**In Lieu of a Sovereignty Shield, Multinational Corporations Should Be Responsible for the Harm They Cause**

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**Abstract** Some progress has been made in recent decades to articulate corporate social responsibility (CSR) and, more recently, to associate CSR with international enforcement of human rights. This progress continues to be hampered, however, by the ability of a multinational cor­poration (MNC) that violates human rights not only to shift liability from itself to a nation-state but even to win compensation from that nation-state for loss of profits due to restrictions on its business activities. In the process, the nation-state's sovereignty is diminishing; and, in effect, though still attributed to nation-states, it is being trans­ferred to the MNC. The main aim of this article is (1) to draw on normative considerations to claim that this MNC proto-sovereignty should be modified and (2) to contend that this can eventually be accomplished by adding to corporate adoption of CSR guidelines a regimen of global human rights enforcement. I base this contention on expectations about the internationalization of corporate criminal law and the globalization of civil society in gen­eral and of NGOs in particular. I consider various juris­dictions but I focus on US jurisprudence.

**Keywords** Sovereignty • Human rights • Corporate social responsibility • Corporate criminal law • Global civil society

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**Introduction**

Would that a human being who knows what is right would do what is right. This is not the case, of course, for mythological reasons as diverse as original sin and Sig­mund Freud's warning about a death wish *(thanatos).* Countless corrective mechanisms that target individual misbehavior—ranging from confession of sins to criminal law—have been only minimally successful. Those aimed at institutional perpetrators are far more complex, and it is too early to tell if they can succeed. This is singularly the case with regard to corporations and human rights.

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A major goal that human rights advocates seek in the twenty-first century is to establish a normative context in which multinational corporations (MNCs) become accus­tomed to comply with CSR principles and practices. This goal, many are convinced, involves embodying the prin­ciples of human rights in international law. But this approach is running into a wall erected by a powerful politico-economic strategy that verbally locates sover­eignty in the state even as it transfers de facto sovereignty to corporations.

The concept of sovereignty is centuries old, of course, and at one time referred to the absolute power of a monarch acting in God's stead on behalf of but without substantive input from the people. Secularist political philosophers, notably David Hume and Jean-Jacques Rousseau, traced the sovereignty of a ruling individual or group to the consent of the people but insisted that once transferred, it is incontestable and irrevocable. Writing with the hindsight gained from increasingly destructive wars waged by the so-called sovereign states, Jacques Maritain (1951, pp. 28-53) recommended that the uncontained and philosophically untenable concept of sovereignty be abolished at least from the political vocabulary. His wise advice has gone unheard

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by political leaders disinclined to abandon their Westpha­lian prerogatives (Stephens, 2013). In the US in particular, neo-conservatives worry that their country's "democratic sovereignty" is endangered by alien proponents of inter­national law (Kyl et al. 2013). They choose not to notice that investors and their minions have been transferring the substance of sovereignty to corporations.

Ever since the foundational establishment of interna­tional human rights after WW II, corporations have argued ever more successfully that any legal liability involving them is the responsibility of the nation-state where their headquarters is located. Some legislation and court rulings in recent times have modified this blanket exoneration, but others have helped canonize it. Both trends are illustrated by the results of cases that appeal to the US Alien Tort Statute (ATS), a two centuries old basis for recouping losses incurred from certain transactions outside the United States. Long left in obscurity, this archival law came into prominence recently when human rights activists began using it as a basis for challenging cross-cultural MNC human rights violations (Ruggie 2013, pp. 12, 30-31, 34, 43). The apparent end of this novel use came, however, almost as swiftly as its emergence.

Various US courts ruled against applying the ATS to corporations. Then on April 17, 2013, the United States Supreme Court ruled unanimously in *Kiobel v. Royal*

*Dutch Petroleum Co.* (569 US ) that the ATS cannot be   
applied to actions that have occurred outside the United States. The majority say their position is based on the fact that when Congress originally enacted this statute, it did not clearly specify that it applies to (then non-existent) corporations.

The US Supreme Court's rejection of a human rights claim against a corporation surprised many given that it, along with other US courts, had in other rulings given some support to international human rights law (Davis 2006). But it has also been inclined to free corporations from legal constrictions that have long been applied to them.' For example, it ruled in Citizens United (2010) that corpora­tions' funding of political candidates is not subject to any limits because corporations being persons have First Amendment free speech rights.

One critic of these rulings (Baker Azmy) says the exemptions carved out from responsibilities for corporate personhood could only happen in a Court that is obsessed with corporate power (Learning 2013). So it was, perhaps, when a lower court (the US 2nd Circuit, in New York) refused to grant plaintiffs standing in the *Kiobel* case and denied them a rehearing on grounds that a corporation cannot be held liable for human rights violations (05-4800-cv, 04-4876-cv, decided 17 September 2010). But, as

Nuremberg Scholars (October 2010) argued in their amicus curiae briefs, this court was wrong on the facts: in 1949 the US-administered Nuremberg tribunal dismantled I.G. Far­ber; and it charged several other German companies with human rights violations (Ratner 2001, p. 477, incl. notes 131-133). And decades earlier the US government and others as well banned the cross-border slave trade business.

International law practitioners and scholars will con­tinue to debate the status of the ATF after *Kiobel.* But, as UN special representative John Ruggie noted before the final ruling, it was unsustainable to have so much of the litigation against MNCs regarding human rights abuses "hinge on so quirky—and... so poorly understood—a statute in one single country" (2013, p. 198). As a corrective Ruggie developed and put forward for consideration a set of "Principles for Responsible Contracts" (p. 137). Their wide adoption would be beneficial, no doubt; and, as I will show, some international law scholars have been pondering how best to accomplish this. Meanwhile, however, an International Investment Regime (Alvarez et al. 2011) has been developing legal instruments that facilitate corporate avoidance of responsibility.2 These developments obvi­ously complicate efforts to subject MNCs to CSR princi­ples by building their obligation to respect human rights into international law.

