives evidence of beatings, torture, starvation, rape and other gender-based violence at 37-40.
[140] Appellees' Answering Brief at 10, 12–18, *John Doe III v. Unocal Corp*., No. 00-56628 (9th Cir. filed 7 May 2001)
[141] Collingsworth, 'The Key Human Rights Challenge: Developing Enforcement Mechanisms', (2002) 15 *Harvard Human Rights Journal* 183 at 189.
[142] *John Doe I v. Unocal Corp*. 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000).
[143] Muchlinski, supra n.14 at 41 – citing 28 USC s.1350.
[144] Supra n. 142 at 1308–10.
[145] Collingsworth, supra n. 141 at 202.
[146] Supra n. 74.
[147] Total in Burma, FAQs, available at: http://burma.total.com/en/ow/faq.htm#faq1.

in the face of detailed reports of a series of armed attacks.[148] The army, it says is generally responsible for maintaining law and order and any wrongful activity was either carried out before the firm's arrival, or was unconnected with the pipeline project. Just like Unocal, Total insists it has 'never had a contractual relationship with the Army, given it instructions, or paid it any money'.[149] Is this a carefully drafted 'partial denial'? Is it true at all? Such doubts gain weight in light of recorded comments of senior TNC representatives about their reliance on the army's security operations, like this remark from Unocal President John Imle: 'If you threaten the pipeline there's gonna be more military … for every threat to the pipeline there will be a reaction'.[150]

Nigeria is the largest oil producer in Africa, and the fifth largest in the Organisation of Petroleum Exporting Countries (OPEC).[151] For the last two decades, oil has provided approximately 90% of foreign exchange earnings and 80% of Nigeria's federal revenue.[152] Despite these huge reserves and abundant supplies of natural gas, Nigeria remains one of the poorest countries in the world; corruption is rife – most notably 'around the oil industry itself, where large commissions and percentage cuts of contracts have enabled individual soldiers and politicians to amass huge fortunes'.[153] The 1970s saw the Nigerian government successfully centralise power by obtaining operational involvement in TNCs' activities through the creation of the Nigerian National Petroleum Corporation in 1971, and wrestling ownership and rent payments of oil-rich land away from local communities through promulgation of the Land Use Act 1978.[154] These developments, coupled with the continued corruption and inefficiency of the 'Oil Mineral Production Areas Development Commission', sparked the first dissatisfaction amongst Nigerian locals upset at losing access to what they saw as their fair share of oil production revenues.[155]

Whilst this is clearly a hostile environment for TNC operations, it does not absolve the oil companies from blame for failing to meet their responsibilities. Shell is the major TNC operating in Nigeria, producing nearly half of the country's total crude oil – Chevron, ExxonMobil, Total and Agip have also invested significantly.[156] Above all, these companies have retained direct operational control over the day-to-day running of the joint ventures, including 'important decisions, such as, for instance, how to respond to a protest by the local people'.[157] The oil companies have persistently turned to the government for protection in the face of the cycle of protest, repression and increased public anger and have thereby transformed resource-rich regions into the sites of a 'simmering conflict',[158] with anti-oil protestors facing the state-orchestrated 'suppression of political activity, the lack of legal redress for damage ... and the sheer ubiquity of human rights abuses by the region's security forces'.[159] Shell in particular has been criticised for its involvement in shocking violations of the local people's rights to life, liberty, security, and a fair trial. Frustrated by opposition

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[148] ERI and SEAIN, supra n. 129 at 25-9.
[149] Total in Burma, supra n. 147.
[150] Unocal President John Imle – quoted in ERI and SEAIN, supra n. 129 at 25.
[151] Manby, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch: New York, Jan 1999) Chapter I at para. 21.
[152] Ibid., chapter I at para. 21.
[153] Ibid., chapter I at para. 21; According to a special government report, in 1994 the military government had misappropriated $12bn – Maier, 'Nigerian Dissident Faces Death Penalty', *The Independent*, 29 October 1995, at 12.
[154] Frynas, 'The Oil Industry in Nigeria: Conflict between Oil Companies and Local People', in Frynas and Pegg (eds), *Transnational Corporations and Human Rights* (Palgrave Macmillan, 2003) 101.
[155] Ibid. at 103.
[156] Manby, supra n. 151, chapter I at para. 22.
[157] Frynas, supra n. 154 at 103.
[158] Manby, supra n. 151, chapter I at para. 43.
[159] Ibid., chapter I at para. 43.

