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ARTICLES

WHAT'S IN A NAME? TRANSNATIONAL CORPORATIONS AS BYSTANDERS UNDER INTERNATIONAL LAW

JENA MARTIN AMERSON[†]

INTRODUCTION

"You said we were Namers. I still don't know: what is a Namer?"

"I've told you. A Namer has to know who people are, and who they are meant to be."¹

The concept of naming is a powerful one. By naming a thing, the namer provides it with a sense of belonging, a characterization. By giving something that had previously been unidentified a name, the namer immediately imbues it with a set of characteristics. The name has powerful connotations: It can provide people with instant recognition based on a shared understanding.

But there is also a danger in the act. If, instead of naming, the would-be namer labels—that is, imbues it with a quickly formulated, thoughtless identifier—then it does not provide people with a sound understanding of the thing, be it person or concept, that the labeler is trying to contextualize. In our sound-

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¹ MADELEINE L'ENGLE, A WIND IN THE DOOR 111 (Square Fish 2007) (1973) (emphasis omitted).

bite culture, many are content to simply stop at the label, without looking deeper into the nuances and complexities that come from being named.

And so it is here. Transnational corporations (“TNCs”) are unique in the international arena. They are not state actors and do not create law as state actors do. TNCs, however, with their vast economic multi-jurisdictional influence, wield an enormous amount of power in the international social, economic, and legal arena.² The rise of their power and influence has coincided with their increased involvement in human rights-related issues. And yet, TNCs consistently reject the notion of their active participation or complicity in these events. In doing so, TNCs are labeling themselves “bystanders” under international law.³

Using the label of “bystander” is significant because, implicit in this name is a lack of culpability. This label often conjures up images of an *innocent* bystander. As such, when TNCs employ this rhetoric, they are tapping into a ready-set cloister of assumptions that helps to distance them from the underlying act, while simultaneously providing them with a basis for arguing a lack of culpability. They are the innocent bystanders whose hands are never dirty.

By giving TNCs the “bystander” name, this Article attempts to take the rhetoric out of its sound-bite environment and examine it for what it is: a strategy with implications for corporate accountability. This Article attempts to distinguish the “bystander” label that TNCs employ, which conveys the idea of the innocent bystander, and the name of the bystander that this Article would like to adopt, which contemplates a party that is complicit to the underlying action even when it is inactive. The term “rhetoric” employed throughout this Article is used as a more generic term for discussions of TNCs within the international discourse.⁴ To the author’s knowledge, no one has

² See Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 57–58 (2002).

³ To the author’s knowledge, no TNC has explicitly used the name of “bystander” to describe its relationship within the international community.

⁴ This Article will employ the term “bystander rhetoric” or “bystander theory.” These terms encompass three interrelated concepts. First, in matters pertaining to actual litigation, it is, at its most basic, the defense or legal strategy that TNCs implicitly employ. Second, in the community, it encompasses the public relations strategy that TNCs employ when discussing their role in relation to human rights incidents. Third, at its most fundamental, it imbues the internal culture of the TNC.

ever used the bystander paradigm within the context of corporate accountability. Some scholars have discussed the role of bystanders within a larger accountability framework.⁵ However, the bystander framework has not yet been applied to issues of corporate accountability. This Article attempts to fill that gap by offering a new theoretical perspective, one that names the TNC as a “bystander” under international law. Giving the TNCs this name is important, because it allows us to move beyond the current framework—or lack thereof—for corporate accountability and instead move towards a realistic solution for TNCs under international law.

I. KEN WIWA'S STORY

On November 10, 1995, Ken Saro-Wiwa, a Nigerian protestor and eight of his compatriots were executed by the Nigerian government.⁶ Their crime? Protesting environmental practices by gasoline companies—particularly Shell Oil—operating in the Niger Delta.⁷ The Nigerian government barred all outside media, but representatives from Shell were allowed to attend the trial.⁸

Since then, the trials and execution have been roundly condemned. John Major, Britain's Prime Minister at the time, called the incident “an unjust sentence . . . followed by judicial

⁵ See, e.g., Mark A. Drumbl, *Accountability for System Criminality*, 8 SANTA CLARA J. INT'L L. 373, 380–81 (2010) (discussing the possible effects of holding bystanders liable in a criminal context); Laurel Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT'L L. 1013, 1014–18 (2005) (discussing the possible effects of holding bystanders liable under international law in the wake of genocide).

⁶ See Nigeria Democracy Act, H.R. 2697, 104th Cong. § 2(1) (1995).

⁷ See Meredith Griffiths, *Shell Pays \$19.5m over Saro-Wiwa Case* (June 9, 2009, 5:09 PM), <http://www.abc.net.au/news/stories/2009/06/09/2593497.htm>. According to the complaint filed against Shell in the aftermath of the executions, no formal charges were ever levied against Saro-Wiwa. See Demand for Jury Trial & Complaint for Summary Execution; Crimes Against Humanity; Torture; Cruel, Inhuman or Degrading Treatment; Arbitrary Arrest; and Detention; Wrongful Death; Assault and Battery; Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress; Negligence, *Wiwa v. Royal Dutch Petroleum Co.* (S.D.N.Y. Sept. 12, 2006) (No. 96 Civ. 8386), 1996 WL 33663676 [hereinafter Demand for Jury Trial & Complaint].

⁸ See Robert Stone et al., Letter to the Editors, *The Case of Ken Saro-Wiwa*, N.Y. REV. BOOKS, Apr. 20, 1995, at 71.

murder.”⁹ Leaders from the Nigerian government have been held accountable by the African Commission on Human and People’s Rights.¹⁰

Following the executions, Shell issued a statement that read in part as follows: “We are concerned about, and sympathise with, many of the grievances felt by the people of the oil producing Niger Delta”¹¹ However, Shell stated that “as a multinational company . . . to interfere in such processes, whether political or legal, in any country would be wrong.”¹²

Shell’s language is the language of the “bystander.” Shell did not deny that the underlying action occurred; rather it denied any involvement in the acts that would lead to culpability either in the environmental claim or in the events that led to the execution. It concluded its rhetoric by stating that it was inappropriate to get involved. In the immediate aftermath of the executions, no methods of accountability were implemented against the company—it continued with business as usual.¹³

⁹ See *NewsHour with Jim Lehrer: Nigerian Execution* (PBS television broadcast Nov. 10, 1995) (transcript), available at http://www.pbs.org/newshour/bb/africa/africa_11-10b.html; see also Nicholas Wood, *Nigeria Faces Expulsion for Hanging Nine*, *TIMES* (London), Nov. 11, 1995.

¹⁰ See KINGAH STEPHEN, PROTECTING AFRICAN PEOPLE AGAINST PRIVATE VIOLATORS OF HUMAN RIGHTS: WHAT CAN THE NEW AFRICAN COURT OF HUMAN AND PEOPLES’ RIGHTS DO TO CHECK THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS (TNCs)? 25 (2004), available at <http://www.dhdi.free.fr/recherches/droithomme/articles/stephenafricanrights.pdf>.

¹¹ Press Release, Shell Petroleum Dev. Co. of Nigeria, Execution of Ken Saro-Wiwa and His Co-Defendants (last visited Mar. 11, 2011), http://www.crudeimpact.com/page.asp?content_id=13895. The press release was made in reaction to Nigeria’s execution of playwright and activist Ken Saro-Wiwa the previous Friday, November 10, 1995. Gary Borg, *Shell Red-faced over Nigeria*, *CHI. TRIB.*, Nov. 14, 1995, http://articles.chicagotribune.com/1995-11-14/news/9511140321_1_shell-nigeria-dutch.

¹² In fact, Shell did intervene—after the sentence it appealed to the Head of State for clemency. See *id.* See generally HUMAN RIGHTS WATCH, “PERMANENT TRANSITION”: CURRENT VIOLATIONS OF HUMAN RIGHTS IN NIGERIA (1996), available at <http://www.hrw.org/legacy/reports/1996/Nigeria.htm>.

¹³ See Steve Crawshaw & James Roberts, *Pressure Mounts for Nigeria Oil Ban*, *INDEPENDENT* (London), Nov. 13, 1995, at 1; see also John Vidal, *Niger Delta: Shell’s Annus Horribilis*, *GUARDIAN* (London), Nov. 10, 2010, at 21 (describing the measures Shell took after the executions). Since that time, an action was brought under the Alien Tort Claims Act (“ATCA”) on behalf of Ken Wiwa and others in the United States District Court for the Southern District of New York, claiming that Royal Dutch Shell and its subsidiary, Shell Nigeria, were complicit in, among other things, the torture and abuse of the Nigerian activists. *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 02 Civ. 7618(KMW)(HBP), 04 Civ. 2665(KMW)(HBP), 2008 WL 591869, at *1–2

Shell's statement is not atypical. This is the standard rhetoric that TNCs use when responding to human rights violations that happen on their watch.¹⁴ It is this rhetoric that has been, to date, largely unexamined. In essence, TNCs such as Shell are claiming a "bystander" status. Currently, TNCs use the "bystander" label as a proxy for the concept of the innocent bystander. According to TNC rhetoric, their role as an observer to the human rights atrocities was that of an impartial observer, at the scene by happenstance, and powerless to stop the tragedy that was happening on the ground.¹⁵ This is significant because, until the nature of the rhetoric is identified, TNCs will be able to shape the debate.

TNCs often get involved in relationships with state actors who violate international human rights.¹⁶ TNCs then argue that they cannot be held accountable for the violations because they merely observed the underlying atrocities and did not participate in the acts that caused them.¹⁷ Much of the literature that examines these relationships merely analyzes issues of corporate

(S.D.N.Y. Mar. 4, 2008). The matter was originally dismissed at the district court level. *Id.* The dismissal was reversed by the Second Circuit. *Wiwa v. Shell Petroleum Dev. Co. of Nig.*, 335 F. App'x 81 (2d Cir. 2009). Subsequently, on June 8, 2009, the parties settled the action for \$15.5 million. Press Release, Shell Nig., Shell Settles Wiwa Case with Humanitarian Gesture (June 8, 2009), http://www.shell.com.ng/home/content/nga/aboutshell/media_centre/news_and_media_releases/2009/saro_wiwa_case.html. Notably, Shell was not found legally liable. In its press release announcing the settlement of the case, Shell once again invoked the language of the bystander, stating, "Shell today agreed to settle a court case in New York related to allegations in connection with the *Nigerian military government's execution of Ken Saro-Wiwa.*" *Id.* (emphasis added). Shell further stated that, "[the company] has always maintained [that] the allegations were false. While we were prepared to go to court to clear our name, we believe the right way forward is to focus on the future for Ogoni people." *Id.* For further discussion of the case against Shell, see discussion *infra* Part III.

¹⁴ See Alison Lindsay Shinsato, *Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria*, 4 NW. J. INT'L HUM. RTS. 186, 190 (2005).

¹⁵ See *id.*; see also Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 156–57 (1997); Press Release, Shell Petroleum Dev. Co. of Nig., *supra* note 11.

¹⁶ See, e.g., Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment's Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 576 (2008) (discussing how Yahoo! executives provided email and personal information to the Chinese government regarding a journalist that was later used to incarcerate the journalist).

¹⁷ See, e.g., Paul Magnusson, *A Milestone for Human Rights*, BUSINESSWEEK, Jan. 24, 2005, at 63.

accountability.¹⁸ In doing so, the literature fails to examine the rhetoric that TNCs are employing.¹⁹ This is a crucial oversight, because without starting from the language of the TNC, one can never address a solution that truly characterizes the actual role of TNCs. Instead, advocates and TNCs will always speak at cross-purposes, never adopting the language of the other. By failing to employ the TNC's own rhetoric when developing accountability mechanisms, human rights advocates miss out on an incredibly powerful tool—beating the TNCs at their own game. This Article attempts to move towards that measure of accountability by examining the bystander rhetoric of the TNC. Using a bystander paradigm, this Article examines TNCs' accountability under international law.

Part II examines the concept of the bystander to develop a coherent foundation for how bystander rhetoric is studied and analyzed. This Part also explores the bystander paradigm on a number of different fronts—psychological, social, and legal—and examines what parallels can be drawn between the human bystander and the TNC bystander.

Part III examines a number of situations where TNCs employ the “bystander” label. Drawing on U.S. corporate and securities law, this Article shows how corporate accountability and the bystander rhetoric are already interconnected in our current legal system. Even in instances where TNCs are active participants to the wrong, this Part argues that bystander rhetoric is still being employed. Using three case studies with interrelated facts, this Part also contrasts how the bystander paradigm can be viewed in the international arena.

Part IV analyzes the current scholarship on accountability mechanisms for TNCs and analyzes how these concepts fall short because of a crucial missing link: the TNC as “bystander.”

Finally, Part V discusses some of the questions that will inevitably be raised by naming the TNC as “bystander.” Specifically, how does the name “bystander” change how we think about TNCs? This Part also discusses the limitations of

¹⁸ See, e.g., Peggy Rodgers Kalas, *The Implications of Jota v. Texaco and the Accountability of Transnational Corporations*, 12 PACE INT'L L. REV. 47, 65–67 (2000) (discussing accountability issues for TNCs that operate in developing countries).

