

Transnational Corporations and Human Rights: An Evolutionary Perspective

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Whether transnational corporations are, or should be, subject to international human rights law?

Key points:

- Many corporations are responsible for respecting human rights or voluntarily do so
- They have done so as a result of the process of democratic evolution at the national level
- At the international level, a Matrix of Human Rights Governance Networks has evolved to pursue a business and human rights agenda

Key considerations:

- What is the purpose of a corporation?
- How have corporations evolved to expand that purpose and address social concerns?
- What is “human security” and the international human rights that are included in the concept?
- How has democratic evolution resulted in corporate accountability for respecting human rights and achieving human security?

Key considerations (cont.)

- How is the United Nations using a Matrix of Human Rights Governance Networks to hold transnational corporations accountable for realizing human rights?”
- What are the evolutionary aspects of the Matrix of Human Rights Governance Networks?
- What will be the impact of the U.S. Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum*?

Milton Friedman, “The Social Responsibility of a Business is to Increase its Profits,” *The New York Times Magazine*, September 13, 1970

“In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the *basic rules of the society, both those embodied in law and those embodied in ethical custom.*” (emphasis added)

Since 1970, the range of laws and “ethical customs” have evolved from CSR to ESG to BHR

Corporate social responsibility (“CSR”)- to operate in a manner that reduces risk of environmental disasters or massive personal injuries arising from grossly negligent or willful and wanton conduct

- Oil spills
- Air pollution
- Deforestation
- Patently unsafe products

1980s: Businesses increase their activities in developing countries

Begin to report on their efforts to minimize environmental, social, and governance (“ESG”) abuses

- UN Global Compact
- OECD Guidelines on Multinational Enterprises
- UN Principles for Responsible Investment
- Global Reporting Initiative (“GRI”) Sustainability Reporting Framework

The ESG movement produced new standards, obligations, and reporting

- Consulting firms, law firms, and accounting firms added ESG compliance and audit services

Key business sectors played a role in promoting the ESG agenda:

- Financial firms (such as Barclays)
- Pension investment firms (such as CalPERS)
- Insurance firms (such as Willis)
- Transnational companies (such as Unilever)

The latest phase in the evolution of the purpose of a corporation- the business and human rights (“BHR”) agenda being pursued by the United Nations and its partner NGOs

In 2011, the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights (“UNGPs”)

- Governments are to *protect* human rights
- Corporations are to *respect* human rights
- Both are to *remedy* human rights abuses

From CSR to ESG to BHR, an evolution from:

- voluntary initiatives to *international standards*;
- targeted projects to *comprehensive obligations*;
- flexible communications to *highly structured reporting*

Foundational questions:

- What are human rights?
- Who defines the nature and scope of those rights?
- Who must protect and promote those rights?
- Who should pay for fulfilling those rights?

The International Bill of Rights

- Universal Declaration of Human Rights (1948)- states the basic rights and fundamental freedoms to which all human beings are entitled
- International Covenant on Civil and Political Rights (1966), plus two Optional Protocols
- International Covenant on Economic, Social and Cultural Rights (1966), plus an Optional Protocol (“ICESCR”) (U.S. is not a party)

On 9/10/12, the UN General Assembly adopted a resolution on Human Security:

“The right of people to live in freedom and dignity, free from poverty and despair. All individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential.”

USG and corporations are funding many of the economic rights comprising human security

- Social security- Old-Age, Survivors, and Disability Insurance program
- Health security- Affordable Care Act
- Employment security- unemployment compensation
- Wage security- minimum wage laws
- Food security- food stamps; school lunches
- Housing security- federal housing benefits

- Education security- student loans
- Environmental security- EPA and related regulations
- Energy security- Low Income Home Energy Assistance Program