enough to halt business activity in 1993,[160] Shell has reportedly not only asked the Nigerian government for assistance, but expressly requested the services of the notoriously brutal 'Mobile Police', known locally as the 'kill and go mob'.[161] The mantra that 'oil is the lifeblood of the Nigerian federal government, and any threat to oil revenues is viewed in the most serious light'[162] has ensured that the slightest TNC worry is put to rest by crushing displays of armed might. According to a detailed Human Rights Watch investigation,

> *In virtually every community*, there have been occasions on which the paramilitary Mobile Police, the regular police, or the army, have beaten, detained, or even killed those involved in protests, peaceful or otherwise, or individuals who have called for compensation for oil damage, whether youths, women, children, or traditional leaders. In some cases, members of the community are beaten or detained indiscriminately, irrespective of their role in any protest.[163]

Two incidents stand out prominently in the reports: the results of TNC-Ogoni animosity; and, security operations in the Umuechem area. The first of these has become well publicised by the international media and human rights advocacy groups. Complaining of TNCs' damaging environmental impact in their territory and demanding a share of the oil revenues has earned the people of Ogoniland years of harsh repression. Paul Lewis' reportage, 'Blood and Oil: A Special Report: After Nigeria Represses, Shell Defends Its Record', argues that whilst some accounts have glossed over the more questionable aspects of the local protests against Shell, research reveals certain broad points: Ken Saro-Wiwa – leader of the Ogoni protests – was ambitious (possibly ruthless) in pursuit of his main goal of winning Ogoniland autonomous power and a share of its oil revenues; in response to what they feared was the pre-cursor of a separatist war, the Nigerian government 'ferociously' sought to 'waste' Ogoni leadership and vocal individuals – reportedly, 30 villages were destroyed and 2,000 Ogoni were killed; Shell's request for security assistance provided the pretext for state-planned abuses – the military understood the lucrative 'Shell operations [remained] impossible unless *ruthless* military operations were undertaken';[164] Shell paid for the transportation and salary bonuses of the state troops.[165] Finally, Shell has been criticised for ignoring pressure from Western diplomats and declining – until it was too late – to intervene in the 'secret and clearly rigged' trial, described by Lewis as 'a travesty, its outcome preordained and his sentence more a reflection of Nigeria's harsh politics than any judicial process'.[166]

The incident in Umuechem represents the single most serious loss of life directly involving oil company activities.[167] On 29 October 1990, the divisional manager of the 'Shell Petroleum Development Company of Nigeria Limited' requested 'security protection', with a preference for the Mobile Police, from the Rivers State Commissioner of Police, in anticipation of an 'impending attack' on Shell's facilities that was allegedly planned for the following morning. There were 'peaceful protests by village youths' on Shell's premises the following day, and on 31 October, following a further report to the Rivers State governor, the

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[160] Lewis, 'Blood and Oil: A Special Report: After Nigeria Represses Shell Defends its Record', *New York Times*, 13 February 1996 at para. 35.
[161] Cassel, supra n. 8 at 1965; Maier, supra n. 153 at 12; and Lewis, supra n. 160 at para. 12.
[162] Manby, supra n. 151, chapter VII at para. 12.
[163] Ibid., chapter I at para. 31 (emphasis added).
[164] From a May 1994 letter from Maj. Paul Okuntimo to Lieut. Col. Dauda Komo, the Military Administrator of Rivers State –Lewis, supra n. 160 at para. 41 (emphasis added).
[165] Lewis, supra n. 160.
[166] Ibid. at paras 14 and 54.
[167] The following largely draws from Manby, supra n. 151, chapter VIII at para. 2; and Frynas, supra n. 157 at 104.

Mobile Police attacked peaceful demonstrators with teargas and gunfire. After further indiscriminate shooting upon their return the next morning, 80 people had been killed and almost 500 houses destroyed. A judicial commission of inquiry has since found no evidence of a threat by villagers and 'concluded that the Mobile Police has displayed "a reckless disregard for lives and property".'[168] Shell claims to have learned from the 'regrettable and tragic' incident at Umuechem and has said that it would now never request Mobile Police protection and would emphasise the need for restraint to the Nigerian authorities.[169] However, compensation has not been offered, nor prosecutions pursued, and Shell even continues to request Nigerian army interventions without seeking guarantees as to their acceptable behaviour.[170] The Mobile Police have continued to be sent in response to Shell's concerns.[171]

Similar allegations have been directed at Chevron: Human Rights Watch claims that in January 1994, company boats and a helicopter were used by state troops in their attacks on the Opia and Ikenya communities of Nigeria's Delta State, 'killing at least four people and burning most of the villages to the ground'; more than fifty people were still missing when Forcese's account of the strike was published five years later.[172] Neither Shell, Chevron, nor the Nigerian government has been called to account for these horrendous violations.