I will now identify some obstacles to holding MNCs directly liable for human rights violations under US law and beyond. Then in subsequent sections, I will examine several other global developments that might indirectly bolster international law approaches.

**Problems Involved in Applying Criminal Law to MNCs**

Most countries around the world have established some form of corporate criminal law, many of these within the last several decades. These are based either on an identi­fication model, which holds the corporation directly liable for employee-committed offenses (e.g., the UK and Can­ada), a vicarious liability model (e.g., the US), wherein the corporation is indirectly liable if the state of mind of the individual is imputable to the corporation, or more recently, an organizational model, which holds a corpora­tion directly liable for criminal offenses in circumstances where features of its organization, including "corporate culture," directed, encouraged, tolerated or led to the commission of the offense (notably, Australia). Some countries recognize no corporate criminal liability (e.g., Brazil), but among these, some allow administrative pen­alties (e.g., Germany). Other countries that once had no corporate criminal law have been moved to enact

I See Liptak (2013). 2 For analyses of problems, this raises see von Moltke (2000).

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provisions because of domestic or transnational pressures, including the OECD Bribery Convention (in force from 1999) and the UN Convention against Transnational Organized Crime (in force from 2003). (See Aliens Arthur Robinson 2008). These developments duly noted, I will focus on US corporate criminal law.

In the US, as elsewhere, many laws are extant to regu­late corporations. Some of these are intra-state, but those most discussed are on the federal level, civil and criminal alike. Federal corporate criminal law in particular is a century-old tool (see e.g., Simpson 2002). Some critics say, however, that it never should have been developed, e.g., because it manifests a liberal bias (Smullen 2011; Hasnas 2009). Moreover, since the demise of accounting firm Arthur Andersen in the wake of the Enron debacle (2001) federal prosecutors have been reluctant to file criminal charges against a company lest by doing so they put it out of business: the so-called "corporate death penalty" brought on by the "Andersen Effect."3

To avoid causing such untoward consequences, the US Department of Justice has relied far more on deferred prosecution agreements (DPAs) or even non-prosecution agreements (or mere "declinations"). A deferred prosecu­tion entails a criminal charge, a fine, an enhanced com­pliance program, and eventual dropping of the criminal charge (usually after 3 years). A non-prosecution agree­ment involves no criminal prosecution, a fine, monitoring, and an enhanced compliance program. The US Securities and Exchange Commission (SEC), which exists to regulate the banking industry, has no criminal law powers but relies mostly on consent decrees.

Beneath the surface of these complex mechanisms aimed at containing corporate misbehavior, scholars debate the very concept of corporate criminal law. Legal scholars in particular either oppose it in principle or, if more favorably disposed, think it will take decades of efforts to formulate and codify. The obstacles they identify are many, but they all seem to involve the inapplicability of the theoretical lodestone of criminal law, intent (be it objective or subjective), to a corporation as such. This problem notwithstanding, other scholars favor developing corporate criminal law because, in their opinion, it is a necessary tool for constraining corporate misbehavior (e.g., Beale 2009). And this position has recently been bolstered by a ground­breaking study of all 54 companies publicly traded on a major exchange that were convicted under criminal law between 2001 and 2010 inclusive (Markoff 2013). Of all these companies, 49 remain active and/or have merged

Its integrity undermined, Arthur Andersen ceased to exist as a company. But its criminal conviction, upheld by an appellate court, was unanimously overturned in Arthur Andersen LLC v. United States, 544 U.S. 696 (2005), 374 F.3rd 281, reversed and remanded.

with another company or had its name changed (pp. 841-842). The other five were business failures, but none because of its criminal conviction. So there is no evidence of an Andersen Effect (pp. 818-830). Given this finding, Markoff recommends criminally prosecuting corporations when and as necessary on the basis of a "Core Business Model" that involves applying rational choice theory4 to distinguish companies that if convicted would experience acute (short-term) or structural (long-term) consequences (pp. 831-834).

Markoff s proposal merits serious consideration, not only domestically but internationally as well. On the international level, though, there are comparatively few effective international law mechanisms in place to reign in MNCs. As Fauchald and Stigen (2009) put it,

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As there is no authoritative definition of "responsi­bility" in international law, there can be no authori­tative conclusion on whether corporations are subjects to whom responsibility is or can be applied under international law (p. 1096)

Despite such skepticism, numerous inter-state treaties and multi-national guidelines have been enacted that constitute at least a foundation for international regulation of corporations. Most of these, however, are voluntary rather than mandatory as regards corporations. Meanwhile in academe, important creative work is being done with a view to building corporate responsibility for human rights violations into international law. Especially promising in this regard is the work of Steven Ratner (2001). Such efforts are by no means universally endorsed, however, by other international law scholars.

Whatever the merits of these provisions, international law experts seem highly doubtful on balance that their proponents' creative endeavors will ever result in anything so monumental as legally binding and enforceable inter­national corporate criminal law (see e.g., Alston 2005). A number of works published during the past decade assess the current status of international corporate criminal law and identify feasible ways to transform proposals into binding legislation. Several of these include articles not in favor of international corporate criminal law (e.g., Alston 2005; De Schutter 2006). Others lay out a path to that goal (notably, Clapham 2006). The difficulties that lie in the way are many; but their nature is not altogether obvious. Their critics clearly want to give the impression that they are favorable in principle but practically pessimistic because of technical problems (e.g., De Brabandere 2009).