¹⁹ See discussion *infra* Part IV.

the name but concludes that, despite these limitations, this is the best method currently available for developing a system of accountability for TNCs.

International law, as it stands now, does not adequately account for the TNC. However, until a solution is developed that incorporates the bystander rhetoric into the debate, there is a danger that the issue of corporate accountability under international law will continue to stall.

II. TNCs AS “BYSTANDERS”

When one thinks of transnational corporations, the term “bystander” does not usually come to mind. TNCs are powerful entities, wielding a large amount of authority and influence, oftentimes accumulating more wealth than the countries that host them.²⁰ However, on closer inspection, the implied language that TNCs are using as bystanders seems particularly well adapted to the context of international law.²¹ Typically, non-state actors are discussed as objects of international law.²² Although this confined view of international law as between states is changing,²³ international law still does not adequately capture the concept of the TNC. For good or for bad, the TNC has no explicit voice and no liability under current international law.²⁴

Comparing the TNC to the classic bystander takes the TNC out of its typical setting. Although usually equated with someone who is innocent, a bystander can, in fact, be seen as either morally innocent or morally culpable.²⁵ Under generally accepted norms, however, the bystander is not legally liable.²⁶ So too, a

²⁰ Stephens, *supra* note 2, at 57 (“Corporations have grown to a level of economic power that dwarfs most nation-states.”).

²¹ See Richard M. Buxbaum, *A Legal History of International Reparations*, 23 BERKELEY J. INT’L L. 314, 317 & n.9 (2005).

²² See *id.*

²³ See *id.* at 316 (writing on the transition of international law from a vehicle between states to a forum for non-state actors as well).

²⁴ See Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 512 (2008).

²⁵ See generally VICTORIA J. BARNETT, *BYSTANDERS: CONSCIENCE AND COMPLICITY DURING THE HOLOCAUST* (2000) (discussing some of the complicity issues raised by bystanders during the Holocaust).

²⁶ See, e.g., *Lacey v. United States*, 98 F. Supp. 219, 220 (D. Mass. 1951) (“It is well settled common law that a mere bystander incurs no liability where he fails to

TNC can be seen as good or bad, aware of the underlying human rights violations or not. The current framework of international law, however, does not have a standard by which to impose liability on the TNC even when it engages in affirmative human rights violations.²⁷ In addition, there are a wide range of actions in which an individual can engage in that nevertheless allows the person to maintain a “bystander” status.²⁸ Likewise, the TNC as “bystander” can be defined through many different behavioral paradigms.²⁹

There are two important distinctions between TNCs and individuals for the purposes of a bystander analysis. First, traditional bystanders are much more localized. They are tied to a particular area; moving outside of the community where the violations occur is not always possible. In contrast, by their nature, TNCs are much more transient. They have power over which communities to enter and can choose to be a part of a community or not.³⁰ Second, in the vast majority of cases, TNCs wield far more influence and power in the communities in which they reside than a typical bystander.³¹ Therefore, any discussion of the TNC as “bystander” must take this power differential into account.

Much of the rhetoric that TNCs employ when discussing issues of corporate accountability is a variation on a bystander theme. Rarely do TNCs deny the existence of the underlying violation. Instead, they argue that their complicity in these

take any action, however negligently or even intentionally, to rescue another in distress.”).

²⁷ See, e.g., Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304, 315 (2008) (“Corporations cannot generally be prosecuted before international criminal courts, and current international law does not generally impose criminal responsibility on corporations.”). Of course, there is a distinction between criminal and civil law for the purposes of assessing aiding and abetting liability. However, a full analysis of this is outside the scope of this Article.

²⁸ See LEON SHASKOLSKY SHELEFF, *THE BYSTANDER: BEHAVIOR, LAW, ETHICS* 7 (1978).

²⁹ For an example of some behavioral paradigms, see discussion *infra* Part III.

³⁰ See, e.g., William L. Bricker, Jr. et al., *Use of Hybrids in International Tax Planning: Past, Present and Future*, 13 ST. JOHN'S J. LEGAL COMMENT. 79, 95 (1998).

³¹ See, e.g., *The Legacy of Louis Henkin: Human Rights in the “Age of Terror”*: An Interview with Sarah H. Cleveland, 38 COLUM. HUM. RTS. L. REV. 499, 513 (2007) (“Many multinational corporations have wealth, power, global reach, and influence vastly exceeding that of many states.”).

actions does not rise to the level of legal culpability.³² In short, TNCs argue that they were bystanders to the atrocities that occurred. It is necessary, therefore, to understand the landscape of bystander research in order to fully examine how this research may be applied to TNCs. This research will also help develop a theory of corporate accountability that will utilize the theoretical perspective of the TNC. In addition, looking at TNCs as “bystanders” shows the current limitations of the law in this area.³³

There is, of course, a peril in examining TNCs using the bystander rhetoric. Even by exploring the rhetoric of the bystander, there is a risk of legitimizing any defenses that are based on this rhetoric. Many would argue that the behavior of TNCs is well outside the practice of a bystander.³⁴ A true theory of corporate accountability, however, cannot be reached until a familiarity is gained regarding what TNCs are saying about themselves. Any system of corporate accountability and corporate governance that does not take into account this rhetoric runs the risk of being regarded as obsolete by the very members of the international community needed to instill these mandates.³⁵

³² See, e.g., Laurie Goering, *Pollution Test Case Pits Ecuadorians Against U.S. Firm*, CHI. TRIB., June 25, 1996, at 1.

³³ See discussion *infra* Part V.

³⁴ See, e.g., Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT'L L. 1, 2 & n.4 (2007) (summarizing the various human rights violations in which TNCs have participated, such as supplying guns to guerillas and employing workers under sweatshop conditions).

³⁵ The United Nation's Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the “Norms”) is a classic example of this concern in action. See generally U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, pmbl., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *Norms*]. The aim of the Norms was to articulate a system of accountability and enforcement mechanisms for TNCs regarding abuses of human rights. See *id.* ¶ 1, at 4. Because of its intended binding nature, TNCs from across the world balked at their implementation, stating that it would be “unclear who would be the investigator, judge and jury assessing the performance of global companies.” Daniel Vasella, *Business Must Help Frame New Human Rights Rules*, FIN. TIMES, Apr. 8, 2004, at 19. As a result of intense lobbying by TNCs, most states took a very muted approach to the resolution of these Norms, and they never became effective. See discussion *infra* Part IV.C for additional details on the Norms.

Moreover, examining the TNC through bystander rhetoric brings to the forefront some difficult issues regarding the scope of liability. It is relatively easy to come to a consensus of liability when there is clear evidence of overt action by the TNC. It is much harder to reach that conclusion when the TNC maintains that it is not participating in the underlying wrong.³⁶ Looking at bystander rhetoric also underscores the reason why there is such a disconnect between the problem of corporate accountability and any solution, which must encompass corporate responsibility to be successful: If TNCs see themselves only as bystanders, they will be less likely to change. In addition, the language being used by advocates assumes some degree of action by TNCs.³⁷ Since, in large part, TNCs deny that claim, the debate inevitably stalls.

Finally, an examination of the bystander rhetoric helps to explain the flexibility TNCs have in evading corporate accountability. Because a TNC is, in essence, a legal person being controlled by another person or group of people, at some point—even when the individual representative acts on behalf of a TNC—the TNC can still make the claim of being a bystander, disclaiming responsibility for the atrocities committed in its name.³⁸ Because TNCs do not view themselves as culpable, any instruments that TNCs help to craft are usually “couched in broad and vague language” and particularly designed to be unenforceable.³⁹

A. *A Theory of Bystanders*

At its heart, a bystander is someone who bears witness to an act, but takes no steps to intervene.⁴⁰ The bystander, while part of a lively scholastic debate in other disciplines, such as philosophy, psychology, and sociology, has received very little

³⁶ See Regina Kreide, *The Obligations of Transnational Corporations in the Global Context: Normative Grounds, Real Policy, and Legitimate Governance*, 4 ETHICS & ECON. 1, 6 (2007); *infra* Part IV.

³⁷ See, e.g., Goering, *supra* note 32.

³⁸ Cf. Laurel Fletcher, *Facing up to the Past: Bystanders and Transitional Justice*, 20 HARV. HUM. RTS. J. 47, 51 (2007) (discussing the difficulty in acknowledging acts of atrocities committed in your name).

³⁹ Oshionebo, *supra* note 34, at 9.

⁴⁰ See Claire Valier, *Complicity and the Bystander to Crime 2* (Ctr. for Study of Law & Soc'y Bag Lunch Speaker Series, Sept. 12, 2005), available at <http://escholarship.org/uc/item/7rj7808m>.

attention in the legal community. This could be the result of the black letter law, which, with rare exception, does not place legal liability on “mere bystanders.”⁴¹ In fact, the current legal scholarship is more focused on damages awarded to bystanders who have witnessed a violent act than on holding them liable for their inaction while doing so.⁴²

Yet for all this, there is a tradition of examining the bystander in other disciplines. By adding the bystander to the discourse when examining underlying atrocities, this tradition elevates an essential stakeholder from the background to the forefront, allowing for a more complete assessment of a myriad of situations that, at least superficially, would seem to implicate only two people: the victim and the oppressor.⁴³ Rather than viewing the situation in two dimensions, examining the bystander provides him with an active role as a co-creator to the situation he is witnessing.⁴⁴

In addition, a thorough analysis of the bystander shows the variety of situations that can trigger the bystander rhetoric. As one sociologist notes:

The possible bystander situations . . . are many and varied. The cry for help may emanate from the lips of one individual or be a concerted plea uttered by large masses. The event may be a minor incident or a major calamity, a crime or a natural

⁴¹ Only four American states have enacted statutes requiring rescue by a bystander: Rhode Island, Vermont, Wisconsin, and Minnesota. Other states—Colorado, Florida, Hawaii, Massachusetts, Nevada, Ohio, Rhode Island, and Washington—have enacted statutes that require witnesses to report crimes they witness to authorities. Jennifer Bagby, Note, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required To Call for Help*, 33 IND. L. REV. 571, 572–75 (2000).

⁴² Usually, under American legal jurisprudence, bystander liability is assessed as the need to compensate the victim’s spouse or other family members for horrors that they witnessed being imposed on the victim. See, e.g., *Dunphy v. Gregor*, 642 A.2d 372, 380 (N.J. 1994) (awarding damages to a bystander who had witnessed her partner’s death); see also Kathleen Andrews, Comment, *The Next Best Thing To Being There?: Foreseeability of Media-Assisted Bystanders*, 17 SW. U. L. REV. 65, 65 (1987) (exploring the reasonableness of expanding an award of damages to bystanders who view events through the media). But see Fletcher, *supra* note 5, at 1017 (arguing that the role of human bystanders within the context of criminal complicity needs to be further examined).

⁴³ See Stuart W. Twemlow et al., *The Role of the Bystander in the Social Architecture of Bullying and Violence in Schools and Communities*, 1036 ANNALS N.Y. ACAD. SCI. 215, 216–17 (2004).

⁴⁴ See *id.* at 217.

disaster, a momentary, fleeting event affecting a handful of people, or a momentous, continuous act embracing an entire community or society. . . .

The bystander situation may be thus of varied types—the help sought and the response evoked cover a wide spectrum of possibilities. Although superficially it might appear that the problem of the bystander is of only peripheral concern for society, the total impact of bystander activity touches on the very essence of a society, and helps both to form and reflect much of its true nature and the quality of its life.⁴⁵

Particularly in cases where the underlying action involves a violent act committed by one person against another, incorporating the bystander adds a whole new dimension to the analysis. For instance, some scholars argue that for the oppressor, having a bystander witness his deeds lends legitimacy to the violent act, because if the act was really so heinous, the bystander would step in and stop it.⁴⁶

In his groundbreaking work on the bystander, Leon Sheleff discusses the three types of scholarly works that have focused on the bystander: (1) studies that have researched the behavior of the bystander; (2) studies that have researched the legal position of the bystander; and (3) works that implicate the larger “*social, moral, and philosophical issues*,” including “the practical manner in which society may, apart from the legal provisions, create the conditions for fostering altruistic behavior.”⁴⁷ Naming the TNC as “bystander” implicates all three types of scholarship.⁴⁸

1. The Behavior of the Bystander

Most sociological studies that have examined bystanders' reactions to certain situations have focused on why, when witnessing events, a bystander did or did not react to the situation.⁴⁹ Out of this research, several different characteristics

⁴⁵ SHELEFF, *supra* note 28.

⁴⁶ According to Vetlesen, bystanders, viewed from the different sides of the conflict, are the persons whose actions are either capable of halting their plan, as the perpetrators, or the only hope left for the victims of the violence. ARNE JOHAN VETLESEN, *EVIL AND HUMAN AGENCY: UNDERSTANDING COLLECTIVE EVILDOING* 236 (2005).

⁴⁷ SHELEFF, *supra* note 28, at 5.