The experiences of Talisman Energy in Sudan, ExxonMobil in Indonesia and Enron in India show that the cases of Burma and Nigeria are paradigmatic of a basic problem, rather than isolated examples. The constrictions of space do not allow for an equally detailed examination of reports of the 'symbiotic' relationship between Talisman and its genocidaire hosts,[173] the 'systematic torture, murder, rape, and acts of genocide against the local population of Achanese people' by the Indonesian national army hired by ExxonMobil to provide security for its gas extraction and liquidification project in Aceh,[174] or Enron's years of complicity in the 'pattern of harassment, intimidation, and attacks on individuals opposed to [its] Dabhol Power project' in India,[175] which epitomised the 'serious, sometimes brutal human rights violations carried out on behalf of the state's and the company's interests'.[176]

B. Involvement of Private Military Firms in TNC Security Operations

> The spread of sporadic small-scale war will cause regular armed forces themselves to change form, shrink in size, and wither away. As they do, much of

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[168] Manby, supra n. 151, chapter VII at para. 2.
[169] Ibid., chapter IX at para. 50.
[170] Ibid., chapter IX at para. 52.
[171] Ibid., chapter IX at para. 53.
[172] Forcese, supra n. 122 at 180.
[173] '… a former employee of the Canadian company originally involved in the deal has "warned that when oil profits start flowing into government hands, Christians in the south of Sudan will be largely eliminated within two years"' in Forcese, supra n. 122 at 180-1; 'Critics of Talisman maintained that the oil operations furnish motive, opportunity, and resources for the [government] to decimate Southern Sudanese in the Western Upper Nile region through brutality, intimidation, and terror. Indeed, on the same day the first shipment of crude oil from [25% Talisman-owned] GNPOC left the Port of Sudan, some twenty Russian T-55 tanks entered Port Sudan' in Macklin, 'Like Oil and Water, With a Match: Militarized Commerce, Armed Conflict and Human Security in Sudan', in Giles and Hyndman (eds), *Sites of Violence: Gender and Conflict Zones* (University of California Press: Berkeley, 2004) 77; 'It is irrelevant to my argument that serious genocide authorities disagree about whether the conflict is a genocide or not. All agree that it had many of the dimensions of a genocide, that it is an appalling catastrophe' in Caplan, 'From Rwanda to Darfur: Lessons Learned?' *Global Policy Forum*, 12 January 2006.
[174] Collingsworth, supra n. 141 at 190-1.
[175] Forcese, supra n. 122 at 182.
[176] Human Rights Watch, 'The Enron Corporation: Corporate Complicity in Human Rights', 23 January 2003 at para. 4.

> the day-to-day burden of defending society against the threat of low-intensity conflict will be transferred to the booming security business.[177]

Proposed 15 years ago by Martin van Creveld, in the wake of the Cold War, this prediction accurately described the rise and rise of the private military firm ('PMF'). Defined by Peter Singer as 'business organizations that trade in professional services intrinsically linked to warfare',[178] PMFs are corporate bodies specialising in the provision of a 'panoply of military expertise',[179] including 'combat operations, strategic planning, intelligence, risk assessment, operational support, training, and technical skills'.[180] Created in response to the post-Cold War vacuum in the market of security,[181] changes in the nature of warfare and the normative rise in privatisation,[182] PMFs have built on their 'enormous success' of the 1990s[183] as the sector enjoys 'acyclical' expansion, with estimates putting current annual revenue at around US$100 billion, a figure set to double by 2010.[184] Whilst most writings on this subject focus – sometimes exclusively – on the hiring of PMFs by states, these newly developed entities have begun to play a major role in the protection of TNC interests around the world.[185] Hugh Brazier, managing director of 'Sterling Lines' has pointed out that 'companies are becoming far more reliant on providing their own security because they can't rely on foreign governments to protect them';[186] PMFs, in turn, have recognised that TNCs 'represent untapped areas and the next likely market drivers'.[187]

Columbia could easily have figured in the last section on state-corporation security arrangements. BP's US$5.4 million plus, three-year security agreement with the Colombian Defence Ministry and Occidental Petroleum Corp's $2million deal of a similar nature[188] have enabled this 'human rights basket case'[189] to continue 'assassinating between 5,000 and 8,000 victims annually'.[190] MEP Richard Howitt declared nine years ago that 'BP managers must know or should know about human rights violations carried out in the company's name, and with what appears to me to be the direct collusion of some of their staff'.[191]

However, the Columbian case also exemplifies the arrival on the scene of the PMF. In June 1997, Grenada Television's 'World in Action' reported that Defence Systems Ltd, a UK-based private security company comprised mainly of ex-SAS soldiers, had been contracted by

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[177] Crevald, 'On Future War', (1991) at 197 – quoted in Zarate, infra n. 179 at 158. The quote continues, 'and indeed the time may come when the organizations that comprise that business will, like the condottieri of old, take over the state.