4 Rational choice theory involves viewing all social action as self-interested, i.e., aimed at personal gain however irrational or non-rational it may appear. For an analysis and critique, see D. Satz and J. Ferejohn, Rational Choice and Social Theory, *Journal of Philosophy* 91(2), pp. 71-87.

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Their major bone of contention, however, is probably political.

Other international law scholars focus on technical problems. It has long been contended that treating a cor­poration as a subject in law has deleterious consequences (see e.g., Alvarez 2011). Other problems involve the pro­cess of institutionalizing guidelines, e.g., MNC adoption of the OECD Guidelines for Multinational Enterprises (ernie 2008) or inserting enforcement of corporate human rights obligations into international criminal law (van den Herik and ternie 2010). Such problems lead others to suggest alternative solutions, e.g., to focus on international civil rather than criminal law and, in accordance with principles of vicarious liability, hold a corporation directly liable only for actions of an employee that it has not prohibited via an effective compliance program (Weissman 2007).

In a word, corporate responsibility is still not seamlessly embedded in international law. But, international regula­tion of MNCs' behavior is unquestionably a goal that many would like to see achieved, and to this end work continues to develop mechanisms whereby to implement the aspira­tion. To the extent that any such mechanism might be effective, however, it attracts opposition from nation-states whose sovereignty would be undercut. So "we may expect the emergence of intergovernmental regimes to secure compliance and enforcement of corporations with interna­tional norms... to be slow and ad hoc" (Fauchald and Stigen 2009, p. 1100). Meanwhile, intra-state mechanisms in the US have hardly provided an adequate substitute.

As for corporate responsibility, some still maintain that a corporation's primary duty is to maximize income and share as little of it as possible with non-company entities and individuals. This means minimizing outside-the-enterprise payments, which may be incurred because of crime-based relationships, e.g., bribes to gain business contracts or even *sub rosa* arrangements to dispose of individuals or groups that interfere with the company's profit-gaining. A more elegant way to avoid outside-the-enterprise payments is, however, to have governments structure the laws they create so that a company can keep most if not all of its wealth. This objective has recently been facilitated by a judicial ruling in Delaware, a US state where many companies are incorporated, that complainants must file any suit against a Delaware-based corporation in a Delaware court (Brickley 2013). Similarly, corporate tax avoidance options have over time been built or creatively read into intra-state laws and more recently via corpora­tion-friendly instrumentalities that immunize contracting companies from any responsibility to countries or indi­viduals for harm done.

Tax avoidance has long been an objective pursued by companies' lobbyists, accountants, and government oper­atives. Countries with the lowest corporate tax rates attract

companies seeking lower production costs, which is why Coke and Pepsi, e.g-., produce their concentrates in Singa­pore and- Ireland. This lowest-man-wins scenario helps bring many companies' tax liability close to zero. As one nation-state after another faces revenue shortfall, however, they are becoming more sensitive to the immensity of the corporate lacuna in their coffers. And as a result, govern­ment leaders are desperately in search of ways to require MNCs to contribute, as in former times, a fair share of their resources to public sector survival. These moves, more­over, are being made both intra-nationally (see e.g., Leonhardt 2013) and transnationally by a consortium of major national economies.5

In numerous ways, corporations are subject to con­straints on their transnational dealings with other corporate entities. Inequities and imbalances in commercial transac­tions are dealt with in meticulous detail. But as exemplified by the *Kiobel* case discussed above, any ordinary individ­ual who deems himself or herself a victim of corporate misbehavior has little chance of obtaining justice in courts where corpor tions litigate. This state of affairs lends substance to aclaim that sovereignty is being transferred from nation-states to MNCs. This phenomenon is mani­fested in many forms. But as Alex Michalos (2008) has so meticulously shown, it is strikingly on display in recently established arbitration procedures that mandate bypassing nation-based courts in favor of courts that are heavily weighted in favor of MNCs (see Byrne 2011).

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Two legal developments are especially important in establishing these bypass mechanisms: free trade agree­ments (FTAs) and bilateral investment agreements (BITs). FTAs, such as the North American Free Trade Agreement (NAFTA), are comparatively recent in origin but have already proven to be highly destructive of national sover­eignty with regard to MNCs (see e.g., Greider 2001; Michalos 2008). Thus, not surprisingly, major corporations look forward to seeing still others established, notably in Europe. The other development is older, especially if one takes its prototype into consideration. This is a mandatory arbitration mechanism built into bilateral treaties called investment treaties which are increasingly being inter­preted to the great advantage of MNCs. I will now dis­cuss these with a focus on US law.

5 See also Grant, J. (2013), Singapore hardens attitude toward tax evasion, *Financial Times,* July 1, p. 3; Schwartz, N. D. (2013), Big Companies Paid a Fraction of Corporate Tax Rate, *New York Times,* July 2, p. A3: Houlder, V. (2013), Apple avoids corporate tax in UK, *Financial Times,* July I, p. 15. The US media conglomerate Tribune created a complex tax-avoidance scheme for itself that failed because the company had to file for bankruptcy and thereby incurred unanticipated debts (Norris, 2013). Regarding the consortium response to corporate tax avoidance, see Kramer, A. E., and Norris, F. (2013), G-20 Backs Plan to Curb Corporate Tax Strategy, *New York Times,* July 20, pp. B1-2.