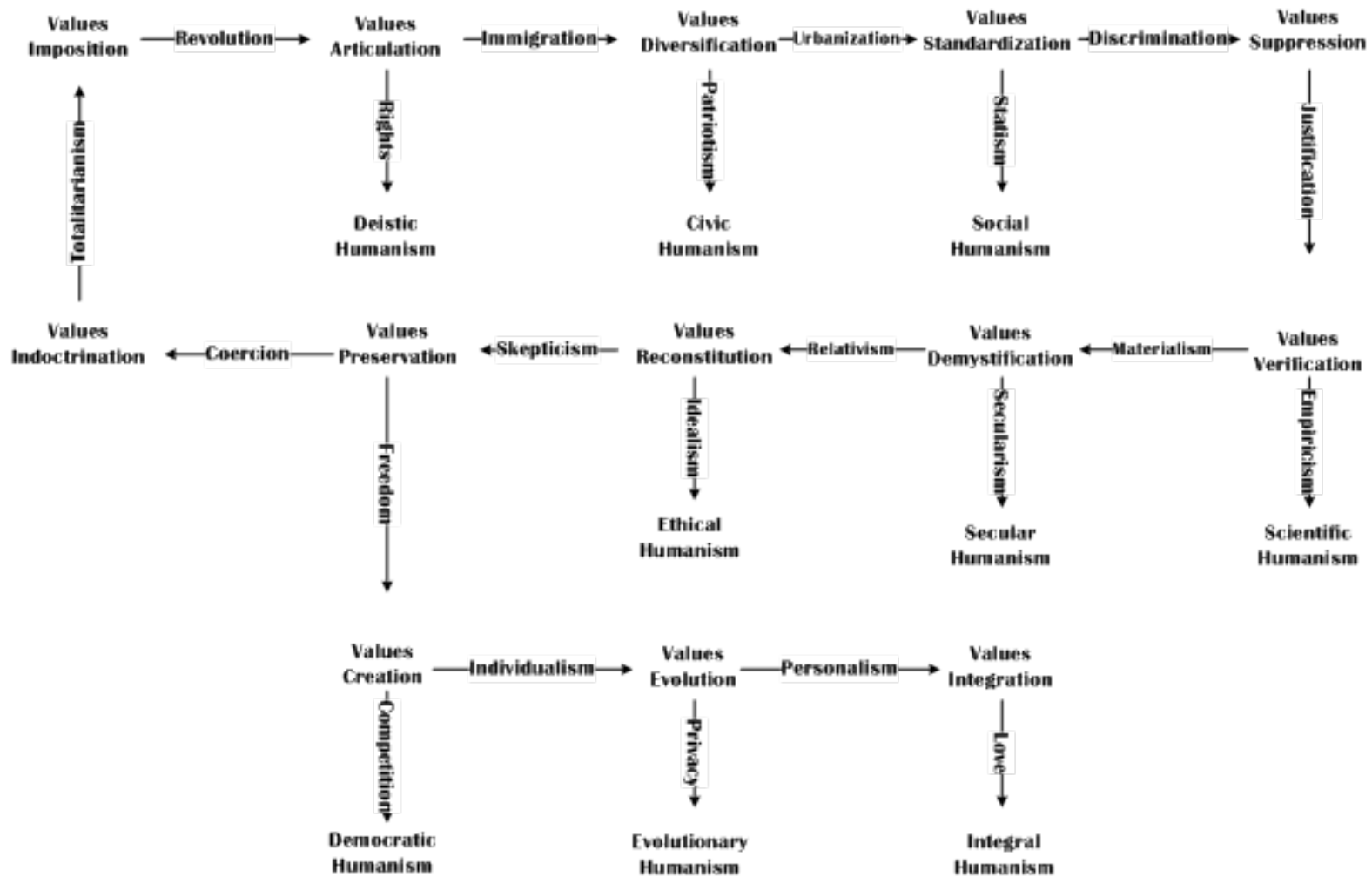
Through organic democratic evolution, American citizens, including corporations, have been protecting the economic rights that are part of the international human security agenda

Democratic evolution- the expression and pursuit of ideas about the ideal social order that become law or “embodied in ethical custom”

These laws and customs result in identifiable values-systems that can be classified as different forms of “humanism”

Ultimately, courts determine the propriety or limits of each new humanist values-system, establishing a legal framework for further social evolution.

DEMOCRATIC EVOLUTION



Key questions regarding democratic evolution:

How best to structure society to protect the inalienable rights of citizens to life, liberty, and the pursuit of happiness?

Should the role of government be limited to protecting the civil and political rights that enable a person to pursue happiness (i.e., freedom from fear)?

Should government also fulfill the economic rights that guarantee a person's happiness (i.e., freedom from want)?

As a result of democratic evolution, laws in most developed nations require businesses to respect the human rights of their workers and the broader public

But, how can the international community hold transnational corporations accountable for human rights abuses they commit in insufficiently democratic developing countries?

And, how can the international community do so without violating national sovereignty and interfering with organic democratic evolution?