[178] Singer, supra n. 1 at 8.

[179] Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder', (1998) 34 *Stanford Journal of International Law* 75 at 92.

[180] Singer, supra n. 1 at 8.

[181] 'Following the end of the Cold War, thousands of experienced military troops found themselves out of work when nations began cutting the size of their militaries. In the US, for example, the military shrunk from approximately 2.1 million active duty forces in 1989 to 1.4 million as of 2004'in Carney, infra n. 213 at 320.

[182] Singer, 'Corporate Warriors: The Rise and Ramifications of the Privatized Military Industry', (2001-2) 26 *International Security* 1 at 8.

[183] Zarate, supra n. 179 at 76.

[184] Singer, supra n. 1 at 78-9; and Carney, infra n. 213 at 319.

[185] PMFs' clientele now also includes regional and international organisations (including the UN), peacekeepers, NGOs, humanitarian aid groups, militia and even drug cartels. See Singer, supra n. 182 at 1.

[186] Kelly, 'Safety at a Price' – as quoted by Singer, supra n. 1 at 81.

[187] Singer, supra n. 1 at 80.

[188] Forcese, supra n. 119 at 175 (the latter figure may be expressed as Canadian dollars).

[189] Collingsworth, supra n. 141 at 191.

[190] Available at: http://www.nadir.org/nadir/initiativ/agp/free/colombia/txt/2002/0625colombia_solidarity.htm; see also 'BP accused on Funding Colombian Death Squads', *The Observer*, 20 October 1996, 1 at 18; and Forcese, supra n. 119 at 176.

[191] Schoon, 'BP Accused on Death Threats', *The Independent*, 17 February 1997.

BP to provide counter-insurgency training to the Colombian forces protecting the firm's installations and staff in the Casanare region.[192] The security needs of the TNC exceeded the level of protection that the host state was capable of providing on its own. Today the Ocensa (of which BP is a major shareholder) Pipeline has two lines of protection, with the PMF running internal security, and the Colombian military protecting the pipeline.[193] Even this latter element seems linked to PMF activity, with the Israeli company Silver Shadow having been accused of contemplating the state forces with high-tech weaponry and helicopters. In the summer of 1996, knowing 'that Ocensa's defence needs are worth millions to the private security industry',[194] Silver Shadow approached the oil firm's security manager with a proposition called the 'Turn Key Project'. Amnesty International claims that the execution of this project featured not only the targeting of guerrillas attacking the pipeline, but also 'intensified political cleansing operations against government critics and perceived subversives in the region', killing 140 in one year alone.[195] A third PMF has also been implicated. Evidence published by 'The LA Times' shows that the cluster bombing of Santo Domingo on 13th December 1998, killing 17 villagers, was planned at Occidental's nearby complex and that AirScan Inc., a Florida-based PMF, had flown a surveillance mission, passing targeting information to military commanders.[196]

It is not only the energy and extraction industries that have realised the advantages of hiring PMFs. Detailed accusations have been aimed at Coca-Cola for their use of paramilitary forces in suppressing the organisation and activities of trade unions, marked by the specific targeting of union leaders. In Colombia, again, Sinaltrainal has been appealing to Coca-Cola and the US Embassy in Bogota since 1996 for an end to this practice which has seen it sustain heavy losses of leaders and members; neither has replied.[197] In a case filed under the ATCA in July 2001, Coca-Cola stands alongside two of its Colombian bottlers, accused of using private military force to engage in anti-union violence, specifically, for involvement in the murder of union leader Isidro Gil insider the Carepa bottling plant.[198] Whilst some link these 'vigilante' troops to the Colombian government,[199] there is evidence that Coca-Cola have begun to hire PMFs to supply their security detail. Nguyen Van Cam notes that in Vietnam, 'Coca-Cola replaced its security force with a professional service provided by a private security company early in December 2003',[200] whilst one report from 'The Ecologist' distinguished the Indian police standing by from the 'Coca-Cola security personnel' who beat hundreds of peaceful demonstrators outside the plant in Mehdiganj.[201]