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As discussed above, sometimes in the United States large corporations are held criminally liable for harm-causing behavior. To avoid the Andersen Effect, though, a corporation will be allowed to settle under a DPA or be held liable for violating a tort and fined an amount the severity. of which is frequently reduced on appeal. In addition, an individual employee, usually lower echelon, may be held criminally liable for actions he or she performs for the employer. Many academics know this is the way things are and offer socially sensitive reasons why it should be otherwise. But juridical obeisance to corporate prowess seems too deeply entrenched to be changed (Greenwald 2011). This is also how things are in international law, as I will now discuss.

In some situations, MNCs do extensive harm to people and environment, often over many years. But they are seldom effectively brought to justice for their egregious conduct. This is due to the availability of legal mechanisms that from the outset favor corporations and arbitrate com­plaints in secrecy. Arbitrations conducted under the rules of the UN Commission on International Trade Law (UNCI-TRAL) are so secretive that not even the existence of the case itself may be known publicly. Consequently, mean­ingful criticism of deals governments sign with foreign investors is impossible (Ruggie 2013, p. 149). A similarly obscure process is embodied in an instrument known as a Bilateral Investment Treaty (BIT).

A BIT is entered into between a foreign entity, indi­vidual or more commonly corporate, that engages in for­eign direct investment (FID) and a host nation. Under the terms of a BIT, any complaint against the foreign investor is filed in the International Center for the Settlement of Investment Disputes (ICSID), which is a member of the World Bank Group, headquartered in Washington, D.C. The World Bank funds it, but it is autonomous under a treaty drafted by the International Bank for Reconstruction and Development's executive director and signed by (159) member countries. The initial idea for the ICSID originated with Aron Broches, then General Counsel for OECD's International Bank for Reconstruction and Development (IBRD). Broches's staff drafted an agreement, approved after revision by the IBRD Board as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Twenty states signed it when it first opened for signatures on March 3, 1965, and it went into force on October 14, 1966. Three states once signa­tories have withdrawn: Bolivia in 2007, Ecuador in 2009, and Venezuela in 2012.

Whatever the good intentions that motivated the devel­opment of BITs, the effect has been not only to neutralize complainants but to require host countries in which a complaint arises to defend against suits filed by the foreign investor demanding full compensation not only for any

penalty assessed but for all lost profits. Under the terms of a BIT, there is no option to appeal a ruling outside of the ICSID. Similar pro-MNCs provisions are built into the Central America Free Trade Agreement (CAFTA), under which the Canadian company Pacific Rim Mining has sued El Salvador to retrieve its investment in that country's gold mines (Collins 2009, pp. 253-255, 260-262, 263). Another case further along in the courts involves the petroleum poisoning caused in Ecuador by Chevron/Texaco: Ecuador courts awarded complainants $19 billion dollars; but all they have received from the defendant are protracted and expensive counterclaims (Ku and Conway 2013). Interna­tional arbitration scholars do see a need to limit awards in these cases (Baldwin et al. 2006). Dependable ways of achieving this, however, have yet to be invented (Bigge 2011).

This corporate dominance in the global arena would seem to involve an altogether non-trivial transfer of sov­ereignty from nation-states to MNCs. A number of scholars have noted this development; and they speak of the resulting corporate power as de facto sovereignty. Some even refer to it as sovereignty without qualification. Wil­liam Greider (2001) speaks of "sovereign corporations" and Allison Garrett (2008) talks about "the corporation as sovereign." Somewhat more cautiously, Daniel Green­wood (2005) analyzes "the semi-sovereign corporation." And Joshua Barker (2013) writes about "corporate sover­eignty." These and other comparable writings apply to corporations a label long theorized as belonging exclu­sively to nation-states. Their theoretical labeling is not yet mainstream, but the data they draw on to explicate it are familiar to many. For, attentive scholars have called attention to the increasingly facile ability of MNCs to gain exemption from normative standards that bind other actors in the global arena (e.g., Michalos 2008).

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Some scholars have insisted with weighty arguments (e.g., Mayer 2009) that the global market would be emi­nently more wholesome if CSR could be enforced by building human rights into international law. But the sov­ereignty-based exemption of MNCs from behavioral norms routinely applied to non-elite individuals hampers efforts to apply such constraints to corporate behavior. This chal­lenge led the political and economic scholars who drafted the UN's year 2000 Global Compact to characterize their product as moral claims that MNCs ought to adopt (Mayer 2009, pp. 569-572). By comparison, human rights law experts who produced the UN's 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights fully intended their work to become legal rules governing MNCs' human rights responsibilities (Mayer 2009, pp. 573-574; Weissbrodt and Kruger 2005). Nation-states, including the US, opposed the Norms, and the UN's John

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Ruggie pleased opponents of the Norms by drafting a non­binding Protect, Respect and Remedy Framework (Framework), and Guiding Principles (GPs) (Ruggie 2013, ch. 3). He nonetheless acknowledges a need for further study on how to avoid a destructive backlash against globalization and maintain the inextricable link between human rights and the sustainability of globalization (Mayer 2009, p. 575).

As here illustrated, corporate push-back against what reformers speak of as their responsibilities has been largely successful even as they endorse voluntary guidelines. Is anything further likely to develop? Actually, there are historically unprecedented developments afoot that may create a normative context in which such constraints will become common if not universally applied. These devel­opments involve the spreading corporate endorsement of CSR standards, International Non-governmental Organi­zations' (INGOs') commitment to see them complied with, and the emergence of a global civil society that provides a social context favorable to having a broad range of human rights recognized and enforced. These matters I will con­sider after some preparatory remarks about the ethical basis for enforcing human rights.