⁴⁸ *Id.* at 12 (“The problem of [inaccuracy] . . . becomes magnified tenfold in trying to assess with any degree of accuracy who the bystanders are . . .”).

⁴⁹ See Mary R. Laner et al., *Bystander Attitudes Toward Victims of Violence: Who's Worth Helping?*, 22 *DEVIANT BEHAV.* 23, 25 (2001).

of bystander behavior have been developed that have particular applicability to TNCs. These include: diffusion of responsibility; bystander awareness and development of personal responsibility; and the setting—both physical and psychological—of the underlying action.⁵⁰

One of the most studied aspects of bystander inaction is the apparent paradox noted in the murder of Kitty Genovese⁵¹: Bystanders are less likely to act in situations where a large group of people are witnessing the same event.⁵² One concept that developed to explain this behavior was that of “diffusion of responsibility.”⁵³ Under a diffusion of responsibility theory, bystanders are less likely to react because they believe that, at any moment, someone else will take action, thus relieving them of the responsibility to act.⁵⁴

The characteristics of diffused responsibility seem a critical component in the bystander rhetoric employed by TNCs. First, the sheer size of TNCs, with their locations spread across the globe, allows the TNC—and its employees—to push responsibility for the handling of an underlying atrocity to different departments. Second, a related concept revolves around the structure of the TNC. Most corporate structures consist of various departments with overlapping responsibilities for matters that implicate human rights. Each department, in addition to human rights related tasks, has responsibilities that are more directly related to shareholder profits. It is axiomatic that more direct financial considerations would take precedence by department heads—especially at the end of a corporation’s quarter—than such amorphous concepts as human rights. In such a way, the system intrinsically lends itself to corporate inaction in matters relating to human rights issues. So long as

⁵⁰ See SHELEFF, *supra* note 28, at 15–17.

⁵¹ Kitty Genovese was a woman who was raped and murdered outside of her home in New York City in 1964. When witnesses were questioned about the event, one man responded, “I didn’t want to be involved.” See Stephanie Chen, *Gang Rape Raises Questions About Bystanders’ Role*, CNN (Oct. 30, 2009, 2:48 PM), <http://www.cnn.com/2009/CRIME/10/28/california.gang.rape.bystander/index.html> (quoting a statement made by a witness to the Genovese murder in a 1964 newspaper article).

⁵² See SHELEFF, *supra* note 28, at 15–16.

⁵³ *Id.* at 13.

⁵⁴ See *id.* (discussing the research that was done on bystander behavior that places it as a response to a situation rather than as some sort of altruistic behavior).

corporate executives are unable to see how human rights matters relate to the corporation's bottom line, corporations will always be predisposed to bystander inaction.

Another studied concept of bystander behavior is the relationship between bystander awareness and personal responsibility. Sociologists have theorized that in order for bystanders to move from inaction to action, they must be able to attribute a sense of personal responsibility to the event.⁵⁵ This resounds particularly well with the naming of the TNC as "bystander." Just as positive social influences can encourage a bystander to intervene in the underlying action, positive social reassurance—in the form of publicity campaigns and negotiations—can lead to changed TNC behavior.⁵⁶

Another factor that bears on the likelihood that a bystander will intervene in an underlying action is the setting where the action takes place.⁵⁷ Specifically, scholars have argued that the setting of the action impacts whether a bystander will choose to intervene. For instance, researchers William Howard and William Crano stated:

[T]he psychological structure, or ambience, of a setting might also affect the production of pro-social behavior in a helping situation. It seems reasonable to postulate that greater degrees of bystander intervention would occur in less structured social situations, that is, in settings in which the rules of proper conduct are neither explicit nor restrictive. Thus, the weaker the situational constraints on the varieties of acceptable behavior, the stronger should be the tendency for bystanders to offer assistance in an emergency.⁵⁸

⁵⁵ See John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377, 377–78 (1968).

⁵⁶ See WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., MEETING CHANGING EXPECTATIONS: CORPORATE SOCIAL RESPONSIBILITY 6 (1999) (discussing how consumer power and concerns over various social issues have become "a force to influence corporate behavior"). *But see* Benjamin Fishman, Note, *Binding Corporations to Human Rights Norms Through Public Law Settlement*, 81 N.Y.U. L. REV. 1433, 1447 (2006) (arguing that using publicity campaigns as a tool to change corporate behavior is only effective if consumers and investors change their buying patterns as a result of the campaign).

⁵⁷ See William Howard & William D. Crano, *Effects of Sex, Conversation, Location, and Size of Observer Group on Bystander Intervention in a High Risk Situation*, 37 SOCIOMETRY 491, 494 (1974).

⁵⁸ *Id.*

This concept is central in its application to the idea of the TNC as “bystander.” Many of the underlying human rights violations take place in developing nations where the state actor is either (1) the main perpetrator of the underlying act or (2) unable, due to a lack of controls, to fulfill its duty to protect its individuals from a violation of human rights.⁵⁹ In such a scenario, the TNC’s ability to influence the outcome of the underlying act would be particularly well suited. Given Howard and Crano’s theory, one would imagine that the TNC would be more involved in stopping the underlying action abroad than here in the United States. It seems, however, that the opposite result is true.⁶⁰ The TNC—freed from constraining legal norms such as strict environmental regulation—acts instead almost completely within its own self-interests. This crucial distinction may relate to the difference between the personality of the bystander as human being in contrast to the TNC as “bystander.” Arguably, many human beings act altruistically, with some measure of self-sacrifice.⁶¹ In contrast, the TNC, in its corporate personality, shares many of the characteristics of a sociopath.⁶²

2. The Legal Culpability of a Bystander

Under traditional notions of jurisprudence, a bystander cannot be held liable for failing to intervene because it had no legal duty to do so.⁶³ In addition, failing to hold a bystander

⁵⁹ See Philip C. Aka, *Prospects for Igbo Human Rights in Nigeria in the New Century*, 48 HOW. L.J. 165, 187–202 (2004) (documenting Nigeria’s persistent violation of human rights for the Igbo people); Anup Shah, *Corporations and Human Rights*, GLOBAL ISSUES (July 20, 1998), www.globalissues.org/article/51/corporations-and-human-rights.

⁶⁰ See Shah, *supra* note 59.

⁶¹ See Kenneth Einar Himma, *Privacy Versus Security: Why Privacy Is Not an Absolute Value or Right*, 44 SAN DIEGO L. REV. 857, 892 (2007); Jerome C. Wakefield, *Is Altruism Part of Human Nature? Toward a Theoretical Foundation for the Helping Professions*, 67 SOC. SERV. REV. 406, 406–07 (1993) (arguing that the concept of egoism as a basis for understanding human nature does not reflect the self-sacrificing behavior seen in individuals).

⁶² See JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 1–2 (2005).

⁶³ There is an interesting parallel between legal culpability and likelihood of action within the context of the bystander. For instance, sociological research shows that a bystander is much more likely to act when there has been a pre-established relationship that connects him to the victim. Similarly, Bagby discusses how liability is imposed upon persons “standing in certain personal relationships to others.” See Bagby, *supra* note 41, at 573.

legally culpable comports with notions embedded in our society that generally correlate liability with action—that is, overt malfeasance—versus inaction.⁶⁴ Often, bystander liability can be avoided by raising the issue regarding what type of duty should be imposed upon them. A duty to intervene? A duty to report the act to the authorities?⁶⁵

The idea of establishing criminal liability for bystanders has proved to be a challenge. For instance, Laurel Fletcher discusses the bystanders' lack of legal liability in the criminal context and explains why they fall outside criminal adjudication.⁶⁶

Implicated in the [wrongdoing] by their passivity, it is not unreasonable to ask whether bystanders should pay a price for their inaction. The conventional response is that it would violate fundamental principles of fairness to impose criminal liability on a group that is morally but not legally complicit. . . . Bystanders have “done” nothing and therefore fall outside the ambit of criminal sanctions. The law does not impose a duty to intervene, to rescue, or to prevent harm where doing so poses a risk to oneself. A duty of altruism does not require sacrifice of one's own welfare.⁶⁷

This concept resounds even more so within the context of the TNC. TNCs are, by their very nature, profit-driven machines.⁶⁸ Rather than offering altruism as their primary goal, the typical TNC mandate has always been maximizing shareholders' profits.⁶⁹ While in recent years TNCs have recognized the benefit of being more responsible participants in the global community,

⁶⁴ Bagby offers four sociological justifications for holding bystanders accountable: (1) moral justifications; (2) civic duty as a justification; (3) the prevention of harm; and (4) the protection of public interests. *Id.* at 579–83.

⁶⁵ See Kate E. Bloch, Note, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty To Report Suicide Threats*, 39 STAN. L. REV. 929, 945 (1987) (“The law can be employed to persuade the bystander to take responsibility. Law serves to inform behavior on a large scale, modifying attitudes, reinforcing moral impulses, and guiding confused or impassive bystanders.”).

⁶⁶ Fletcher, *supra* note 5.

⁶⁷ *Id.* at 1030 (footnote omitted).

⁶⁸ See Stephens, *supra* note 2, at 45–46 (discussing the debate regarding voluntary corporate responsibility mechanisms and arguing that, due to the nature of the corporate personality, TNCs would not be capable of making these altruistic decisions).

⁶⁹ Cf. Shane M. Shelley, *Entrenched Managers & Corporate Social Responsibility*, 111 PENN ST. L. REV. 107, 109 (2006).

it is usually borne out of the recognition that, in today's sophisticated marketplace, responsible members can be more profitable.⁷⁰

Fletcher's discussion of bystanders raises another interesting point. Under this scenario, the bystander is defined by his inaction and his passivity in the face of wrongdoing. It is difficult to imagine that the concept of "bystander" could be delineated in any other way; however, when discussing the TNC as "bystander," this Article argues that there is a way to view even a TNC who actively commits a wrong as a bystander.⁷¹

3. The Philosophical Implications of the Bystander

According to scholars, there are certain ethics of a society that breed the necessary conditions to either help or hinder altruistic behavior by people who have no legal responsibility to act as such.⁷² This idea is echoed in scholarship that looks at the underlying social evils that bystanders witness. For instance, according to one examination of evil in human behavior, there are three conditions that must be present for something so outrageous as the Holocaust to have occurred. First, the violence is authorized by an official with a mandate to give such orders.⁷³ Second, the actions are routinized or given structure in codes and

⁷⁰ Many companies, for instance, discuss issues of corporate social responsibility in a wide number of settings, including environmental issues, fair trade movements, and workplace habitats. This corporate social responsibility serves two purposes. First, it allows the corporation to attract investors who place a value on socially responsible initiatives—without losing other investors. Second, the measure taken often leads to a long-term increase in profits: For instance, hotels save money by reducing the number of times they must launder guest towels, which not only has a positive environmental impact, but also saves on labor and laundry products. *See, e.g.,* LYNN SHARP PAINE, VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE 48–49 (2003) (discussing how companies with better social reputations benefit financially by decreased marketing costs, better market share, the ability to recruit better talent and, in some instances, the ability to charge a good company premium for goods and services).

⁷¹ Additional problems arise when the corporate entity is deconstructed even further through the use of subsidiaries—each having a separate legal personality under the law—especially when the parent company and the subsidiary exist in different jurisdictions. *See* Binda Sahni, *The Interpretation of the Corporate Personality of Transnational Corporations*, 15 WIDENER L.J. 1, 1–2 (2005). In some circumstances, however, the liability of the subsidiary can be traced back to the parent. *See id.* at 2.

⁷² *See* SHELEFF, *supra* note 28, at 75.

⁷³ *See* VETLESEN, *supra* note 46, at 16.

regulations that set forth how the violence will occur.⁷⁴ Finally, using doctrinal mantras and ideology, the victims are dehumanized.⁷⁵

These specific stages—particular to a modern society—are by their very nature fertile breeding grounds for the behavior of the TNC. The bureaucratic entity of the TNC provides internal forces that make it conducive to taking a position of inaction when morally repugnant behavior—or even morally ambiguous behavior—is occurring.⁷⁶

Within this context of evil, as articulated in a modern society, the role of the bystander takes on new meaning. Traditionally, the concept of noninvolvement is “articulated as a determined refusal to ‘take sides.’ This stance of principled non-involvement is frequently viewed as highly meritorious”⁷⁷ However, underlying a more nuanced premise of “bystanders” is the idea that every inaction is an action. As such, a failure to act has multiple implications. First, it will make a difference in the underlying action. Second, and arguably more important, the inaction will send a message to both the victim and the perpetrator.⁷⁸ As Arne Johan Vetlesen notes:

Knowing, yet still not acting, means granting acceptance to the action—if not wholesale moral acceptance, then pragmatic and factual acceptance in the sense that what is being done is allowed to be done without there being any action taken to help prevent it. . . . In short, inaction here entails complicity. It raises the question of responsibility and guilt on the part of the inactive bystander as depicted here.⁷⁹

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.* at 235; see also Stephens, *supra* note 2, at 46–47 (documenting the rise of the TNC as a separate legal entity in the Western World).