The UN and NGOs are using a Matrix of Human Rights Governance Networks to influence national laws and policies to develop “soft law” human rights norms.

A decade ago, the United Nations examined the manner in which a “networks” approach could be used to address pressing global problems.

The UN focused on what it referred to as “global public-policy networks,” consisting of cooperative arrangements among governments, businesses, and civil society.

A Matrix of Human Rights Governance Networks has evolved, consisting of ten networks:

1. Advocacy networks
2. Research networks
3. Policy networks
4. Standards-setting networks
5. Interpretative networks
6. Explanatory networks
7. Implementation networks
8. Assessment networks
9. Enforcement networks
10. Funding networks

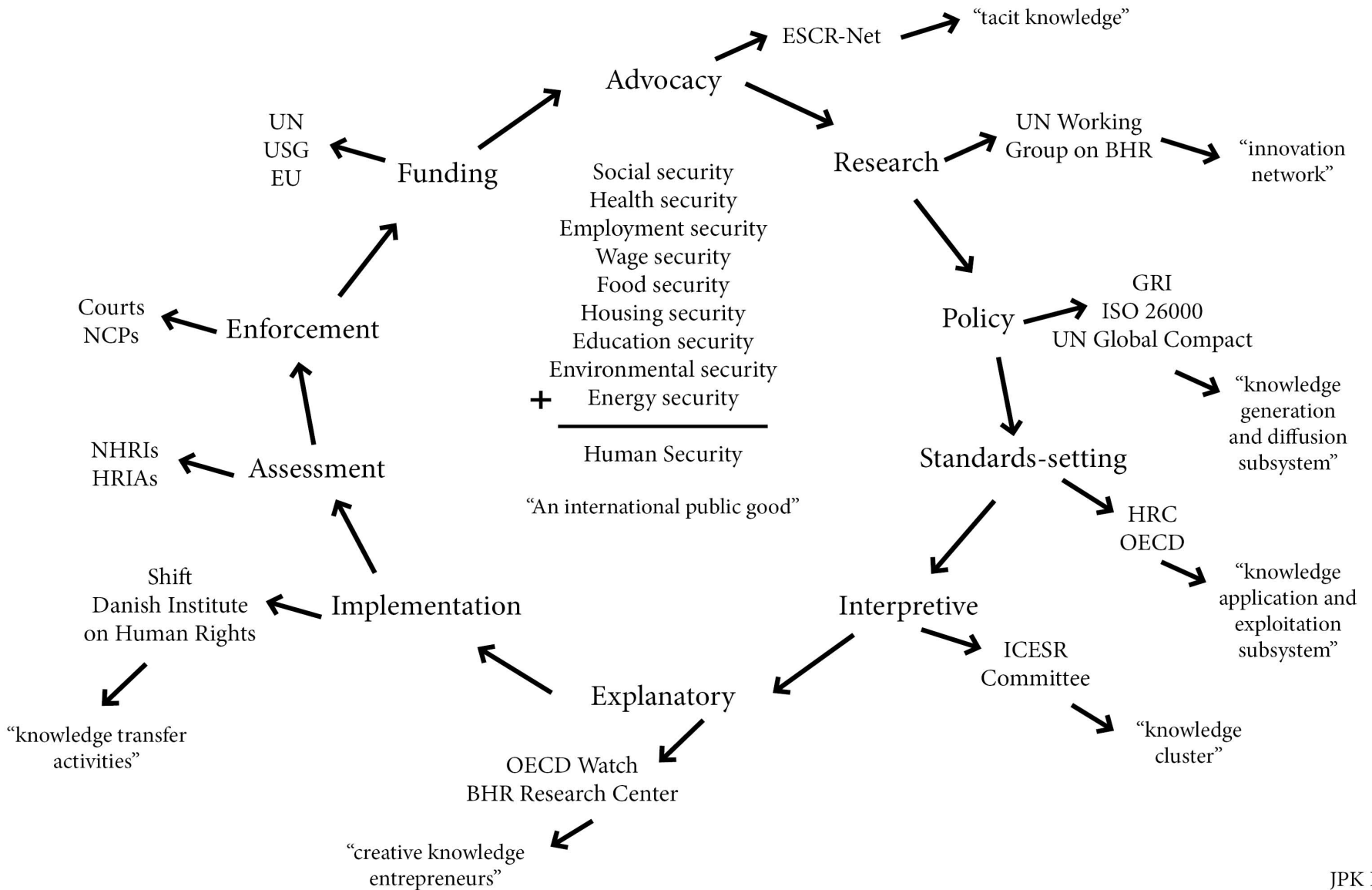
The Matrix and Transnational Corporations