**Ethical Reasons Why MNCs Should Uphold CSR and Human Rights**

As is true of most arrangements congenial to the powerful that are called into question by others who lack comparable power, merely arguing persuasively in a scholarly debate that corporations harm human beings will not effect changes in their behavior. This is true simply by virtue of power's preference for self-perpetuation; but it is exacer­bated by the recognition in modern times that no ethical theory is so well grounded in reason that it is beyond question or controversy. This decline of confidence in ethical norms complicates the efforts of business ethicists seeking normative foundations for CSR and of human rights proponents seeking normative foundations for human rights.

To ground CSR, some business ethicists have drawn on mainstream Western ethical theories, especially the widely studied consequentialist and deontological approaches. These theories are increasingly called into question by philosophers who specialize in ethical theory. In fact, a number of philosophical ethicists have concluded that no ethical theory can encompass all normative decision-making adequately, so they appeal to alternative bases for widely respected behavioral preferences (e.g., Wong 2006). Post-modernist theorists devalue the probative import of the traditionally favored theories. Other theorists try to adapt them to otherwise unmanageable problems. The

deontological -approach in particular serves as a basis for social contract and stakeholder theories, each of which has numerous devotees among business ethicists.

A recent article by Paul Neiman (2013) illustrates both the strengths and the weakness of trying to base business ethics on a social contract. First, he distinguishes three different ways to apply social contract theory to business: (1) by directly applying a philosopher's theory; (2) by adapting the social contract methodology to the domain of business ethics; and (3) by building on actually existing social contracts. He takes the second approach, drawing on John Rawls's (1971) veil of ignorance methodology to envision hypothetical negotiations between someone who represents a major company (about which he has no detailed information) and someone who represents a community (without knowing details about it). Their fact-free dialog, Neiman contends, leads a la Rawls via a "a wide reflective equilibrium" (p. 85) to best-in-its-class ethical principles regarding wages, the environment, and cultural and social norms. How these principles are to affect real world behavior of MNCs in the Ecuadorian Amazon or the Niger River delta is another matter entirely. For, Neiman acknowledges, corporations (p. 85) and gov­ernments (p. 88) in the real world are minimally bound by law and can only be urged to voluntarily follow the ethical standards he recommends.

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Obviously something more than careful reasoning is needed if better thinking is to be translated into better policy and practice. That more increasingly involves efforts to institutionalize CSR and/or human rights. Such efforts are of primary importance; but scholars also try to identify which ethical theory, if any, best supports CSR and/or human rights. Much of what they recommend would not be recognized as ethics by professional ethicists.

David Secchi (2007) distinguishes three normative supports for CSR: utilitarian, managerial, and relational—none of which is clearly ethical as he describes it. Stefano Zamagni (2006) identifies four theories he says are ethical that can be used to "anchor" CSR: ethics of intentions; enlightened self-interest; ethics of responsibility (stake­holder and/or Rawlsian model); and ethics of virtues. Garriga and Domenec Mele (2004) distinguish four groups of CSR theories—instrumental (economic), political, inte­grative (social), and ethical—only the last of which is, as per its title, ethical. In another work, Mele (2006) singles out normative from other theories that underpin CSR, then lists four such theories: fiduciary capitalism, stakeholder, corporate citizenship, and corporate social performance, the latter seemingly equivalent to the aforementioned eth­ical theory. Claus Frederiksen (2010) reports that key CSR personnel in three Danish companies are guided not by egoism, libertarianism, or utilitarianism but by "common­sense morality" (p. 359).

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Predating these efforts and in some respects laying the groundwork for consolidating them is a still important analysis by William Frederick (1991). With a view to identifying "the moral authority of transnational corporate codes," Frederick focused on the 1948 UN Universal Declaration on Human Rights and five other intergovern­mental compacts adopted in the 1970s. Corporate codes, he contended, are supported by "four normative orientations" embodied in these documents: national sovereignty, social equity, market integrity, and human rights (p. 168). "By far the most fundamental, comprehensive, widely acknowl­edged, and pervasive source of moral authority for the corporate guidelines," he asserts, "is *human rights and fundamental freedoms"* (p. 169; italics in original). These, in turn, "are conditioned by political, social, and economic values" (ibid.). But, inversely,

Except for the human rights principle, all other nor­mative sources that undergird the multinational cor­porate guidelines are... culture bound, unable to break out of their respective societal concerns. By contrast, human rights are seen to be transcendental. (p. 170)

After emphasizing the dependence of these guidelines on voluntary compliance, Frederick makes a perceptive prognostication:

As human societies are drawn ever closer together by electronic and other technologies, and as they face the multiple threats posed by the unwise and heedless use of these devices, it will become ever more necessary to reach agreement on the core values and ethical principles that permit a human life to be lived by all (p. 176).

Leaving the technological dimension for later, I first want to stress that in addition to efforts to ground CSR ethically, there are comparable efforts to ground human rights ethi­cally. Clearly, the persuasiveness of human rights doctrines is a function of their being endorsed and implemented internationally. Their endorsement is well advanced, but their implementation is very much a work in progress. Responsibility for legal enforcement of human rights vio­lations is still widely assigned only to nation-states and not at all to MNCs (Ruggie 2013). This Westphalian world has given way somewhat to the movement to achieve a global civil society. But even if successful that movement cannot in and of itself establish ethical foundations for human rights. For this to come about, the problem of cultural relativity must be overcome. This was once tried unsuc­cessfully via colonization; and that overreaching still engenders hostilities. Even the otherwise powerful US is fearful of signing on to any international agreement regarding human rights lest doing so somehow diminish its

autonomy. But other efforts now underway are more promising in that they strive to deal respectfully albeit critically with value systems that in some respects hinder the universalization of human rights. This is especially true regarding centuries-old religious doctrines.