Similar problems have faced the SITRABI union in Guatemala. In its efforts to improve conditions for Del Monte plantation workers, and negotiate a proposed mass layoff of staff by the TNC, SITRABI called a strike. Collingsworth tells of how, '[t]he evening before the planned work stoppage, Del Monte employees organized a private security squad and abducted five key leaders of SITRABI. The union leaders were taken to their own

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[192] Forcese, supra n. 119 at 177.
[193] Gillard, Gomez and Jones, 'BP Hands "Tarred in Pipeline Dirty War"', *The Guardian*, 17 October 1998 at para. 9.
[194] Ibid. at para. 12.
[195] Ibid. at paras. 26-7.
[196] Girion, 'Occidental Sued in Human Rights Case', *Los Angeles Times*, 25 April 2003 at paras. 3 and 8.
[197] Collingsworth, supra n. 141 and 192.
[198] *Sinaltrainal v Coca-Cola Co*. 256 F Supp 2d 1345 (SD Fla 2003) - The case is pending, on appeal after the District Court failed to hold there was subject matter jurisdiction.
[199] Paul, 'Colombia's Agony, Coca-Cola's Responsibility, Americans' Solidarity', *Open Democracy*, 31 August 2005.
[200] Cam, available at: http://vietnamnews.vnanet.vn/2004-02/16/Columns/Business%20Beat.htm, *Viet Nam News*, 17 February 2004.
[201] Available at: http://www.theecologist.org/archive_detail.asp?content_id=268.

headquarters and tortured with guns and threats of death' until they agreed to call off the industrial action and resign.[202]

Again, other examples of violative behaviour by PMFs have been reported but cannot be detailed here. Claims that security services retained by Freeport McMoRan 'engaged in acts of intimidation, extracted forced confessions, shot 3 civilians, disappeared 5 Dani villages, and arrested and tortured 13 people' in Irian Jaya, Indonesia, demonstrate that violative activities are known to the gold extraction industry too.[203] Similarly, diamond mining in Sierra Leone must be closely monitored since, Amann tells us, they are run by '"shadowy companies" believed to employ private security firms that thwart government efforts at control'.[204] Halliburton's $200 contract to construct oil well services in the Angolan enclave of Cabinda would be worthless without the protection guaranteed by PMF AirScan and its local joint ventures; in a world where the UN categorises a quarter of all recognised countries as high risk business destinations,[205] Air Partner Plc's offer of 24 hour emergency evacuation is attracting much corporate attention and contributing to healthy profits.[206] Only by exposing such arrangements to transparency and accountability can we shed light on these clandestine areas and be sure that profit maximisation and dissent management do not lead inexorably to human rights abuses and continued dissatisfaction.

5. Conclusions: Thematic Analysis and Next Steps

As clearly illustrated by the case studies, TNCs – especially those in the energy and extraction industry – have established a new model for business activity: the militarisation of commercial operations. TNCs have found host states most accommodating in meeting security needs, and when such options proved inadequate, corporations have either used PMFs to train and equip the state armed presence (Defence Systems Ltd in Colombia), or have hired them to provide their entire security detail (Coca-Cola in Vietnam). The forces act as 'investment enablers', making high-risk business ventures safe enough to be financially viable.[207] States and PMFs have benefited from what Singer calls the 'huge outflows of money' from TNCs: oil firms in Algeria reportedly devote a whopping nine per cent of their operational budget to military-style protection while TNCs in Colombia security costs are said to be roughly 6%.[208] In return, TNCs have undoubtedly benefited from the often-brutal treatment of local people, the crushing suppression of protest and the dispatching of those audacious enough to inconveniently question their treatment. By delegating such messy tasks to state forces, paramilitaries or incorporated PMFs, TNCs are provided with the cover of plausible deniability which has thus-far been enough to shield them from public criticism and legal responsibility. Referring to US military interests, Myles Frechetter, former US ambassador to Colombia, once declared the utility of privatised security operations: '[w]hen private contractors are killed, we can just say that they are not part of our military forces'.[209] This is no less relevant for the world of militarised commerce and extends to instances where

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[202] Collingsworth, supra n. 141 at 194.
[203] Forcese, supra n. 119 at 182; *Presbyterian Church of Sudan v Talisman Energy* 244 F Supp 2d 289 (SDNY 2003).
[204] Amann, supra n. 87 at 331.
[205] Emergency Assistance, Japan available at: http://www.emergency.co.jp/english_security%20asst.htm.
[206] Air Partner, Crisis and Relief Flying, available at: http://www.airpartner.com/en-uk/24.php; http://www.airpartner.com/releases/apar2005.pdf at 2, and 4-6.
[207] Singer, supra n. 1 at 81.
[208] Ibid. at 82.
[209] 'Brutality Emanates from Occupation', *Arab Am. News* (Dearborn, Mich.), 14 May 2004, at 4H –quoted in Carney, infra n. 213 at 323.