⁷⁷ VETLESEN, *supra* note 46, at 235.

⁷⁸ This idea is at the heart of the concept of the TNC as “bystander.” The position a TNC takes in the community, whether through action or inaction, is invariably viewed by the community as a larger statement. Therefore, when a TNC that has the ability to intervene in an underlying event fails to do so, that action gains increased legitimacy.

⁷⁹ VETLESEN, *supra* note 46, at 237–38 (emphasis omitted); see also Twemlow et al., *supra* note 43, at 216 (“In summary we define the bystander role as an active role with a variety of manifestations, in which an individual or group indirectly and repeatedly participates in a victimization process as a member of the social system.”).

Moreover, when looking at the rhetoric of the TNC as “bystander,” it shows how TNCs often minimize their influence within the larger global community. While TNCs may not be actively participating in the underlying behavior, their presence, as Vetlesen discusses, gives an enormous amount of legitimacy to the events that are occurring around them. So although a TNC is a bystander, but it is a very big bystander whose intervention would undoubtedly change the course of the underlying events. That it chooses not to intervene in these circumstances makes a stark difference in the outcome.⁸⁰ As Beth Stephens notes:

As both cause and effect of growing corporate economic power, the international and domestic political systems have increasingly relinquished their control over business. Economic power carries with it a growing political clout. Corporations play influential direct and indirect roles in negotiations over issues ranging from trade agreements to international patent protections to national and international economic policy.⁸¹

This idea of the varied actions of the bystander and its influence on underlying events—even through inaction—is also elucidated within the discourse of genocide and crimes against humanity.⁸² This concept is useful for providing a framework that allows TNCs to become a part of the international legal structure.

The most important point that is drawn from the discussion of the bystander is that the term “bystander” captures a wide range of behavior and actions. While this may be seen as a shortcoming when developing a theory of accountability, the amorphousness of a bystander’s conduct serves as a clarifying lens regarding what and whose behavior should be held accountable and the current methods and shortcomings in advocates’ ability to do so. For instance, for those activists who believe that any morally culpable action should be held legally

⁸⁰ Cf. VETLESEN, *supra* note 46, at 235 (comparing the non-governmental organizations (“NGOs”) during WWII to bystanders with an enormous amount of influence, whose actions led to unique results for the underlying events).

⁸¹ See Stephens, *supra* note 2, at 58.

⁸² Although this is not usually the context in which TNCs are viewed as being complicit with human rights, there are certainly situations that could give rise to a TNC being a bystander to genocide. See, e.g., *id.* at 45–46 (discussing the business relationship between IBM and the German Nazi Party before and during WWII).

accountable—a current impossibility under the legal theory of bystanders—then one course of action may be to change the standard of liability for bystanders under international law.⁸³

B. Bystanders and Self-Incrimination: On a Path to Reconciliation

An important part of the bystander theory concerns how to reconcile bystanders with their community after an atrocity has occurred. In her discussion on culpability for bystanders, Fletcher makes a number of noteworthy observations on the bystander's process of reconciliation. First, she states that “[t]he question is whether nonaccountability mechanisms can be created that will enable bystanders to confront and acknowledge their own roles in crimes committed in their communities.”⁸⁴ Second, she states that “[b]ystanders need to be pressed to acknowledge and confront the distance between, on the one hand, their implied innocence in [court] opinions and, on the other hand, their condemnation as betrayers by [people in their community].”⁸⁵

These statements bring to light an important question under bystander theory: How should we perceive a bystander's ability to engage in self-incrimination? Specifically, is it the role of the justice system to push bystanders toward introspection and accountability or is simply providing the tools and giving bystanders a role in the process enough for bystanders to engage in introspection and self-recrimination unaided? This distinction is crucial because while the former is seemingly easier to implement, it is based on a faulty premise: that bystanders naturally want to embrace accountability.

The elusiveness of defining bystander accountability applies even more so to the TNC as “bystander.” The argument that a TNC, when faced with its potential wrongdoing, will take it upon itself to fix its behavior, is often met by justifiable skepticism within the international human rights community.⁸⁶ Few believe that a TNC with admittedly self-interested goals will develop the necessary tools to address the particular issue that human rights

⁸³ See Fletcher, *supra* note 5, at 1061.

⁸⁴ *Id.* at 1059.

⁸⁵ *Id.* at 1075.

⁸⁶ *Cf.* Stephens, *supra* note 2, at 64.

advocates would like to see corrected. As such, the proposition of making these very same parties the primary instrument to their own accountability seems fraught with peril.

A corollary to this issue raised by Fletcher concerns the problem of the future behavior of bystanders. Fletcher states that “bystanders are a critical segment [of the collective] that must engage in the social and political processes of reclaiming and rebuilding communities.”⁸⁷ The underlying presumption is that bystanders must be reconciled with their communities. This notion has interesting ramifications for the concept of the TNC as “bystander.” For instance, there is the potential for bystanders to be integrated back into the collective without the process of acknowledgment and culpability having taken place. Doing so could lead to potential recidivism on the part of bystanders if confronted with a similar situation in the future.⁸⁸ In addition, while a goal with the TNC may be reconciliation, it would be defined differently for a TNC than for an individual.

The idea of self-incrimination as a process of reconciliation is based on the concept of human bystanders.⁸⁹ While both individuals and TNCs are persons under the law, the personality characteristics of a TNC, however, are more closely analogized with a sociopath than a cognitively normal human being.⁹⁰ As such, the traditional definition of reconciliation will not work. Reconciliation must instead be defined by demonstrative and measurable goals for complying with an approved normative behavior for associating with a community. This might take the form of adjustments to previously harmful environmental policies or an increase in wages for the people who are creating its products. It is not as necessary that the reconciliation of the TNC be viewed with the same sincerity as it would with the individual bystander who must interact on a personal level with the members of his community. All that matters is that, once held accountable, the TNC does in fact comply with its professed efforts of social change.

⁸⁷ Fletcher, *supra* note 5, at 1016.

⁸⁸ Fletcher does touch on this point when she notes that post-war Serbia is just as divided on ethnic lines as before. *See id.* at 1072–73.

⁸⁹ *See id.* at 1034.

⁹⁰ For an interesting look at the dissociative behavior of a corporation, see *THE CORPORATION* (Big Pictures 2004).

III. TNC ACTIONS UNDER A BYSTANDER THEORY: AN ANALYSIS

There are three interrelated concepts of the TNC as “bystander” within the international framework that must be explored. The first is the concept of the TNC as a passive actor in a situation where human rights violations have occurred. In that situation, the TNC and all agents of the TNC can be said to be completely divorced from the violation. The second notion is the concept of the TNC as an active participant in those acts that led to human rights violations. In that situation, the TNC also employs the “bystander” label, in as much as the TNC, like all corporations, is essentially a legal fiction—no acts perpetuated in the name of the bystander can be effectuated without the participation of individuals. In that regard, the TNC can be seen as a bystander as defined by Fletcher: a passive participant or willing accomplice of the crimes that are being perpetuated in its name.⁹¹

A third way that the concept of TNC as “bystander” can be analyzed expands upon the notion of the TNC as the sum of its parts. This concept is mutually supportive in that, just as the TNC can be viewed as a bystander despite the participation of the individuals who are acting in its name, likewise the individuals who make up a TNC can be seen as bystanders to the actions of a TNC that are so prevalent and so widespread that it has become a part of the very fabric of the TNC.

These three concepts are all distinct, theoretical visions of the way to view the TNC as a bystander.⁹² Each theoretical construct is prevalent in the current legal strategies used by TNCs and their employees. They also have a great impact on developing accountability mechanisms for TNCs.⁹³

Analyzing the bystander rhetoric through national examples and international case studies highlights the current accountability discourse regarding bystander rhetoric already

⁹¹ See Fletcher, *supra* note 5, at 1034 (discussing how some atrocities were being committed in the name of the bystanders).

⁹² Practically speaking, these categories may not be so distinct. For instance, there may be situations where the CEO of a TNC commits acts that are so egregious and exerts so much pressure on others to do the same that he, in effect, changes the culture of the TNC. If the CEO continues at that corporation for an extended period of time, it would be difficult to separate the bystander from the actor. For the sake of clarity, though, I will treat each theoretical construct as distinct.

⁹³ See Lucy Kronforst, Comment, *Transnational Corporations and Human Rights Violations: Focus on Columbia*, 23 WIS. INT'L L.J. 321, 334 (2005).

taking place just below the surface. Each of these scenarios offers targeted approaches that delineate the various views of the TNC as “bystander.” These scenarios also provide a theoretical framework that is already rooted in international legal theories of agency,⁹⁴ human rights, and corporate structure.

A. *The Passive TNC as “Bystander”*

This view is the most straightforward. Under this construct, situations will arise where a corporation will act passively, witnessing the behavior of another actor—particularly a state—while doing nothing. An example of this type of TNC would be the controversy that took place with the Bolivian government, its people, and Bechtel Corporation. When the Bolivian government decided to privatize its country’s water rights, it awarded the contract to Bechtel.⁹⁵ Under the contract, Bechtel had the rights to all of Bolivia’s water, even its rainwater.⁹⁶ As a result of the privatization, up to one quarter of each Bolivian’s salary was consumed by water bills.⁹⁷ When the Bolivians protested, the government sent in armed troops to quell the masses, resulting in the death of one civilian.⁹⁸ Bechtel did not participate in the violence but was rather a bystander—a passive observer to the events that transpired around it.

More recently, Exxon Mobil and its subsidiaries made the “bystander” argument in a summary judgment motion before the United States District Court for the District of Columbia.⁹⁹ The case, brought by Indonesian villagers and their next of kin, alleged that soldiers who were employed by Exxon to maintain order for their pipeline brutalized and tortured the villagers.¹⁰⁰

⁹⁴ See, e.g., Lucien J. Dhooge, *A Modest Proposal To Amend the Alien Tort Statute To Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT’L L. & POL’Y 119, 139 (2007) (discussing agency theory within the context of TNCs generally and the Alien Tort Claims Act specifically).

⁹⁵ THE CORPORATION, *supra* note 90.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See *Doe v. Exxon Mobil Corp.*, 573 F. Supp. 2d 16, 23 (D.D.C. 2008).

¹⁰⁰ *Id.* at 19. The fact that Exxon allegedly paid the soldiers for their job does not necessarily destroy the concept of the bystander in its argument. As noted above, a wide range of actions falls within the bystander framework. If the connection between the “action” of the bystander and the underlying act is distended, the notion of the bystander will still lie. *Cf.* Twemlow et al., *supra* note 43, at 221–22

Exxon, rather than arguing that the alleged torture did not take place, instead chose to concentrate its argument on the corporation's inaction. As Exxon stated,

Plaintiffs do not . . . seek to hold [the] individual soldiers responsible for their alleged injuries. Nor do they suggest that the Indonesian military bear responsibility for the alleged actions of its personnel, or that Indonesia's state oil and gas agency, Pertamina (which, in accordance with Indonesian law, provided Indonesian troops to secure the gas facilities at issue) should be held responsible for their injuries. Instead, Plaintiffs seek to hold [Exxon], a contractor to Pertamina and an operator of the gas facilities, liable for the wartime acts of the Indonesian military generally, and then seek to hold the U.S. Defendants liable for the acts of their independent subsidiary, [Exxon].¹⁰¹

Since then, Exxon has taken steps to incorporate human rights issues into its corporate governance policy.¹⁰² The company insists, however, that its recent policy is unrelated to the lawsuit.¹⁰³

Case Study 1: Ken Wiwa and Shell: The Passive TNC as "Bystander"

The case of Ken Wiwa provides a mechanism for viewing TNC bystander liability under international law. As stated

(discussing the scenario where bystanders interlocked arms to actively keep people out of the fight that was occurring and encouraged the ensuing violence).

¹⁰¹ Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment and Dismissal at 1–2, *Exxon Mobil Corp.*, 573 F. Supp. 2d 16 (No. 01-1357). This notion of disavowing responsibility has direct overtones with the studies on bystanders. See Twemlow et al., *supra* note 43, at 217 ("The community bystander role could be described as an abdicating one. Abdication then is avoidance of acknowledgment of the role in the bullying process by the abdicating bystander, who projects the blame onto others."). For Twemlow, reconciling bystanders into the discourse requires providing them with the means and the environment to acknowledge their responsibility. As Twemlow writes,

Dissociation is a violent process, therefore, and the goal of any intervention is the transformation of brute power into passionate statement and respectful communication. This requires a clear conceptualization of the group's task from a perspective that does not permit scapegoating, empowers bystanders into a helpful altruistic role, and does not overemphasize therapeutic efforts with the victim or victimizer.

Id. at 217–18.

¹⁰² See generally EXXONMOBIL, HUMAN RIGHTS (2009), available at http://www.exxonmobil.com/Corporate/Files/human_rights_brochure.pdf.