To advance mutual respect and accommodation in these matters, the intercultural dialog needs to be reframed so as to respect all views however divergent while seeking less circumscribed interpretations (Flynn forthcoming 2013). This has already been greatly advanced with regard to Catholic views that after a century of opposition now support human rights as consistent with church doctrine. Key figures in that transformation were French philosopher Jacques Maritain (1951) and then Pope John XXIII via his Second Vatican Council. Comparable efforts are afoot to broaden Islamic doctrine to encompass human rights. One scholar at work on this agenda (An-Na'im 1990) tries to show that human rights were already recognized in the original texts. A more recent Islamic scholar finds An-Na'im's approach too much like "original intention" legal theorizing and urges instead that Islamists seek to identify their religion's "core values." Unfortunately, this well-intended debate is being sabotaged by others' politicization of Islam (Mayer 2012).

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Similar concerns came to the fore in the 1990s in East Asia, where non-democratic rulers opened a compatibility debate by claiming that their governance style was faithful to Buddhism, or Hinduism, or Confucianism. To overcome the shortcomings of this debate in pursuit of global endorsement of human rights, philosopher Charles Taylor (1999) suggests a non-colonialist approach that would involve extending to everyone the treatment formerly accorded only to the elite. More broadly, philosopher Thomas McCarthy (2009) recommends something com­parable for the world at large. Good work is also being done in furthering that objective with regard to the world's religions (Runzo et al. 2003). As such work contributes to facilitating cross-cultural understanding, philanthropic boots-on-the-ground are helping to create institutional frameworks for their implementation.

**The Influence of INGOs on MNC Behavior**

The phenomenon of INGOs is historically of fairly recent origin. Some predate WWI (Keane 2003, pp. 47-50); but nearly 90 % of them were founded after 1970. As a group, they are responsible for disbursing more relief aid funds than the UN, some two-thirds of the EU's relief aid, and ever more of the funds governments allocate to people-oriented projects (Keane 2003, p. 5). Some are involved in policing governmental policy and practices. And in par­ticular a number of INGOs have focused on and at times

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persuade MNCs to adopt and act in accordance with CSR guidelines (Spar and La Mure 2003; Welch 2001; Korey 1999). But, whether the reported successes are due to special circumstances or to having adopted the most suit­able strategy is a matter of considerable controversy.

In his careful study of this issue, Morton Winston (2002) first notes that the growing power of MNCs in the world has led INGOs to increasingly focus attention on them (pp. 71-74). Then he distinguishes between two main approa­ches that INGOs are taking to MNCs. Engagement is preferred by the CSR movement. Confrontation via enforceable international legal standards (EILS) is pre­ferred by those who doubt that MNCs are structurally able to adopt CSR standards voluntarily but have to be pres­sured (pp. 74-77).6 Between these two approaches (which correspond roughly to the good cop/bad cop approach to questioning suspects), Winston identifies eight different tactics used by INGOs that range from the least to the most confrontational: dialog toward adopting voluntary codes of conduct (the pure CSR approach); advocacy of social accounting and independent verification schemes; filing shareholder resolutions; documenting abuses and moral shaming; boycotts and divestment; advocacy of selective purchasing laws; advocacy of government-imposed stan­dards; and litigation to obtain punitive damages (p. 77).

Each of the INGO strategies that Winston lists has been used to good effect at one time or another and is preferred by some more than others. Academics are singularly fond of getting MNCs to adopt voluntary codes of conduct.' Critics complain, however, that these codes are ineffective; but arguably they would be less so if based on human rights (Campbell 2006). Activist approaches, of course, are not uniformly effective either; but each has been used. Activist human rights organizations have made good use of the "shaming and blaming" strategy (Davis et al. 2012; Mur-die and Davis 2012). Collaborative use of boycotts and divestment contributed to the end of apartheid in South Africa. Government-imposed standards are also sometimes useful. Selective purchasing laws have not been well received in US courts; but the horrendous irresponsibility manifested by garment manufacturers is generating cor­rective responses (Mauldin and Kapner 2013). As dis­cussed above, however, litigation has not been particularly successful. And more generally, the activist efforts of some groups are problematic in that impressive media coverage does not routinely translate into lasting changes. But, there

6 This divergence of strategy preferences was in evidence in the year 2000 when the UN Global Compact, supported by such mainstream human rights INGOs as Amnesty International and Human Rights Watch, was resoundingly opposed by more activist-oriented INGOs. (Since then, it has been widely adopted.).

7 *Business Ethics Quarterly* 16(2), April 2006, is devoted to a Special Forum: Voluntary Codes of Conduct for Multinational Corporations.

is a robust literature which provides documentation, eval­uation, and critique of how and why INGOs are effecting improvements in MNCs' attention to CSR and/or human rights. Consider in this regard a few relevant studies that point to obstacles which INGOs have to overcome if they are to advance CSR and/or human rights in MNCs.

One such obstacle, not surprisingly, is the concern of unions that INGOs are intruding on their established role vis-a-vis a company. This concern emerged very clearly in a study conducted in Spain (Arenas et al. 2009). Egels-Zanden and Hyllman (2006) found also that unions and INGOs were ultimately unable to collaborate on a rights-based campaign to improve working conditions in the Swedish garment industry. Somewhat more abstractly, Teegen et al. (2004) think the very process of globalization, including that of INGOs, expands the ability of INGOs to get MNCs to adopt human rights standards. Based on her examination of relevant arguments and empirical evidence, however, Rhoda Howard-Hassman (2010) finds that glob­alization as such does reduce world poverty levels but also exacerbates economic inequality across and within coun­tries. For human rights—civil, political, as well as eco-nomic—to be enhanced, she contends, social democracy will have to be greatly expanded.