- UN Guiding Principles on BHR
- UN Working Group on BHR
- Universal Periodic Review
- ICESCR Treaty Body
- National Human Rights Institutions
- Human Rights Impact Assessments
- OECD Guidelines National Contact Points

The UN and NGOs use the Matrix to “encourage” transnational corporations to respect and fulfill their human security agenda

The Matrix of Human Rights Governance Networks in the Context of Business and Human Rights

"A knowledge-based complex adaptive system"



Evolution at work?

The Matrix of Human Rights Governance Networks is a:

complex, multilevel emergence, co-evolutionary, symbiotic, synergetic, and knowledge-creation, collaboration, and transfer organism consisting of a:

phase transition-sensitive international entrepreneurial community of self-organizing adaptive agents who, through

niche-constructing distributed networks linked by strategic complementarities, untraded interdependencies, and complementary schemata, produce a

digitally connected collective intelligence and adaptive procedural routines that facilitate creative and concerted entrepreneurship, the

consciously-pursued joint action and distributed cognition of which generate a collective schema, cumulative cognitive and social capital, and an international public good.

Democratic evolution at the national level
compels businesses to respect human rights

The Matrix of Human Rights Governance
Networks can inform and facilitate democratic
evolution at the national level

Example: Denmark is a leader in the field of
business and human rights

- Danish Institute on Human Rights
- Parliament passed an “Act on the Creation of
a New Mediation and Grievance Mechanism
for Responsible Business Conduct”

Danish officials are in the best position to decide whether the activities of a Danish corporation in a foreign country have violated human rights

If Danish officials decide that a Danish corporation has not committed a human rights violation in a foreign nation, should a citizen of that foreign nation residing in the United States be able to sue the Danish corporation in a U.S. court?

U.S. Alien Tort Statute (1789) (“ATS”)

U.S. Second Circuit *Filartiga v. Pena-Irala* (1980)

The ATS provides jurisdiction over:

- (1) tort actions
- (2) brought by aliens (only)
- (3) for violations of the law of nations (also called “customary international law”)
- (4) including, generally, war crimes and crimes against humanity—crimes in which the perpetrator can be called an enemy of all mankind (i.e., pirates)

ATS imposes liability only for a violation of the law of nations, or customary international law

ATS does not specify who can be held liable

Leaves the question of the nature and scope of liability to customary international law

U.S. Second Circuit (2010)- There is no customary international law for holding corporations accountable for human rights violations

Kiobel v. Royal Dutch Petroleum

Twelve Nigerians granted political asylum in the United States sued Shell Oil, which is based in the Netherlands and the U.K.

Alleged that Shell conspired with Nigerian government in the torture and killing of Nigerians who protested that their property was being taken for oil without compensation

Foreign plaintiffs; conduct in foreign country; foreign corporation from a third country

Appeal to Supreme Court of the United States

- Can corporations be held liable under ATS? (USG argues they can; State Dept. joins brief)
- A second round of oral arguments this term: Do U.S. courts have jurisdiction over corporations with no substantive connection to the U.S. (extraterritoriality issue) (USG argues they cannot; State does not join brief)

USG protects U.S. corporations from foreign lawsuits; State protects human security agenda

Will the U.S. Supreme Court give the enforcement network of the Matrix a tool for remedying the failure of national governments to hold their corporate citizens accountable for violating human rights abroad?

Will the U.S. Supreme Court leave it up to other countries to determine whether and how they will hold their corporate citizens accountable for violating human rights abroad?

John Ruggie interview, *Business Ethics Magazine*, October 30, 2011

“Finally, judicial remedy will continue to evolve. Judicial reform in countries where the rule of law is weak and governments are corrupt is a slow process, but it is happening. And the web of legal liability for corporate involvement in egregious violations is expanding in the home countries of multinational corporations—a trajectory that will continue no matter how the U.S. Supreme Court rules on the applicability of the Alien Tort Statute to legal persons, such as corporations.”

Will the Matrix of Human Rights Governance Networks encourage and facilitate democratic evolution at the national level?

Will the Matrix of Human Rights Governance Networks supplant democratic evolution with an undemocratic international human security regime?