¹⁰³ Cf. Fletcher, *supra* note 38, at 50 ("Acknowledging one's agency is a very tricky business. It becomes impossible to talk about what one might do in the present without raising questions about what one could have done in the past.").

earlier, Wiwa, a Nigerian activist, protested the presence of Shell Corporation in his region of Nigeria.¹⁰⁴ Wiwa claimed that Shell's pipeline construction and subsequent drilling wreaked havoc on the environment in Nigeria.¹⁰⁵ Wiwa also protested against the Nigerian government, which, he argued, was reaping the profits along with Shell on the backs of the labor of Nigerians.¹⁰⁶ In 1995, the Nigerian government executed Wiwa after a trial that many called unjust.¹⁰⁷ A representative of Shell was present during the trial but members of the international press were barred from entering.¹⁰⁸ As a result of Wiwa's execution, the Nigerian government was excluded from the African commonwealth for three years until a new democratic government replaced the dictatorial regime that ordered Wiwa's execution.¹⁰⁹ Since then, the old regime has been brought before human rights tribunals, and truth commissions have been established in an effort to punish it for the death of Wiwa and other activists.¹¹⁰

While rumors circulated that Shell officials had bribed witnesses to testify against Wiwa, none of these allegations have been proven.¹¹¹ As such, we are left with the scenario of Shell acting as a bystander to the execution of Wiwa. The subsequent events follow naturally from this concept of bystander liability. As would be expected, the main actor, the Nigerian government, was isolated by members of the political community for three years. Interestingly, the role of the bystander, Shell, was also discussed during the initial proceeding and subsequent events. For instance, at the end of his trial, Wiwa himself brought the Shell Corporation into the discourse. In his closing address, he said,

I and my colleagues are not the only ones on trial. Shell is here on trial and it is as well that it is represented by counsel said to

¹⁰⁴ See Stone et al., *supra* note 8.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See Howard W. French, *Nigeria Executes Critic of Regime: Nations Protest*, N.Y. TIMES, Nov. 11, 1995, at A1.

¹⁰⁸ See Stone et al., *supra* note 8.

¹⁰⁹ See *BBC News: Commonwealth Lifts Nigeria Suspension* (BBC News broadcast May 19, 1999), <http://news.bbc.co.uk/2/hi/africa/347520.stm>.

¹¹⁰ See *BBC News: Nigeria Examines Abuses* (BBC News broadcast Oct. 24, 2000), <http://news.bbc.co.uk/2/hi/africa/986264.stm>.

¹¹¹ See Patricia Cohen, *A Writer's Violent End, and Legacy*, N.Y. TIMES, May 5, 2009, at C1.

be holding a watching brief. The Company has, indeed, ducked this particular trial, but its day will surely come and the lessons learnt here may prove useful to it for there is no doubt in my mind that the ecological war that the Company has waged in the Delta will be called to question sooner than later and the crimes of that war be duly punished. The crime of the Company's dirty wars against the Ogoni people will also be punished.¹¹²

While Shell remained outside legal liability, its role as a bystander was still significant enough to merit discussion and acknowledgment. The subsequent coverage and media attention after Wiwa's death demonstrated the type of pressure that can be used to bring about a process of self-incrimination—if not publicly, then at least privately—and reconciliation.¹¹³

B. *The Active TNC as "Bystander"*

Simply examining the passive TNC as "bystander" does not solve the equation because even in certain situations in which human rights violations have been actively attributed to TNCs, the TNC will still label itself an innocent bystander, standing helplessly by as individuals commit atrocities in the corporation's name.¹¹⁴

Often in the context of regulating domestic corporations, there is the idea—promulgated by, among others, Harvey Pitt, former Chairman of the U.S. Securities and Exchange Commission—that corporations do not act alone. Rather, corporations always have at their head some individual actor or actors that were responsible for the acts committed by the corporation.¹¹⁵ Under Pitt's tenure at the SEC, the Enforcement

¹¹² See Press Release, GreenPeace Int'l, Ken Saro Wiwa and 8 Ogoni People Executed: Blood on Shell's Hands (Nov. 10, 1995), <http://archive.greenpeace.org/comms/ken/murder.html>.

¹¹³ See, e.g., Press Release, Shell Petroleum Dev. Co. of Nig., *supra* note 11 ("We withdrew all staff in January 1993 from Ogoni land Since then we have repeatedly and publicly stated we had no plans to move back into the area and restart production and that we would return only when we are assured of the co-operation and support of all the Ogoni communities.").

¹¹⁴ See Kronforst, *supra* note 93, at 329 (discussing the defense claimed by Coca-Cola relating to its alleged treatment of union workers).

¹¹⁵ See, e.g., Harvey L. Pitt, Chairman, Sec. & Exch. Comm'n, Remarks at the SEC Speaks Conference (Feb. 22, 2002), *available at* <http://www.sec.gov/news/speech/spch540.htm> ("One of the other elements that we are looking into is how to make corporate officers and directors more responsive to the public's expectations and interest. We think the best way to do that is a two-fold approach: [F]irst, make

division saw an increase in the fines imposed on individual executives at corporations,¹¹⁶ as well as the institution of Rule 13a-14 of the Securities Exchange Act of 1934.¹¹⁷ Known as the “certification provision,” the rule requires that both CEOs and CFOs of all publicly traded companies personally certify that all of the corporation’s financial information “fairly present[s] in all material respects the financial condition, results of operations and cash flows of the [corporation].”¹¹⁸ Should a corporation’s financials be found to be fraudulent after this certification provision has been executed, the CEO and CFO can be held individually liable for those false financials.¹¹⁹

This concept is particularly interesting for TNCs and human rights advocates because it underscores the policy goals that each may offer in pursuing its aims. For instance, human rights advocates may be uncomfortable with this theoretical framework because it potentially immunizes TNCs from liability and prevents them from taking responsibility for the actions that were committed in their names. Meanwhile, TNCs may refuse to engage in any systematic changes to their policies because, by definition, these acts were simply performed by certain rogue individuals, and now that the individuals are gone, there is no need for TNCs to change. Indeed, TNCs would argue that any subsequent remedies would be punishing the “innocent” parties—particularly the shareholders who would be hurt by subsequent declines in profits.¹²⁰ This position is shared by many enforcement-minded regulators who believe that a part of

certain that officers and directors have a clear understanding of what their roles should be, and second, to apply serious consequences to those who do not live up to their fiduciary obligations.”)

¹¹⁶ See, e.g., Former Top Officers of Sunbeam Corp. Settle SEC Charges, SEC Litigation Release No. 17,710, Accounting and Auditing Enforcement Release No. 1623 (Sept. 4, 2002), available at <http://www.sec.gov/litigation/litreleases/lr17710.htm> (discussing the \$500,000 fine imposed on Dunlap for his role in the fraud—the largest fine ever imposed upon an individual at the time).

¹¹⁷ 17 C.F.R. § 240.13a-14 (2011).

¹¹⁸ *Id.* § 229.601(b)(31)(i)(3) (providing the precise language of the Rule 13a-14 certification).

¹¹⁹ See, e.g., SEC Charges NIC, Inc. and Four Current or Former Executives for Failing to Disclose CEO Perquisites, SEC Litigation Release No. 21,809, Accounting and Auditing Release No. 3229 (Jan. 12, 2011), available at <http://www.sec.gov/litigation/litreleases/2011/lr21809.htm> (settling a CEO and CFO’s 13a-14 charges).

¹²⁰ But see Editorial, *Corporate Crime and Punishment*, MULTINATIONAL MONITOR, Nov./Dec. 2005, at 6 (discussing why the idea of shareholders as innocent bystanders may be disingenuous).

“protecting investors,” the SEC’s motto,¹²¹ involves protecting them from overzealous governmental regulations.¹²²

Finally, this concept of the TNC also has ramifications on the notion of reconciliation. For instance, Fletcher states that, within the context of genocide, “[d]ifferentiating the ‘bad’ perpetrators from the ‘innocent’ members of the same nationality is thought to prevent public attribution of collective guilt and permit individuals to rebuild communal ties.”¹²³ Similarly, within the context of corporate malfeasance, there is a school of thought that attributing the conduct to certain individual “bad apples” as opposed to the collective aids in the reconciliation of the corporation to the larger community and allows the corporation to continue with its business.

Case Study 2: Ken Wiwa and Shell: The Active TNC as “Bystander”

As stated earlier, during the Shell controversy in Nigeria, rumors circulated that Shell officials had bribed some of the witnesses to give adverse testimony at Ken Wiwa’s trial.¹²⁴ While the rumors were never proven, the allegation provides an example of the second scenario—the active TNC as a bystander to the actions of its employees. Presumably, the actions of the employees would have represented a one-time egregious act and not a pattern of behavior that transcends any one individual’s term of employment. Under that presumption, Shell, the corporation, would make the argument that those individuals, although acting in the name of the company, were not acting on the company’s behalf, and that Shell was a bystander to the acts of the individuals.

In this situation, the individuals responsible could be targeted for prosecution, allowing the TNC to divest itself of the rogue actors. This would also allow for the process of reconciliation to take place for Shell and the community, in

¹²¹ *About, What We Do*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/about/whatwedo.shtml> (last modified Feb. 28, 2011)..

¹²² *See, e.g.*, Paul S. Atkins, Comm’r, Sec. & Exch. Comm’n, Remarks at the Corporate Directors Forum 2007 (Jan. 22, 2007), *available at* <http://www.sec.gov/news/speech/2007/spch012207psa.htm> (“[O]ur regulations must not price those very investors out of our markets through burdensome regulations or eat up the fruits of their investments through nonsensical mandates.”).

¹²³ *See* Fletcher, *supra* note 5, at 1021.

¹²⁴ *See* Cohen, *supra* note 111, at A1.

whatever form the community believed would be effective. Perhaps it would take the form of compensation to the victim's family for the role Shell's employees played in the violations.¹²⁵ Doing so would perhaps alleviate some of the burden for the community, making it more willing to accept Shell back into the community while also providing a method of reconciliation for the company. Of course, if the behavior manifested itself as a pattern of violations, the role of Shell under bystander theories would then move into the third category.

C. *Passive Employees as "Bystanders" to an Active TNC*

A third concept of bystander seems to be inapposite. The facts, on their face, are the same: A TNC is actively involved in some malfeasant behavior. In this situation, however, the theory behind the facts is different: It is the TNC itself, through its culture, that is causing the human rights violation.¹²⁶ The employees are mere bystanders, morally complicit perhaps, but only in the way that employees of a murderous regime are complicit in the slaughter, by pushing the paperwork along that makes the death of individuals easier to pursue.¹²⁷ Although these people may be more morally repugnant, they are, under the law, still within the category of bystanders. Fletcher contemplates this conception of the bystander when she refers to the standard definition of a "bystander" as "a person who is present at an event or incident but does not take part."¹²⁸ This can also be extended to employee bystanders within the context of TNCs—that is, those who are witnessing their company's long-

¹²⁵ In fact, Shell did compensate the victims' families after a suit was filed accusing Shell of liability under the Alien Torts Claim Act. See Press Release, Ctr. for Constitutional Rights & EarthRights Int'l, Settlement Reached in Human Rights Cases Against Royal Dutch/Shell (June 8, 2009), http://wiwavshell.org/documents/Wiwa_v_Shell_Settlement_release.pdf. The lawsuit was based on allegations of active bribery by members of Shell Corporation. *Id.*

¹²⁶ This concept of the culture of the TNC has particularly interesting ramifications in the field of international human rights. In much the same way that some states are arguing that human rights are not universal, TNCs can also argue that their institutional culture represents certain norms of both the TNC itself and the state in which it resides, and, as such, the "universal" human rights concept does not fit within the larger model. Cf. Simon S.C. Tay, *Human Rights, Culture, and the Singapore Example*, 41 MCGILL L.J. 743, 747 (1996) ("Human rights and democracy in Asia differ, [Asia] representatives say, because its culture differs.").

¹²⁷ See Fletcher, *supra* note 5, at 1060.

¹²⁸ *Id.* at 1027.

standing practices, such as hiring sweatshop workers, but are neither condoning nor condemning such practices.

This concept of “bystander” often plays out in the context of corporate fraud litigation. For instance, in the SEC’s investigation of financial fraud at Sunbeam Corporation, the Commission charged the corporation with numerous counts of securities fraud relating to Sunbeam’s public statements in filings and press releases regarding its earnings and prospects.¹²⁹ The allegations depict a multiyear orchestrated fraud performed in an attempt to artificially boost Sunbeam’s revenue and make it a more attractive prospect for potential buyers.¹³⁰ As a result of the Commission’s investigation, it filed suit against certain former officers and directors of Sunbeam Corporation.¹³¹ Included among the defendants was Lee B. Griffith, Sunbeam’s former vice president of domestic sales.¹³² Griffith argued that his role in this proceeding amounted to little more than that of a bystander.¹³³ Particularly, given his role in the corporation, Griffith contended that “[t]he Complaint does not allege that Griffith was involved in any of Sunbeam’s revenue recognition decisions”—the actions that were the basis of the fraud—describing his role in the malfeasance that took place as “nonexistent.”¹³⁴

Griffith’s defense relies on the bystander rhetoric. Griffith does not contend that he was not there. Nor does he argue that the malfeasance did not occur. Rather, Griffith claims the “bystander” label—a present party, but passive to the fraud that surrounded him.¹³⁵

¹²⁹ See Sunbeam Corp., Order Instituting Pub. Admin. Proceedings, Securities Act Release No. 7976, Exchange Act Release No. 44,305, Accounting and Auditing Enforcement Release No. 1393 (May 15, 2001).