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That social democracy is important for advancing human rights is illustrated by Maria Joutsenvirta and Liisa Uusitalo's (2009) study of how "cultural competencies" can facilitate INGO-MNC dialog. They focus on values shared between Greenpeace and global forestry company StoraEnso regarding cultural market orientation, mutual recognition of expertise, and maintenance of trust and credibility in the community. Also relevant is Leonor Blum's (2001) insistence that the establishment of peace in Guatemala after a long civil war was a sine qua non con­dition for INGOs to bring about human rights improve­ments in that country. But Denis Collins (2009) finds that the end of a civil war in El Salvador gave no INGOs except Oxfam any leverage in advancing indigenous people's rights.

As can be seen from these case studies, analysts disagree about the efficacy of INGO interventions. But INGO leaders tell us that they now focus on a broad range of human rights as they encourage corporations to incorporate CSR norms. This is especially true of Amnesty Interna­tional and Human Rights Watch (Goering 2007; Kahn 2009). As these works indicate, the organizations their authors represent have added economic, social, and cultural rights to their traditional focus on civil and political rights. And according to an assessment of INGOs' influence on labor and environmental codes of conduct:

NGOs will achieve the greatest impact on codes of conduct when: 1) they intervene early in the code

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development process; 2) they forge transnational coalitions with other organizations, including other NG0s, MNCs, and governments; codes are devised outside of international organizations; and 4) the structure of the codes or agreements explicitly pro­vides for involvement by non-business and non-state actors. (Doh and Guay 2004)

In other words, the process would benefit from global governance.

**IV. How a Global Governance Might Influence MNC Behavior**

As the foregoing indicates, globalization of commerce and ancillary relationships developing therefrom have stimu­lated interest worldwide in creating institutions that can regulate rather than merely facilitate what MNCs do in and to the various countries where they locate and engage in business practices that can and sometimes do harm resi-dents—typically, citizens—of that place. On an academic level, this project has engaged the expertise of many dis­ciplines, including international law, international rela­tions, political theory, social and political ethics, and business ethics. The ultimate state of affairs envisioned by experts in these various disciplines varies considerably given the diversity of their frames of reference and pre­suppositions. So one risks oversimplification by trying to specify neatly just what sorts of institutions these researchers hope will contribute to a global regimen more fully committed to human rights. That said, one can get a sense of where this research is going from the following summary of three approaches.

I. The **cosmopolitan citizenship** approach focuses on the structural bases for political inclusion and exclusion, especially as rationalized and institutionalized by traditional nation-states. Andrew Linklater (1998), e.g., concentrates on overcoming what he perceives to be the no longer morally relevant distinction between citizen and alien (p.192) and advancing cosmopolitan citizenship (pp. 204-211) based on the ideal of a universal communication community (p. 103). This will come about, he contends, as post-Westphalian communities break away from the clas­sical nation-state and promote a transnational citizenry with multiple political allegiances and without the need for submission to a central sovereign power (Linklater 1998, p. 181).

2. The **cosmopolitan governance** approach is based in extra-national global institutions and as such provides a framework within which forces associated with diverse nation-states can interact, cooperate, and coordinate

efforts to govern globally and independently of nation-state constraints. This approach is advanced by polit­ically oriented scholars who differ in their degree of attention to MNCs. In its most extreme form, it would actually recognize MNCs as governments or, short of that, what one writer calls "the cosmopolitical corpo­ration" (Maak 2009, pp. 364-370). More broadly, theorizing about cosmopolitanism embraces moral, legal, political, and cultural dimensions (Maak 2009, pp. 363-366). In this mix, determining the responsibil­ities of MNCs as political actors is more a corollary of a broader concern about what political philosopher Nancy Fraser (2005) describes as a diffusion of sovereignty. She contends that the Westphalian nation-state has been superseded by "a new multi-leveled structure of sov­ereignty, a complex edifice in which the country is but one level among others" (p. 5). "No longer unified in a single institutional locus, sovereignty is being disag-gregated, broken up into several distinct functions, and assigned to several distinct agencies, which function at several distinct levels, some global, some regional, some local and subnational" (ibid.). Given this trans-formative situation, cosmopolitan governance amounts to a renovated version of public sphere theory, as developed by German philosopher Jurgen Habermas (see also Scherer and Palazzo 2007).

3. The **global civil society** approach calls for integrating the globally consequential activities of diverse institu­tions including nation-states but also businesses, non­profits, and quasi-political organizations. A prominent advocate of this approach is political scientist John Keane. Keane does not envision a world government in the foreseeable future but rather an ever more complex interaction of multiple kinds of organizations that operate beyond any one national border. Thus, INGOs and MNCs participate each in their own way. Especially influential toward advancing worldwide civil society is the market, operating as "turbocapitalism" (2003, pp. 65-74). As Keane contends, "the artificial distinc­tion between 'the market' and 'global civil society' is unwarranted because turbocapitalism both nurtures and disorders the structures of global civil society within which it operates" (2003, p. 82). Finally, he recognizes the importance to global civil society of "ethics beyond borders" (2003, pp. 175-209) and of religion as one possible source of ethical principles (pp. 40-43, 192-194). Consistent with this institutional interdepen­dence is the involvement of local citizens in human rights INGOs (Tsutsui and Wotipka 2004).

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What remains unclear in these post-Westphalian theories is the border between reality and aspiration. This lacuna has

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been addressed by a group of philosophers and political sci­entists who examine the theories and a number of case studies that show the complexity of issues involved in inserting communities of people into or separating them from an existing nation-state (Seymour 2004). In light of these prob­lems, one must retain a degree of skepticism about any claim that global respect for and enforcement of human rights can be attained just by deviating from the Westphalian canonization of nation-states to make room for cross-boundary connec­tions. In the meantime, however, the quest for a globally effective human rights regimen is also being advanced by scholars who start from the premiss that many, perhaps most, people derive their social values from a religion.