TNCs' security is doing the killing. Whilst TNCs proclaim innocence and ignorance, their security partners can sometimes be heard to say that 'they got everything they paid for'.[210]

The sheer volume of similar allegations of wrongdoing must not desensitise us to the painful reality of each individual violation nor dampen our resolve to prevent their recurrence in the future and to hold past perpetrators accountable. The case studies have illustrated the extent to which some TNCs have displayed contempt for the right to life, the promise of liberty and security, and the guarantee that punishment will only follow the legitimate finding of guilt by a fair trial. Culpability is either determined by security bosses in advance, or else seems never to have been a consideration in the arbitrary detention and summary execution of dissenters. The trials that do take place fall far short of the standards of competence and impartiality, such as the trial of Ken Saro-Wiwa, described by then-Prime Minister John Major as 'fraudulent'.[211] The village-clearances of commercially sensitive regions are *prima facie* intrusive, but have been conducted in the most brutal and injurious manner, in clear violation of the right to security of the person. These fundamental rights derive from individuals' very human existence and their universal affirmation belies any claim that they are undermined by cultural relativism. The non-derogable status of the right to life pre-empts reliance on claims of corporate necessity or national emergency, whilst the strict criteria for the lawful qualification of the rights to liberty, security of person and a fair trial represent a high threshold not nearly satisfied in the cases examined. Whilst not every allegation of rights abuse can claim irrefutable accuracy – and TNCs routinely deny their veracity – in every case studied there is, at least, sufficient evidence to raise material questions of guilt. So shouldn't such questions be directed to TNCs facilitating the wrongs of militarised commerce?

The imputation of responsibility for privatised human rights abuses to the TNCs is not advocated by this article as an alternative to measures proscribing and punishing their perpetration by the state forces or PMFs who have their fingers on the proverbial trigger. With regards to states, the problem is quite clearly one of enforcement. Michael Addo is right to submit that 'the standards in human rights law are sufficiently diverse, pervasive and flexible to provide the legal basis for the wider rules of corporate responsibility advocated by the good governance movement'.[212] Indeed, the rights to life, liberty and security, and a fair trial are both international obligations as well as provided for in the domestic laws of the countries investigated. Mechanisms to compel states to actually live up to these obligations – not only in refraining from violating rights themselves, but by effectively monitoring all other parties – should continue to be developed: this, however, falls outside this article's ambit. The PMF industry, conversely, operates 'in a virtual legal void'.[213] Whilst described as 'a reconstituted form of organised corporate mercenarism',[214] PMFs are qualitatively different from mercenaries as conceptualised in international law and gain authority from state practice: 'the use of [PMF]s by numerous countries, especially by Nigeria, Angola, and other African nations which have led the charge against the use of mercenaries, further demonstrates that [PMF]s are not illegal under international norms'.[215]

As confirmed by the UN Special Rapporteur on the Question of the Use of Mercenaries, any norms that can be said to prohibit mercenaries are 'certainly of no assistance in dealing

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[210] Nadel, director of Silver Shadow, in light of Ocensa's denials that it was linked to brutal death squad activities – as quoted in Gillard *et al*., supra n. 193 at para. 31.
[211] Cassel, supra n. 8 at 1969.
[212] Addo, supra n. 62 at 23.
[213] Carney, 'Prosecuting The Lawless: Human Rights Abuses and Private Military Firms', 74 *George Washington Law Review* 317 at 319.
[214] Zarate, supra n. 179 at 81.
[215] Ibid. at 117-9.