¹³⁰ See Complaint for Civil Injunction & Civil Penalties at 1, SEC v. Dunlap (S.D. Fla. May 15, 2001) (No. 01-8437), 2001 WL 34716841.

¹³¹ See *id.*

¹³² See *id.* at 7.

¹³³ See Motion To Dismiss & Supporting Memorandum of Law by Defendant Lee B. Griffith at 2–4, SEC v. Dunlap (S.D. Fla. July 26, 2001) (No. 01-8437), 2001 WL 34716888.

¹³⁴ See *id.* at 3.

¹³⁵ See also Editorial, *supra* note 120 (discussing the use of deferred criminal prosecutions for corporations convicted of corporate malfeasance and the underlying rationale that it will avoid imposing harm on “innocent bystander[s]”—the company’s shareholders). The author offers three reasons as to why these claims should not apply. First, focusing attention solely on the shareholders does not consider the other innocent parties, such as the victims of the company’s

Given the SEC's allegations of rampant fraud, the best course of action for both Sunbeam and Griffith to pursue was one based on a theory of "bystander." Similarly, the best strategy for the company was to depict the problems as the result of a few rogue actors. The individual employees' best strategy, in contrast, was to argue that Sunbeam's culture was one of maximizing profit at any cost and that it was this cultural pressure that led to the financial fraud.

Case Study 3: Shell and the Environment: The Individual as "Bystander" to an Active TNC

The concept of Shell as a passive bystander does not apply to the underlying claims of environmental abuse made by Wiwa. The underlying environmental atrocities, however, can also be discussed through a bystander theory. The Shell Corporation has long been seen as one of the main actors of environmental rights abuses.¹³⁶ In country after country, the TNC has demonstrated a disregard for the claims of environmentalists that the company's practices in capturing oil have resulted in untold damage to the environment.¹³⁷ Moreover, these claims have been made historically about the corporation and its practices—transcending the tenure of any one individual employee or board member.¹³⁸ Environmental abuses that take place under this scenario must be seen as being committed by the TNC itself—namely, that the TNC's culture historically has been so infused with callousness toward the environment that the individual employees are in effect bystanders to the violations committed by the TNC. International accountability methods can, therefore, also come into play. Litigation can target the corporation and document the practices that it has perpetuated

malfeasance. *Id.* Second, the underlying fear for the "innocent party" is that "a convicted company will be forced out of business." *Id.* The author, however, points out that, in fact, that rarely happens. *Id.* Third, the author argues that calling shareholders "innocent parties" is disingenuous because shareholders especially have benefited from corporate misdeeds. *Id.*

¹³⁶ See, e.g., *Shell—100 Years Is Enough!*, CORPORATE WATCH, <http://archive.corporatewatch.org/publications/shell.html> (last visited Mar. 12, 2011).

¹³⁷ See Shinsato, *supra* note 14, at 189 (discussing TNCs' "enormous influence and their significant role in the degradation and destruction of the environment which subsequently harms human populations").

¹³⁸ See, e.g., CORPORATE WATCH, *supra* note 136.

for years.¹³⁹ Current corporate laws allow the TNC to be held criminally liable when its actions rise to that level of culpability.¹⁴⁰

Conversely, for those TNCs whose actions transcend the work of any single individual and where the culture itself, and by extension the actions, can be attributed to the TNC, then international tribunals would also offer a mechanism for targeting and prosecuting the “guilty” party without ignoring the place of the bystander.

IV. CURRENT CORPORATE ACCOUNTABILITY MECHANISMS

The applicability of the issue of bystander liability has very real world consequences. Because of the bystander rhetoric that TNCs use in addressing underlying human rights violations, certain accountability mechanisms are simply ineffective in their ability to bind TNCs. It is therefore necessary to examine the current mechanisms available under international law to determine which, if any, can survive a bystander defense made by TNCs.¹⁴¹

Largely due to their unique status under international law, corporations have largely escaped proper accountability mechanisms sought to be imposed by scholars and advocates.¹⁴²

¹³⁹ See, e.g., Demand for Jury Trial & Complaint, *supra* note 7 (“[Shell] ha[s] in the past and, continuing through the present, used force and intimidation to silence any opposition to their activities in Nigeria which include the exploitation of the petroleum resources of the Delta and spoliation of the environment there.”).

¹⁴⁰ See *Arthur Andersen Indicted in Enron Probe*, NEWSMAX.COM (Mar. 15, 2002), <http://www.newsmax.com/archives/articles/2002/3/14/170156.shtml>.

¹⁴¹ Dhooge, *supra* note 94, at 132–33 (stating, “it is hardly radical to accept the notion that an entity directly participating in egregious human rights violations may be properly designated as a defendant”); see also Shinsato, *supra* note 14, at 186 (discussing how TNCs have come to have an increased amount of power and influence in the international economic development arena, particularly thanks to “lax environmental regulations and what amounts to tolerance of human rights violations”). Different relationship scenarios that occur between TNCs and their host states implicate this discourse. One scenario involves the TNC doing something in flagrant violation of the host country’s human rights norms, with the host country being powerless to stop the violation. See *id.* at 187–88. Another scenario is where TNCs have been specifically asked to do something by a host state that is in violation of international human rights law. See Bascuas, *supra* note 16, at 576–79 (discussing the incident with Yahoo! China and the reporter). A third scenario is where the host country, or someone acting in the TNC’s name, does something to violate human rights law.

¹⁴² See Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT’L L.J. 411, 412

The proposals for dealing with the problem have ranged from advocating corporate aiding and abetting liability to developing “soft law” agreements that are co-signed by TNCs.¹⁴³

Part of the problem is the historic nature of the players—both rights holders and duty bearers—under international law.¹⁴⁴ While the status of international law has changed and will continue to change, it is still viewed primarily as a mechanism for states and by states.¹⁴⁵ Even the addition of human rights to the lexicon in the last sixty years has focused on the rights of the individual vis-à-vis the obligations of the states.¹⁴⁶ Non-state actors as “duty bearers” is still a new concept under international law.¹⁴⁷

In addition, TNCs under international law offer unique challenges for human rights violations. The concept of corporate responsibility has gained traction only recently.¹⁴⁸ Before then, it was accepted, even lauded, that TNCs’ sole focus and purpose should be on generating profits for their shareholders.¹⁴⁹ As a result, most international laws governing corporations focus on traditional, business-related issues, such as trade, antitrust, and labor.¹⁵⁰ As one author notes, “laws that define human rights and those that shape standards for TNCs historically have not

(2005) (discussing the various “rule scheme[s]” that TNCs participate in within the international arena).

¹⁴³ See *infra* Part IV.B.

¹⁴⁴ See Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 290–92 (2006).

¹⁴⁵ See PETER FINELL, ÅBO AKADEMI INST. FOR HUMAN RIGHTS, ACCOUNTABILITY UNDER HUMAN RIGHTS LAW AND INTERNATIONAL CRIMINAL LAW FOR ATROCITIES AGAINST MINORITY GROUPS COMMITTED BY NON-STATE ACTORS 3–5 (2002), available at <http://web.abo.fi/institut/imr/norfa/peter.pdf>.

¹⁴⁶ See David Kinley, *Human Rights and the Shrinking State: The New Footprint of State Responsibility* (Jan. 25, 2010) (unpublished conference paper), available at <http://www.law.monash.edu.au/castancentre/conference2001/papers/kinley.html>.

¹⁴⁷ *Id.*

¹⁴⁸ While this concept is beginning to change, see Part II.A.1, the idea of corporations being outside the dialogue of human rights is still entrenched in some institutions. See, e.g., Andrew Newton, *Amnesty Interminable*, ETHICAL CORP., Nov. 14, 2006, at 28 (“It’s important that we don’t get involved in [human rights] in China, or any other countries we do business in.” (quoting Sir Fred Goodwin, CEO of Royal Bank of Scotland)).

¹⁴⁹ See Stephens, *supra* note 2, at 46.

¹⁵⁰ See *id.* at 60.

overlapped. Corporate law primarily governs the actions of corporations but does not explicitly address the problem of corporate compliance with human rights standards.”¹⁵¹

A. *Traditional Concepts of Liability*

1. Direct Liability

The most typical types of accountability efforts involve court cases. Litigants, drawing upon international law, attempt to extend liability to the TNC. As one author writes, “[s]uch initiatives typically rely on an inventive combination of national and international law, but they frequently contribute to emerging international legal norms and standards. . . . Strengthened international criminal law, through the International Criminal Court and other developments, greatly assists this process.”¹⁵²

International criminal or human rights courts offer a unique setting for the TNC as “bystander.” Under the law of corporations, corporations can be held accountable, even criminally, as a distinct and separate person under the law.¹⁵³ By delineating the corporation from the individual under a bystander theory, international trials can develop a cogent theory of liability that would hold the appropriate actor liable while addressing the needs of accountability and reconciliation, as defined above, for the bystander. These mechanisms, however, are few.¹⁵⁴ More often, even when TNCs have been found taking an active role in the underlying human rights violation, little is done to hold the TNC liable under international law.¹⁵⁵ In

¹⁵¹ Kronforst, *supra* note 93, at 324 (footnote omitted); *see also* Stephens, *supra* note 2, at 54 (“The key characteristics of modern transnational business corporations developed piecemeal over the course of hundreds of years. This disjointed history explains the gap between the economic reality and the legal tools available to hold corporate groups accountable for their actions.”).

¹⁵² *See, e.g.*, James A. Paul & Jason Garred, Making Corporations Accountable: A Background Paper for the United Nations Financing for Development Process 10–11 (Dec. 2000) (unpublished background paper), *available at* <http://www.worldsummit2002.org/publications/corporationaccount.pdf>.

¹⁵³ *See, e.g.*, NEWSMAX.COM, *supra* note 140. Although Arthur Andersen’s indictment was subsequently overturned, it was not because the company was legally unable to be sued, but rather because standards set for establishing criminal liability were too low. *See* Linda Greenhouse, *Justices Reject Auditor Verdict in Enron Scandal*, N.Y. TIMES, June 1, 2005, at A1.

¹⁵⁴ *See* Fletcher, *supra* note 5, at 1028–30.

¹⁵⁵ *See supra* Part III.B–C.

addition, given the structure of the international legal regime, whereby legal instruments are often gap fillers to a nationally-based mandate, prosecuting a TNC for a human rights violation under international law would raise a host of logistical questions.¹⁵⁶

An inherent tension has arisen through the development of international law primarily as a body for binding state actors and the concept of fundamental human rights, which seems to give “duty bearers” a universal concept unlimited by borders or government.

[I]t is patently clear that human beings have recourse to the United Nations, and not only to their nation states, since the formal, treaty-bound inception of international human rights law. At the same time, there is an undeniable tension, or “disconnect,” between human rights theory and international human rights law. “While human rights theory supports the claims of rights holders against all others, international human rights law treats the state as the principal threat to individual freedom and well being.”¹⁵⁷

¹⁵⁶ This concept, however, is changing. The TNC now tends to view itself as beholden to a larger constituency rather than simply to its shareholders. *See, e.g.*, Andrew Newton, *Beyond the Tipping Point*, ETHICAL CORP., Nov. 14, 2006, at 5 (“The earlier piecemeal approach [to corporate responsibility] is evolving into a more holistic one based around stakeholder groups, overseen by specialised corporate responsibility departments integrated into the corporate governance framework.”). In addition, shareholders themselves are insisting that a TNC’s mandate goes beyond mere profit increase to larger issues of social responsibility. For instance, the environmental lobby has been very effective in creating venture funds that invest in companies that are making strides to become environmentally friendly. *See, e.g.*, Anojja Shah, *Green Mutual Funds Ride Wave of Popularity*, SMART MONEY MAG. (Feb. 13, 2008), <http://www.smartmoney.com/smartmoney-magazine/index.cfm?story=march2008-green-mutual-funds&hpadref=1>; *see also* David Weissbordt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 902 (2003) (“There is also increasing reason to believe that greater respect for human rights by companies leads to greater sustainability in emerging markets and better business performance.” (footnote omitted)).

¹⁵⁷ Julie Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, 37 J. MARSHALL L. REV. 1205, 1211 (2004) (quoting Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT’L & COMP. L. REV. 273, 281–82 (2002)).

