the protection of individuals against governments. One concrete concern might be that human rights bodies would be overwhelmed with complaints about corporate behavior and diverted from considering complaints against states.[389]

Several responses are in order. First, to the extent an individual can point to a specific internationally recognized human right that he or she claims has been violated, that person has made a bona fide human rights claim; it is still special in that sense. The victim of, for instance, privately initiated torture or private discrimination based on religion is not a mere plaintiff in a tort case; that person's human rights—stated in core human rights instruments—were violated. Second, the theory is one based on human rights, not human desires. International human rights law has developed limits as to what certain rights against the state actually mean. For example, the individual right of members of national minorities to have their own schools does not require the state to pay for a religious establishment, nor would it require corporations to do so.[390] Because corporate duties derive from existing rights, not new ones, the danger of outrageous claims is diminished.

Third, and most critically, the possibility that relevant international decisionmakers will derive human rights duties for corporations does not mean that those obligations will be coextensive with the obligations on states. The differences between corporations and states regarding both their internal structures and those to whom they owe duties, as well as the need to respect corporate interests and rights, will inevitably limit the list of duties. For example, with respect to the right to privacy, those applying the theory might well find a duty not to invade people's homes, but not a duty to avoid publishing embarrassing information about public figures. The focus by respected NGOs, corporations, and governments on business behavior directly affecting physical integrity suggests a recognition of the need to proceed cautiously in making claims of corporate duties. I suspect that, over time, decisionmakers are likely to find a set of duties on corporations larger than those on individuals under international criminal law but noticeably smaller than those on states under existing human rights law.

A second, related, criticism is that this enterprise cannot be logically separated from an attempt to address duties by all other nonstate actors. In other words, if corporations can violate human rights, then why not sports clubs, unions, NGOs, universities, churches, and, ultimately, individuals? Of course, that individuals have some legal duties in the human rights area

389. I appreciate this critique from John Knox.

390. *See, e.g.*, Framework Convention for the Protection of National Minorities, *done* Feb. 1, 1995, art. 13(1), 34 I.L.M. 351, 356; *see also supra* note 301 and accompanying text (noting limitations on the right to form a family).

has been obvious since Nuremberg.[391] The concern must then be that new categories of dutyholders will inevitably arise, or new duties will fall on individuals. Indeed, this criticism suggests that my project inadvertently advances the cause of some world leaders who seek to give the state new powers over individuals through, for instance, the idea of a code of human responsibilities to complement the various codes of human rights.[392]

Clearly, the theory does broach the private-public divide in a way that invites the possibility that the law will recognize new dutyholders in the future. But why the concern? If, for example, the Rwandan Catholic Church participated in the 1994 genocide in that country, as has been alleged by respected observers, why not regard it as having violated the human rights of the victims?[393] If other entities have the ability to deprive individuals of recognized human rights, this theory might provide a framework for doing so, or the basis for a broader framework addressing more actors. If, at some point, decisionmakers end up recognizing more duties for the individual than those now encompassed in international criminal law, they need not have brought about an increase in state power relative to the individual. For any duties of individuals derive only from *human* rights; because the government does not and cannot itself have human rights, the individual has no new duties toward the government. If the concern is that new individual duties would empower the government to limit the human rights of some in order to guarantee the rights of others (and thus fulfill the former's duties to the latter), the prerogative—indeed the responsibility—of the state to protect individuals from each other is well enshrined in human rights law.[394]

Other skeptics could make claims not about the danger of the doctrine, but of its futility. First, it could be argued that tort law remains equipped to deal with corporate abuses of rights, and that reformulating corporate duties

391. *See supra* text accompanying notes 74-78.

392. *See, e.g.*, Universal Declaration of Human Responsibilities (Sept. 1, 1997), http://www.asiawide.or.jp/iac/UDHR/EngDecl1.htm; Theo van Boven, *A Universal Declaration of Human Responsibilities?*, *in* REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 73 (Barend van der Heijden & Bahia Tahzib-Lie eds., 1998). For a balanced evaluation, see INT'L COUNCIL ON HUMAN RIGHTS POLICY, TAKING DUTIES SERIOUSLY (1999).

393. INT'L PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS, SPECIAL REPORT ch. 14, para. 14.66 (2000), http://www.oau-oua.org/document/ipep/report/Rwanda-e/EN-14-CH.htm; *see also* PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 135-42 (1998) (discussing the involvement of clergy in the 1994 Rwandan genocide).