An obvious reason against basing a human rights regime on religion is that there are so many different and mutually exclusive religious beliefs each of which is embedded in a cultural context that may foster militant hostility toward others with different beliefs. From this perspective, if a religion is politicized it is as likely as not to engender violations of human rights, e.g., as between Sunni and Shi'a Muslims in the Middle East. To counter such retro­gression, a multi-faceted group of concerned religionists have been drawing on the values of their respective faiths to cooperatively support a global human rights regime (see e.g., Runzo et al. 2003). To link their diverse values to advance this project its proponents often find a helpful intermediary in the relevant documents promulgated by the United Nations. In effect, then, while defending the values of their preferred communities they give veto power to respect for human rights.

This ethically calibrated approach to defense of com­munity interests removes a lacuna in my onetime claim (Byrne 1990) that community empowerment could over­come the excesses of corporate sovereignty. For, I built my case on social contract theory without reference to human rights, as follows. Work, including work done for a trans-national corporation, is done in community. So corporate decisions should be not only corporate and/or govern­mental but also community-based. But insofar as corpo­rations exercise de facto sovereignty, theorists (and, I would now add, activists) need to take into consideration social communities that are globally distributed but locally defined. If this understanding of the meaning and purpose of work is to take root in a corporation-dominated world, both workers and their communities need to be empowered to constitute a socio-political buffer against the human costs of corporate hegemony. True as written, but this empowerment of community is not attainable without achieving respect for and protection of human rights. That is now more feasible than a quarter of a century ago, thanks to the emergence of social networking.

The Internet in general and social networking in partic­ular are able to become powerful instruments whereby the

people as ultimate bearers of political power might translate their theoretical status into political reality (Walters 2001). Thus, for example, the speed with which people's attitudes changed and then juridical rulings legitimated same-sex marriage in the US is attributable, some contend, to the intercession of social media (Switzer 2013). But some people in the US and abroad are appalled by this develop­ment; and this illustrates the broader reality that proponents of any cause, however unacceptable to others, can use the Internet to achieve their ends. Furthermore, governments that rule by controlling rather than by facilitating people's preferences can limit access to and content of social media. This suppression of open communication has led to policy positions and organizational countermeasures declaring that governments have a "positive obligation" to allow Internet access. An example of the former is the 2009 Reykjavik Declaration of the Council of Europe Council of Ministers, and an example of the latter is the Global Network Initiative (GNI) (Korff and Brown 2011).

Some analysts doubt that social media have revolu­tionary potential (see e.g., Gladwell 2010). Clay Shirky (2011) thinks otherwise because by facilitating communi­cation they engender political power. Sarah Joseph (2012), in turn, after conducting a thorough examination of social media use during the Arab Spring, concludes that, in spite of counterindications,

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social media in its various forms has [sic] created an unprecedented global public space that vastly increases and amplifies the number of accessible voices and connections in all parts of the world. In the future, governments or other powerbrokers might seize control or compromise these platforms, and social media might change their largely benign or even supportive attitude toward activism. For now, however, this digital communications Hydra provides a unique platform for millions of people to pro­claim... that they are "as mad as hell and they aren't going to take it anymore" (p. 188; quotation from the 1976 Metro-Goldwyn-Mayer film, *Network).*

I would only add that this emerging force can be directed just as readily to MNCs as to nation-states in defense of human rights.

**Conclusion**

Especially in their search for a normative base for CSR, many academics are heavily invested in the project of maximizing corporate responsibility for corporate-gener­ated behavior and its consequences. But academic pro­posals alone cannot move MNCs to adapt their behavior accordingly. Also needed is a twofold transformation: one,

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de-canonization of state sovereignty; the other, subjection of MNCs' de facto sovereignty to global regulation with regard to human rights.

The process of de-canonizing state sovereignty will be neither simple nor straightforward. As already noted, it has already been happening de facto with respect to relation­ships between MNCs and nation-states: increasingly, MNCs are appealing to states' sovereignty as the unique locus of responsibility for whatever harm an MNC might cause within its boundaries. This skirting of responsibility is analogous to the way nation-states deal with one another when one of them egregiously violates human rights inside or even beyond its borders. Thus did the international community, so-called, stand by as state-authorized geno­cide was perpetrated in Ruanda and as Russian invaders mercilessly raped and murdered Chechen civilians. By contrast. Western nations did intervene to stop horrendous human rights violations in Kosovo; but that intervention has not been universally recognized as justified. Sover­eignty, as noted, is undergoing serious rethinking (e.g., Pellet 2009); but in the struggle between sovereignty and human rights, sovereignty is still sovereign.

Given this unsettled state of affairs, the project of per­suading sovereign-like MNCs to respect human rights will encounter many obstacles. But as globalization continues to involve more inter-institutional arrangements, MNCs' respect for human rights will become more unavoidable. For this to happen, continuing academic and INGO engagement in behalf of CSR is necessary. Also necessary, however, is for human rights INGOs to concentrate not on governments alone but on MNCs. This redirection of attention might be bolstered considerably, moreover, if proponents of global governance were also moving in that direction!' Hopefully, this is already the case with such programs as International Human Rights Clinics, which now exist in most of the major US law schools. Even more productive, however, might be a deliberate endorsement of human rights as a motivating objective behind the multi­faceted public protests that are being coordinated via the instruments of social networking.

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