with the PMF industry'.[216] Promises that PMFs 'employ elite military professionals … not ragtag miscreants'[217] and can promote respect for human rights in the developing world by professionalising militaries and security forces,[218] hide the fact that PMFs 'want to hire individuals who will be effective, even if this sometimes means casting a blind eye on past human rights abuses'[219] and have hired troops trained in the forces of apartheid South Africa, Pincohet's Chile, Milosevic's Yugoslavia and the communist USSR.[220] The rapid growth and expansion of this sector poses urgent questions, which a few scholars have started to address – particularly in terms of the closely related phenomenon of the commercialisation of war.[221] 'The Sunday Times', in its 10 September 2006 edition, reported the investigation of Avient, an air cargo firm, for its links to war crimes in the Congo.[222] Whilst purportedly fulfilling a purely logistical role, the firm has allegedly crewed aircraft used for military activities and carried out blanket bombing raids 'that in all probability were killing and maiming civilians caught in the war zone thousands of feet below'. When questioned on these operations by Graham Pelham, an undercover investigator for the UN Security Council, Avient's head reportedly insisted, '[t]his is what Avient is there for and it's part of the fun of Avient's activities'.[223] Whilst not linked to a TNC,[224] this current (and ongoing) investigation represents the recent realisation that the 'PMFs comprise one remaining industry whose behavior is dictated not by the rule of law, but by simple economics.[225] As Carney says, 'regulations are needed to constrain the industry, not only to promote contractual transparency, but also to curb human rights abuses'. With the Iraq war putting $1⅓ billion every month into the pockets of PMFs and their employees and facing scandals such as Abu Ghraib,[226] this debate seems certain to gain prominence in the immediate future.

The case studies have shown not only how militarised commerce has enabled TNCs to benefit hugely from serious, large-scale violations of human rights in the immediate geographic and functional areas of their commercial activity, but also how they have sought to defend themselves from criticism and legal challenges. By analysing these purported defences, the dialogue concerned with strengthening human rights can hopefully develop a much clearer vision of how the worst effects of globalisation can be eliminated in the future. Firstly, and most strikingly, TNCs have relied upon what Collingsworth 'hope[s] will become known infamously as the "Unocal defense"': that as a 'passive investor' the firm was not liable for any atrocities committed by the firm's co-venturer and/or agent, even if it profited from its wrongful acts.[227] This argument was submitted to the US District Court in *John Doe v Unocal* and was relied upon by Judge Ronald Lew who, in granting a summary judgment for Unocal, found that the ATCA required direct participation in the wrongful acts and, accordingly, that control over the military regime was a prerequisite for liability.[228] Similarly, Coca-Cola has claimed that it does not 'own', and therefore does not control, its Colombian

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[216] Singer, 'War, Profits, and the Vacuum of Law: Privatised Military Firms and International Law', 42 *Columbia Journal of International Law* 521 at 534; 'Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination', ESCOR, 53d Sess., Agenda Item 7, ¶ 85–86, E/CN.4/1997/24 (1997).
[217] Zarate, supra n. 179 at 149.
[218] Ibid. at 150.
[219] Singer, supra n. 182 at 34.
[220] Carney, supra n. 213 at 324; and Singer, supra n. 182 at 34.
[221] See in particular the above-referenced works of Singer, Zarate and Carney.
[222] Swain, 'Briton Linked to Congo War Crimes', *The Sunday Times*, 10 September 2006, News 12.
[223] Andrew Smith, a former British army officer.
[224] Avient was working with General Joseph Kabila, the future president of the DRC.
[225] Singer, supra n. 216 at 524.
[226] Carney, supra n. 213 at 327-8.
[227] Collingsworth, supra n. 141 at 200.
[228] Ibid. at 189.

bottling plants.[229] A closely related, second theme has seen TNCs successfully hide behind complex corporate structures and company law to assert their parent firms' legal separation from subsidiary companies. Whilst often little more than a legal fiction, this corporate veil has enabled the wealth-holding public face of the company to protect itself from the dubious acts of its severely undercapitalised, and completely subordinate, operational constructs:

> In the Unocal case, for example, the company continues to assert that even if plaintiffs prove the company's complicity in the wrongful acts, liability attaches only to the Myanmar Gas Transportation Corporation (MGTC), a Bermuda corporation created by Unocal and its co-venturers to construct the gas pipeline in Burma. Further, Unocal's interest in MGTC is held by Unocal Myanmar Offshore Company Ltd ... another Bermuda-based subsidiary.[230]