394. *See, e.g.*, *Universal Declaration of Human Rights*, *supra* note 91, art. 29(2), at 77 ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others . . . ."); ICCPR, *supra* note 129, art. 5(1), S. EXEC. DOC. E, 95-2, at 25, 999 U.N.T.S. at 174 (stating that there is no right of a state, group, or person to "perform any act aimed at the destruction of any of the rights and freedoms" in the Covenant); *id.* arts. 12(3), 18(3), 19(3), 21, 22(2), S. EXEC. DOC. E, 95-2, at 27, 29-30, 999 U.N.T.S. at 176, 178 (permitting states to limit rights as necessary to protect rights and freedoms of others); *see also* RAZ, *supra* note 82, at 184 (exploring conflicts of rights and conflicts of duties).

as human rights duties accomplishes nothing. But such a position assumes too much about tort law and too little about human rights law. While high-profile tort cases in the United States against corporations for human rights and environmental harms may be proceeding, the practice is hardly uniform. Most states provide no realistic possibility of such recovery. Transforming the controversy into a human rights issue is hardly a cure-all, as victims will always face such barriers to recovery as recalcitrant legislatures, inept courts, and powerful economic pressures. But reformulating the problem of business abuses as a human rights matter might well cause governments and the population to view them as a legitimate issue of public concern and not as some sort of private dispute.[395] In addition, using human rights, rather than tort law, as the prism through which to examine certain business abuses offers some possibility of more uniform global treatment of the issue rather than reliance upon the divergences of domestic tort law.

Second, skeptics might well seize on the cautious tone of Part VI and ask why, assuming that governments are unable or unwilling to regulate business activity now, the proposed scheme will somehow improve matters. In the end, does not resistance by the state doom the prospects for enterprise accountability? What possible incentives could states have to get such a process started? Will not corporations simply move to states that refuse to impose new obligations on them? It is, of course, unexceptionable that if states are so uninterested in regulating the activities of corporate actors, they will neither create domestic regimes nor cooperate to prescribe more hard or soft international law. The corporation can no more easily replace the government as having the first duty to protect human rights than can an international organization.

But even if states remain reluctant for the short term to prescribe new domestic or international norms on this issue, the derivation of enterprise duties still serves a critical function, insofar as it sets standards for businesses that can be monitored by nongovernmental organizations, international organizations, or the corporations themselves. The changing of expectations regarding appropriate behavior by transnational actors must often begin with civil society before governments can be expected to respond. Recognizing duties on enterprises, rather than merely on governments, also has the advantage of putting pressures directly on them not to seek refuge in some state that may be lax about enforcement. Thus even if the host states do not enforce the new duties, the outside scrutiny

395. *Cf.* Ole Esperson, *Human Rights and Relations Between Individuals*, *in* RENÉ CASSIN AMICORUM DISCIPULORUMQUE LIBER, *supra* note 108, at 177, 180 (rejecting the application of human rights law to private entities in the abstract, but recognizing that new "legal terminology" can itself have positive results).

will elicit compliance.[396] Moreover, it is possible that courts, domestic and international, that remain somewhat insulated from such economic pressures could jump-start this process through the sorts of rulings the European Court of Justice has issued regarding nondiscrimination in the private sector.[397]

Indeed, the same broad claim about government reluctance could be (and has been) leveled at the entire enterprise of human rights law, which is premised on the notion that domestic law may not offer sufficient protections for human dignity. And yet states have still come together over the last fifty years to draft an impressive corpus of human rights instruments and empower various institutions to monitor compliance and even adjudicate violations. This revolution has clearly affected the way that governments act toward their citizens and even promoted wide-scale changes in governmental structures to promote democracy.[398] As for the obvious reluctance of many governments to curb their abuses in practice even as they promulgate and promise to adhere to human rights norms, this cognitive dissonance represents one of the ways in which international law and institutions can improve state and nonstate behavior over time, as targets of norms find it increasingly difficult to walk away from their professed commitments.[399]

In the end, this exercise's strongest defense is its possibility of providing a framework and rationality to the dialogue of the deaf that seems to be transpiring among businesses, those affected by their operations, governments, and NGOs. One of law's great purposes is to provide a set of bookends that exclude certain claims by various sides from the table and thereby narrow the range of differences.[400] If these four participants in the accountability dynamic can focus their debate on what are truly human rights violations, the possibilities for constructive solutions loom larger. As the South African Truth and Reconciliation Commission said when it rejected both the view that all apartheid-era businesses should be condemned and that they were blameless, the duties of corporations turn on "[i]ssues of realistic choice, differential power and responsibility."[401]

396. I appreciate this argument from David Wippman.

397. *See supra* note 94 and accompanying text.

398. Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591 (2000).

399. Peter M. Haas, *Choosing To Comply: Theorizing from International Relations and Comparative Politics*, *in* COMMITMENT AND COMPLIANCE, *supra* note 179, at 43, 45, 58-61; *see also* Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS, *supra* note 349, at 1, 14-17 (discussing the reaction of states to outside pressures).

400. *See* Ratner, *supra* note 398, at 627-29 (discussing the use of minority-rights norms to reject extreme claims by government and minorities).

401. 4 TRUTH & RECONCILIATION COMM'N, *supra* note 4, ch. 2, para. 146.

This is not to suggest that the law is the end of the story: Political and economic interests will surely drive the various actors as they make their claims and work to accommodate them, just as they do in other areas where international law is relevant. And both corporations and NGOs will have reasons for discussing enterprise activities that do not breach legal standards. Nonetheless, the law can, as it does in countless other areas of international affairs, offer a common language in this debate, as well as a set of standards that can be enforced. The duties resulting when these actors work through the above theory will clearly satisfy no group fully. But if prescribed and applied by legitimate and effective institutions, or enforced through corporate self-regulation, these norms represent the beginning of a more global and coherent response to new challenges to human dignity.