Or, as another scholar notes, "Once we begin to loosen our customary view that states 'act' and corporations 'react,' it becomes equally difficult to attribute responsibility for the social welfare effects of the regulation to any given actor."¹⁵⁸

2. Aiding and Abetting Liability

While aiding and abetting liability for individuals under international law has been well established, the liability element for corporations is much less clear. The main debate centers on how to apply the element of scienter, crucial for the issue of culpability, to a fictional entity. Among the choices that have riddled scholars is whether it is enough to establish aiding and abetting liability if you can show that the actor simply had knowledge that its actions would facilitate the underlying abuse or whether there must be a purpose to facilitate that crime.¹⁵⁹ Given the difficulty, the issue becomes how to attribute such knowledge to a corporate entity. One scholar argues for a specific intent analysis for human rights abuses committed as the result of a joint enterprise between the TNC and a ruling sovereign.¹⁶⁰ Other commentators believe that having the action done at the behest of the sovereign allows the TNC to escape completely from liability.¹⁶¹

The most significant flaw, however, with attempting to use an aiding and abetting model for TNCs is that it does not fit within the rhetoric that TNCs are using for themselves. Establishing aiding and abetting liability requires at least a showing of knowledge and possibly also purpose.¹⁶² When TNCs claim that they are bystanders, they lay the foundation to deny both of these.¹⁶³

¹⁵⁸ See Danielsen, *supra* note 142, at 413.

¹⁵⁹ See Cassel, *supra* note 27, at 304.

¹⁶⁰ See Dhooge, *supra* note 94, at 133.

¹⁶¹ See *id.* at 133-34; MANDY MACDONALD, INT'L RESTRUCTURING EDUC. NETWORK EUROPE, CONTROLLING CORPORATE WRONGS: THE LIABILITY OF MULTINATIONAL CORPORATIONS 3 (2000), available at <http://www.indianet.nl/irene.html> ("Arguments on the grounds of sovereignty, however, are double-edged. Companies often use (or abuse) sovereignty as a pretext for devolving responsibility to host states . . .").

¹⁶² See, e.g., Cassel, *supra* note 27, at 325.

¹⁶³ A bystander is merely a witness. As a witness, a bystander does not instigate or attempt to put an end to what the bystander was bearing witness to. By claiming to be bystanders, they cannot be liable for aiding and abetting because that would

B. *Soft Law Approaches*

Mark Janis defines soft law as “rules which are neither strictly binding nor completely void of any legal significance.”¹⁶⁴ While “[t]hese may in time ‘harden’ ” into a legal binding pact, its hardening will mark its transformation into “customary international law.”¹⁶⁵ According to Janis, soft law is always transitory and never a legally binding end unto itself, but at the moment that it becomes hardened, it becomes customary law.¹⁶⁶ The advantage espoused by proponents of soft law is that it provides the needed flexibility for those actors that have no strict demands on themselves.¹⁶⁷ But this also highlights the difficulty in using soft law as a framework for corporate accountability: In order for TNCs to be active participants in soft law, they must to some degree acknowledge their complicity in the underlying behavior. Acknowledging their complicity, however, is in direct contravention to the bystander rhetoric that the TNCs have adopted. If TNCs were to acknowledge their involvement in an underlying human rights atrocity, then they would immediately open themselves up to direct liability under various national regimes, if not under international law.¹⁶⁸ In addition, participating in a scheme that presumes their involvement also would lead to a significant decrease in reputational currency in the international arena.¹⁶⁹ As such, the inherent structure of soft law—as it stands now—would make it one of the least viable options for engaging TNCs on human rights issues.

One example of a soft law initiative is the United Nations Global Compact. The Global Compact is “a strategic policy

require assistance, facilitation, or promotion of the event—the bystander label is clearly contradictory to action of any kind.

¹⁶⁴ MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 52–53 (4th ed. 2003) (quoting 7 RUDOLF BERNHARDT, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 62 (1984) (internal quotation marks omitted)).

¹⁶⁵ *Id.* at 53.

¹⁶⁶ *See id.*

¹⁶⁷ *See, e.g.,* Ann C. Wallis, Note, *Data Mining: Lessons from the Kimberley Process for the United Nations’ Development of Human Rights Norms for Transnational Corporations*, 4 NW. J. INT’L HUM. RTS. 388, 389 (2005) (discussing the Kimberley Process as a means for resolving the issue of conflict diamonds within the context of soft law norms).

¹⁶⁸ *See* Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool To Avoid Alien Tort Claims Act Litigation While Simultaneously Building a Better Business Reputation*, 40 CAL. W. INT’L L.J. 55, 85 (2009).

¹⁶⁹ *See* Newton, *supra* note 156 (discussing how the change in self-regulatory corporate governance has paid dividends in reputational currency).

initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.”¹⁷⁰ By its own mandate, the Global Compact is not “legally binding,” “a regulatory body,” or “a means of monitoring company behavior.”¹⁷¹ Instead, it is a “voluntary initiative to promote sustainable development and good corporate citizenship.”¹⁷² The Compact’s mandate extends beyond corporate accountability. The Compact was created as a way for, among other things, TNCs to “improve [their] corporate reputation and brand image” and “network with other organizations.”¹⁷³

One flaw occurs with companies who did not sign onto the Global Compact. The idea of binding these companies, regardless, is both practically untenable and legally unsound. The notion of soft law, as discussed above, is even more controversial than customary law because it can lead to a “non-consensual” source of international law that, in the view of some, may harden over time.¹⁷⁴ To believe that such a controversial source of international law can be forced upon corporations who did not even sign up to participate voluntarily seems unfeasible. In addition, with customary international law as it currently stands, actors have the option of “opt[ing]-out” of a custom simply by not participating.¹⁷⁵

¹⁷⁰ *What Is the Global Compact?*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org> (last visited Mar. 15, 2011).

¹⁷¹ *Global Compact Self Assessment Tool: About the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <http://www.globalcompactselfassessment.org/aboutthistool/unglobalcompact> (last visited Mar. 15, 2011).

¹⁷² *Id.*

¹⁷³ *About the UN Global Compact: Why Participate*, GLOBAL COMPACT NETWORK NORDIC COUNTRIES, <http://www.genordic.net/index.php?r=page/show&topicId=1> (last visited Mar. 15, 2011). The key focus of the Global Compact stems from its ten principles, all of which relate to human rights issues. *Overview of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last updated Nov. 23, 2010).

¹⁷⁴ See INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 55–60 (Anthony D’Amato & Kirsten Engel eds., 1996) (discussing the various methods for developing soft law, including “soft” enforcement mechanisms by international commissions); Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT’L L. 443, 443–44 (1983).

¹⁷⁵ See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 218–20, 220 n.72 (2010).

Finally, this approach to TNCs does not take into account all the individual actors that are involved. As the bystander theory brings out, the human rights violation can occur through: individuals working on behalf of the company; the company's own long-standing practices; and state actors with the company passively present. Soft law's approach seems unequipped to handle these variations.¹⁷⁶

C. U.N. Norms

International law has moved towards developing accountability instruments for TNCs. The Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the "Norms") were approved in 2003.¹⁷⁷ The Norms differ from previous initiatives in two significant ways. First, unlike previous initiatives that targeted TNCs, these norms were developed by the U.N. Sub-Commission with very little input by TNCs at their nascent stage.¹⁷⁸ Second, as originally conceived, the Norms were intended to be a binding initiative, with provisions within the document related to enforcement mechanisms for noncompliance.¹⁷⁹ These two facets make the Norms more closely akin to traditional national regulation, with a top-down approach to regulation, as opposed to international legal formation, which is usually viewed as a bottom-up approach.¹⁸⁰ Although the Norms have arguably dwindled in legal significance since the appointment and report of Special Representative John Ruggie,¹⁸¹ an analysis of the Norms from a

¹⁷⁶ See Weissbordt & Kruger, *supra* note 156, at 914 ("No one can realistically expect business human rights standards to become the subject of treaty obligations immediately.").

¹⁷⁷ See Norms, *supra* note 35.

¹⁷⁸ See Weissbordt & Kruger, *supra* note 155, at 904. TNCs, however, were vociferous in their commentary after the Norms were presented to the full Commission for approval. See David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUMAN RIGHTS L. REV. 447, 457–58 (2006).

¹⁷⁹ See Weissbordt & Kruger, *supra* note 156, at 903 ("The Norms are the first nonvoluntary initiative accepted at the international level.").

¹⁸⁰ See Janet Koven Levit, *Bottom-Up Lawmaking: The Private Origins of Transnational Law*, 15 IND. J. GLOBAL LEGAL STUD. 49, 53 (2008) ("[W]hereas top-down lawmaking is a process of law internalized as practice, bottom-up international lawmaking is a soft, unchoreographed process whereby private practices are externalized as law.").

¹⁸¹ See Kinley & Chambers, *supra* note 178, at 459–61.

bystander perspective is particularly helpful since the language surrounding the debate in adopting the Norms highlights the bystander rhetoric that TNCs are employing. To fully understand the significance of the debates, an examination of the language of the Norms is necessary.

The Norms are explicit in bringing TNCs into the international human rights discourse. The Preamble declares,

[E]ven though States have the primary responsibility to promote, secure the fulfilment [sic] of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.¹⁸²

This marks a significant shift from prior international documents. Not only do the Norms name TNCs as an integral part of the rubric for human rights issues, but they also explicitly bring them into the debate as “duty bearers.”¹⁸³ The Norms provide that TNCs, as part of the international community, are obligated to respect “generally recognized responsibilities and norms contained in United Nations treaties and other international instruments.”¹⁸⁴

The Norms were drafted over several years by a working group at the UN Sub-Commission on Human Rights in Geneva, and involved extensive consultations with businesses, unions, and non-governmental organizations, including Amnesty International. . . .

The Norms distill in one place the human rights principles applicable to businesses—referencing the Universal Declaration, Convention of the Rights of the Child, ILO conventions and many other existing international laws and standards, and clarify in operational terms what corporate social responsibility means for a company. . . .

[T]he Norms do recognize that transnational and local companies carry responsibilities as well as States.

Alexandra Arriaga, Dir. of Gov't Relations, Amnesty Int'l USA, Remarks at the Congressional Human Rights Caucus Corporate Social Responsibility: Human Rights and Transnational Companies (Nov. 22, 2004), available at <http://www.amnestyusa.org/business/csr.html>.

¹⁸² See Norms, *supra* note 35, pmb1.

¹⁸³ Surya Deva, *U.N.'s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J. INT'L & COMP. L. 493, 507 (2004) (“The most striking feature of these provisions [in the Norms] is their treatment of TNCs, together with other state organs, as [a] vehicle of developing a society wedded to rule of law, transparency, accountability and sustainable development and in which people’s civil, political, economic, social and cultural rights are realized.”).

¹⁸⁴ See Norms, *supra* note 35, pmb1. The instruments specifically enumerated in the Norms include: (1) the convention on genocide; (2) the convention against

The Norms are forward looking, placing TNCs squarely within the paradigm for solving issues that affect the human rights of citizens everywhere.¹⁸⁵ From a normative value approach, it takes a giant step forward in bringing the TNC within the legal discourse. By providing for an expansive view of complicity that does not depend on overt action, the Norms offer the closest thing to a theoretical structure that encompasses the bystander rhetoric. That is also, however, its greatest weakness. Because the Norms make no distinction between participation and complicity, they lump all behavioral paradigms into one grouping that triggers liability. As such, they allow TNCs to capitalize on this lack of distinction by associating themselves with the *label* of innocent bystander rather than the *name* of bystander. This provides a large loophole that TNCs will exploit again and again in escaping liability.¹⁸⁶ Instead, what is needed is language that squarely addresses the label of TNCs and makes clear that inaction is also a form of complicity and that, as such, binding initiatives are appropriate. If the rhetoric of TNCs is that they are bystanders to the underlying action being committed, then their participation in document after document that holds them liable for their *active* participation will be ineffective because it fails to address their defense. Crafting a document or a set of norms that does not address this will be ineffective from the beginning.¹⁸⁷

torture; (3) the convention against slavery; and (4) the convention attaching civil liability for oil pollution. *See id.* These conventions in particular are among the hot button issues that would specifically come within the gambit of dealings and TNCs.

¹⁸⁵ *See* Kinley & Chambers, *supra* note 178, at 458 (“A number of non-governmental organisations (NGOs), academics and human rights advocates from around the world took various opposing positions to that of the business alliances, lobbying national governments and making submissions directly to the Commission in support of the Norms.”).

¹⁸⁶ *Id.* at 452 (“It is the very idea of an international instrument apparently speaking directly to non-state entities, as well as to states, which has caused consternation in some quarters . . . [T]he Norms seek to extend implementation and enforcement obligations to non-state entities and provide novel mechanisms for ensuring that these obligations are met.”). Kinley & Chambers also discuss how one of the main objections to the Norms is the idea that TNCs might be liable for the deeds of its partners. *Id.* at 448–49.

¹⁸⁷ *Id.* at 454 n.23 (“In many situations the apparent violator is not a TNC but its subsidiaries, contractors or suppliers.”).