It is submitted that these two contrived defences should be subject to a test of proximity. As Pegg proposes, 'corporations should be held responsible for [wrongful] actions regardless of whether they were perpetrated by legally-distinct subsidiaries or "arms-length" sub-contractors'.[231] Making parent companies liable on the basis of factors showing that they made the decision to invest, provided the initial capital and received profits in return would be a fair and more realistic reflection of blameworthiness in today's business world. Such a mechanism would also deal with outright denials of involvement, such as that made by Shell in the ATCA *Wiwa* case.[232] Alternatively, Clapham and Jerbi's three formulations of corporate complicity – 'direct', 'beneficial' and 'silent' – provide objective nexus for the establishment of liability. Such developments would also prevent the unfounded use of other defences seen in the case studies, which have sought to justify involvement in wrongs – often advanced as secondary arguments in case the TNC was ever linked to the abusive acts. Chevron argued necessity by insisting that it participated in forceful measures only when forced to do so 'at gunpoint',[233] and Coca-Cola claimed that it could not be held liable in the absence of a specific intention that human rights be violated.[234] Whilst legal regulation must recognise TNCs' right to defend its staff and assets, their responses must be limited by requirements of objectively established necessity and proportionality, with intention afforded no role. Finally, reliance on jurisdiction-based defences – such as Coca-Cola's submission that murder and terrorism carried out on company premises in Colombia could not lead to liability in US courts[235] - shows the need for a truly international approach.

The case studies have also shown that voluntary, non-binding codes of conduct have failed to adequately influence TNC behaviour. At best well-intentioned but powerless, and at worst the empty rhetoric of deliberately ineffectual public relations exercises, these codes cannot be used to hold TNCs to account. Zarate's hope that market forces and the desire to foster 'a "good guy" image' will prove sufficient incentive for mighty corporations to pursue 'best practice' in their operations[236] has proved naïve and dangerous.[237]

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[229] Ibid. at 192.
[230] Ibid. at 201.
[231] Pegg, 'An Emerging Market for the New Millennium: Transnational Corporations and Human Rights', in Frynas and Pegg (eds), *Transnational Corporations and Human Rights* (Palgrave Macmillan, 2003) 26.
[232] *Wiwa v Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC*: C. Forcese, 'ACTA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act', (2001) 26 *Yale Journal of International Law* 487 at 490.
[233] Forcese, ibid.at 490.
[234] Collingsworth, supra n. 141 at 191.
[235] Ibid. at 193.
[236] Zarate, supra n. 179 at 148.
[237] Singer, supra n. 182 at 33.

There is, therefore, a vital need for all involved in the creation and development of international law to consider the issue of TNC regulation with a view to eradicating the harmful impact of the growing phenomenon of militarised commerce. The UN Norms, considered in part three, represent our best hope of developing the much-needed regulatory mechanism for TNCs' activities. As pointed out above, the substantive content of the Norms is comprehensive and certainly demands that TNCs respect the rights to life, liberty and security, and the guarantee of a fair trial in all their operations. Crucially, the Norms leave no room for the denials and excuses advanced by TNCs in response to criticism and legal challenges to their business practices. The violations inextricably linked to militarised commerce are condemned by even the narrowest interpretation of the complicity clause, which demands that '[t]ransnational corporations and other business enterprises shall refrain from *any* activity which supports, solicits, or encourages *States or any other entities* to abuse human rights',[238] especially when informed by the rule that '[s]ecurity arrangements ... shall observe international human rights norms as well as the laws and professional standards of the country in which they operate'.[239]

The content of the Norms, however, is not the problem. As Collingsworth warns us, '[a] continual focus on refining standards, knowing that there is no effective enforcement mechanism, demonstrates a cynical detachment from reality'.[240] Whilst the Norms may consist of already-binding obligations, the text itself boasts no authoritative status, leaving TNCs as free to ignore its provisions as they have shown themselves to be thus far. Much work is yet to be done in realising the Norms' intended evolution into legally binding form. Charlesworth has noted that the silence of international law in this area 'may be as important as its positive rules and structures', since it implicitly recognises the issue's significance.[241] Unfortunately, this tacit understanding does little to actively prevent human rights atrocities, nor holds perpetrators accountable under the law. Rather more imagination – in McCorquodale's words – will be required to bring the violative activities of TNCs under the ambit of international law.[242] For the sake of those vulnerable people around the world whose fundamental rights have been trampled by the phenomenon of militarised commerce, international law *must* embrace the Norms and ensure that the world of global business is conducted according to its high, but eminently attainable, standards. Cassel's 'second human rights revolution' is not yet upon us.

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[238] Para.11, Norms [emphasis added].
[239] Para. R, Norms.
[240] Collingsworth, supra n. 141 at 185.
[241] Charlesworth, 'Feminist Methods in International Law', (1999) 93 *American Journal of International Law* 379 at 381 –as quoted in McCorquodale, supra n. 16 at 114.
[242] McCorquodale, ibid.