In addition, there is a potential conflict between these international documents and state law.¹⁸⁸ This is exacerbated by the idea that, according to the Norms, states still maintain primary responsibility for the promotion and protection of human rights.¹⁸⁹ As such, any conflict between international conventions and state doctrine will provide for the preeminence of the states.¹⁹⁰ But what happens when the actions taken by the states are in direct contravention to the international treaty?¹⁹¹ Liability for the state aside, TNCs have a built-in alibi: Because they are guests in the host state, any actions that they take must abide by the laws of that state. Therefore, if they are complicit in a larger phenomenon that was triggered by the state, then they are merely bystanders to the international law that may be triggered by the state's actions. Indeed, the language in the Norms seems to support this. For instance, in article 1, "States have the primary responsibility to promote . . . and protect human rights."¹⁹² The Norms also limit the power of TNCs to only those issues "[w]ithin their respective spheres of activity and influence."¹⁹³

¹⁸⁸ See *id.* at 466 (discussing the difference between domestic and international instruments—for example, that international litigation provides the general framework while domestic laws fill in the gaps).

¹⁸⁹ See *Norms*, *supra* note 35, ¶ 1.

¹⁹⁰ See *id.*

¹⁹¹ Kinley and Chambers discuss this precise issue:

In practice, the dividing of responsibility between the state and the TNC most often occurs when a government fails in its human rights duties. . . . The Norms do not purport definitively to establish binding legal obligations (although they do not rule out such an eventuality); still less do they purport to replace state responsibility with corporate responsibility to protect human rights. Rather, they establish that companies should not be able to hide behind governments that are failing to implement human rights, and deny any responsibility whatsoever for human rights violations in which they are involved or complicit.

The Norms also cover the situation where a state not only fails to uphold its citizens' human rights, but is itself the perpetrator of human rights violations. When this occurs, companies that work in concert with the state may find that they are complicit in the state's wrongdoing.

Kinley & Chambers, *supra* note 178, at 467–68; see also *Doe I v. Unocal Corp.*, 395 F.3d 932, 946 (9th Cir. 2002) (finding a claim under the Alien Tort Claims Act without state action when the acts were committed in furtherance of genocide or war crimes).

¹⁹² See *Norms*, *supra* note 35, ¶ 1.

¹⁹³ *Id.* It is this aspect of the Norms that, in particular, has been most critically denounced. *Human Rights*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/Issues/human_rights/ (last visited Mar. 15, 2011).

D. Direct Attacks on the Construct of the TNC Bystander

There are three ways for addressing the TNC as “bystander” directly under international accountability methods. Each method is similar in that it directly attacks the concept of the active TNC perpetrator as being a bystander. One method, which has already been attempted, albeit unsuccessfully, in California, is to dissolve the TNC’s corporate charter.¹⁹⁴ Doing so would strip the corporation of its status, making it disappear under both law and bystander theory.¹⁹⁵ Left without a screen, the individual employees of the corporation could be targeted and held accountable.¹⁹⁶ Meanwhile, the dissolution of the corporation would prevent any further atrocities from being perpetuated in the bystander’s name.

The second method offers a similar though separate avenue of attack. This method would expand the use of the “piercing the corporate veil” doctrine¹⁹⁷ that allows litigants, in certain situations, to penetrate the screen of a corporation and attach liability to the individuals directly.¹⁹⁸ While this avenue is advantageous because it is already an accepted legal principle, it has its downsides: (1) the corporation would still exist even after individual liability attaches, and (2) the doctrine, in its current state, is applied only in the most egregious of circumstances,

(“[C]ompanies are often uncertain how to avoid complicity in human rights abuse and where the boundaries of their human rights responsibility lie.”).

¹⁹⁴ See Charlie Cray, *Chartering a New Course: Revoking the Corporations’ Rights To Exist*, MULTINATIONAL MONITOR, Oct./Nov. 2002, at 8.

¹⁹⁵ See *id.* (“[R]evoking corporate charters’ means . . . dismantling harm-inducing corporations by revoking their right to exist.”).

¹⁹⁶ See *Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 569–70 (7th Cir. 1985).

¹⁹⁷ Piercing the corporate veil is a rare remedy, employed only when necessary to prevent fraud or achieve equity. Several factors are to be considered when determining whether it is appropriate to pierce the corporate veil, such as when there is a unity of interest and ownership where the separate personalities of the corporation and the individual no longer exist and also where allowing the fiction of a corporation to exist would promote injustice. See *id.*

¹⁹⁸ But see Sahni, *supra* note 71, at 37 (“[T]he remedy of ‘piercing the corporate veil’ is incompatible with a practical interpretation of ‘Company Law.’ The corporate group has replaced the single company as the predominant unit of business activity. The ‘veil theory’ lacks recognition of the facets and complexities of multi-tiered enterprises.”).

when it is clear that the corporation is a mere sham or façade for individual actors.¹⁹⁹ It does not apply to those situations where the corporation is a viable separate entity.²⁰⁰

The third method is currently being employed by two Pennsylvania townships. These localities have each passed a law that strips corporations of legal privileges as persons, in essence dissolving the corporation *before* it has had the chance to commit the human rights violations.²⁰¹ While this solution has the advantage of being proactive, it is countered by the notion that it is treating all corporations, good and bad, as the same. There is also the economic argument that employing such a seemingly harsh method would chill investment by businesses in those communities because of a fear of individual liability.²⁰²

These methods of attacks, while currently applied only at the national level, could be transferred to the international level as well. This could take the form of a rider attached to a human rights declaration stating that any TNC who conducts business within a signatory's borders must abide by human rights norms, lest liability and potential dissolution attach. This would seem like a favorable option for states, allowing some of the pressure from current human rights advocates to be assumed by the TNCs within their borders.

These situations also take into consideration the two distinctions between the TNC and the human bystander addressed above. The level of state involvement that is contemplated by at least two of these solutions would, if applied correctly, aid in balancing the power differential that a TNC would wield. In addition, attaching these standards to an international law or treaty would prevent TNCs from forum

¹⁹⁹ See *Van Dorn*, 753 F.2d at 570; see also Sahni, *supra* note 71, at 6.

²⁰⁰ See *Van Dorn*, 753 F.2d at 570.

²⁰¹ THE CORPORATION, *supra* note 90; see also Press Release, Cmty. Envtl. Legal Def. Fund, Pennsylvania Township Is Second To Strip Sludge Corporation of "Rights"—Joins Tamaqua Borough To Become Second Municipality in the United States To Recognize the Rights of Nature (Sept. 28, 2006), <http://www.celdf.org/article.php?id=519>.

²⁰² One counter, however, to that oft-cited argument is that, if enough communities banded together to institute these practices, the corporation would have no choice but to abide by these conditions.

shopping their business based on a state's current human rights standards, something that lends itself to the transient nature of the TNC.²⁰³

V. BRINGING THE BYSTANDER RHETORIC INTO THE DEBATE

A complete analysis of the various corporate accountability mechanisms under the bystander language is beyond the scope of this Article.²⁰⁴ There are, however, some basic questions raised by this new paradigm that should, at least initially, be explored. Two central questions this Article explores are (1) how does the name "bystander" change how we think about TNCs, and (2) what are the ramifications of incorporating the bystander rhetoric into the corporate accountability debate?

A. *What's in a Name?*

As discussed earlier, naming the TNC as a "bystander" under international law has an enormous amount of peril. Rather than creating a new paradigm that will form the basis of a meaningful debate on the subject, there is the chance that TNCs instead will openly embrace the term "bystander," but only as a label by which to actively avoid liability. This public relations coup might be inevitable. By engaging in a thoughtful and thorough analysis of what it means to be a bystander, much of the wind may be taken out of the TNCs' sails in this regard. While the idea of a bystander does often connote an image of innocence, the lessons from scholars who have written about the Holocaust and other genocides highlight that, in fact, bystanders are often morally complicit or at least morally ambiguous.²⁰⁵ Any

²⁰³ This is based on the presumption that human rights treaties will be as widely adopted with these riders as they currently are without them.

²⁰⁴ This Article is part of a larger research agenda that examines the role of the transnational corporation using a bystander methodology. Subsequent articles will focus on using the bystander methodology as a basis for creating other constructs under international law. The author is particularly interested in the idea of non-feasance concepts under American law and how they can fit in with the notion of international accountability.

²⁰⁵ See Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and Its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. INT'L & COMP. L. 239, 253–54 (2008) (discussing the need for bystanders to reconcile with the families of victims of genocide in Rwanda); Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341, 353–54 (2010) (discussing bases for state bystander responsibility for human rights violations). See generally

serious discussion on what it means to be a bystander should include these underlying notions of ambiguity. Applying the name “bystander” to a TNC does not provide absolution to the corporation. Rather, it can move us forward to a workable framework that encompasses the notion of passivity—something currently lacking in any international legal framework for the TNC. While using passivity as a basis of liability is unusual, it is not unheard of—it must simply involve a shift in our notions of rights and duties by and among TNCs. While using the name “bystander” is by no means a panacea to the issue of corporate accountability under international law, it is a step forward from our current legal framework.

B. Incorporating the Bystander Rhetoric into the Corporate Accountability Debate

The idea of using the bystander rhetoric specifically within the area of corporate accountability can also have many consequences, both foreseeable and unforeseeable. For instance, if a meaningful framework for corporate accountability could be developed based on this bystander rhetoric, one potential consequence is that TNCs will simply shift their litigation strategy from that of the innocent bystander to denying completely that the underlying wrong took place. While that is a potential danger, in the end this would be a difficult shift for TNCs to make. Many of the underlying wrongs that have occurred—such as environmental injuries, the killing of citizens by guerillas employed by TNCs, and deplorable working conditions for the indigenous population—have been well documented and are beyond dispute.²⁰⁶ By denying that these incidents even took place in the face of uncontroverted evidence, TNCs would face a huge credibility gap that could impact their position both in this and in subsequent liability. That does not mean that TNCs will not do it—witness for instance, the denial by tobacco companies of the addictive nature of their product

BARNETT, *supra* note 25 (offering a nuanced view of the role of bystanders during the Holocaust that takes into account both their potential innocence and complicity).

²⁰⁶ See The Secretary-General, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, ¶¶ 9–11, delivered to the General Assembly, U.N. Doc. A/65/223 (Aug. 4, 2010); see also Steven Greenhouse, *Suit Says 18 Companies Conspired To Violate Sweatshop Workers' Civil Rights*, N.Y. TIMES, Jan. 14, 1999, at A9 (reporting lawsuits filed against eighteen U.S. retailers and apparel companies alleging sweatshop practices in Saipan).

even in the face of overwhelming evidence to the contrary²⁰⁷—however, it does weaken the TNCs' position and strategy significantly.

CONCLUSION

The position set forth in this Article is unsettling. Because TNCs employ the innocent bystander rhetoric, sometimes corporations who are witnesses to very bad acts cannot be held liable under current legal theories. Moreover, the gap in current international law is such that even when those corporations affirmatively act in committing human rights violations, they can still escape legal responsibility. Part of this has come from the power that TNCs have claimed in labeling themselves “bystanders”—that is, innocent bystanders—under the law.

Perhaps what needs to be reassessed then is not so much the rhetoric that the TNCs are using, but the implications of what that rhetoric means from a standpoint of accountability. Implicit in this notion is the idea that the TNC as “innocent bystander” is free of moral and legal culpability. By recasting the “bystander” name into one that involves, at the least, moral, if not legal, complicity, then perhaps a theory of accountability can be developed that will close the loophole TNCs rely upon in their rhetoric. Doing so may lead to a workable understanding of corporate accountability that moves beyond mere words to action.

In the end, to name the TNC as a “bystander” is “to know who [they] are, and who they are meant to be.”²⁰⁸ A TNC's inaction when faced with underlying corporate accountability issues holds just as much power as any overt action it employs. A bystander? Yes. Innocent? Definitely not. Its power is too far flung to be viewed as anything but a critical part of the equation. National corporate and regulatory schemes have long accepted and accounted for the “bystander defense” in their enforcement schemes against TNCs. While the results have been inconsistent, a TNC's attempt to use the “bystander defense” in human rights litigation is also beginning to falter.²⁰⁹ The most

²⁰⁷ See *Curtis v. Altria Group, Inc.*, No. A10-215, 2010 WL 5292065, at *15 (Minn. Ct. App. Dec. 28, 2010).

²⁰⁸ L'ENGLE, *supra* note 1.

²⁰⁹ See *Norms*, *supra* note 35, ¶ 1 (“Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect

effective strategies will anticipate this language head-on and either counter it or assimilate it into the larger enforcement scheme. To do otherwise will allow the innocent bystander to control the human rights agenda while atrocities continue to happen in the bystander's name.

To name something is to give it belonging. By naming the TNC as "bystander," this Article attempts to bring the TNC into the debate, squarely where it belongs: as a key component of a triad that includes the oppressor, the victim, and the bystander—all of whom have integral roles to play. Unlike the label of "innocent bystander" that the TNCs through their rhetoric are currently employing, naming the TNC as "bystander" brings it to the forefront of the act and shows that even its inaction creates real and specific consequences for the people within its influence.

human rights . . ."); *see also* Press Release, Cmty. Envtl. Legal Def. Fund, *supra* note 201 ("The Rush Township law . . . asserts that corporations doing business in Rush will henceforth be treated as 'state actors' under the law, and thus, be required to respect the rights of people and natural communities within the Township . . .").